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Steven Lynn Kay v. Joseph Prent Wood : Brief of Appellant

Utah Supreme Court

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Gary D. Stott; Attorney for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN LYNN KAY, dba GARY APARTMENTS
Plaintiff and Appellant,

v.

JOSEPH PRENT WOOD,
Defendant and Respondent

Case No.
14197

v.

STEVEN LYNN KAY, et al, and
GARY APARTMENT CORPORATION,
Third-Party Defendants and
Appellants

BRIEF OF APPELLANTS

APPEAL FROM JUDGEMENT OF FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, HONORABLE
GEORGE E. BALLIF, JUDGE

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STATEMENT OF THE KIND OF CASE

This is an appeal from a Judgement by the Lower Court in favor of the respondent and against the Appellants with regard to a forfeiture provision under a Uniform Real Estate Contract. The respondent defaulted pursuant to the terms of payment under the Contract, and Appellants sought to forfeit respondent's interest in the property.

DISPOSITION OF LOWER COURT

The case was tried by the Court on January 17, 1975. The Court entered its Findings of Fact and Conclusions of Law and Judgement. Pursuant to a motion by the respondent the Court on June 26, 1975, entered its Amended Findings of Fact and Conclusions of Law and Judgement. The initial Findings of Fact and Conclusions of Law held that to enforce the forfeiture provision would not be unconscionable and the amount of such forfeiture would not exceed any loses to the Appellants that the parties may have contemplated. Furthermore, the Court concluded that there was nothing unconscionable about the Appellants retaining the $6,000.00 down payment received from the respondent under the Contract, the monies paid for improvements, and the monthly mortgage payment, since losses sustained by the respondent were within the risks of the purchase which he made.

The Amended Judgement awarded the respondent Judgement against the Appellants in the sum of $4,663.05 plus interest representing the amount that the principal mortgage balance was reduced by respondent's monthly payments.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Amended Judgement and Amended Findings of Fact and Conclusions of Law and ask for Judgement in their favor pursuant to the initial Judgement and Findings of Fact and Conclusions of Law as entered by the Trial Court, thereby dismissing the judgement.

STATEMENT OF FACTS

On or about July 1, 1971, plaintiff, defendant, and third-party defendants entered into a Uniform Real Estate Contract for the purchase of property located in Ephriam, Utah. The property was commonly referred to as the Gary Apartments. The total purchase price of the apartments was $125,000.00. The terms of that Contract are set forth in Exhibit 1 being the Uniform Real Estate Contract in question.

The respondent Joseph Brent Wood, while representing his own interests and as a practicing attorney in Utah County, executed the documents which were signed by the parties in

this case relative to the property located in Ephriam, Utah. At the top of the Contract (Exhibit 1) the following Language appears: "This is a legally binding Contract. If not understood, seek competent advise." Obviously, the respondent was fully acquainted with the provisions of the Contract which he was drafting, and entered into that agreement freely and voluntarily, anticipating that what he was entering into was a good business venture.

In addition to the down payment and the monthly payments, the Contract required that respondent pay to appellants on or before July 15, 1972, the sum of $6,000.00. The respondent took possession of the apartments and began managing and operating them upon the executing of the agreement. Respondent defaulted in that he failed to make the $6,000.00 cash payment of July, 15, 1972, and failed to continue with the monthly payments. Respondent subsequently acknowledged such default by voluntarily surrendering the key to the apartment buildings and possession thereof to counsel for the appellants on or about August 23, 1972.

Pursuant to the Contract, respondent Wood was to pay the monthly payment of $1,142.00 directly to Zions First National Bank in Spanish Fork, Utah. In addition to the down payment of $6,000.00 paid by the respondent for the purchase of the property, thirteen monthly mortgage payments totalling $14,846.00 were paid by respondent. Also, respondent expended the sum of $5,802.30 for permanent improvements on the building.

Recognizing the consequences involved in defaulting under the terms of the Contract (Exhibit 1), respondent chose to refuse to comply with the terms of the agreement thereby submitting himself to the remedies as provided under paragraph 16A of that Contract. Appellants sought to initiate action to enforce the right of the Seller to retake the property and retain the payments made as liquidated damages.

ARGUMENT POINT 1

TO ENFORCE THE FORFEITURE PROVISIONS OF THE UNIFROM REAL ESTATE CONTRACT AGAINST THE RESPONDENT WOULD NOT BE UNCONSCIONABLE WITHIN THE CIRCUMSTANCES OF THE CASE.

Paragraph 16A of the Uniform Real Estate Contract in question provides the following:

> 16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within Thirty days thereafter, the Seller, at his options shall have the following alternative remedies:
>
> A. Seller shall have the right, upon failure of the Buyer to

> remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller;

The contract is specific in its terms, i.e. the Buyer's default shall result in a forfeiture to the drafter of all monies paid by the buyer including improvements made. Respondent Wood was well aware of the terms and conditions of the contract before ever signing the agreement. Not only did he have an understanding of the document by reason of his profession but as the drafter of the agreement, he had consented to its terms before appellant had ever executed the same. Respondent, by chosing to default on the terms of the Contract, subjected himself to the enforcement of the remedies as set forth in paragraph 16 of that certain Uniform Real Estate Contract.

In the case of Perkins v. Spencer, 121 Utah 468, 243 P2d 466 (1952), the trial Court and Supreme Court dealt with the problem of enforceability of forfeiture clauses in Uniform Real Estate Contract. That case together with the case of Jacobson v. Swan, 3 Utah 2d 59, 278 P2d 294 (1954), established the proposition that forfeiture provisions under a Uniform Real Estate Contract were enforceable and that a plaintiff may be entitled to the relief as set forth in Paragraph 16A of said contract. The Court in Swan at page 298 stated;

> . . . in this connection it should be pointed out that prior rulings of this court, including Perkins v. Spencer do not stand for the proposition that whenever payments made under a contract exceed the reasonable value of the use of the property by the purchaser, the provisions that all payments which have been made will be forfeited as liquidated damages will not be enforced. The parties have a right to contract and such right should not be lightly interferred with. It is only when forfeiture would be so grossly excessive (emphasis added) as to be entirely disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock the conscience, that a court of equity will refuse to enforce the provision.

In the case of Stand v. Mayne, 14 Utah 2d 355, 384 P2d 396 (1963), the Utah Court again dealt with the problem of forfeiture. In that case the court found the facts to be

that as follows:

> On April 1, 1955, plaintiffs purchased from the defendant a motel pursuant to Uniform Real Estate Contract for the sum of $41,500.00 making a down payment of $7,578.00.

Payment of the $7,528.00 principal and $4,156.00 interest was subsequently paid making a total of $19,262.00. The court further found that total expenditures and payments amounted to $28,762.00. The plaintiff, Strand, continued to make the payments required by the contract until 1957 when de defaulted. In the action before the court, Strand sought to obtain similar relief as the respondent in this matter. The Court on page 396 of 384 P2d stated that it found no basis for a recovery by Strand. The court went on to indicate that:

> . . . this court has repeatedly recognized the right of parties to contract for the forfeiture of all payments made on a contract to purchase real property as liquidated damages upon the purchaser's default in making the payments specified not be lightly interferred with by the court.

Chief Justice Henroid, in his concurring opinion, made a rather astute observation dealing with the question of unjust enrichment. The Chief Justice state that

> . . . it would be a mockery to give relief at law to such a defecting promissor, and a great mockery in equity (emphasis added), to relieve the Buyer of his sacred but broken and then actually require a non-defaulting Seller to return any part of the consideration for which he bargained and for which he was ready and willing to perform under conditions of performance by the other party to the contract.

Such is the situation before this court with respect to the respondent Wood.

Summary of the law as to enforceability of forfeiture clauses is found in the case of Jensen v. Nielsen, 26 Utah 2d 96, 485 P2d 673 (1971). The Jensen case is an excellent case dealing with the question of damages and unjust enrichment. The court in Jensen discussed certain principals which underly the theory that the parties are free to contract.

The purpose of forfeiture provisions found in Uniform Real Estate Contracts is well stated by the court in Jensen.

> The forfeiture provision usually included in such real estate contracts has the entirely legitimate objectives: of putting pressure of the Buyer to make his payments and keep the

> covenants of the contract; and the noncomitant protection of Seller. This facilitates and encourages time-payment real estate transactions by enabling a purchaser to acquire property on such a contract; and it enables the Seller to cooperate in that purpose by assuring him that through proper procedure he can reclaim his property in case buyer fails to perform. (485 P2d 674)

The court went further in setting forth the reason why forfeiture provisions should not automatically be distrubed:

> If at anytime this happens, the law would require an accounting as advocated by the plaintiff's, the advantages above mentioned would be lost. Furthermore, inasmuch as in the event trouble develops, the Court would take over and fashion another contract for the parties anyway, the right of contract would be seriously impaired. Consequently there would be little point of the parties giving much concern to negotiating their contract in the first place. But the law does not do this. Even if it be true that in some exigencies the courts refuse to enforce such forfeitures, before this is done there is an essential predicate which first must be found to exist: The circumstances must be such that if the forfeiture were applied, it would be so grossly excessive in relation to any realistic view of loss that might have been contemplated by the parties, that it would so shock the conscience that a court of equity would refuse to enforce such forfeiture. (emphasis added)

POINT II

THE TRIAL COURT'S FINDINGS THAT TO ALLOW THE APPELLANTS TO REAP THE ADDITIONAL BENEFIT OF THE REDUCTION OF THE MORTGAGE PRINCIPAL BALANCE WOULD BE INEQUITABLE TO THE RESPONDENT IS NOT SUPPORTED BY THE FACT OF THE CASE.

The trial court in its Memorandum Decision of January 7, 1975, concluded that at the time of the sale of the property between the parties, the respondent was aware of the net return from the apartment rentals. He was aware that after debts service, there was practically nothing which could be recouped from the rental; and, therefore, different management, rental rates and other improvements would be required to make the investment produce any profit. Therefore, the Court was corrent in concluding that the losses suffered by reason of respondent's default were foreseeable and that the same could possibly be incurred in purchasing the property. The trial court in its initial Findings stated that upon total review of the evidence presented in the case, the Court could not conclude that there is "anything

unconscionable about plaintiff retaining the $6,000.00 down payment received from defendant under the contract, since the losses sustained by the defendant were within the risk of the purchase which he made with the hope of turning a profit." (Decision January 7, 1975.) Furthermore, respondent in his Cross Appeal has requested that he be given credit for the $6,000.00 in addition to the improvements placed by him upon the property. The Court was correct in its conclusion that the respondent made the improvements for the purpose of attempting to increase the return from the rentals of the apartments, and that in addition to the reasonable business venture made by him, such losses were foreseable upon default for which the respondent is not entitled to recover from the appellants.

The trial Court initially concluded that it was not unconscionable for the appellants to retain the subject property and at the same time, allow the respondent to forfeit his down payment, the mortgage payments and the improvements made by the respondent. Appellants submit to the Court that the trial court's finding that respondent should be given credit for the amount which the mortgage payment was reduced, is a conclusion which cannot be justified by the facts of the case or within the meaning of the law as to total forfeiture.

Respondent Wood was the party who prepared the documents for the sale of the property. Respondent Wood was and is a licensed attorney practicing in the State of Utah. Respondent Wood knew of the risks involved with the rental property prior to the time of purchase. Furthermore, respondent Wood, for a period of approximately one year, collected the rents from the apartments and used those rents in paying the monthly mortgage payments. Appellants submit to the Court that it is unconscionable and inequitable for the respondent to default on his agreement for the purchase of the property and at the same time be allowed to have judgment against appellants. Appellants fully complied with the terms of the purchase agreement. To allow the respondent to have the benefit of the judgement after he had failed to make the monthly mortgage payments, and after he had failed to live by his part of the bargain in paying the $6,000.00 when it bec ame due, is a principal which the appellants have a difficult time understanding.

CONCLUSION

Appellants earnestly request the Court that after a careful examination of this case, that the Court deny respondent's Cross Appeal and grant to appellants their relied prayed for thereby restoring the parties to their position established by way of the initial Findings of Facts and Conclusions of Law. A long standing principal of law is that a party who seeks equity must do equity. It is appellant's sincere opinion that the respondent cannot come before this Court in good faith and with clean hands and ask the Court for the relief as requested in the Cross Appeal, nor further ask the Court to deny plaintiff's request on Appeal.

Furthermore, appellants request that they be awarded their costs incurred herein.

Respectfully submitted,

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