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Rex T. Fuhriman, Inc. v. John E. Jarrell : Appellant's Brief

In the Supr

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REX T. FUHRIMAN

Plaintiff and

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Attorney for Defend

TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

CASES CITED

TEXTS CITED

In the Supreme Court of the State of Utah

REX T. FUHRIMAN, INC.,
Plaintitff and Appellant,

vs.

Case No. 10925

JOHN E. JARRELL,
Defendant and Respondent.

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is a civil action brought by Plaintiff to recover for rent of a house, with a Counterclaim by the Defendant for damages for breach of a construction contract between the parties.

DISPOSITION IN LOWER COURT

The Court, sitting without a jury, gave judgment to the Plaintiff on its Complaint for the rentals and judgment to the Defendant for his Counterclaim for damages for breach of contract.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of that part of the judgment in Defendant's favor for damages for breach of contract.

STATEMENT OF FACTS

Plaintiff is a building contractor corporation and the principal constructor of homes in what is known as the "Golf Course Subdivision" in Logan, Utah, having built about one-half of the new homes in this area. (Tr. 120)

Defendant desired to build a new home in this area and engaged Plaintiff to do the job. (Ex. 4 and 5) In the meantime, Defendant needed a home in which to reside and entered into a lease arrangement with Plaintiff to occupy one of Plaintiff's completed homes in said area. (Tr. 6, 8, 51, and 52)

The address of the rental home is 1454 North 16th East, Logan, Utah. The Complaint involves this home.

The address of the constructed home is 1675 East 14th North, Logan, Utah. The Counterclaim involves this home.

Defendant occupied the rental home from September 9, 1964 to April 5, 1965 (when the constructed home was finished) at an agreed rental of $125.00 per month, a total of seven months less four days, or a total rental of $858.36. (Tr. 6, 8, 51, 52, and 102)

Following the completion of the constructed home, Plaintiff submitted a billing to the Defendant, Exhibit Def. 1, showing rent due on the rented house and the

balance due on the constructed house, summarizing both charges and credits.

On May 12, 1965, Defendant sent Plaintiff two checks:

(a) Exhibit Def. 2 for $138.36 marked "Rent (1454 North 16th East) less interest on house money." (Tr. 86 and Exhibit Def. 2)

(b) Exhibit Pl. 1, for $3,920.10 marked "In full payment on my home 1675 East 14th North, Logan, Utah." (Tr. 82 and Exhibit Pl. 1)

Plaintiff returned the rent check as unacceptable and accepted and cashed the home check as payment on the home. Plaintiff made further demand on the rent due and, receiving no payment, filed suit in City Court.

Defendant originally filed only an Answer and did not file a Counterclaim until after trial and over Plaintiff's objection in City Court. (R. 5) The Counterclaim exceeded City Court jurisdiction and threw the matter into District Court, where a second trial was had resulting in the judgment appealed from.

As to the constructed home, water came into the basement, some through a cement wall where tie rods penetrated the wall and some through a window well. (Tr. 62, 128, and 134)

The language of the specifications here involved,

Exhibit 5, reads: "Waterproofing: asphalt emulsion." To comply with this, Plaintiff applied a thick asphalt emulsion about the size of a baseball at each place in the foundation where a tie rod penetrated through the foundation. (Tr. 63, 124, 125, and 152)

The Court, in its Memorandum Opinion, ruled that the above phrase menat "one coat of emulsion to be sprayed or painted on the outside of the walls to the basement." (R. 11)

When Plaintiff was advised of the leaks in the basement, the source of the leaks were plugged effectively. (R. 11, Memorandum Opinion) The Court then held that, even though the patchwork was effective, the market value of the dwelling was materially diminished to the extent of $1200.00, for which amount Defendant was awarded judgment. (Plus $100.00 for a defect in linoleum, hereinafter discussed.) The Court, in arriving at the figure $1200.00, determined the record was void as to evidence on this point of market value but adopted in this respect a figure given by the one witness called by Defendant on this point that to dig up around the foundation and apply *two* coats of asphalt emulsion would cost $1200.00. (Tr. 41 and Ex. 7) Another witness said $200.00. (Tr. 133)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DECIDING THAT "WATERPROOFING: ASPHALT EMULSION" MEANS ONE COAT OF EMULSION TO BE SPRAYED OR PAINTED ON THE OUTSIDE OF THE WALLS TO THE BASEMENT AND IN MAKING AND ENTERING A FINDING OF FACT, CONCLUSION OF LAW, AND JUDGMENT THEREON.

The portion of the judgment appealed from hinges on the lower court's interpretation of the phrase in the specifications of the building contract between the parties hereto found on page one of Def. Ex. 5, Description of Materials, xxx 2. Foundations: xxx Waterproofing: Asphalt Emulsion. The lower court modified this contractual provision by reading into it: "One coat of emulsion to be sprayed or painted on the outside of the walls to the basement." The extent to which the lower court read these extra words into the specifications is aptly illustrated by the exchange between court and counsel on pages 166 and 167 of the transcript.

In this exchange, the Trial Court readily agreed that he was reading the extra language into the Agreement (Tr. 166, 167)

Then, notwithstanding a determination by the Trial Court that the corrective work by Plaintiff had been

effective, the Court proceeded to apply a $1200.00 bid to excavate completely around the house, apply *two* coats of asphalt emulsion, backfilling, and repair of a patio (Exhibit 7) as a diminution of market value of the dwelling, there being no other evidence in the record of such change in market value.

It is Plaintiff-Appellant's contention that in adding words to the written agreement and in fixing the damages in the manner set forth, that the Trial Court committed error.

The Specifications, Exhibit 5, Description of Materials, merely called for "Waterproofing: asphalt emulsion." The lower court somehow adopted a fixed theory in its mind that this consists of coating the entire foundation with an asphalt emulsion. The main question seems to be now, where did the lower court get this definition of the specifIcation, and was the court justified in so adopting it?

This language certainly is ambiguous and does not in any way define itself. Accordingly, it would seem that evidence is admissible to determine what is meant by it. Defendant seemed to rely upon proof of custom in the trade; but in this respect, he had only one witness, a Mr. Steffenhagen who is a building contractor, and testimony concerning certain FHA specifications on buildings covering the area of dampproofing and waterproofing.

To dispose of this last item first, it should be pointed out to this Honorable Court that this house was not an FHA house, nor was it built under FHA specifications. (Tr. 137) Second, the FHA specifications call for the application of *one* coat of bituminous dampproofing material to wall from footing to finish grade. (Tr. 156 and 160) This alone is in conflict with the testimony given by the other witness for the Defendant, whose testimony was that *two* coats should be applied. (See Exhibit 7, upon which the lower court based its arrival at the amount of damages) Most important is the balance of the FHA specification which provides that foundation dampproofing may be omitted when acceptable to FHA field office in locations where well-drained soil exists or where ground or surface will not present a problem. (Tr. 128 and 160) The testimony in this respect was that the soil in this area was dry and contained no dampness; and that when this area was first developed as a subdivision, a hole was dug down for a septic tank test purpose in several areas to approximately 20 feet, and no water table was apparent. (Tr. 121 and 160) Certainly, it would seem that the FHA specification is not controlling in any respect in this particular instance.

As to proof of custom, the only witness for the Defendant was Mr. Steffenhagen who had been a general contractor for 12 years. He had built only one or two

homes (Tr. 44) in this subdivision and testified that his building practice was to tar all of the surface of the foundation walls. An interesting sidelight here is that in rebuttal testimony, Plaintiff brought in proof that the very home which this witness had just completed in this area had not, in fact, been so tarred or coated with asphalt emulsion as the witness had testified he always did. (Tr. 143, 144, and 155) Thus, it is clear if the witness did have a practice of coating the entire surface of the foundation, he did not carry out this practice in the very area in which we are involved.

Before going on to the law as to proof of custom, a word or two about the other evidence in this matter is pertinent. At the time of the trial, there were about 47 new homes in this subdivision (Tr. 120) Of this number, the Plaintiff had built about one half of them (Tr. 120); and the Plaintiff's witness, Mr. Jerry Greaves, Plaintiff's foreman, testified that he had supervised the construction on all of these homes. (Tr. 150) His testimony was certain and unequivocal that the best practice in the construction of homes in this area was to not coat the entire surface with an asphalt emulsion of a variety that could be applied with a paint brush, but that a thick asphalt emulsion should be placed over each of the places where a tie rod had gone through the foundation to hold the foundation forms in place. There is no doubt that this was done because the Defendant himself testified that when he made his own investigation,

he found a coating of this thick substance over each of the tie areas—the substance being about the size of a baseball at these points. Mr. Fuhriman, the President of the Plaintiff corporation, also testified that in his building experience this type of waterproofing was the best suited in this area. Both Mr. Fuhriman and Mr. Greaves testified they were aware of the method of using a thin coat of asphalt emulsion to be painted over the entire foundation, but they had not used this method for years and that they did not recommend this type of procedure and did not use it themselves because it was not the best type of waterproofing and that their method as described above was the superior.

The specifications are silent on how much asphalt emulsion should be used and over what areas. The lower court in concluding that the entire foundation surface must be coated with asphalt emulsion must have been reading into the contract a custom or usage, thus, recognizing the rule which we are all aware of that usages and customs may and sometimes do affect contractual rights and liabilities even though they are not mentioned in the contract. However, we should review some of the basic and well-known requirements of the application of this important rule of law

First, the mere existence of a custom or usage by itself is not sufficient to affect the parties's contractual rights. While the early view that the custom or usage

must be an ancient one before it will be recognized has gone by the wayside, it is still necessary that the custom or usage must have existed long enough to have become generally known and to justify the conclusion that the contract or transaction in question was made or done in reference to it.

Second, also, the courts have been reluctant to recognize a custom or usage without accompanying evidence that it is general in its operation. It must at least be shown to be so general and universal in character that knowledge of it by the parties to be charged may be presumed.

Third, it must be certain, continuous, and uniform.

Fourth, it must be uniformly acquiesced in by those whose rights would naturally be effected by it and must not have been the subject of dispute.

Fifth, it must be reasonable.

It is Plaintiff's position that the testimony of witnesses engaged in the particular trade in question and familiar with its practices must be available to the court to establish such a custom. While we feel that one witness might be enough if his testimony were uncontroverted, we do not feel that the court can base a finding of custom on the testimony of one contractor when this testimony is controverted by the testimony of two contractors who have constructed approximately 50 percent

of the homes in the area involved in the custom. It appears that items second, third, and fourth stated above are missing in Defendant's case.

Turning to the law on the subject, reference is first made to American Jurisprudence where the discussion of Usages and Customs is found under said heading in Volume 55 at Page 263.

In particular, the requisites and essential elements, emphasizing the points mentioned above, are discussed starting at Page 266 of 55 Am. Jur.

First of all, attention should be called to the fact that the Defendant has in no way pleaded a general custom or usage. His pleadings are silent on this point.

Turning to the case law, there is a recent Idaho case which discusses usages and customs in some detail. It is *Commercial Insurance Company,* a corporation, vs. *Hartwell Excavating Company, Inc.,* a corporation, (Idaho, 1965) 407 Pacific 2d 312.

At page 314 of this Reporter, the Idaho Supreme Court discusses the sufficiency of pleadings to set up a usage or custom in a matter. The court then goes on to discuss proof of usages and custom, citing and quoting from the American Jurisprudence provisions above referred to found at 55 Am. Jur., Usages and Customs.

The Idaho Court says (407 P2d 314):

> "It is generally recognized that a custom or usage which may affect the rights of a party to a contract must be one that has existed for such length of time as to become generally known and practiced in the area in question or in reference to the particular trade or business with which it is connected. 55 Am. Jur., Usages and Customs."
>
> "The foundation for the introduction of evidence of usage or custom is a showing of a series of acts of a similar character performed at different times."

and on page 317 of 407 P2d:

> "It is also recognized to be a general rule that when there is a known usage of a trade or business, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears."

This case is the latest judicial pronouncement in this area on usages and customs that we have been able to find, and one of the few in this area on this point.

Also, we note that in the new edition of American Jurisprudence, Am. Jur. 2d, the subject title has been reversed and is now covered under Customs and Usages, and the discussion is found in 21 Am. Jur. 2d, Customs and Usages, commencing at page 675 of said volume.

In summary, we suggest again that the lower court in ruling that the specifications call for a one coat application of asphalt emulsion over the entire foundation

of the Defendant's home, made its determination from somewhere other than the specifications. In our mind, it can only come from a mistaken belief that custom or usage so dictates; and we certainly strongly submit to this Court that the Defendant failed substantially to plead or make such proof of custom or usage. We submit that the evidence is stronger to the effect that the proper way and customary way to waterproof in the area involved is by placing the thicker type substance over the areas where the ties penetrate throught the concrete foundation, in other words, the critical areas.

In conclusion, on the point of alleged breach of contract, there is no doubt as to the exact language of the specification — "Waterproofing: asphalt emulsion." Nothing is said, however, about where applied, how applied, or in what thickness. This specification is obviously not a warranty that the home will be waterproof or, as defendant seems to claim, watertight. Waterproof is not construed to mean "watertight." See Words and Phrases, Vol. 44, page 723. There cited is the case of *Waters* vs. *Yockey,* (Texas) 193 S. W. (2d) 575, 576, where the holding is:

> "The word waterproof is a relative expression and does not mean that water is to be kept out of the basement under all conditions ... ."

In the instant case, the specifications call for asphalt emulsion. This was applied in the manner called for

under the best judgment of the contractor and foreman based on years of experience in the area. And for the defendant to say that the fact that water came into the basement is ipso facto a breach of contract is not correct. The water came in; the cause was remedied, effectively said the lower court. What more can or need be done?

POINT II

THE COURT ERRED IN FIXING DAMAGES AT $1200.00, EVEN ASSUMING A BREACH OF CONTRACT.

Assuming for argument a breach of contract on the part of Plaintiff, it remains clear that the court below erroneously assessed damages to be $1200.00.

Defendant's witness, Steffenhagen, testified that it would cost $1200.00 to excavate completely around the house, apply *two* coats of asphalt emulsion, backfill, and repair the patio. (Tr. 41 and Exhibit 7)

The Trial Court adopted this as the amount of diminution in market value of the dwelling, notwithstanding a finding that there was no evidence of diminution of market value. (Memorandum Decision, R. 11)

While we agree that cost of repairs may be the measure of damages, it would seem that the costs of repairs would be limited to those repairs necessary to restore the building to its prior condition, here, to a condition where it did not seep water, 22 Am. Jur. (2d)

Damages, Section 140, Page 204, not the costs of repair far in excess of the need to repair something that does not need repair. Here, the lower court determined the repair work done by plaintiff was effective. Here, there is obviously no need to excavate completely around the house, tear up a patio, and apply *two* coats of asphalt emulsion. It is strongly urged that there has been a substantial over-play of remedy here, even assuming a breach. In any event, the cost of repair would not exceed $200.00.

And in passing, we suggest that the lower court also afforded the defendant a gratuity in awarding him a judgment for $100.00 on the flaw in the floor covering. By their own testimony, the Jarrells admitted they were cutting corners and skimping in order to get more items for their money than the contract entitled them to. (Tr. 115)

The credible testimony of the merchant was that the Jarrells purchased an as-is end role, without warranty; and, actually, plaintiff had nothing to do with either the selection or installation of the linoleum. Nevertheless, the Court below charged plaintiff with $100.00, we think, in error.

CONCLUSION

Defendant discovered the leak in the basement shortly after moving into the home on April 5, 1965.

(Tr. 61) Yet, on May 12, 1965, Defendant sent Plaintiff a final payment on the home by a check (PL. Ex. 1) for $3,920.10, marked, "In full payment of my home at 1675 East 14th North, Logan, Utah." Plaintiff accepted this as tendered. This seemed to settle the matter of the new home, and it was not actually until the day of the trial in City Court on the issue of rent on the rental home that Defendant raised the issue of breach of contract. This was on October 5, 1965. (R. 5) Plaintiff respectively submits that it performed the contract involved in a proper manner, remedied the Defendant's complaint when advised of it, and was paid in due course of time. It should not now be called upon to respond in unfair and exorbitant damages where none exist.

Respectfully submitted,
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