1965

Home Electric Corporation and Kenneth E. Smith Company v. George R. Russell, His Wife and George R. Russell and Retta 0. Russell v. Pacific Mutual Life Insurance Company, A California Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

HOME ELECTRIC CORPORATION,
a corporation,
Plaintiff-Respondent
vs.
GEORGE R. RUSSELL and MRS.
GEORGE R. RUSSELL, his wife,
Defedants-Respondents,
and
GEORGE R. RUSSELL and
RETTA O. RUSSELL,
Third-Party Plaintiffs-Respondents,
vs.
PACIFIC MUTUAL LIFE INSURANCE
COMPANY, a California Corporation,
et al.
Third Party Defendants and Appellant.

No. 10[illegible]

KENNETH E. SMITH COMPANY,
a corporation,
Plaintiff-Respondent,
vs.
GEORGE R. RUSSELL and MRS.
GEORGE R. RUSSELL, his wife
Defendants-Respondents,
and
GEORGE R. RUSSELL and
RETTA O. RUSSELL,
Third Party Plaintiffs-Respondents,
vs.
PACIFIC MUTUAL LIFE INSURANCE
COMPANY, a California corporation, et al.
Third Party Defendant and Appellant.

No. [illegible]

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD
COURT FOR SALT LAKE COUNTY, HONORABLE
HANSON, JUDGE.

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Insurance Co.

There being 3 volumes of record in the consolidated cases, for convenience of the court we have marked the records as follows: Home Electric Company case No. 10382 volume 1, as "A", Kenneth E. Smith case No. 10383, Transcript of Trial, as "B" Kenneth E. Smith case (second volume), as "C" reference to record will be identiifed accordingly.

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOME ELECTRIC CORPORATION,
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No. 10382

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a corporation,
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COMPANY, a California corporation, et al.
Third Party Defendant and Appellant.

No. 10383

APPELLANT'S BRIEF

STATEMENT OF NATURE OF THE CASE

The actions of Home Electric Corporation and of Kenneth E. Smith Company were consolidated for trial in the lower court, (R A 31), because the cases involved

the same issues and facts they are therefore consolidated in this brief on appeal. While judgment was entered against defendants George R. Russell and Retta O. Russell, each of whom had pleaded over under their third party complaints and each of whom were awarded judgment over against appellant Pacific Mutual Life Insurance Company and against Deseret Construction & Investments, Inc., a corporation, this appeal is taken by Pacific Mutual Life Insurance Company only.

The actions were brought by Home Electric Corporation in the one case, and by Kenneth E. Smith Company in the other case, as against defendants Russell to recover the cost of materials furnished to Russells by each of said plaintiffs in the construction of a home on unimproved property belonging to Russells, Russells having failed to require a bond for the protection of mechanic's and materialmen who furnished labor and materials to Russells. Russells financed the building through a loan evidenced by a mortgage and note given by them to appellant Pacific Mutual Life Insurance Company, the monies from which loan were advanced by the agent of Pacific Mutual Life Insurance Company to the general contractor as the building progressed according to a written agreement made and entered into by and between Russells and Pacific Mutual Life Insurance Company. Russells also entered into a written contract for the construction of the building on their property with Deseret Construction & Investments, Inc., as general contractor.

DISPOSITION OF CASE MADE IN LOWER COURT

The lower court entered a judgment dated February ....., 1965 in the case instituted by Home Electric Corporation (No. 10382) in favor of plaintiff Home Electric Corporation and against George R. Russell and Retta O. Russell, his wife, in the sum of $347.42 with interest thereon at the rate of 8% per annum, and in favor of George R. Russell and Retta O. Russell, his wife, on their third party complaint, against Pacific Mutual Life Insurance Company, and Deseret Construction & Investments, Inc., in the same amount.

The lower court entered a judgment, dated February ....., 1965 in the case instituted by Kenneth E. Smith Company, (No. 10383) in favor of plaintiff, Kenneth E. Smith Company and against George R. Russell and Retta O. Russell, his wife, in the sum of $945.06 with interest thereon at the rate of 8% per annum, and in favor of George R. Russell and Retta O. Russell, his wife, on their third party complaint, against Pacific Mutual Life Insurance Company, and Deseret Construction & Investments Inc., in the same amount.

RELIEF SOUGHT ON APPEAL

Appellant, Pacific Mutual Life Insurance Company seeks reversal of the judgments as the same affect this appellant.

STATEMENT OF FACTS

Defendants George R. Russell and Retta O. Russell, his wife, the owners of unimproved real property in Salt Lake County, Utah, a building lot described as Lot 511, Arcadia Heights Plat "E," did on January 17th, 1961, enter into a construction agreement with Third Party Defendant, Deseret Construction and Investments, Inc., for the construction of a home on said property, at a stated cost, (R A 6). Russells did not require Deseret Construction and Investments, Inc. to furnish a performance bond as provided by Sec. 14-2-2 UCA, 1953.

In order to finance the construction of a home on their lot, Russells borrowed the sum of $17,000.00 from Third Party Defendant, appellant, Pacific Mutual Life Insurance Company, executing and delivering a promissory note and mortgage on said property to secure said sum. Prior to and to induce appellant to make said loan, Russells executed and delivered to said loan company a construction agreement, which was made a part of the mortgage by reference, which agreement is attached to and made a part of Russells' Third Party Complaint, (R A 9, 10). Under said agreement Russells agreed with Pacific Mutual Life Insurance Company to diligently improve said property at a cost of not less than $18,168.00 in accordance with plans and specifications and general building contract (if any) approved by Lender (Pacific Mutual Life Insurance Company), and to furnish Pacific Mutual Life Insurance Company

with receipted bills for all work or materials furnished for such improvements and to remit to said loaning agency such other amounts as it may from time to time require in addition to such loan funds to assure full payment for such improvements.

The said construction agreement further provided that "subject to all conditions herein provided, Lender shall disburse such loan funds and the amount of all such remittances either to Owner or Order, or in Lender's sole discretion, from time to time, without liability so to do or for so doing, to any architect, engineer, *contractor,* subcontractor, mechanic or materialman engaged in or furnishing any work or material for such improvements or any part thereof, as follows: "(then in typewritten figures and letters is set out five paragraphs designating the method of advances as the building progressed, the first four being unimportant to the case, the fifth paragraph provides:) "$4000.00 (being the last draw of the mortgage money) after house is completed according to plans and specifications now on file in Lender's Office, yard has been graded, and all bills for material and labor have been paid." The other provisions of said agreement herein referred to are printed and further provide: "Lender in its sole discretion may from time to time make any or all such disbursements without the occurence of any or all conditions hereto and upon default in performance of any obligation of Owner herein or in said loan application or secured by said mortgage or trust deed, may itself for its own protection and without liability so to do or for so doing

cause such improvements to be completed and any or all such obligations to be performed and disburse such loan funds and the amount of all such remittances or any part thereof as above provided or in payment or satisfaction of any or all such obligations of Owner."

Appellant deposited said loan fund with Backman Abstract & Title Company for disbursement. Not only were these loan funds deposited with Backman Abstract & Title Company but Russells also deposited with said title company the sum of $1663.00 for disbursement with the loan funds (R B 14).

Defendants and respondents Russells went to the office of Backman Abstract & Title Co. and executed the note and mortgage in favor of Pacific Mutual Life Insurance Company (R B 16), and LeGrand Backman of the title company was told by Russells that the general contractor on the job was Deseret Construction & Investments, Inc. (R B 17). Funds were thereafter issued to the general contractor as follows: Mr. Tatro, the general manager of said company would go to the office of Backman Abstract & Title Company with vouchers of checks issued to sub-contractors. Mr. Backman would then total the amount represented by these vouchers and issue a check for the Russell account to Deseret Construction & Investments Inc., for said amount. This method was followed during the entire construction period (R B 18). All of the funds were paid out from the Russell account to Deseret Construction & Investments, Inc., the general contractor (R B 20). The title

company did not have a list of the sub-contractors, had no knowledge as to who they were and made no payment to any sub-contractors, but all payments were made to the general contractor, Deseret Construction & Investments, Inc. (R B 20).

The plaintiff, respondents, who were materialmen, sub-contractors, were not fully paid by the general contractor. As a result these cases were filed by them against defendants, respondents Russells, who filed action under their third party complaint and obtained judgment over against Deseret Construction & Investments, Inc. and Pacific Mutual Life Insurance Company, the latter being appellant herein.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE ACTION, MADE AFTER THIRD PARTY PLAINTIFFS, RUSSELLS, RESTED, ON THE GROUND FROM THE EVIDENCE AND FACTS AND LAW THIRD PARTY PLAINTIFFS HAD SHOWN NO RIGHT TO RELIEF AS AGAINST PACIFIC MUTUAL LIFE INSURANCE COMPANY.

The uncontradicted evidence is that appellant's agent, upon completion of the construction, had paid to Deseret Construction & Investments, Inc., the general contractor, the monies deposited with said company (R B 20, 30). The construction agreement between the Russells and Pacific Mutual Life Insurance Co. was in evidence, from which it is clearly seen that it was essential

that the funds provided under the mortgage would, under the construction agreement, be employed exclusively in the erection of the home on the property mortgaged, since the security for the loan only came into existence as work progressed according to settled plans and specifications. This is basic to construction financing and is often emphasized where the role of construction lending is compared and contrasted with mortgage practices generally. In such cases, the loaning institution insists upon control over expenditures and payments to insure completion of the improvement because of the risks inherent in this form of lending. It is to insure that sufficient funds are available to complete the improvement and the agreement gives the loaning agency the right to pay to the contractor or parties furnishing the materials and labor or, at the option of the lender, to the mortgagor to be applied by the latter for this purpose. The retention of funds by the lender together with authority to make direct disbursements follow naturally from recognition of the fact that completion of the structure is of paramount importance in this type of security arrangement.

The authority given to appellant under the construction agreement is a device commonly required of the mortgagor in such construction, as a means of protecting the lender against claims of negligence or other impropriety in the disbursement procedure; it does not affect the lender's obligation to perform when the terms of the agreement have been met. This is the usual procedure followed in construction loan financing. It is

stated, for example, in a study of mortgage practices that

> ". . . progress payments for work in place may be made to either the *general contractor* in a lump sum or to each of the subcontractors, in the discretion of the mortgagee. The decision is based on the lender's estimate of the financial and administrative responsibility of the general contractor and his ability to procure the necessary waivers of lien and supporting affidavits from the subcontractors. (italics added)
>
> An authorization from the owner to the mortgagee . . . to disburse the proceeds of the loan in accordance with the contractor's statement is, of course, a prerequisite to any disbursement." Pease and Kerwood Mortgage Banking 312 (2d ed. 1965)

The authorization contained in the Construction Agreement in the instant cases is a socalled "blanket" authority to disburse. It has been noted that some lenders require the borrower to authorize individual disbursements at all stages of construction. Conway Mortgage Lending 340 (1960). In any event the purpose is clear. It is natural that the mortgagee should seek protection against the consequences of improper disbursements, in view of the complexity of factual determination with which a construction mortgagee is confronted while the building is being erected. (Falls, Lumber Co. v. Heman, 114 Ohio App. 262 (1961)). Thus the authorization by its terms releases the mortgagee from liability for errors of judgment in making disbursement *but not for wilful misconduct.*

No wilful misconduct is shown in these cases on the part of the disbursing agent and none is charged. The evidence shows clearly that if a mistake was made, which is not admitted, it was error of judgment in relying on representations of the general contractor. It is evident that the disbursing agent had, on other occasions dealt with the general contractor in the same manner on other jobs (R B 17, 18), and these dealings with the general contractor were conducted in a satisfactory manner (R B 20, 21).

It has been said that the need for individual judgment in making disbursements under construction mortgage financing is reflected in the agreement entered into by the lender and borrower. An instance is *Whiting-Mead Co. v. West Coast Bond and Mortgage Co.* 152 P2d 629 (Cal. 1944) where the loan terms contained this language:

> "The owner hereby authorizes the lender, at any time at its option, either in its own or the owner's name to do any and all things necessary or expedient in the opinion of the lender to secure the erection and completion of the improvements in accordance with the plans and specifications . . . and to make or withhold payments for labor and materials used in the construction, and to do any and every act or thing appertaining to or arising out of the construction or completion of the improvements. . . ."

The parties to a contract are free to define its terms. In the instant cases we have a contract in which the borrowers agree to improve unimproved property owned

by them at a cost of *not less than* $18,168.00. They agreed to furnish to Lender receipted bills for all work or materials furnished for such improvements *and to remit to Lender such other amounts as it may from time to time require in addition to such loan funds to assure full payment for such improvements.* Not only this but the borrowers authorized the Lender to disburse such loan funds and the amount of all such remittances either to the *Owner or order* or in Lender's sole discretion, from time to time, without liability so to do or for so doing, to any architect, engineer, *contractor,* subcontractor, mechanic or materialman engaged in or furnishing any work or material for such improvements or any part thereof. Then the parties specified the manner under which advancements may be made and further agreed that the Lender in its sole discretion may from time to time make any or all such disbursements *without the occurence of any or all conditions thereto.*

As heretofore stated, even with such provisions contained in the agreement between the borrowers and the lender, it is conceded that the lender would not be excused from wilful misconduct. But it is contended that the lender is not liable for errors of judgment and the lender is especially not liable under the facts of the instant cases where the general contractor represented to the lender's disbursing agent, that the claims represented by the vouchers produced to the disbursing agent were all of the outstanding claims and that they would be fully satisfied out of the final draw.

For the trial court to find against appellant it was necessary that the evidence show wilful misconduct on the part of the disbursing agent. This was neither pleaded nor was any suggestion of such made during the trial of the case.

The borrows failed to comply with the terms of the Construction Agreement if receipted bills for materials were not furnished to the Lender. If the building cost more than the contract price, as the general contractor testified, then the borrowers not the Lender as the trial court has adjudged, are obligated under the terms of their agreement to furnish such addition funds as are required to fully pay for the building.

While no claim is made that the Construction Agreement is not intended to protect the borrower, the real purpose in the Lender's requirement that such an agreement be executed is because it becomes an essential part of the security arrangement providing the only means of assuring that ample funds will be available to complete the construction.

As was held by this Honorable Court in the case of *Utah Savings & Loan v. Mecham,* 12 U. 2d 335, 366 P. 2d 598, when the premises are improved the mortgagee became bound by virtue of its agreement to advance the specific sums to pay therefor.

By its decision in this case the trial court entirely ignored the provisions of the written agreement between the borrowers and the lenders and frustrated the intention of the parties to the agreement;

Corbin on Contracts says:

> "If the parties have concluded a transaction to which is appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left." (Corbin, Contracts Sec. 95)

The decision of the Lender's agent, in advancing the mortgage monies under the circumstances of this case was reasonable. He exercised the discretionary power given him under the contract in paying the monies over to the general contractor. There was no obligation on his part to determine who the sub-contractors were or whether they were paid. That was the responsibility of the general contractor who was hired by third party plaintiffs. The Lender followed the accepted practice in such cases in paying the monies to the general contractor, when the work was completed.

The decision from which this appeal is taken is not in accord with the recognized rule of contract interpretation. "Whenever possible a contract should be so construed that there are mutually binding promises on each party." *Ross v. Producers Mut. Ins. Co.* 4 U2d 396, 295 P. 2d 339. And, perhaps most important, in determining both the "meaning and the legal effect of an agreement, the transaction should be considered as a whole." Corbin, Contracts, Sec. 549. This of course requires consideration of the "nature of the business at hand, the purpose

of the parties to the transaction, and other relevent circumstances." Corbin, Contracts, Sec. 550.

It is evident in the instant cases that the work on the construction of the improvements on borrower's property had been completed as was represented to appellant's agent by the general contractor. Therefore the appellant was obligated to advance the monies held by it to pay for the same. See *Utah Savings & Loan v. Mecham*, 12 U. 2d 338, 366 P. 2d 598. This appellant did. The fact that there were not sufficient monies in the account to pay the sub-contractors in full was no fault of appellant. Yet the trial court held that because appellant's agent did not see to the application of the monies beyond the general contractor, appellant is liable for the shortage in funds. That is the effect of the decision in these cases. Had appellant's agent advanced the monies before the work and materials required for the completion of the building were furnished, then appellant might be liable to the borrower in that case there being no obligation on the part of appellant to advance the funds. However, as heretofore stated, the evidence is to the effect that the construction of the improvement was complete when the final draw was made by the general contractor. (R B 30).

There is no evidence in these cases to support the Court's finding against appellant. There is not a scintilla of evidence that any of the monies held by appellant's agent went elsewhere than into the construction. Such is not even contended by respondents. Respondent's only contention is that appellant's agent was obligated

to see that all sub-contractors were paid, whether or not there was sufficient money in the account. The trial court entirely ignored the obligations of the borrowers under the construction agreement and applied one sentence therein against appellant, when it was evident from the general contractor's testimony in the record that in order to pay for the construction of the improvements it was necessary for the general contractor to draw the monies on deposit for such purpose (R B 30). The whole of the contract must be considered, one paragraph cannot be picked out and applied without the consideration of the whole contract. This is a cardinal rule in the construction of contracts.

In 17A CJS Sec. 297 at page 112 it is stated:

> "The intention, or purpose, of the parties to a contract is to be collected, ascertained, or gathered from the entire instrument, or the instrument as a whole, and not from detached or isolated portions, or provisions, or fragmentary parts, and it is necessary to consider all of its parts or provisions in order to determine the meaning of any particular part."

The Utah courts followed this rule in *General Mills, Inc. v. Cragun*, 134 P2d 1089 and in *Vitagraph, Inc. v. American Theatre Co.*, 77 U. 71, 291 P. 303.

Disbursement procedure is set out in paragraph 3 of the construction agreement. It provides for payments according to progress of construction in the amounts set forth therein and confers upon the mortgagee the option of making payments either to the mortgagor (owner)

or order, or to contractors, materialmen, sub-contractors or mechanics or any of them without liability so to do or for so doing. This simply prescribes the manner in which performance under one of the alternatives open to the mortgagee would be undertaken. The disbursement clause and the authorization provision therein are not inconsistent and give the mortgagee an option as to mode of performance. This contract gave the mortgagee the right to advance funds as construction progressed in accordance with settled plans and specifications; the obligation could be discharged by payment to the Owner or, at the option of the mortgagee, directly to the contractor, or subcontractors; if the method of payment to the contractor were adopted, the mortgagee possessed authority to make payments directly to this designated contractor and reserved the right to exercise discretion in making particular payouts.

The obligation of the mortgagee to disburse funds is contingent upon adequate performance warranting such disbursement. This concept is basic to construction financing and has received acknowledgment in a number of decisions. In *Boise Payette Lumber Co. v. Winans*, 276 Pac. 971, for example, it is said:

> "The mortgagee's obligation was to advance the balance of the funds represented by the mortgage note upon compliance by the mortgagor with the conditions of the agreement, viz., the improvement of the premises."

And when performance has been satisfactory, the obligation of the mortgagee is fixed:

> "The premises were improved and the mortgagee became bound by virtue of the construction agreement to advance the specific sums to pay therefor."

That is to say, the obligation to disburse is contingent upon adequate performance. Performance was adequate in the instant case and the general contractor was entitled to receive the monies which were promised to be paid to him upon such performance.

There is no evidence in these cases to show that the monies paid out by appellant's agent to the general contractor did not go into the construction of the home of third party plaintiff, Russells. On the contrary, the evidence shows that all monies did go into the improvements.

POINT II.

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT DESERET CONSTRUCTION & INVESTMENTS, INC. WAS ACTING AS AGENT FOR THIRD PARTY PLAINTIFFS, RUSSELLS, AT ALL TIMES AND PARTICULARLY IN RECEIVING THE MORTGAGE MONIES FROM APPELLANT'S AGENT AND IN FAILING AND REFUSING TO INVOKE ESTOPPEL AGAINST THIRD PARTY PLAINTIFFS AND IN FAVOR OF APPELLANT.

Third party plaintiffs Russells in their answer and Third-Party Complaint in each case pleaded under their First Cause of Action as follows:

> 1. That on or about the 17th day of January, 1961, the defendants George R. Russell and Retta O. Russell, his wife, entered into a con-

struction agreement with the third-party defendant, Deseret Construction and Investments, Inc., wherein third-party defendant agreed to construct a home on the following described property, to-wit:

Lot 511, Arcadia Heights Plat "E," according to the official plat thereof,

which property was and is now owned by the defendants Russell.

2. That the defendants Russell have fully paid said third-party defendant, Deseret Construction and Investments, Inc., for the construction of said home, but said third-party defendant has failed to pay the obligations in connection with said construction, including the alleged obligation of (here is set out the party plaintiff and the amount claimed in each case).

Third party plaintiffs plead that they have fully paid the general contractor.

It is not claimed by third party plaintiffs that Deseret Construction & Investments was not authorized by them to draw the monies on deposit with appellant's agent to pay for the construction of the improvements. The evidence is to the effect that third party plaintiffs authorized and expected Deseret Construction & Investments, Inc. to draw the monies as the building progressed. This it did as general contractor.

It would appear from these facts that it is elementary that Deseret Construction & Investments, Inc. acted at all times as agent for third party plaintiffs contracting with sub-contractors and materialmen and in drawing

on the funds to pay for same. It is evident that third party plaintiffs knew at all times that Deseret Construction & Investments, Inc. was drawing on said funds. There was no means of paying the contractor other than to draw on said funds. The court should have invoked estoppel in third1party plaintiff's action against appellant. For the court to find against appellant as it did is to find that third-party plaintiffs may recover from appellant monies paid on deposit by appellant to third-party plaintiffs.

In 3 Am.Jur.2d Agency Sec. 20 the law is stated:

> "The question of whether an agency has been created is ordinarily a question of fact which may be established the same as any other fact, either by direct or by circumstantial evidence; and whether an agency has in fact been created is to be determined by the relations of the parties as they exist under the agreements or acts, with the question being ultimately one of intention. . . . and if relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relation or not. Moreover, the manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called."

Appellant's agent relied on the representatives made by third-party plaintiffs' agent; if the representations were false, third-party plaintiffs cannot look to appellant to recover for the fraud of third-party plaintiffs' own agent.

Even if it appeared that third-party plaintiff's agent, Deseret Construction & Investments, Inc., did said monies and did not apply the same toward payment of materialmen, which the evidence does not reflect third-party plaintiffs, having placed their agent in position to commit a fraud on appellant, must suffer, as appellant. See *Eamoe v. Big Bear Land & Water Co.* (Cal. 220 P2d 408, 4 of syllabus, 2 CJS Agency, Sec. 10 pages 1270 et. seq.)

In 3 CJS Agency at page 187 the law is stated as follows:

> "The principal is liable although the agent's negligence causing the tort occurs while the agent is deviating from the method in which he has been directed to perform the principal's business"

In *Martin v. Leatham,* (Cal.) 71 P2d 336, it is said in citing the case of *Johnson v. Monson,* 183 Cal. 149, 190 P. 635, wherein the court quotes from *Otis Elevator Co. v. First Nat. Bank,* 163 Cal. 31, 39, 124 P. 704, 7 L.R.A. (NS) 529, as follows:

> "It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of his agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as a part of the transaction of such business, citing Story on Agency, Sec. 452, Sherman & Redfield on Negligence, Sec. 65.

In *DeMirjian v. Ideal Heating Corp.* (Cal.) 246 P2d 51, it is said:

> "Unless required by law to employ a particular agent, a principal is responsible to third persons for negligence of his agent in transaction of business of agency, including wrongful acts committed by such agent as part of transaction of such business, and for his wilful omission to fulfill the obligations of the principal."

In *Vaughn v. Board of Police Com'rs.* (Cal.) 140 P2d 130 it is held. A principal is liable for torts of his agent committed within scope of his authority under doctrine of 'respondent superior.'

POINT III.

THE COURT ERRED IN FAILING AND REFUSING TO ADOPT THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT SUBMITTED BY APPELLANT.

There was no evidence introduced in the case to support the Findings of Fact, Conclusions of Law and Judgment submitted by third-party plaintiffs and adopted by the court. There was evidence supporting the Findings of Fact, Conclusions of Law and Judgment submitted by appellant.

POINT IV.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL.

There being no evidence before the court to support the Findings of Fact, Conclusions of Law and Judgment, the court should have granted a new trial.

CONCLUSION

Third-Party Plaintiffs having by their written agreement authorized appellant to pay monies held by it to the general contractor for the construction of improvements on property of third-party plaintiffs, and the construction having been completed requiring the drawing down of all monies on deposit for said purposes, the judgment of the lower court should be reversed and the actions as against appellant should be dismissed.

Respectfully submitted,
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