

2000

# Mary Buzianis v. Beneficial Homes, Inc., Ron Gibb : Brief of Respondent

Utah Supreme Court

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SEP 17 1976

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MARY BUZIANIS,

Plaintiff-Respondent,

vs.

BENEFICIAL HOMES, INC.,  
a Utah corporation, and  
RON GIBB,

Defendants-Appellants.)

CASE NO. 14257

BRIEF OF RESPONDENT

Mary Buzianis

Appeal from the judgment of the Third  
Judicial District Court of Tooele County.  
Gordan R. Hall, District Judge,  
Presiding

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MAR 10 1976

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Plaintiff-Respondent,	)	
	)	
vs.	)	CASE NO. 14257
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RON GIBB,	)	
	)	
Defendants-Appellants.	)	

\* \* \* \* \*

BRIEF OF RESPONDENT

Mary Buzianis

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the plaintiff-respondent to enforce a promissory note.

DISPOSITION IN THE LOWER COURT

The trial court without a jury, awarded a judgment to plaintiff in the amount of \$5,500.00 plus \$1,181.35 in interest, court costs of \$37.80 and attorneys' fees in the sum of \$2,227.11.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks affirmance of the judgment of the trial court.

STATEMENTS OF FACTS

Respondent accepts the statement of facts of appellant with the following clarifications and additions:

Plaintiff, Mary Buzianis, transferred certain real property to Beneficial Homes Incorporated for the development of a subdivision. In consideration thereof defendant, Ronald Gibb, personally executed a promissory note on the 14th day of January, 1971, agreeing to pay plaintiff the sum of \$7,500.00, at the rate of \$500.00 per lot as each lot was sold from East Highlands Subdivision #4.

Plaintiff's suit was brought against Beneficial Homes Incorporated and Ronald Gibb, personally, alleging that the defendants had defaulted in making payments on said written instrument according to the tenor thereof, in that defendants had transferred said lots from Beneficial Homes Incorporated to Lawrence D. Gibb without making the \$500.00 per lot payment thereon and thereby owed the amount of \$5,500.00 on said written instrument and further defendants defaulted in making interest payments on said written instrument according to the tenor thereof and owed interest at the rate of six (6) percent per annum and reasonable attorneys fees as provided by the promissory note. (Exhibit A attached to Complaint). The defendant, Ron Gibb, prepared and filed his own answer to plaintiff's Complaint on the 13th day of August, 1974.

At the initial hearing on June 9, 1975, Ron Gibb appeared personally and represented himself. (Tr. 2, June 9, 1975 hearing). The parties entered a stipulation that judgment be granted against the defendant, Ron Gibb, and that said judgment was not to be entered until July 14, 1975. (Tr. 2&3, June 9, 1975 hearing).

The stipulated purpose for the delayed entry of judgment was to afford the defendant, Ron Gibb, an opportunity to produce evidence that he was entitled to additional credits against the amounts prayed for by the plaintiff. (Tr. 2&3, June 9, 1975 hearing). This stipulation was accepted by the Court and judgment was granted, but not allowed to be entered until July 14, 1975. (Tr. 3&4, June 9, 1975 hearing).

On July 14, 1975, the parties again appeared in Court and the defendant, Ron Gibb, presented to the Court a series of copies of checks he alleged to have been payments to Mary Buzianis on the above described promissory note. (Tr. 2, July 14, 1975 hearing). These copies were not received by the Court as exhibits or evidence, but the plaintiff did admit receipt of several of these checks, and the same were only considered upon plaintiff's admission of their receipt and proper credit having been given therefore.

Check #1212, in the amount of \$2,139.00, was acknowledged as a down payment for the purchase of plaintiff's real property East Highland Subdivision #4. (Tr. 3, July 14, 1975 hearing). The check was dated in numerals and appeared to counsel for plaintiff that the date could possibly be September 14, 1971. However, the check was stamped paid by the bank upon which it was drawn January 15, 1971, and therefore the date of said check was probably January 14, 1971, the date of the promissory note and confirms that said check was received as a down payment on the land. There never was a finding by the Court that this check was received on September 14, 1971, and the plaintiff never admitted receiving it on that date.

Copies of four other checks numbered B4985, B4986, B4705 and B4987 in the amount of \$500.00 each and each being designated East Highland #4 were admitted by plaintiff to have been received and credited to the above described promissory note. (Tr. 2&3, July 14, 1975 hearing).

The remaining copies of checks entitled East Highland #3

were rejected by the plaintiff as evidence of payments on the above entitled promissory note for East Highland #4. (Tr. 3, July 14, 1975 hearing). Of the checks presented by defendant for credit plaintiff acknowledged five as having been received, four of which were in the amount of \$500.00 each and one in the amount of \$2,139.00 as down payment. The trial court inquired if proper credit had been given for these checks that plaintiff acknowledged receipt of. Plaintiff answered affirmatively. The court asked defendant if there were any questions about that. The defendant replied "The five he went through?" The Court - "Have you been given credit for those?" The defendant - "Yes." (Tr. 3, July 14, 1975 hearing).

The Court at the second hearing granted the defendant, Ron Gibb, an additional week to procure admissible evidence, and Ron Gibb was told to appear on the 21st day of July, 1975, at 9:00 o'clock. (Tr. 8&9, July 14, 1975 hearing).

At the third hearing on July 21, 1975, the defendant, Ron Gibb, failed to appear and the court allowed entry of the previously granted judgment without any further restrictions on execution. (Tr. 2, July 21, 1975 hearing).

#### ARGUMENT

##### POINT I.

#### THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S EVIDENCE OF DAMAGES.

Pursuant to the stipulation of the parties a judgment was granted on June 9, 1975, as prayed for in plaintiff's Complaint. (Tr. 2, June 9, 1975 hearing). The parties also stipulated that



the judgment would be entered on July 14, 1975, provided that no documentation at that time could be presented by the defendant showing that defendants were entitled to additional set-offs.

On July 14, 1975, the defendant, Ron Gibb, appeared in Court and presented to the plaintiff copies of ten checks he alleged to have been payed to the plaintiff on the promissory note.(Tr. 2, July 14, 1975 hearing). The plaintiff acknowledged that four of the checks in the amount of \$500.00 each and designated East Highland #4 had been received and credited to the promissory note at issue, for a total credit in the amount of \$2,000.00.(Tr. 2&3, July 14, 1975 hearing).

The plaintiff also acknowledged receipt of a check for \$2,139.00 as the initial down payment on East Highland #4.(Tr. 3, July 14, 1975 hearing).

The defendant was specifically asked by the Court if he had been given credit for the above five described checks, and he responded that he had.(Tr. 3, July 14, 1975 hearing).

The remaining copies of checks presented by the defendant, Ron Gibb, were rejected by the plaintiff as evidence of payments on the promissory note for East Highland #4.(Tr. 3, July 14, 1975 hearing). The plaintiff alleged that these checks were for other transactions, such as East Highland #3 and not East Highland #4.

The Court also refused to accept these copies of checks as evidence qualifying for credit, since it found the unauthenticated copies of checks lacking an endorsement on the reverse side and in the words of the Court "There is nothing on the check that indicates what it was for at all-nothing at all."(Tr. 5&6, July 14,

1975 hearing). The trial Court refused therefore to accept and give credit for the remaining checks since they failed to show on their face that they were in payment of East Highland #4.

The Court after refusing to accept these copies as evidence told the defendant that he had the burden of presenting admissible evidence. (Tr. 4, July 14, 1975 hearing). The burden of proof was shifted to the defendant at the initial hearing when he stipulated to the judgment. (Tr. 3, June 9, 1975 hearing). The parties at that initial hearing agreed that the judgment would not be entered for five weeks allowing the defendant time to present evidence that he was entitled to additional credits against the judgment. (Tr. 3, June 9, 1975 hearing). The defendant himself agreed that he had the burden of procuring evidence "of any payment, or partial payment on the amounts due under the note" to prevent the judgment from being entered. (Tr. 3, June 9, 1975 hearing).

At the second hearing the defendant also attempted to introduce a disbursement record for East Highland #3, that was prepared by Commercial Security Bank. (Tr. 7&8, July 14, 1975 hearing). The defendant alleged that Commercial Security Bank had recorded payments on this ledger that he had authorized to be paid towards East Highland #4. (Tr. 8, July 14, 1975 hearing). However, the Court refused to accept this evidence. The Court stated that before this kind of evidence would be admissible the defendant would have to "subpoena someone from the bank and have him testify". (Tr. 8, July 14, 1975 hearing). The defendant

then stated he would subpoena someone from the bank, whereupon the Court gave the defendant, Ron Gibb until July 21, 1975, at 9:00 a.m. to bring forth a witness or further admissible evidence. (Tr. 9, July 14, 1975 hearing). On July 21, 1975, the defendant failed to appear at the scheduled time and the Court allowed the previously granted judgment to be entered. (Tr. 2, July 21, 1975 hearing).

The plaintiff continually objected to the introduction of all checks and ledgers dealing with East Highland #3, since the promissory note of defendant was entitled East Highland #4. (Tr. 3&4, July 14, 1975 hearing). These were the same copies of checks and ledgers that were excluded by the court at the trial, and in its findings of fact and conclusions of law, the Court said they were "not entitled to credit against said note due to incomplete documentation".

#### POINT II.

THE TRIAL COURT GAVE THE DEFENDANT CREDIT FOR A \$2,139.00 CHECK WHICH THE PLAINTIFF ADMITTED RECEIVING AS A DOWN PAYMENT.

At the hearing on July 14, 1975, the plaintiff admitted that defendant's copy of a check for \$2,139.00 had been received by the plaintiff, and that it was the "down payment on the land, East Highland #4". (Tr. 3, July 14, 1975 hearing).

The defendant was asked if he had been given credit for this and four other checks and he responded that he had. (Tr. 3, July 14, 1975 hearing). The Court in its findings of fact and conclusions of law referred to this check as "No. 1212, drawn on the account of Beneficial Homes Incorporated, in the amount of

\$2,139.00 [and] was the down payment for purchase of said property and previously credited to defendants prior to execution of the note".

Defendant-appellants in their brief state that check No. 1212 for \$2,139.00 was dated September 14, 1971, and therefore could not have been a down payment on the promissory note executed on January 14, 1971. However the trial court never referred to the date of the \$2,139.00 check and as was previously stated in the Court's findings of fact, that the check, Numbered 1212 for \$2,139.00 was the down payment for purchase of said property and was previously credited to defendants prior to execution of the note.

The only reference to the date on check No. 1212 was by the plaintiff's attorney, Mr. Watson, when he was attempting to read the copy of that check, on Page 3 of the July 14, 1975 transcript, as follows:

"Then, your Honor, there is a check there, dated looks like September the 14th of 1971, it's in the amount of \$2,139.00, which is a down payment on the land, East Highland #4."

It is clear from this statement that the date on the unauthenticated copy was not clearly legible. It is also clear that if the plaintiff had not acknowledged receipt of this \$2,139.00 check as the down payment on East Highland #4 it would never have been entertained by the Court.

The defendant, Ron Gibb, at the trial never questioned the fact that he had been given credit for the \$2,139.00 as a down payment on East Highland #4 and never questioned the proposi

that it was received by the plaintiff prior to the execution of the promissory note on January 14, 1971. He in fact admitted having received credit for it. (Tr. 3, July 14, 1975 hearing).

It is plaintiff-respondent's contention that the illegible numerical date of said check unsuredly referred to as September 14, 1971 was in fact January 14, 1971, the same date the promissory note as issue was executed. However the only findings of fact referred to by the Court concerning this check were that check No. 1212 was a down payment and previously credited to defendants prior to the note's execution.

It is a very tenuous position to attempt to overturn the lower Court's findings based upon an unsure reading of one digit of a numerical date of a copy of a check, contrary to all other evidence presented to the Court and the defendant having admitted in court to having received credit for said check.

#### POINT III.

THE STIPULATION BETWEEN PLAINTIFF'S COUNSEL AND DEFENDANT SHOULD BE GIVEN FULL EFFECT.

The defendant-appellant, Ron Gibb, acted as his own attorney at every stage of the lower court proceedings, including the filing of his own Answer, setting the trial date and appearing at two separate hearings.

The defendant, Ron Gibb, specifically agreed at the initial hearing that a judgment be granted against himself and in the amounts prayed for in plaintiff's Complaint.

In Deseret Savings Bank v. Walker, 78 Utah 241, 2P.2d 609 (1931) this Court concluded that a stipulation entered at

trial in open court between a layman and an attorney was valid and effective as against the lay person. This finding was based on the fact that the layman there was, "a man of affairs with no little experience in business matters".

In the present case the defendant, Ron Gibb, was in the business of purchasing property and developing it into subdivisions. This Court's declarations in Deseret Savings Bank v. Walker, supra, apply equally as well to the defendant-appellant in the present case, when the Court stated:

"Nothing is made to appear that he was either ignorant or inexperienced or that any advantage was taken of him, or that he did not fully comprehend the full meaning of his stipulation and the implications necessary arising therefrom. He made no application to the trial court for permission to withdraw his stipulation, and before the trial court made no effort to repudiate it nor to be relieved from it on the ground of misapprehension or mistake. There is no reason why the ordinary rules applicable to stipulations of this sort should not be applied and given full effect. Id., at 251.

The defendant, Ron Gibb, also added this statement concerning his competency at the second hearing when he said:

"The reason I am here by myself is that I am competent counsel." (Tr. 6, July 14, 1975 hearing).

The trial court was very generous in giving the defendant-appellant five weeks to produce evidence of payments made to plaintiff as provided by his stipulation. When he failed to do so he was again given another additional week to subpoena witnesses or produce admissible evidence. The defendant responded by failing to appear at the third scheduled hearing. There is nothing whatsoever in the record to indicate that the defendant did not understand the implications of his actions and therefore

his stipulation must be given effect.

POINT IV.

THE AWARD OF ATTORNEYS' FEES OF \$2,227.11 WAS PROPER.

Plaintiff's suit is an action to recover money due under a promissory note. The amount due and owing on the note at the time the initial Complaint was prepared was \$5,653.22, plus \$1,028.13 interest, or a total of \$6,681.35. The note also provided that the defendant, Ron Gibb, would also pay a reasonable attorney's fee upon default if necessary for collection. Plaintiff's Complaint alleged that a reasonable attorney's fee was \$2,227.11 or thirty-three percent of the amount due and owing.

The stipulation of the parties entered into on June 9, 1975, was for "the amounts prayed for according to the prayer thereof". (Tr. 2, June 9, 1975 hearing). It is true that this stipulation itself did not refer to specific amounts, but only referred to the prayer in plaintiff's Complaint. In addition to not specifically referring to attorney's fees, it did not refer to the amount of interest due, the costs of court, or the principal amount due and owing. The parties were well aware of these specific amounts as prayed for in plaintiff's Complaint, and when the Court accepted the stipulation of the parties it accepted a stipulation as to the amount of reasonable attorney's fees. It is clear that a stipulation as to attorney's fees is sufficient to base a judgment thereon. In F.M.A. Financial Corporation v. Build, Inc. 17 Utah 2d 80, 404P.2d 670 (1965) this Court stated the rule regarding the awarding of attorney's fees, as follows:

"It is fundamental that the judgment must be based upon findings of fact, which in turn has been followed by this Court and other jurisdictions in regard to awarding attorney's fees. Because both judges and lawyers have special knowledge as to the value of legal services, this is not always required to be proven by sworn testimony. It is sometimes submitted upon stipulation: as to amount; or that the judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule."

The present judgment for attorney's fees was upon stipulation of the parties, reviewed by the Court and never thereafter questioned by the defendant-appellant. It represented plaintiff's preparation for three separate hearings and cannot be declared clearly unreasonable.

#### CONCLUSION

The trial court properly excluded defendant's proffered copies of unendorsed checks, when there was no evidence adduceable on their faces to show that they were in payment of the promissory note for East Highland #4. The Court also properly excluded a ledger book prepared by Commercial Security Bank when the defendant attempted to introduce it without supporting testimony from a bank employee. Defendant, Ron Gibb, was given credit for \$2,139.00 as a down payment received by plaintiff prior to the execution of the promissory note and in fact agreed he had been properly credited.

The defendant was a competent businessman self-declared competent counsel and therefore there is no reason that his stip-



ulation for judgment including attorney's fees should not be given its full effect.

RESPECTFULLY SUBMITTED this 10th day of March, 1976.

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