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 Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

OCT 14 1965

Clerk, Supreme Court, Utah

HOME ELECTRIC CORPORATION, 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 Defendants and Appellant.

No. 10932

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. 10933

APPELLANT'S REPLY BRIEF

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

HORACE J. KNOWLTON, ESQ.
[illegible] Tenth Avenue,
[illegible] Lake City, Utah,
Attorney for Plaintiff-Respondent [illegible] Electric Corporation,

FRANK J. GUSTIN, ESQ.
Gustin, Richards & Mattsson,
[illegible] Bank Bldg.
[illegible] Lake City, Utah,
Attorney for Defendants and Third Party Plaintiffs & Respondents, [illegible] R. Russel and Retta O. Russell

[illegible] S. NELSON, ESQ.
[illegible] First South Street,
[illegible] City, Utah,
Attorney for Plaintiff-Respondent, [illegible] E. Smith Company,

BACKMAN, [illegible] & CLARK
1111 [illegible]
Salt Lake City, [illegible]
Attorneys for Defendant-Appellant Pacific Mutual Life Insurance Co.

TABLE OF CONTENTS

AUTHORITIES CITED

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

No. 10383

APPELLANT'S REPLY BRIEF

Examination of the respondents' brief discloses that the sole basis relied upon for affirming the ruling below lies in the language of No. 5 under paragraph three of the building loan agreement, viz.:

> 5. $4,000. After house is completed according to plans and specifications now on file in Lender's Office, yard has been graded, and all bills for materials and labor have been paid

The respondents' argument is essentially that the language of this clause binds the appellant as well as the respondents. In determining the validity of this position, it would be well to review again the meaning and purport of this clause, considered both in light of its relationship to other provisions and in the context of the loan agreement as a whole.

POINT I

THE SCHEDULE OF PAYMENTS INCLUDING THE PROVISION FOR FINAL PAYMENT CONTAINED IN THE LOAN AGREEMENT SERVED ONLY TO DEFINE THE RIGHTS OF LENDER AND BORROWER WITH RESPECT TO THE *DUTY TO ADVANCE* FUNDS ACCORDING TO THE PROGRESS OF CONSTRUCTION IT DID NOT PURPORT TO ESTABLISH THE RIGHTS OF THE PARTIES *UPON DISBURSEMENT* OF THE MORTGAGE FUNDS.

In appellant's initial brief, it was shown that the manner of disbursing funds provided for in the loan agreement was the method usually employed in construction lending. This method clearly contemplates that the borrower shall be entitled to have the funds disbursed when the events specified in the agreement are met. In essence, then, the provisions for disbursement contained in paragraph three established the obligation of the lender *to advance* the mortgage funds.

Wholly apart from this aspect of the agreement are other provisions which govern the rights of the parties *upon disbursement* of the funds. Thus, in paragraph two it is provided, inter alia, that the borrowers are to remit to the lender such other amounts as may be required from time to time "to assure full payment for (the) improvements." This language obviously contemplates a situation where actual job cost might exceed the contract price, and requires the borrower to make good the excess, notwithstanding any previous disbursement of funds.

Also in paragraph three — the language on which respondents predicate their entire case — it is provided that lender may disburse funds to any ". . . contractor" without liability for so doing. And in the rider attached to the agreement, it is expressly provided: "Lender in its sole discretion may from time to time make any or all such disbursements without the occurrence of any or all conditions thereto. . . ."

POINT II

VIEWING THE LOAN AGREEMENT AS A WHOLE, IT IS CLEAR THAT PARAGRAPH THREE WAS NOT INTENDED TO DICTATE THE EXCLUSIVE MANNER OF DISBURSEMENT BY THE APPELLANT; BUT RATHER THAT APPELLANT'S RIGHTS WITH REGARD TO DISBURSEMENT WERE GOVERNED BY OTHER PROVISIONS OF THE AGREEMENT FULLY SUPPORTING THE ACTUAL PAYMENT OF FUNDS MADE BY APPELLANT.

It is apparent that respondents' position can be upheld only if the above mentioned parts — and indeed very material parts — of the loan agreement are ignored. For, in substance, the respondents' contention is simply that the obligation of the appellant to disburse, as contained in paragraph three, must dictate its own mode of disbursement should it choose to pay funds directly to parties designated in the agreement.* Under respondents' interpretation, therefore, the provisions noted above *which directly control* disbursement procedure are mere surplusage, since they are so patently at variance with the position contended for by respondents.

However, it is clear the courts do not interpret contracts by ignoring material clauses and provisions, but will, rather, consider all parts of the instrument in their endeavor to apply a reasonable construction thereto. (*Cornwall v. Willow Creek Country Club*, 13 U. 2d 160.) 369 P 2d 928, As stated in *Gates v. Daines*, 3 U. 2d 95, 279 P 2d 458.

> The court may construe the contract only as to give effect to the entire agreement without ignoring any part thereof.

---

*We point out the fact that respondents are able to cite only one case in support of their contention, *viz.*, *Holand v. Brown*, 15 U. 2d 422. This decision adds nothing insofar as the instant controversy is concerned, for it simply states that inserted material will prevail over the printed portions of a contract. This, of course assumes that some inconsistency or contradiction exists between the written and printed portions of the contract. Corbin, Contracts § 548. There is no such contradiction here; paragraph three and subparagraphs thereunder relate only to the events giving rise to the appellant's obligation to disburse; the rights relating to the disbursement itself are covered elsewhere in the agreement, as is discussed more fully in the body of the present brief.

It is true also that

> . . . construction (is) preferred which will harmonize all provisions of the writings. . . .

Here, it is apparent the conditions contained in paragraph three were intended only to define the events which had to occur before the appellant was obligated to disburse funds; the appellant then had the option of paying the borrowers directly or of disbursing the funds directly to any one or all of the parties specified, including the general contractor. In the event the latter method were adopted, the parties expressly agreed the appellant should have the right to pay the funds as it might in its discretion deem proper, such right clearly not subject to but in fact wholly exclusive of the conditions qualifying its obligation to disburse in the first instance.

CONCLUSION

The end result is that the appellant did disburse the funds in accordance with terms of the loan agreement, and no evidence whatever has been adduced to show that such funds were not actually used for construction purposes.

Respectfully submitted,

BACKMAN, BACKMAN & CLARK
1111 Deseret Bldg.
Salt Lake City, Utah
Attorneys for Appellant