

2000

Lynn D. Paul and Anita K. Paul v. Mable S. Kitt : Brief of Plaintiffs-Respondents Lynn D. Paul and Anita K. Paul

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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LYNN D. PAUL and ANITA K. PAUL, :

Plaintiffs-Respondents, :

vs. : Case No. 13968

MABLE S. KITT, :

Defendant-Appellant. :

BRIEF OF PLAINTIFFS-RESPONDENTS LYNN D. PAUL AND ANITA K. PAUL

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE JAMES S. SAWAYA, JUDGE

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LYNN D. PAUL and ANITA K. PAUL, :

Plaintiffs-Respondents, :

vs. : Case No. 13968

MABLE S. KITT, :

Defendant-Appellant. :

BRIEF OF PLAINTIFFS-RESPONDENTS LYNN D. PAUL AND ANITA K. PAUL

NATURE OF THE CASE

Plaintiffs-Respondents, as Buyers, brought suit for specific performance against Defendant-Appellant, as Seller, for breach of a real estate sales contract and for attorneys fees. Defendant-Appellant, the Seller, counterclaimed alleging default and fraud, and mailed a notice as basis for unlawful detainer or forfeiture.

DISPOSITION OF THE CASE BY THE TRIAL COURT

Judgment was entered in favor of the Buyers directing specific performance of the contract by the Seller and awarding the Buyers \$500.00 damages for attorneys fees incurred. The damages

were credited on the contract payments. The counterclaim was dismissed.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Respondents request the judgment of the trial court be affirmed.

MEMORANDUM

References to "Tr." pertain to the numbered pages in the transcript. References to "R." pertain to the indicated pages of record. References to Plaintiff's exhibits are shown by "P-" and Defendant's exhibits are shown by "D-" preceding the number of the exhibit.

* * * * *

STATEMENT OF FACTS

On March 7, 1972, the Plaintiffs-Respondents in this action, herein referred to as Buyers, executed a contract to purchase real estate from the Defendant-Appellant and her then-living husband, John Maynard Kitt, herein referred to as Seller (Ex. P-10). This contract required a down-payment of \$480.00 with \$50.00 or more to be paid on or before the first day of each month succeeding April 1, 1972. The payments were to be applied first to interest and subsequently to principal. Payments were made by the Buyers and accepted by the Seller until March 25, 1974, at which time the Buyers mailed the March payment in the form of a money order on the Bank of Salt Lake No. 36775 (Ex. P-1 and Tr. 41). Said payment, though late by 25 days, was mailed within the 30-day period allowed

under Paragraph 16 of the aforementioned contract. This money order was mailed to Mable Kitt, 7821 South 3500 East at Sandy, Utah, or Salt Lake City, Utah, which City was uncertain. The January and February, 1974, payments were addressed to Mable Kitt, 7821 South 3500 East, Sandy, Utah, and were delivered (Tr. 21 and Ex. D-24 and D-25). In either case, the correct street and number of 7821 South 3500 East were used. Apparently, in such cases, the post office either returns the letter to the sender or corrects the Sandy City to read Salt Lake City and then delivers the letter (Tr. 21).

Defendant-Appellant claims this money order was never received by her. On April 3, 1974, the Seller sent a letter to the Buyers which stated she terminated the contract and repossessed the lot. Said letter states:

Salt Lake City, Utah
April 3, 1974

Mr. Lynn and Anita Paul:

I hereby notify you of the termination of your contract on Lot 204, Honeywood Hills II, for lack of payment on same.

I am taking possession of said Lot under Option One of the contract you signed. Refer to your contract for information.

Respectfully yours,

Mable S. Kitt
7821 South 3500 East
Salt Lake City, Utah

LaRhea Kitt Walton
Linda Spencer Kitt

(Ex. P-11)

This letter was received by Plaintiffs-Respondents on April 4, 1974 (Ex. D-26).

On Friday, April 5, 1974, Buyers purchased a \$50.00 money order No. 36892 (Ex. P-5). This money order was apparently mailed

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April 9, 1974 (Ex. P-15) but was returned to the Buyers April 11.

1974, by the post office marked "Return to Sender."

On April 16, 1974, Buyers' attorney remailed the April 5th money order to the Seller by certified mail properly addressed (Ex. P-18). Included with the money order was a letter which explained the loss of the March 25th payment plus the fact that a tracer on the lost payment was being placed by the post office. The letter states in part, "If the money order cannot be found, they will have the bank stop-payment and will issue a duplicate payment to you by the end of April, 1974" (Ex. P-18). This payment was returned by the Seller.

On May 1, 1974, Plaintiffs-Respondents' counsel mailed Defendant-Appellant two \$50.00 money orders. Money Order No. 37124 was a replacement for the lost money order dated March 25th (Ex. P-4). Money Order No. 37116 was intended to be the May, 1974, installment (Ex. P-7). Included with these two payments was a letter from the Buyers' counsel which states in part, "Mr. and Mrs. Lynn Paul herewith offer to pay the net balance of the contract in exchange for a warranty deed" (Ex. P-19).

On May 31, 1974, another Money Order No. 37406 (Ex. P-9) was purchased and sent to Mrs. Kitt properly addressed. Each money order mentioned was returned to Buyers by the Seller as soon as it was received except the May 31st money order which was returned to the Court by the Seller at the time of the hearing.

On May 17, 1974, Buyers filed suit for specific performance, and Seller counterclaimed for cancellation of the purchase contract or presumably an unlawful detainer counterclaim and for fraud. The trial court, Judge James S. Sawaya, decreed specific performance, awarded attorneys fees, and dismissed the counterclaim. Seller

ARGUMENT

POINT I

THE TRIAL COURT WAS JUSTIFIED UNDER THE CIRCUMSTANCES TO DIRECT SPECIFIC PERFORMANCE OF THE REAL ESTATE CONTRACT.

Buyers were not in default at the time Seller sent a notice of termination of the contract. Buyers had purchased and mailed on March 25, 1974, a money order for the March installment. The receipt issued by the bank for said money order was admitted into evidence and the testimony concerning the fact that it was mailed was uncontroverted. Use of the mail for payments was the accepted custom (Tr. 33). March 25th was within the 30-day period allowed by the Uniform Real Estate Contract under Paragraph 16. Seller contends that this installment was never received by her. As a result, from her point of view, it may have appeared that a default had occurred, thus her concern is understandable. What cannot be understood is the belligerent attitude taken by the Seller after she had received not only an explanation of the lost payment but the assurance that a duplicate would be issued no later than the end of April, 1974, if the lost payment were not found by then. In the meantime, all payments were kept current.

The Buyers testified that their relations with the Seller were amicable. This seems to be confirmed by the testimony of Mrs. Kitt concerning a delinquency which occurred in November and December, 1973 (Tr. 62-63). This testimony indicates an amicable attitude between the parties. The Seller accepted those two late payments, which indicated Seller would not be so technically strict.

Acceptance of late installment payments without termination of the purchaser's rights under the contract has been considered

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waiver of the vendor's right to declare a forfeiture because of

default in timely payments, at least in the absence of reasonable notice that the vendor would thereafter demand strict compliance with the terms of the contract. 55 A.L.R. (3d) 39.

Hill v. Taylor, (1970) 285 Ala. 612, 235 So. (2d) 647.

In this case the court held that the failure of the purchaser to make a monthly payment on time did not justify a determination that the delayed tender of installment constituted a default or work a forfeiture.

In the case of Kingsley v. Roeder, (1954) 2 Ill. (2d) 131, 117 N.E. (2d) 82, the court took the position that once the seller had waived the provisions as to strict compliance with the payment requirements they were required to give the purchaser adequate advance notice that strict compliance with the payment requirements would henceforth be required, and that where the sellers made no diligent effort to serve such a notice upon the purchasers, they were precluded from declaring the contract forfeited by the mere fact that the installment payments were sent a month or two late.

It is common knowledge that the street numbering system in the Salt Lake Metropolitan Area uses South Temple and Main Street as the central point and basically the streets are numbered with reference to this point, quite like the geological survey system of designating Township and Range (i.e., T2S, R3E, etc.). The suburbs around Salt Lake City proper are not well defined by boundary, but an address such as 7821 South 3500 East is significant to the post office, especially with the zip code 84121 added (Ex. P-25).

Since any delay caused by addressing to "Sandy" could only result in potential problems, no rational motivation, such as Seller claiming an intentional delay, can be imputed to Buyers. There

and Sandy City (Tr. 20). This type of mistake or inadvertence does not attain the degree of gravity to justify an inequitable forfeiture for a possible "technical default" on a contract. This is especially true in view of the promise to issue a duplicate money order at the end of April should the lost installment not be found.

Under the extenuating circumstances of the case at bar, it would be unconscionable to adjudge a forfeiture. This court has announced the equitable policy or rule in Utah as follows:

Weyher v. Peterson, (1965) 16 U.2d 278, 399 P.2d 438. By common practice in Utah, an action in unlawful detainer may be brought against a vendee of realty when payments are far in arrears, after sufficient demands for payment have been made and subsequent notice to quit has been given by the vendor; and where a vendor does cancel the contract for sale and bring such an action, vendee may be required, if the contract so provides, to forfeit as liquidated damages all money theretofore paid to the vendor along with all improvements placed on the land by the vendee, unless such forfeiture would be unconscionable. (Emphasis added.)

Seller claims that at no time did the Buyers tender more than a portion of the delinquency, yet Mrs. Kitt said she would not have accepted three payments at one time (Tr. 63-64). When the April 5th payment was mailed while the March 25th installment was still lost, the contract may be considered current by applying that payment for March. The Seller was given a full explanation and Buyers promised to issue a duplicate March payment. In view of the facts, Buyers were taking reasonable precautions to protect the lost payment. Since Seller assumes nothing but the worst of intentions on the part of the Buyers, conversely, the Buyers might legitimately be allowed to assume that the lost payment had been received by Mrs. Kitt who simply refused to cash it in order to establish a phony

justification for repossession of the lot (Tr. 51-52). In view of this possibility, Mr. and Mrs. Paul acted reasonably in taking the precautions they did. Once the tracer did not find the lost payment, a duplicate was issued.

By the end of April or first of May, 1974, Seller was in receipt of all "delinquencies." No effort was made to retender for the third time the rejected April 5th payment (Ex. P-8) which was last mailed on April 16, 1974 (Tr. 63). It was at this time that the offer to pay the remaining balance on the contract was made in lieu of retendering the rejected April payment.

Defendant-Appellant cites Corporation Nine v. Taylor, 30 U. 2d 47, 513 P.2d 417 (1973), for the proposition that the Seller is entitled to have delinquencies paid in full. In the case at bar, the Buyers tendered the "delinquent" payments during April and May (Tr. 41, 42, 43).

The central issue in Corporation Nine was whether prior deviations by both parties from a plan of sale established in a contract for sale of land justified later deviations from the contract. Because of the deviation, the Buyer simply stood upon the position that it had tendered full performance. This tender and refusal was the heart of the controversy.

The Buyer in Corporation Nine cited the following cases, and Plaintiffs-Respondents in the case at bar also invite the Court's attention to these cases for the principle that forfeitures are not favored: Jensen v. Nielsen, 26 Utah 2d 96, 485 P. 2d 673 (1971); Perkins v. Spencer, 121 Utah 468, 243 P. 2d 446 (1952); Malmberg v. Baugh, 62 Utah 331, 218 P. 975 (1923).

The Court then made this comment:

We agree that in the situation of the usual real estate contract, and perhaps even in this one, the five day notice to perform might be unreasonable and arbitrary if a more reasonable and longer time would have been of any benefit to the buyer.

Defendant-Appellant cites Fuhriman v. Bissegger, 13 U. 2d 379, 375 P. 2d 27 (1962), for the proposition that the purchaser must pay all amounts due into the court. Such method of payment is only one possible consideration for a given case. The court did not infer that this method must be used in all cases. The court might just as easily have ordered payments to be made to an escrow, as Buyers in the case at bar suggested at the conclusion of the trial. Since there is more than one equitable method to remedy controversies of this nature, the Fuhriman case certainly does not hold that the money must be paid in to the Court in all cases as the condition for specific performance.

POINT II

THE NOTICE SENT TO PLAINTIFFS-RESPONDENTS BY DEFENDANT-APPELLANT IS WHOLLY INADEQUATE.

Accepting Seller's argument that Buyers were in default, simply for the sake of discussion, it can be seen that the April 3rd notice sent to Buyers is wholly inadequate for the purpose intended. It does not give the Buyers a reasonable chance to inquire into the alleged default nor does it give five days to correct an alleged default. The letter states definitively that Seller has terminated the contract and is taking possession. It is implied that the reference to the contract contained in the letter speaks indirectly to the five-day period in which to remedy. This argument is countered by the unequivocal statement that the contract is terminated.

However, a \$50.00 payment (money order) (Ex. P-8) was obtained on

Friday, April 5th, and mailed April 9, 1974.

In the case of Pacific Development Co. v. Stewart, (1948) 113 U. 403, 195 P. 2d 748, this Court held that acceptance by vendor of purchaser's past due payments under a uniform real estate contract, and other conduct leading the Buyer to believe that strict performance would not be required by vendor, imposes a duty on vendor to give purchaser a reasonable notice before vendor may insist on strict performance by purchaser.

Defendant-Appellant, by way of an inaccurate citation, cites the case of Leone v. Zuniga, 84 Utah 417, 34 P. 2d 699 (1934). It is felt that this case is distinguishable from the case at bar for several reasons. First, there was no question as to the Buyer's default in that case. The default existed and was not challenged. Second, the central issue in that case, contrary to the case at bar, was whether the forfeiture clause contained in the land sale contract was self-executing or not. If the clause stated that Buyer's default made the contract null and void, then no notice of an election of forfeiture need be sent by the seller to the buyer. In other words, the contract would be self-executing. As is stated in 94 A.L.R. 1232, at 1245, no such notice is necessary in the absence of a statute requiring such, unless the contract is to be interpreted as requiring it. In speaking of the Leone case in particular, the annotation explains that the contract there in question did not provide for the giving of written notice of forfeiture. It did say, however, that the vendor "at his option" could respond to a default in several different ways. The Court held that until the vendor exercises his election to forfeit by notice given to the vendee a suit for forfeiture and possession by the vendor would not lie.

the vendee an explanation of what result his default would have, since the contract itself did not give such an explanation. The Court was aided in its decision by the unlawful detainer statute in force at that time (R.S. Utah 1933, 104-60-3). This statute varies greatly from that presently in effect, which constitutes another distinction between the two cases. The final distinction stems from the fact that a uniform real estate contract was not involved there as it is in the case presented now. (Emphasis added.)

In the Fuhriman case (supra) cited by Seller, the Court recognized the right of a purchaser under an installment land contract to specific performance notwithstanding default in timely payment of installments. The decision was based upon a determination "that forfeiture of the purchaser's rights was barred by the failure of the vendor to comply with provision of the contract ... governing notice requirements with respect to termination and forfeiture of the rights of the purchaser."

In the Fuhriman case, the purchaser had defaulted in making payments on a contract for the sale of real estate for many years. An action was brought by the vendor to evict under a clause like Paragraph 16a in the contract at bar. Purchaser counterclaimed for specific performance. The Court held, in part, that vendor had failed to notify purchaser that unless payments were made within a reasonable time, there would be a forfeiture of the agreement. Just as in the case at bar, Seller tried repossession without a notice of the time period to remedy the default.

POINT III

THE DAMAGE AWARD IS REASONABLE AND IS SUPPORTED BY THE

EVIDENCE.

Defendant-Appellant cites F.M.A. Financial Corporation v. Build, Inc., 17 U. 2d 80, 404 P. 2d 670 (1965), for the proposition that damages or attorneys fees must be supported by evidence and not a promise to pay an attorney. In the case at bar, testimony was given as to the obligation which Plaintiffs-Respondents incurred to their attorney as a result of the actions taken by Mrs. Kitt (Tr. 44-45). The case cited states that attorneys fees to the Plaintiffs were awarded "without any evidence or stipulation in the record with respect thereto."

The attempt was made in the last cited case to justify the award by an "advisory schedule of fees and charges" only. The reason for the Supreme Court's holding denying attorneys fees is obvious and distinguishable from the case at bar. At no point does that case state that a promise to pay an attorney given as testimony in open court is insufficient evidence of such item of damages. There was no contention in our case that the fee was unreasonable. The trial court in the case at bar found from the evidence (Tr. 44) and not from a suggested schedule of fees that the Pauls had incurred \$500.00 attorneys fees and awarded this as damages (R. 34, Para. 4) (R. 44, Para. 2).

CONCLUSION

It is respectfully submitted that the trial court properly ordered specific performance and denied the counterclaim; that said judgment should be affirmed.

Respectfully submitted,

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