

1967

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

REX T. FUHRIMAN, INC.,
Plaintiff Appellant,

vs.

JOHN E. JARRELL,
Defendant and Respondent.

} Case No. 10925

RESPONDENT'S BRIEF

STATEMENT AND KIND OF CASE

This is a civil action brought by the Plaintiff to recover rent claimed due, and 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 rental and to the Defendant for his Counterclaim for damages for breach of contract. The Court amending the Judgment striking an offset for interest allowed to the Defendant in the Court's memorandum decision and in the initial Judgment.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks to affirm the first Judgment of the Trial Court and to amend the Judgment to include damages improperly omitted to the Defendant.

ADDITIONAL STATEMENTS OF FACTS

In the main, Defendant agrees with the Statement of Facts given by the Plaintiff, however Respondent adds the following to that Statement of Facts.

Plaintiff states on Page 2 that the Defendant occupied the rental home from September to April at an agreed rental of \$125.00 per month, a total of seven months less four days, for rental in the amount of \$858.36. The transcript also shows that it was Major and Mrs. Jarrell's understading that the interest on the money they deposited at Logan, Utah was to be deducted from the amount of the rental. (Tr. 55 105.) The Court held that the accrued interest in the amount of \$182.30 would be deducted from the rent. (Memorandum Opinion Findings of Fact and Judgment.) The Trial Court then deleted this offset allowed to the Defendant-Respondent. (See Amended Findings, Conclusions and Judgments.)

The Plaintiff in his Statement of Facts conceeds that some water came into the basement of the home constructed by the Plaintiff for the Defendant through places where tie rods penetrated the concrete walls, (a tie rod being used to hold the concrete forms in position during the pouring of the concrete, and it is not removed thereafter, but the end are broken flush with the concrete wall,) and in a "honeycomb" area. (As defined Tr. 46, 128, 136, and 157.)

The contract entered into between the parties contains the agreement that the Plaintiff will construct for the Defendant a residence in a good, workmanlike and

substantial manner. Ex 4, the specification with regard to the basement of the home specify that the Plaintiff is to apply "asphalt emulsion" to the foundation of the home to waterproof it. Ex. 5, Plaintiff stated compliance with this provision by applying "thicker material" than asphalt emulsion, (Tr. 139) to the tie rod holes only, omitting to waterproof the honeycombed areas. (Tr. 157 and 158.)

The President for thee Plaintiff, Rex Fuhriman, admitted that he was the author of the contract and the plans and specifications. (Tr. 139.)

When Plaintiff was advised of the leaks in the basement, the source of the leaks were plugged effectively, however it was then discovered that the holes below those plugged, leaked the water and these were never plugged. (Tr. 92 and 93.)

The Defendant testified that the basement was not entirely usable, that his personal possessions were on boards to keep them dry. (Tr. 64 and 65.) Mr. Fuhriman testified that water in the basement makes the basement untenable and unlivable. (Tr. 142.) Mr. Fuhriman testified that if all else failed to make the basement waterproof he would remove the dirt and paint the foundation with asphalt emulsion, which he admitted would cure the leaking of the basement through the tie holes and the honeycomb areas. (Tr. 141.)

The Court gave the Plaintiff Judgment for \$1,200 representing the diminuation in value of the basement and, or the costs to repair, and for the further sum of \$100.00 being the damages to the linoleum. (Memorandum Decision.)

The Plaintiff contends that the Defendants agreed to accept a "as is" piece of floor covering. (Tr. 71 and 75.) The Defendants contend that the floor covering is not of good quality and was not laid with good workmanship. (Tr. 66.) The Court held that there was a glaring patch in the floor and that the Plaintiff must accept some responsibility. The bid for replacement was \$372.90. Ex. 8. The Trial Court allowed \$100.00. (Memorandum Decision.)

Plaintiff testified that he used R. & S. Floor Covering as a matter of course, and that he sent the Defendant's to them to choose their floor covering, and told R. & S. of the allowance the Defendants had. (Tr. 29.) Plaintiff chose a roll end of "top quality" and was shown no defects, (Tr. 66.) the price being lowered as it was a discontinued pattern.

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED AS TO THE COURT'S FINDINGS OF DAMAGES AWARDED TO THE DEFENDANT FOR FAILURE OF THE PLAINTIFF TO CONSTRUCT THE HOME IN A GOOD AND WORKMANLIKE MANNER.

The real issue in this case is whether or not the Plaintiff constructed the home for the Defendant in a good and workmanlike manner. The failure of the Plaintiff to comply with the plans and specifications and the basement still leaking, leaving the basement unusable,

the Plaintiff would still have a claim for relief, as a home is not well constructed in an area of good drainage where the basement leaks from spring runoff.

This Court has on several occasions reaffirmed the rule of construction of contracts that doubtful, ambiguous terms in a written contract shall be strictly construed against the author. (Bryant vs. Deseret News Pub. Co. 233 P. 255. Maw vs. Noble, 10 Ut. 2d 440, 354 P.2d 121, also 17A C.J.S. 217.)

Another rule of the interpretation of contracts that needs no citation is that where there are several documents constituting one contract, all are to be construed together. Here we have a contract, plans and specifications. With regard to the basement, the specifications state what shall be used to waterproof and the construction contract states that all work shall be of good, workmanlike and substantial manner. These being the contract provisions, the performance of the Plaintiff must be measured with these standards.

The specification calls for "Waterproofing: Asphalt Emulsion." This is a specification of the material but not the application. Plaintiff did not apply the material in the specification; he applied a "thicker material." (Tr. 140.) Mr. Fuhrman also testified that he was willing to do whatever was necessary to waterproof the basement, even if it included moving all the dirt from the foundation and painting asphalt emulsion. (Tr. 133 and 141.)

The contract therefore, is not ambiguous as to the substance to be applied, but it is silent as to the manner

of its application. For this purpose Defendant called Mr. Steffenhagen, a building contractor in the Logan, Utah area. He was asked what was the customary manner of applying asphalt emulsion, and he stated that it was applied to the entire foundation below the surface with a brush or roller. The specification says that it must be waterproof and the contract states that the waterproofing must be done in a good, workmanlike and substantial manner. Construing these provisions together it can be only rationalized that the basement must be waterproofed so as to be livable. Mr. Fuhrman testified that if all else failed to repair the basement he would apply asphalt emulsion by painting it over the entire foundation. (Tr. 141.) Mr. Greaves testified that he would paint it on so that the foundation was black and completely coated. (Tr. 157.) Therefore, there is no dispute between the parties over the technique of how to apply asphalt emulsion. The only question is whether or not the "thicker material" complies with the specification of "asphalt emulsion," and the only conclusion is that it does not. The material applied by the Plaintiff did not patch the tie holes effectively nor did it waterproof areas where there was an improper joiner of the concrete known as "honeycomb." To have honeycomb areas in a foundation is poor construction, (Mr. Fuhrman, Tr. 136. Mr. Greaves, Tr. 158.) and to fail to protect such an area is even further evidence of poor, unworkmanlike quality construction.

Plaintiff's Brief deals with the Trial Court's acceptance of the custom of the trade to provide for the application of the asphalt emulsion. All parties agreed on the

manner of application of asphalt emulsion, and that was the custom of the trade.

13 Am. Jur.. 2d 114, states that:

“If, however, the terms of the contract are uncertain or ambiguous, parol or extrinsic evidence is admissible to explain or interpret the contract language, such as for example, parol evidence of custom or usage to show the meaning in which particular terms were used, or to identify and apply the terms of the writing to the subject matter.

The case cited by the Plaintiff of Commercial Insurance Co. vs. Hartwell Excavating Co., Idaho, 407 P.2d 312, appears to support contentions in this matter much better than it supports the Plaintiff's contentions. Looking at the testimony of the Plaintiff it appears that the custom of Plaintiff when he applied the asphalt emulsion (thin material) was to paint it on in a thick, black coat over the entire surface of the foundation, covering all the tie holes and honeycomb areas. He proved his own custom and his evidence is there admissible to show the standard of the construction industry. If the Plaintiff specified the “thicker material” by a trade name he could have applied it by the prevailing custom of the industry, but he chose not to do so, and cannot now be heard to say that his application of a different material is justified by the specifications.

POINT II

THE TRIAL COURT DID NOT ERR IN FIXING THE DAMAGES.

Mr. Fuhriman, the President of the Plaintiff company was asked the following question: (Tr. 142.)

“When a basement leaks such as this, and when you accumulate water on the floor up to I think there’s testimony of a quarter of an inch deep, what does that do as far as the usefulness of the basement is concerned, as far as living in it, storing items in it?”

Answer: “It would be bound to make it uncomfortable. I would imagine if there was water around, like this — I never did see any water — but if it was there it would be untenable, unlivable.”

Major Jarrell stated (Tr. 64.) that the basement was not entirely usable, in that finished bedrooms leaked in the spring time of the year and personal property was placed on boards in the storage room to preserve it.

The leakage in the basement in essentially a dry area (Tr. 121.) supposes poor construction, and therefore the basement of the house, being one-half of the total square footage becomes unusable by reason of the poor construction. The measure of damages is a sum which will compensate the injured party, usually the difference in value of the home. However, where the building is substantially completed in accordance with the plans and specifications, providing the same can be done at a reasonable expense. (25 C.J.S. 858, 859.) The Trial Court found that \$1200.00 was a reasonable expense to waterproof the exterior of the foundation. Major Jarrell testified that Mr. Fuhriman told him that when the rear patio was poured with concrete the leaking would stop.

It didnt. Therefore the waterproofing must be completed under the patio and around the house. Mr. Steffenhaggen's bid was the only one that was complete. Mr. Fuhriman's estimate of the cost of the repairs was incomplete and was biased in an attempt to minimize the damages.

See 25 C.J.S. 861:

"Where the building or structure is completed substantially according to the plans and specifications. the measure of damages may be the cost of repairing the defections or making the building or structure conform to the specifications, particularly where such may be done at a reasonable expense and unreasonable economic waste is not involved."

See Christensen vs. Hoskins, Wash. 397 P.2d 830, where the Washington Supreme Court said:

"In our opinion, the damages properly to be allowed are the cost of repair and such other damages as are proved to be the direct result of the breach of warranty."

See also Baldwin vs. Alberti, Wash. 362 P2d 258. In this case a contractor agreed to remedy defects. The Plaintiff wanted damages based upon the difference between the value of the house as it was against what it should have been. The Washington Court said:

"In the instant case, the evidence discloses, and the Trial Court found, that the defects could have been 'adequately and reasonably' repaired. In other words, the Coumrt found that the Defendant sub-

stantially performed the contract and that the defects could be repaired without unreasonable economic waste; hence, our disposition of this case is controlled by the rationale of 1 Restatement, Contracts, 346(a)(i).”

Restatement, Contracts as cited above states that the element of damages is “the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste.”

In this case the Trial Court found and properly so, that the measure of damages was the repair of the foundation in the amount of \$1,200.00.

POINT III

THE TRIAL COURT ERRED IN ITS AWARD OF DAMAGES FOR THE FAULTY LINOLEUM INSTALLED BY THE PLAINTIFF.

The Plaintiff in his Brief considers the matter of the replacement of the flooring. The Trial Court found that there was a “glaring patch in the middle of the room where the linoleum was laid” and that the Plaintiff must accept some responsibility. However, the Trial Court only awarded the Defendant the sum of \$100.00 as the Defendant got involved in the selection of the linoleum. The Trial Court should have awarded damages upon the criteria set forth above for the repair of the linoleum as per the estimate given to them in the amount of \$372.90. The Plaintiff customarily and as a matter of business forwarded people, including the Defendants, to R. & S.

Floor Covering and there allowed them to select the floor covering. He also, as a matter of course advised R. & R. of the allowance each party had for the floor covering. The Court found for the Defendants but applied the wrong measure of damages.

POINT IV

THE TRIAL COURT ERRED IN REDUCING THE OFFSET OF INTEREST AGAINST THE RENTAL IT FOUND DUE, AND AMENDING THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

The contract for the rental of the home and for the construction of the new home was one contract. The recapitulation sheet shows that the Plaintiff grouped all the agreements together.

The parties through mutual agreement settled the balance due on the construction contract and left without settlement the question of the rental due and the offset for the interest Mr. Fuhrman agreed to pay on money borrowed from Defendant during the construction of the home. The Trial Court found that the offset was proper and without any reason reversed its opinion denying the offset.

CONCLUSION

At the top of Page 14 of the Plaintiffs brief, Plaintiff attempts to explain away the principal question of this law suit by saying it is not correct to claim a breach of contract by reason of leaks in the foundation. An agreement to build a house of good materials in a good and

workmanlike and substantial manner is an agreement to do just that. The evidence on the case shows where the Plaintiff failed and why he failed. Plaintiff's President testified that the area was dry and without surface water and now by Brief states that a leaky basement is not a breach of contract. The usual spring runoff is to be expected and provided for by contractors in this area. The Plaintiff must accept the responsibility for the reasonable cost of the repairs. The same measure of damages must be used to make an award for the linoleum that was patched and unsightly. The Trial Court accepted the evidence of the Defendants in this case and the record supports that decision, and by reason thereof the Defendant-Respondent requests this Honorable Court to affirm the Judgment of the Trial Court with the modifications as to the off-set and cost of repairing the linoleum.

Dated this 14th day of August, 1967.

Respectfully submitted,

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By

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