

1965

Eastern Utah Development Company v. General Insurance Company of America, A Corporation, and Fred Reynolds : Appendix

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APPENDIX "A"

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

EASTERN UTAH
DEVELOPMENT COMPANY,

Plaintiff,

vs.

GENERAL INSURANCE
COMPANY OF AMERICA
and FRED REYNOLDS,

Defendants.

MEMOR-
ANDUM
DECISION

Case No.
145042

After consideration of the motions of defendant and the arguments relating thereto, it is my view that the answers of the jury to Interrogatories No. 2 and 3 are not inconsistent. The finding was that the parties remained partners, but that plaintiff's beneficial interest in the construction project was modified from being a partner's share of the profits to rental for the partner's equipment. This the parties could accomplish. The partnership relationships at the outset are not immutably cast in stone. By mutual consent and for consideration, the contract under which a partnership is organized may be modified at any time, and the changes may relate to the share of any partner in the profits. (68 CJS, Section 12, Page 420.)

In the trial of the case, no issue was raised relative to plaintiff's potential obligation, should the construction project finally show a loss. Certainly there was no proof that the job had been finished and settled, showing a loss; neither was there any evidence that the partnership had been terminated and duly dissolved. If loss, instead of gain, should be the terminal situation when the project shall be finally settled, defendant may contend that further proceedings will be necessary in this action. If it should show a profit, one may reasonably expect that defendant Reynolds will be able to pay the bills, and thus eliminate need for further proceedings here.

Plaintiff's claim is based upon defendant Reynolds's failure to pay; not that the project made or lost money. The claim involves defendant, General Insurance Company, because of the surety contract it wrote, providing for payment of unpaid labor and material bills on the job, as required by the owner of the project.

I still believe that neither its contract for indemnity nor reliance upon principles of conventional subrogation afford defendant, General Insurance Company, a recovery from plaintiff or a defense to plaintiff's action. In substance, General Insurance Company is obligated to pay delinquent labor and material bills on the job; and, upon doing so, it will be entitled to stand in the creditor's shoes,

asserting a creditor's claim against the principal — in this case, the defendant Reynolds. If defendant Reynolds shall make the surety whole, it will have no claim. If defendant Reynolds should be unable to make the surety whole, the surety's claim will be levelled at defendant Reynolds; not at the creditor to whom the surety will have been required to make payment.

With the possibility in mind that the job will show a loss and that the defendant will contend that, necessarily, an accounting must precede dissolution of the partnership, it may be appropriate to modify the judgment so that it will operate without prejudice to such proceedings. With this possible exception, defendant's motions should be denied.

DATED: March 8, 1965.

BY THE COURT:

Merrill C. Faux

JUDGE