

1986

Jenny Jensen Shelton v. Montgomery Marcellus Shelton : Brief of Respondent

Utah Court of Appeals

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UTAH
DEPARTMENT
OF
50
A
DOCKET NO.

JENNY JENSEN SHELTON,
Plaintiff/Respondent,
v.
MONTGOMERY MARCELLUS SHELTON,
Defendant/Appellant.

CASE NO. 860394

PRIORITY NO. 13B

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

THE HONORABLE PHILIP R. FISHLER, PRESIDING

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

JENNY JENSEN SHELTON,)	
)	
Plaintiff/Respondent,)	
)	
v.)	
)	
MONTGOMERY MARCELLUS SHELTON,)	CASE NO. 860394
)	
Defendant/Appellant.)	PRIORITY NO. 13B

RESPONDENT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
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IN THE SUPREME COURT
OF THE STATE OF UTAH

JENNY JENSEN SHELTON,)	
)	
Plaintiff/Respondent,)	BRIEF OF RESPONDENT
)	
v.)	
)	
MONTGOMERY MARCELLUS SHELTON,)	CASE NO. 860394
)	
Defendant/Appellant.)	PRIORITY NO. 13B

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"(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 50-day period, fixes, then such contract or lease is deemed rejected."	
11 U.S.C. § 365(g)	5
"(g) Except as provided in subsections (h)(2) and (i)(2) [not applicable] of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease --	
(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition; or	
(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title --	
(A) if before such rejection the case has not been converted under section 1112 or 1307 of this title, at the time of such rejection; or	
(B) if before such rejection the case has been converted under section 1112 or 1307 of this title --	
(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or	
(ii) at the time of such rejection, if such contract or lease was assumed after such conversion."	

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STATEMENT OF THE ISSUE ON APPEAL

1. Whether the court was correct in denying Defendant specific performance of Plaintiff's contractual duty because Defendant had failed to perform a condition precedent to Plaintiff's duty to perform.

2. Whether the court was correct in holding that Defendant's failure to assume and perform the contract contained in the Judgment constituted a failure of a condition precedent, thereby excusing plaintiff's duty to perform.

STATEMENT OF THE CASE

This case concerns the enforceability of a stipulated Judgment requiring Plaintiff to convey real property upon condition of receipt of money which the Judgment required Defendant to pay Plaintiff. Defendant didn't pay the money, claims that the obligation to pay was discharged in bankruptcy, and nonetheless seeks to compel Plaintiff to convey. Defendant filed an Order to show Cause (R. 42-43) in the court below, to compel specific performance of the Plaintiff's duty to convey (R. 30-31), which order was denied by the Court. (R. 75-79, 82-83)

STATEMENT OF FACTS

1. Plaintiff was granted a Decree of Divorce from Defendant on December 15, 1981, the Decree being entered on December 17, 1981 (R. 21-22)

2. Plaintiff thereafter sought to enforce the Decree and obtained a Judgment (R. 30-31), which awarded Plaintiff a money judgment (R. 30, ¶ 1) and which amended the Decree so as to affect the title to a condominium owned jointly by the parties. (R. 31, ¶ 3)

3. The amendment of the Decree was agreed upon by the parties and was stipulated to in court. (R. 30, preamble.)

4. The Judgment provides:

3. Paragraph 4 of the Decree of Divorce, entered herein on December 17, 1981, is amended to read as follows:

"4. That the condominium being purchased by the parties shall remain the joint property of the plaintiff and defendant until plaintiff shall have received from defendant the sum of Three Thousand One Hundred Dollars (\$3,100.00), exclusive of amounts paid to plaintiff on or before March 31, 1982. Upon receipt of the aforesaid sum of money, plaintiff shall execute all necessary documents to transfer her interest to defendant."

(R. 31, ¶ 3)

5. Defendant never paid \$3,100.00 to Plaintiff; instead, he has paid only \$640.00. (R. 78, ¶¶ 2,3)

6. Plaintiff remains a joint owner of the subject condominium with Defendant. (R. 78-79, ¶¶ 4, 5)

ARGUMENT

POINT I

DEFENDANT FAILED TO ESTABLISH A DISCHARGE IN BANKRUPTCY.

Defendant's petition to this court is based wholly upon an assertion of fact that is unsupported in the record. No

evidence was adduced in the court below of the purported discharge in bankruptcy of which Defendant seeks to avail himself. The record is devoid of any such evidence. (R. 78-79) Accordingly, for failure of proof, Defendant's appeal should be dismissed.

POINT II

PLAINTIFF'S OBLIGATION TO CONVEY HER INTEREST IN THE CONDOMINIUM NEVER AROSE BECAUSE OF DEFENDANT'S FAILURE TO PERFORM A CONDITION PRECEDENT TO SUCH DUTY.

Plaintiff was awarded judgment by the court below against Defendant. (R. 30-31 ¶¶ 1-2). Were Plaintiff seeking to enforce that judgment, Defendant's arguments regarding dischargeability of the debt would be apposite to the question before the court. However, independent of the debt, the court below, upon stipulation of the parties, made the receipt of the sum by Plaintiff a condition precedent to Plaintiff's obligation to transfer the condominium to Defendant. (R. 31, ¶ 3). The failure of that condition precedent is undisputed. (R. 78, ¶ 2).

It is hornbook law that failure of a material condition precedent relieves the other party to a contract of the obligation to perform. E.g., Restatement (II) of Contracts, ¶¶ 225, 237 (1981); Wallstreet Properties, Inc. v. Gassner, 632 P.2d 1310 (Or. App. 1981); Connor v. Cal-Az Properties, Inc., 668 P.2d 896 (Az. App. 1983); Ross v. Harding, 391 P.2d 526 (Wash. 1964); see Parrish v. Tahtaras, 7 Utah 2d 87, 318 P.2d 642, 644-45 (1957); cf. Green v. Palfreyman, 109 Utah 291, 166 P.2d 215, op. amended and reh'g denied, 109 Utah 303, 175 P.2d 213 (1946). The

discharge in bankruptcy of a debt is not the same as payment of the debt. See Stewart v. Underwood, 704 P.2d 275, 278 (Az. App. 1985); see POINT III, infra.

There can be no question that the condition precedent to Plaintiff's duty to convey her interest in the condominium, i.e., the payment of \$3,100.00 by Defendant, is a material condition, and thus its nonoccurrence excuses the Plaintiff's contractual duty to convey. See, Fischer v. Johnson, 525 P.2d 45 (Utah 1974) (party who seeks specific performance must have performed his duties under the contract).

Accordingly, Plaintiff is relieved of the obligation to convey her interest in the condominium to Defendant, and the dischargeability of the debt set forth in the Judgment (R. 30-31) is not at issue.

POINT III

THE TRIAL COURT'S JUDGMENT EMBODIED OR CREATED AN EXECUTORY CONTRACT REJECTED BY DEFENDANT.

An executory contract is one in which, at the time a petition in bankruptcy is filed, both parties have continuing or future obligations of performance. NLRB v. Bildesco, 465 U.S. 513, 522, 104 S.Ct. 1188, 79 L.Ed. 2d 482, 493 & n.6 (1983). In this case, the Judgment (R. 30-31) was rendered by agreement of the parties to the terms thereof. (R. 30, preamble) Under that agreement, Defendant was obligated to pay money in installments, and Plaintiff, upon receipt of the total of the payments, was obligated to convey her interest in the condominium. (R. 31, ¶ 3) Neither occurred prior to the purported bankruptcy filing.

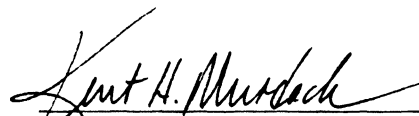
Under 11 U.S.C. § 365(d)(1), any executory contract not assumed within 60 days of the order of relief is deemed rejected. Rejection of an executory contract is a breach thereof by the debtor. 11 U.S.C. § 365(g)(1970). Rejection obviously abrogates the other contract party's obligation to render performance to the debtor. Id.; see POINT II, supra. In this instance, therefore, there is no contract requiring Plaintiff to convey her interest in the condominium to Defendant. Instead, because of Defendant's rejection of the contract, Plaintiff remains a joint owner of the condominium.

CONCLUSION

Accordingly, the court below correctly decided the matter, and its decision should be affirmed.

DATED this 5th day of January, 1987.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to the Utah Rules of Appellate Procedure, I mailed 4 true and correct copies of the foregoing Brief, postage prepaid, on this 5th day of January, 1987, to the following:

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A handwritten signature in cursive script, appearing to read "Elliott Levine", is written over a horizontal line.

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