

1965

Home Electric Corporation and Kenneth E. Smith
Company v. George R. Russell, His Wife and
George R. Russell and Retta O. Russell v. Pacific
Mutual Life Insurance Company, A California
Corporation : Defendants and Third-Party
Plaintiffs-Respondents' Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

AUG 23 1965

HOME ELECTRIC CORPORATION,
a corporation,
Plaintiff-Respondents,
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 Defendants and Appellant.

Chief Justice, Supreme Court, Utah

No. 10382

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 Corporation, et al.
Third Party Defendant and Appellant.

No. 10383

DEFENDANTS AND THIRD-PARTY PLAINTIFFS-
RESPONDENTS' BRIEF

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

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IN THE SUPREME COURT
of the
STATE OF UTAH

HOME ELECTRIC CORPORATION,
a corporation,

Plaintiff-Respondents,

vs.

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GEORGE R. RUSSELL, his wife,

Defendants-Respondents,

and

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No. 10383

DEFENDANTS AND THIRD-PARTY PLAINTIFFS-
RESPONDENTS' BRIEF

STATEMENT OF NATURE OF THE CASE

This case involves the interpretation of a contract between Third-Party Plaintiffs-Respondents, hereinafter referred to as Russells, and Third-Party Defendant-Appellant.

pellant, hereinafter referred to as Pacific Mutual Life Insurance Company or Pacific Mutual.

DISPOSITION OF CASES IN LOWER COURT

The trial court entered judgments in Civil Nos. 10382 and 10383 in favor of Plaintiffs and against Russells. Judgments in the same amount were entered in favor of Russells and against Pacific Mutual Life Insurance Company and Deseret Construction & Investments, Inc.

RELIEF SOUGHT ON APPEAL

Russells seek affirmance of the trial court judgments.

STATEMENT OF FACTS

Russells agree substantially with the statement of facts set forth by Pacific Mutual Life Insurance Company, subject to the following particulars:

The contract which is the subject of interpretation is set forth in the record at R A 9, R C 13 and 14, and is also Exhibit D-1. It is a printed form agreement upon which typewritten matter has been inserted. The pertinent portion of the contract so far as this case is concerned is the following portion of Paragraph Three which consists of printed matter followed by inserted typewritten language, as follows:

“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, sub-contractor, mechanic or materialman engaged in or furnishing any work or material for such improvements or any part thereof, as follows:

1. \$1,500.00 *After foundation and basement are in and sub-floor is on.*
2. \$2,000.00 *When the house is on the square, roof framing and sheeting is on.*
3. \$4,000.00 *After house is closed in, roof is on, structural framing is completed, plumbing and heating are roughed in, electrical wiring is in and house is ready for plaster.*
4. \$5,500.00 *After floor is on, finished plaster is completed, all cabinets are in, outside and inside woodwork primed and house ready for decorating.*
5. \$4,000.00 *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 italicized portion is the typewritten insertion in the contract.)

Russells deposited with Pacific Mutual the monies required of them under the contract and the latter paid out said funds to the general contractor (T B 63, 64, 69). The method of disbursement used by Pacific Mutual, however, enabled the general contractor to obtain draws before the labor and materialmen were paid and lien waivers were executed (T B 79, Exhibits D-5, D-6). The record is silent with respect to what actually happened

to the money paid the general contractor and Pacific Mutual's statement in the last sentence under POINT I at Page 17 of their brief to the effect that all of the monies on deposit with it went into improvements on Russells' property is not supported by the record. Pacific Mutual's statement in the second paragraph on page 12 to the effect that the building cost more than the contract price is likewise not supported by the record, the evidence being inconclusive on this point as set forth in the transcript at page 79:

By Mr. M. V. Backman

"Q. As a matter of fact some of the bills which were a part of the vouchers, which you presented, were not paid, is that not correct?

A. Yes, I believe this is true. However, the amounts of the contract were exceeded by the cost of the job, and there are various factors that would relate back to this.

Q. Is it your testimony that the job exceeded the amount of money which was on deposit?

A. I would have to check the records real thoroughly before I would want to swear to that. I am under oath and I wouldn't want to say that with any degree of confidence right now."

It was agreed at the time of trial that plaintiffs' claims in both actions were valid and subsisting claims and in conformance with the general building contract referred to in the agreement between Russells and Pacific Mutual, with the exception of plaintiffs' first cause of

action in Civil No. 10382 in the amount of \$59.80 which the court denied after testimony was received (T B 56, R A 48). Russells left the entire matter of disbursing the funds to Pacific Mutual who made no demands on the Russells for further funds nor were any requests made by Pacific Mutual that Russells pay directly any subcontractor or materialmen (T B 62, 74).

ARGUMENT

POINT I.

THE TRIAL COURT WAS CORRECT IN FINDING THAT PACIFIC MUTUAL LIFE INSURANCE COMPANY BREACHED ITS AGREEMENT WITH RUSSELLS AND THAT PACIFIC MUTUAL LIFE INSURANCE COMPANY WAS LIABLE FOR CLAIMS FOR LABOR AND MATERIAL.

It is conceded by Pacific Mutual that Russells had \$18,503.50 on deposit with said Company, that plaintiffs' claims were proper and in conformance with the general building contract, and that all of the funds were disbursed by Pacific Mutual without plaintiffs being paid.

Pacific Mutual seeks to avoid the effect of the inserted typewritten portion in paragraph Three of the contract and more particularly Paragraph Five which is as follows:

"5. \$4,000.00 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.*" (Emphasis added)

The modus operandi for this attempted avoidance of contract responsibility is the injection of the misconceived issues of negligence and willful misconduct; changing the established definition of an independent contractor; reducing a borrower to a mere convenience for a lending institution; ignoring fiduciary obligations and contract clauses. The contract between Pacific Mutual and Russells was for their mutual protection against the contractor. Pacific Mutual acted as agent for Russells in the disbursement of funds. The argument that the contractor acted as agent for Russells in this regard is specious. In short Pacific Mutual Life Insurance Company maintains that it could have paid the contractor all of Russells' money before any work was done on the premises *without liability!* The requirement that the last disbursement not be made until all the bills for material and labor had been paid is just as important as the requirement that the first payment not be made until the foundation and basement were in, etc.

The position advocated by Pacific Mutual Life Insurance Company is contrary to the recent case of *Holland v. Brown*, 15 Utah 2d 422, 394 P.2d 77, in which case this court held:

“Where there is a printed form of contract and other words are inserted in writing or otherwise, it is to be assumed that they take precedence over the printed matter.”

The trial court so held in the instant case.

CONCLUSION

Paragraph Three of the contract gave Russells their only assurance that all labor and materialmen would be paid before the balance of the money was spent. Pacific Mutual agreed to accept this responsibility. Having failed in its duty to protect Russells, Pacific Mutual should not now be allowed to complain. The judgment of the trial court should be affirmed.

Respectfully submitted,

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