1976

Don S. Smith And Brigham H. Smith v. R.L. War v. J.H. Ehlers, Evelyn P. Boyce. Lois P. Connell : Brief of Respondent J.H. Ehlers

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

- -

DON S. SMITH and BRIGHAM H. SMITH,

Plaintiffs,

vs.

R. L. WARR,

Defendant and Cross-complainant and Appellant,

vs.

J. H. EHLERS, EVELYN P. BOYCE, LOIS P. CONNELL,

Defendants and Cross-defendants and Respondents.

Case No. 14565

- -

BRIEF OF RESPONDENT J. H. EHLERS

- -

NATURE OF THE CASE

Appellant appeals from a judgment in his favor and against Respondents based on a breach of two (2) real estate contracts.

DISPOSITION IN THE LOWER COURT

Appellant's cross-complaint against Respondents was tried without jury before the Honorable James S. Sawaya on January 16, 1976, at which time the lower court denied the Appellant's claim for damages based on benefit of the bargain theory and limited

recovery to Appellant's out-of-pocket loss and denied Appellant's request for attorney's fees and costs of court.

RELIEF SOUGHT ON APPEAL

Respondent, J. H. Ehlers, asks the court to affirm the judgment of the trial court.

STATEMENT OF FACTS

Respondent, J. H. Ehlers, agrees with the statement of facts set forth in the Appellant's brief, except as follows and with the following additions.

Exceptions:

1. Appellant, R. L. Warr, never made a tender to the Respondents of the balance due on the contracts and never made application with a bank or lending institution to obtain the necessary money to pay off the contracts. (R 279) Whether the Appellant was "prepared" to pay the remaining amount due under the contracts, as the Appellant's brief claims, is seriously questionable. (R 276)

Additions:

1. Appellant, R. L. Warr, had actual and constructive knowledge and notice of the adverse claims of the Plaintiffs in the principal action from the time of the execution of the real estate contracts. The Appellant was on the property prior to the execution of the real estate contract in August, 1973. (R 276) Although Appellant's brief states that the Appellant did not know

that a lawsuit had been filed until June 16, 1975, the Appellant talked with Utah Title Insurance Company in the summer of 1974 and was informed that there was a possibility of a lawsuit on the property. (R 274) Furthermore, Appellant, R. L. Warr, said that one reason he did not attempt to take possession of the property in August, 1973, was because he was trying to stay out of trouble. (R 281) Appellant, R. L. Warr, also testified that he made no effort to find out who was using the land between the contract date and the first year. (R 281) Appellant testified at the trial that he made such an effort the following year after purchasing the property, approximately in the spring of 1974, and discovered that it was being farmed by a tenant of a party claiming to own it, namely, the Plaintiffs in the principal action. (R 282)

2. The Respondent, J. H. Ehlers, through his attorney, offered to refund the monies paid by the Appellant, R. L. Warr. (R 285)

3. Respondents secured a Preliminary Title Report from Utah Title Insurance Company, showing clear title in them at the time of the execution of the real estate contracts. (R 264 and 265)

ARGUMENT

POINT I

APPELLANT FAILED TO STATE A CLAIM IN THE LOWER COURT BECAUSE OF APPELLANT'S FAILURE TO TENDER THE BALANCE DUE UNDER THE REAL ESTATE CONTRACTS.

The closest thing that the Appellant did toward paying

off the contract was allegedly asking his father to loan him the money. (R 275 and 275) The money was never loaned to the Appellant by his father and there is no proof that sufficient amount was available. There was no application to a bank or lending institution. (R 279) Admittedly, there was no tender of the balance due on the contracts from the Appellant to the Respondent. That such is required is clear from the Supreme Court of Utah case of Woodard vs. Allen, 265 P2d 398 (1953). In that case, it was held that the seller was not obliged to prove marketable title simply because the Defendant raised the point in a case where there was a real estate sale on contract and where the buyer had not tendered the full purchase price. The trial court had found that the seller had no marketable title and, hence, no right to relief. On appeal, the Utah Supreme Court said in effect that the marketablity of the seller's title was immaterial until the contract had been paid. As in the Woodard case, Warr's demand for a good warranty deed is premature.

Under the very terms of the Uniform Real Estate Contract itself, it provides as follows in paragraph 19:

"The seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the buyer and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the seller, an abstract brought to date at the time of sale or at any time during the term of this agreement or at time of delivery of deed, at the option of the buyer." (emphasis added)

The payments were never "received".

A mere offer to pay does not constitute a valid tender, the law requires that the tenderer have the money present and ready and produce and actually offer it to the other party. See 74 Am Jur 2d 549, Tender §7, citing Talty vs. Freedman's Sav. and T. Company, 93 US 321; Somerton State Bank vs. Maxey, 197 P 892; Rosencrans vs. Fry, 95 A2d 905; St. Georges Soc. vs. Sawyer, 214 NW 877; Louisville and N.R. Co. vs. Cottengim, 104 SW 280.

Until there has been a tender of the purchase price, the vendee's remedy is recission of the contract due to the vendor's inability to convey marketable title, together with a refund of monies paid. Actually, there was a mutual mistake of fact by both parties at the time of the execution of the contract. At that time, the contract seller had lost title by adverse possession since the taxes had been paid and the possession maintained for seven (7) years prior to the execution of the contract. Under the terms of the real estate contract, the contract seller, J. H. Ehlers, and the others, were obligated to give the buyer possession at that time. Because they had lost the property by adverse possession prior to that time, they were unable to so do and therefore the breach occurred at that time. Since the damages are to be measured as of the date of the breach, assuming the Appellant has a cause of action, it occurred when the sellers were unable to give possession. At that time, the fair market value of the property was the same as the contract price (R 277) and therefore

a refund of the contract payments would be the same as compensating the buyer in the amount of the fair market value. If the breach is considered to be as of the date that the seller was unable to give a warranty deed, then it is impossible to determine damages because that obligation to so produce a warrant deed does not arise until tender of the entire purchase price.

On the other hand, if the contract purchaser were to tender the balance of the purchase price, then the contract seller, J. H. Ehlers, would be required to give the purchaser a warranty deed and would be in breach of the warranties implied therein as set forth in §57-1-12, Utah Code Annotated, as amended 1953. The measure of damages for breach of such warranties is set forth in 20 Am Jur 2d 691, Covenants, Conditions and Restrictions, §155. It states as follows:

"The damages recoverable by the grantee for total breach of a covenant of title cannot, as a general rule, be augmented by an increase in the value of the land conveyed. This rule applies to covenants of seisin, of warranty, and for quiet enjoyment, and is applicable whether the increased value results from extrinsic causes, such as a general rise in the market price of the real estate, or from improvements placed upon the land by the grantee."

As the court held in the case of Gerbert vs. Congregation of Sons of Abraham, 35 A 1121, there can be no distinction in principle between the damages recoverable by plaintiff upon a contract to convey and the damages recoverable upon a covenant of warranty upon failure of title and ouster. In that case, the court held that the vendee was merely entitled to a refund of monies paid, if any.

POINT II

THE TRIAL COURT PROPERLY ASSESSED THE PROPER MEASURE OF DAMAGES BECAUSE OF THE GOOD FAITH OF THE RESPONDENTS, ASSUMING THAT THERE WAS A PROPER TENDER OF THE BALANCE DUE ON THE REAL ESTATE CONTRACTS.

Respondent is in agreement with that portion of the Appellant's brief stating that there is a division of authority as to the appropriate measure of damages when it becomes impossible for the vendor to convey real property to a purchaser. (Appellant's brief, page 4.) Many jurisdictions make a determination of whether the vendee is entitled to out-of-pocket loss or benefit of the bargain depending upon whether there was any bad faith on the part of the vendor. The lower court specifically found that the Respondents negotiated the real estate contracts in good faith and acted in good faith throughout the transaction and that their inability to give good title is not caused by any of their acts. (Finding of Fact #8)

It is the Respondent's position that the weight of authority makes such a distinction and only allows the vendee to recover the benefit of the bargain when the vendor acted in bad faith. See 77 Am Jur 2d 647, Vendor and Purchaser, §519, which states as follows:

"When, however, the vendor has acted in good faith but is unable to carry out the contract because of some defect in the title, recovery by the purchaser for loss of his bargain is denied by the weight of authority."

This was published in 1975.

Because of the split of authority and the confusion which it has caused, some jurisdictions have made the damages distinction statutory. The following language appears identically in the Statutes of California, Montana and Oklahoma:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid,

and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in the case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach and the expenses properly incurred in preparing to enter upon the land." California Civil Code §3306; Revised Code of Montana 1947 §17-306; 23 Okl. St. Ann §27.

It does not appear that the reasons for codification were to change common law, but rather that it was done for clarification. As the court held in the case of Shaw v. Union Escrow and Realty Company, 200 P 25 (1921), at page 27, "To our mind the code provisions have added nothing to the law already established when it is declared that in case only of bad faith on the part of the vendor, damages may be recovered because of profits which might have accrued to the purchaser." The court was referring to §3306 of the California Civil Code as referred to above.

Even in those states where there is no statute clarifying the rule of damages, the weight of authority, as stated above, is in support of the rule that determines damages on the basis of the good or bad faith of the vendor. Among these states is the State of New York. See Valley Associates Corp. vs. Rogers, 158 NYS 2d 231; Mokar Properties Corp. vs. Hall, 179 NYS 2d 814; Spuches vs. Royal View Inc., 202 NYS 2d 51; Montagnino vs. Brojer, 214 NYS 2d 208.

Among the Western States, other than those referred to, it is often unknown which rule of damages would be applied in this type of situation, although the States of Washington, Arizona and

Nevada clearly follow the good faith-bad faith distinction as far as damages are concerned. See Parchen vs. Rowley, 82 P2d 857 (1938); Cole vs. Atkins, 209 P2d 859 (1949); Masani vs. Quilici, 218 P2d 946 (1950), respectively.

The law in Utah is not clear. The case of Bunnell vs. Bills, 13 U2d 83, 368, P2d 597 (1962), wherein the court said that the measure of damages is the market value of the property at the time of the breach, less the contract price, involved a factual situation which is distinguishable from the case in concern and is also a case that would come within the realm of "bad faith" on the part of the vendor. The vendor, who was also buying on contract, at the time of his contract to sell, did not have legal title to the property and knew that he did not have legal title and also must have known that he would never receive legal title to the property due to his financial situation. In the case before this court, the seller, in good faith, believed that he had legal title which at one time he did, through a tax deed, and Utah Title Company sustained him in that reasonable belief by issuing a Preliminary Title Report showing such title to the property to be in him, jointly with the other Respondents. Thus, we have a case of first impression in which the damages rule has not been construed as applied to these types of facts.

The case of Shaw v. Union Escrow and Realty Company, supra, as referred to by the Appellant in support of the proposition that negligence is sufficient to satisfy the bad faith requirement,

involved a case where again there was bad faith in excess of mere neglect. In that case, since the knowledge of the agents of the corporate seller is imputed to the corporation, the corporation was selling property that had been previously conveyed to a prior purchaser and the corporation knew of such conveyance. Clearly, this is not our case.

It must also be remembered that Appellant was also negligent in failing to discover the presence of an adverse possessor. Appellant is bound by the findings of fact entered in the principal action which are as follows:

"11. That at all times continuously from November 25, 1930, up to and including the present time that the plaintiffs, or other persons acting with the plaintiffs' permission or under the plaintiffs' direction or control have had exclusive, complete, actual, open, notorious, hostile and continuous undisputed possession of the real property which forms the subject matter of this lawsuit."

Appellant's actual knowledge of the existence of the adverse possessors is also evident from the additional facts set forth in this Respondent's Statement of Facts. There are several cases holding that where the buyer knew of the defect in the seller's title, that upon the failure of the seller to convey good title, the buyer is limited in damages to those out-of-pocket 48 ALR 50 (f). Thus, it was held in the case of Garcia vs. Yvaguirre, 213 SW 236 (1919), that where the vendee knew, at the time of entering into the contract for the purchase of land, that the vendor had no title thereto, and there was no fraud upon the part of the vendor, the vendee can recover only the amount he has

paid on the contract, if any, and such special damages, not including the loss of his bargain, as he may allege or prove.

POINT III

EVEN WHERE A VENDEE IS ENTITLED TO THE BENEFIT OF THE BARGAIN, IT IS DETERMINED BY THE VALUE OF THE PROPERTY AS OF THE DATE OF THE CONTRACT.

The difficulty with determining the fair market value of the property, even assuming that the Appellant is entitled to such, is determining the date to be used in establishing such. As has been pointed out, the breach actually occurred when the vendor was unable to deliver possession of the property. If such a time were used, then a refund of the purchase price would be the same amount as paying the fair market value of the property. (R. 277 & 278)

It is unfortunate that the Appellant did not take or attempt to take possession of the property at the time of the contract. If he had done so, it would have been discovered that the property was being adversely possessed and damages could have been determined at that time before any rise in market value. Actually the property had been lost by adverse possession prior to the execution of these real estate contracts.

If the breach did not occur when the vendee was unable to take possession, then it becomes difficult to determine when it did occur. This is because there never was a tender of the contract balance. Nevertheless, in some of the jurisdictions which allow the vendee the benefit of the bargain, it is determined by determining the market value of the property at the time the contract was executed. For example, see Raisor vs. Jackson, 225 SW 2d 647, where a vendor unconditionally agreed to convey realty knowing he

had no title and with knowledge of an outstanding interest therein owned by a third-party and where the vendor breached his agreement it was held that the purchaser may recover the difference between the contract price and reasonable market value of realty at time contract was executed; Montagnino vs. Brojer, supra.

22 - 352 (70)
25 207 (75)

POINT IV

THE LOWER COURT WAS CORRECT IN RULING THAT THE APPELLANT IS NOT ENTITLED TO COSTS OF COURT OR ATTORNEY'S FEES.

Since the Respondents agreed to refund the contract payments, together with interest, there was no need for the cross-claim of the Appellant and therefore attorney's fees in connection therewith should be denied. (R. 285). Costs of court should also be denied for the same reason.

CONCLUSION

The cross-complaint should either be dismissed for insufficient tender and if not the lower court should be affirmed to the measure of damages.

Respectfully submitted,

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