1975

Zion\'s Properties, Inc. v. Holt : Brief of Appellant

Utah Supreme Court

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 UTAH SUPREME COURT

BRIEF

13922A

STATE OF UTAH

ZION'S PROPERTIES, INC., a Utah corporation,

Plaintiff-Appellant,

vs.

FORREST C. HOLT, VIRGINIA W. HOLT, GORDON C. HOLT, individually, and GORDON C. HOLT, dba HOLT REALTY & INVESTMENT COMPANY,

Defendants-Respondents.

Case No. 13922

TANDY LEATHER COMPANY, a Utah corporation,

Plaintiff-Respondent,

vs.

FORREST C. HOLT and VIRGINIA W. HOLT, his wife, and ZION'S PROPERTIES, INC., a corporation,

Defendants.

Case No. 13922

BRIEF OF APPELLANT

Appeal from the Order and Summary Judgment of the Third Judicial District Court of Salt Lake County, Utah
Honorable G. Gordon Hall

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IN THE

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OF THE

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ZION'S PROPERTIES, INC., a Utah corporation,

Plaintiff-Appellant,

vs.

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BRIEF OF APPELLANT

NATURE OF CASE

This is an action brought by Plaintiff-Appellant, Zion's Properties, Inc., against Defendants-Respondents, Forrest C. Holt and Virginia W. Holt, to quiet title and

enjoin Defendants from interfering with Appellant's peaceful possession of the property located at 1101 and 1107 South State Street in Salt Lake City.

The action is based upon Section 78-40-1, et seq. of the Utah Code Annotated, 1953, as amended, providing that:

> "An action may be brought by any person against another who claims an estate or interest in real property where an interest or claim to personal property adverse to him for the purpose of determining such adverse claim."

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment rendered in a hearing below on Respondent's Motion to Strike Replies to Requests for Admissions, a determination that Appellant is rightfully in possession of the property in question, and an Order requiring Respondent's specific performance under the Uniform Real Estate Contract assigned from Great Southern, Inc., original purchaser, to assignee, Zion's Properties, Inc., on July 18, 1973. Tandy Leather Company joins in this action as a Plaintiff-Respondent.

STATEMENT OF FACTS

The Great Southern, Inc. purchased certain land with the buildings and improvements thereon from Forrest C. and Virginia W. Holt on a Uniform Real Estate Con-

tract executed January 31, 1973 (a legal description of the property is in Appellant's Complaint). All of Great Southern's interest in the property was assigned to Zion's Properties by an assignment executed July 18, 1973. At the time Zion's Properties took full interest in the property under the assigned Uniform Real Estate Contract, Defendant Forrest C. Holt had allowed to remain on said property personal possessions which interfered with Plaintiff-Appellant's ability to lease the property and thereby pay on the installment. Subsequently, Respondent and Appellant orally agreed on December 8, 1973 to modify the Contract to provide for payments in a lesser amount.

Thereafter, Appellant made payment in the amount of Five Hundred Dollars ($500.00) on December 10, 1973, under the terms of the Modification Agreement previously entered; and payment of One Thousand Dollars ($1,000.00) on or about December 16, 1973 with the expressed provision that the Respondent's personal items would be removed from the property.

On February 4, 1974, Respondent mailed to Appellant a Notice of Demand letter demanding payment within five (5) days or Respondent would treat Appellant as in default and rescind on the Contract. Payment in full of the delinquent amount as determined by previous conversations and communications between Appellant and Sterling G. Webber, agent for Respondent, was tendered thereafter in the form of a cashier's check and made conditional upon Respondent's removing his property and possessions from the warehouse on the subject property.

Appellant tendered payment on four separate occasions. One tender occurred December 5, 1973 wherein an oral promise to pay was made on condition that the Respondent's property be removed from the warehouse located on the subject property.

A second tender was made by telephone on or about February 4, 1974. The same day Appellant tendered to Respondent in Respondent's store the amount to bring all delinquencies up to date. Respondent refused payment on any terms.

A third tender was made on or about February 19, 1974 to Mr. Sterling Webber, Respondent's agent, when the stub of a cashier's check for the total delinquent amount was displayed and tender offered upon condition that Respondent remove his personal property from the warehouse.

Finally, a fourth tender occurred on or about March 6, 1974 in Appellant's office to Mr. Sterling Webber, Respondent's agent, on expressed condition that Respondent's personal property be removed from the subject property so that it could be leased.

Appellant served Respondent with a Complaint asking for appropriate relief on April 25, 1974. Respondent filed an Answer and Counterclaim on May 8, 1974, reply to which was returned July 15, 1974. Interrogatories and further discovery continued until August, 1974, Respondents, by way of Motion for Summary Judgment and Motion to Strike Replies to Requests for Admissions,

obtained a summary judgment on October 18, 1974 decreeing that Appellant had no right, interest or equity in or to the property referred to due to forfeiture according to the terms of the Uniform Real Estate Contract on the 10th day of Februay, 1974, denying Appellant's requests by way of Complaint and awarding all rentals subsequent to February 10, 1974 to Respondents.

This appeal is from that judgment.

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN GRANTING JUDGMENT TO RESPONDENT BECAUSE RESPONDENT WAS NOT IN A POSITION TO SEEK RELIEF UNDER THE UNIFORM REAL ESTATE CONTRACT BECAUSE RESPONDENT WAS VIOLATING A DEPENDENT AND CONCURRENT CONDITION IN THE CONTRACT BY IMPAIRING APPELLANT'S ABILITY TO PERFORM.

Respondent has continually refused to remove his personal property from the warehouse located on the subject property. His failure to do so has prevented Appellant, as purchaser, from leasing the property in order to receive rents which, in part, would go to make up the installments which come due.

Such interference excuses Appellant's refusal to pay

pursuant to the Contract. *Davy* vs. *Olgier*, 87 Cal. Rep. 2d, 198 P. 2d 92 (1948). In *Davy*, supra, the Court was confronted with a specific performance action brought by the purchaser. In discussing the rights and duties of the parties to a land sales contract, the Court stated:

> "Time, being of the essence, it was the duty of Plaintiffs to see that Defendant was paid the purchase price and the escrow closed within thirty days, *unless some action of the Defendant prevented the close of escrow.*" Id. 96 (Emphasis added.)

Such holding is merely a restatement of the contractual requirement that one seeking to enforce a contract must do so with clean hands.

The tenders, discussed in Argument III, satisfied the requirement upon Appellant to make payments. Vendor-Respondent has failed, in the instant case, to keep the commitment of any vendor implied under law that he render the subject matter of the contract fit for the use it was intended. Similarly, in *Hayward* vs. *Voorhees*, 12 U. 2d 316, 366 P. 2d 977 (1961), a case concerning distribution of pasture land in probate the Court pointed out that a vendor of land sold by contract could not unilaterally repudiate the contract.

The action by the Respondent herein amounts to an unlimited repudiation because Appellant satisfied the legal and contractual duty upon him to make payments by making two payments under the oral modification and tendering four others.

In *Marlowe Investment Company* vs. *Radmall*, 26 U. 2d 134, 485 P. 2d 1402 (1971), the vendor's assignee brought an action to recover payments accrued under a Uniform Real Estate Contract. In holding against the assignee, the Utah Supreme Court stated:

> "Nevertheless, if it plainly appears that he (vendor) has so lost or encumbered his ownership or his title that he will not be able to fulfill his contract, he cannot insist that the purchaser continue to make payments when it is obvious his own performance will not be forthcoming." Ibid 1408.

If such a limitation is placed upon a vendor in an anticipatory breach action, no less a burden is required in the instant case where the vendor, *at all times*, could have performed on the contract by merely removing his property.

Other states are in accord. In *Huggins* vs. *Green Top Dairy Farms, Inc.*, 75 Idaho 436, 273 P. 2d 399 (1954), the Court was presented an action by the vendors of the dairy against its purchaser seeking forfeiture of the agreement for sale. The Court held for the purchaser because the vendors, being materially in default on the contract, could not enforce a forfeiture of it. The Court stated:

> "The Vendors of a dairy business, who had failed to perform their part of the contract in several particulars, were not in a position to repudiate the entire contract and demand performance by the purchaser relative to payment

> for merchandise or other unliquidated sums." Ibid at 406.

The Court thereupon cited as authority 12 Am. Jur. 959, Section 382, which cites that a party who positively refuses to perform under his contract cannot sue another for nonperformance, whether the promises are independent or not, if one is the consideration for the other and the contract is wholly executory.

In the instant case, the consideration for payment by the purchaser is possession of the property in question without any encumbrances, encroachments or interference by the vendor. By nature, the contract is executory because it is a Uniform Real Estate Contract and therefore, the purchaser acquires all incidents of ownership, except legal title and is regarded in equity as owner of the property while the vendor maintains legal title. *Jelco, Inc.* vs. *Third Judicial District Court*, 29 U. 2d 472, 511 P. 2d 739 (1973).

Further cases are in accord and hold that until one has offered to perform a mutually dependent condition, he cannot place another party in default. *Thein* vs. *Sticha*, 93 Cal. App. 2d 295, 209 P. 2d 13 (1949); *Lifton* vs. *Harshman*, 80 Cal. App. 2d 422, 182 P. 2d 222 (1947).

Further, in *Barton* vs. *Baird*, 163 Cal. App. 2d 502, 329 P. 2d 492 (1958), the Court stated:

> "In a contract for the sale of land where performance is due on a certain date, even if time is of the essence, a party who fails to perform

> is not in default until the other party places him in default by making a tender." Ibid 494.

In order for Respondent to prevail in this quiet title action, he therefore must have placed the Appellant in default by making a legally sufficient tender. The demand letter of February 4, 1974, does not qualify as such a tender since a vendor must tender either title or not interfere with the purchaser's quiet enjoyment of the property. By interfering with Appellant's ability to lease the property as the property's main use, Respondent failed to tender all he was required to do under the contract. The tender must have been a demand when Respondent was performing as the law and the contract provided.

To summarize, Respondent's action in failing to remove his property, thereby rendering the real estate in question non-leaseable, impaired Appellant's ability to perform under the contract. Under these circumstances, after Appellant offered to pay the installments on four occasions provided the property be removed, Appellant was justified in withholding payment and bringing a quiet title action and it should be so decreed.

The dilemma of the purchaser where he does not desire to repudiate the contract but wants specific performance by the vendor and cannot afford to continue the contract, has been pointed out in many cases. In *McFadden* vs. *Walker*, 5 Cal. 3d 809, 488 P. 2d 1353 (1971), the Court again, addressed this situation and

held that a wilfully defaulting vendee may secure specific performance of a land sales contract.

Appellant's request for specific performance should, therefore, be granted regardless of the actions of Respondent; however, where Respondent has wilfully impaired Appellant's ability to perform under the contract, Respondent is not in the position to default the Appellant purchaser. *Leavitt* vs. *Blohm,* 11 U. 2d 220, 357 P. 2d 199 (1960); *Marlowe Investment Company* vs. *Radmall,* 26 U. 2d 134, 485 P. 2d 1402 (1971); *Hayward* vs. *Voorhees,* 12 U. 2d 316, 366 P. 2d 977 (1961).

The Court outlined the basic requirements upon a vendor or a purchaser, before either may enforce the land sales contract in *Leavitt,* supra. That case involved an assignee who treated a contract as abandoned and thereafter complained for restoration of her payments. The Court stated:

> "A purchaser who fails to make his payments cannot enforce his rights, and a vendor who fails to meet his commitment cannot expect the purchaser to perform." Ibid at 193.

Appellant herein made four valid tenders of payment to Respondent who failed to meet his commitment and rendered the property fit for the use it was intended.

POINT II.

THE LOWER COURT ERRED IN GRANTING RESTITUTION TO RESPONDENT

AND BY NOT DECREEING SPECIFIC PERFORMANCE ON THE ORAL CONTRACT DUE TO THE PARTIAL PERFORMANCE BY THE APPELLANT.

The general requirement of the Statute of Frauds is that a writing is required for enforceability of any contract transferring any interest in land. *Simpson on Contracts,* 2nd Edition, Section 77, Page 153. This general rule was codified in Utah under Section 25-5-1, Utah Code Annotated, 1953 which provides in part:

> "No estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law or by deed or conveyance in writing described by the party creating, granting, assigning, surrendering or declaring the same."

Appellant and Respondent orally agreed to payments of a lesser amount on December 8, 1973. Payment was thereafter made by check drawn December 10, 1973 in the amount of $500.00. Noted upon the check are the words "As per agreement 12-8-73". Respondent cashed the check and failed to complain about the notation. The check thereby became a memorandum, a writing, within the scope of the Statute of Frauds. The agreement is clear and performance is in accord. The contract of January 31, 1973 thereby became modified in that, until Respondent's personal property was removed from the warehouse, the lower payments would suffice.

Nevertheless, it is also a general rule that courts will order specific performance of an oral land contract regardless of the State of Frauds where (1) there has been part performance in reliance on the oral contract, (2) said performance occurred because of the oral contract, and (3) the remedy of claimant for the value of the part performance is so inadequate that a denial of enforcement would defraud the party performing. *Simpson*, supra, Section 79, Page 157.

The Utah legislature has additionally adopted this provision allowing the courts to enforce this exception to the Statute of Frauds in Section 25-5-8, Utah Code Annotated, 1953. Such section provides that "nothing in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance".

This Court recognizes the doctrine of part performance as an exception to the Statute of Frauds. *Price* vs. *Lloyd*, 31 U. 86, 86 P. 2d 67 (1906). The Court in *Price*, supra, stated:

> "Courts in equity, in establishing the doctrine of part performance, have not, by any means, intended to annul the Statute of Frauds but only to prevent its being made the means of perpetuating fraud. In order that a plaintiff be permitted to give evidence of the contract not in writing, and which is in the very teeth of the statute and anulity at law, it is essential that he establish, by clear and positive proof,

> exclusively referrable thereto and which take it out of the operation of the statute."

In the case *In Re Madsen's Estate*, (Utah, 1953) 259 P. 2d 595, the Court stated:

> "Part performance which will avoid Statute of Frauds may consist of any act which puts party performing in such position that nonperformance by the other would constitute a fraud." Ibid 601.

In *Ravarino* vs. *Price*, (Utah, 1953) 260 P. 2d 570, the Court stated that where possession is relied upon, "it must be of such nature that it would not have been given without the presence of an oral contract to convey".

This Court has dealt with the types of acts that will satisfy the exception of part performance. In *Randall* vs. *Tracy Collins Trust Company*, 6 U. 2d 18, 305 P. 2d 480 (1956), the Court outlined three general criteria, excepting an oral contract from the Statute:

> "First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract."

Simpson, supra, Section 79, Page 158, indicates possession coupled with valuable and permanent improvements is considered the strongest and most unequivocable act of part performance. But there are other acts which

satisfy the criteria set forth by the Court to *Randall*, supra. The instant agreement for lesser payments, evidenced by writing, is clear and definite, the payments made are clear and definite and are in reliance upon the agreement.

The premise of the doctrine of part performance is that it would be a fraud upon the purchaser if the vendor were permitted to escape the performance of his part of the oral agreement after he has permitted the purchaser to perform in reliance upon the agreement. In 49 Am. Jur., *Statute of Frauds*, Section 421, Pages 725 through 726, the following provision is found:

> "The oral contract is enforced in harmony with the principal that courts of equity will not allow the Statute of Frauds to be used as an instrument of fraud. In other words, the doctrine of part performance was established for the same purpose which the Statute of Frauds itself was enacted; namely, for the prevention of fraud, and arose from the necessity of preventing the Statute from becoming an agent of fraud, for it could not have been the intention of the Statute to enable any party to commit fraud with impunity." Ibid at 725.

The elements required to make the doctrine of part performance applicable are satisfied in the instant case. First, the acts relied upon changed Appellant's position resulting in fraud, injustice or hardship if the contract is not enforced. 49 Am. Jur., *Statute of Frauds*, Section 427. Second, the part performance of Appellant is preju-

dicial to him and places him in a situation which will not result in compensation and which situation he would have avoided had there been no contract. 49 Am. Jur. Supra, Section 734. Third, there need not be payment by Appellant where it appears that he had good reason for not making said payment. 49 Am. Jur. Supra, Section 435. Fourth, the change of position made by Appellant was made with knowledge and consent of acquiescence of the vendor-Respondent. 49 Am. Jur. Supra, Section 451.

Appellant submits that he performed in accordance with the oral agreement, which is evidenced by the written Memorandum, by making definite payments of $500.00 on December 10, 1973, and $1,000.00 on or about December 16, 1973. When it became clear that Respondent refused to remove his personal property, which was injuring Appellant's use of the property subject to the contract, Appellant tendered full payment four times on condition that the property of Respondent be removed.

POINT III.

THE LOWER COURT ERRED IN GRANTING RESTITUTION TO RESPONDENT BECAUSE RESPONDENT REFUSED TO ACCEPT A VALID TENDER ON FOUR SEPARATE OCCASIONS, BY WHICH RESPONDENT PLACED HIMSELF IN A POSITION WHERE HE COULD NOT ENFORCE THE CONTRACT.

Tender of payment in a Real Estate Contract case is an exception to the general rule that a tender must include actual physical offering of the payment. Tender of mutual and concurrent promises in a contract for the sale of real property is mere readiness, willingness and ability to perform all the required obligations provided the other party will do the things concurrently required. *Katemis* vs. *Westerlind*, 120 Cal. App. 537, 261 P. 2d 553 (1953). The Court, in *Katemis*, supra, rules such in an action granting specific performance of the damages for breach of contract for the sale of realty. The Court further stated:

> "A party to a contract cannot require the other party thereto to perform his part of the agreement unless the party demanding such performance has fulfilled all conditions precedent imposed upon him and is able to and has offered to fulfill all the conditions concurrent imposed upon him."

The Utah Supreme Court has addressed the same issue in *Home Owner's Loan Corporation* vs. *Washington*, 108 U. 469, 161 P. 2d 355 (1945). In describing the effect of legally sufficient tender upon a contract, the Court said:

> "Under a contract which provides that any default in the payment of the interest of an installment of the principal when due shall give the obligee an option to declare the whole amount due, the general rule is that a tender of payment of the overdue principal or interest

> before the option to declare the whole debt due has been exercised, cuts off the rights of exercise of the option. This is so because the debt does not become due on the mere default in payment, but by affirmative action by which the creditor makes it known to the debtor that he intends to declare the whole debt due." Ibid at 357.

This view was again re-emphasized by the Court in *Romero* vs. *Schmidt*, 15 U. 2d 300, 392 P. 2d 37 (1964), where an act of telephoning and offer was considered sufficient tender when the tender or otherwise would be a meaningless gesture.

Respondent demanded payment of $11,073.27 on February 4, 1974. Respondent's agent, Sterling Webber, thereafter agreed that the sum demanded was excessive and the lesser amount tendered by Appellant was more appropriate. Such lesser amount was tendered twice in February.

The Court, in *Huggins*, supra, further pointed out that when a vendor demands more than he is entitled, the purchaser is justified in not tendering the total amount due.

After the conversation of February 4, 1974, at Respondent's store wherein Respondent refused valid tender because his brother told him to "not receive payment because he could get the property back if he refused payment at this time", Respondent made it clear that any further tenders would be meaningless gestures. Such

action on the part of Respondent rendered this second tender and all subsequent tenders legally sufficient because they qualified as meaningless gestures, as in *Thomas* vs. *Johnson*, 55 U. 424, 186 P. 437 (1919); *Evans, et al.* vs. *Houtz*, 57 U. 216, 193 P. 858 (1950).

CONCLUSION

For the foregoing reasons, Appellant requests this Court to reverse the judgment and findings of the court below; and in the alternative, to remand for new trial consistent with the rulings of this Court.

Respectfully submitted,

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