1976

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

Utah Supreme Court

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CASES CITED

ARGUMENT

Appellant Warr makes the following points in reply to the arguments raised in the response briefs, Brief of Respondents, Boyce and Connell, and Brief of Respondent J. H. Ehlers.

POINT ONE

RESPONDENT EHLERS' ARGUMENT AT POINT ONE IS NOT PROPERLY BEFORE THE COURT BECAUSE HE HAS NOT CROSS-APPEALED FROM THE JUDGMENT ENTERED AGAINST HIM.

In the proceedings below in the District Court, the respondents moved the Court to dismiss Warr's crossclaim for failure to state a claim. It was claimed that because Warr failed to tender the balance due under the real estate contracts, his pleadings did not state a cause of action. This motion was denied by the Court and a judgment for contract damages was later entered by the District Court. Respondents again raise this issue before this Court. However, because the respondents did not cross-appeal from the judgment entered in the District Court, they should now be precluded from attacking the validity of the judgment for contract damages.

The respondents are saying that Warr's only remedy is for rescission of the contract. However, Warr has never asked for rescission of the contract. Moreover, the Court awarded damages for breach of contract. The respondents' argument attachs the validity of any judgment for contract damages.

Both federal and Utah law recognize that a respondent may not attack a judgment when he has not sought relief from the appellate court by appeal. The United States Supreme Court in Letulle v. Scofield, 308 U.S. 415 (1940), recognized this principal when the Court stated:

> A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.

308 U.S. at 421-22.

This Court has recognized the same principal in Federal Land Bank v. Sorenson, 101 Utah 305, 121 P.2d 398 (1942). In that case, the plaintiff bank was awarded a judgment for recovery of possession of certain real property. On appeal, the plaintiff argued that the judgment should be amended to provide for the recovery of additional rentals, but because the plaintiff had made no cross-assignments of error and had taken no cross-appeal, this Court held that the matter was not before it.

To the same effect is Ludlow v. Colorado Animal By-Product Co., 104 Utah 221, 137 P.2d 347 (1943), where this Court held that it was not required to decide whether the district court erred in not granting injunctive relief where the plaintiff-respondent failed to cross-appeal for the failure to receive injunctive relief after the defendant-appellant appealed the award of damages against it.

See also, generally, 5 Am. Jur. 2d Appeal and Error § 707 (1962).

POINT TWO

FORMAL TENDER OF AMOUNTS DUE UNDER THE CONTRACT WAS NOT REQUIRED BECAUSE SUCH A TENDER WOULD HAVE BEEN AN IDLE CEREMONY AND OF NO AVAIL

If the Court believes that the matter of tender of amounts due under the real estate contract is an issue to be considered here, it is submitted that Warr was justified in not making a formal tender because such a tender would have been an idle ceremony and of no avail. After the district court had entered its judgment in favor of the plaintiffs on their adverse possession claim, respondents no longer had title to the property, and it was clear from that point forward that any effort to tender the balance of the purchase price would have proven fruitless.

The familiar rule is that the law does not require one to do a vain or useless thing and excuses the making of a formal tender which would otherwise be required, where it is reasonably plain and clear that if made, such a tender would be an idle ceremony and of no avail. A recent case in point is Leger Construction Inc. v. Roberts, Inc., 550 P.2d 212 (Utah 1976), where the plaintiff claimed that the defendant would have been entitled to an extension of time under his construction contract only if he had asked for it in writing. In response, the Court noted the facts that the plaintiff had failed to pay the balance on the contract, that he had filed a legal action and that he had alleged in his complaint that the defendant failed to comply with the contract

despite the plaintiff's repeated demand upon him to do so. The Court held that these facts

> make it obvious that if Roberts had asked for an extension, it would have been an idle gesture and was unnecessary under the principle that the law will not require one to do a useless or impossible thing.

550 P.2d at 214. To the same effect is Hansen v. Christensen, 545 P.2d 1152 (Utah 1976), where this Court stated:

> Where the unreasonable conduct of the obligee would make an actual tender a fruitless gesture, an offer to comply with the terms of the contract by the obligor is sufficient

545 P.2d at 1154.

Warr was ready and able to tender the payments required to satisfy the contracts. (Tr. 52, 53) However, the respondents were no longer able to deliver title to the property, the Court having declared ownership in the plaintiffs. It clearly would have been a fruitless and idle gesture to tender the balance due under the contract to vendors who no longer had title and who would have been required to pay multiples of the contract price in order to purchase the property from the plaintiffs if the plaintiffs were even willing to sell. Respondents have shown their unwillingness to have made such a purchase by their refusal to pay damages under a "benefit of the bargain" rule. They cannot now be heard to require tender in a situation where they could not and would not have performed.

POINT THREE

WARR WAS ENTITLED TO TREAT THE REAL ESTATE CONTRACTS AS BROKEN BECAUSE THERE WAS NO POSSIBILITY THAT THE RESPONDENTS WOULD BE ABLE TO CONVEY GOOD TITLE.

This Court in the case of Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (1973), stated:

> First, the law does not require the vendor to have clear and marketable title at all times during the performance of his contract, and is not ordinarily so obliged until the time comes for him to perform. The buyer should not be heard to complain unless it appears that it will be impossible or at least highly unlikely that the seller will be able to perform his contract when he is called upon to do so . . . .

513 P.2d at 421 (emphasis added).

In American Savings & Loan Association v. Blomquist, 24 Utah 2d 35, 465 P.2d 353 (1970), this Court shed light on the meaning of the phrase "impossible or at least highly unlikely" for the seller to perform his contract. In that case, the defendant Blomquist mortgaged his home to the American Savings & Loan Association. After making a few payments he went into default. American Savings then sought to foreclose on the property.

While the foreclosure procedure was pending, Blomquist sold his home to Sellars on contract. American Savings later added Sellars as a defendant in the foreclosure action. Upon being notified of this, Sellars refused to continue making payments to Blomquist. Blomquist then brought action against Sellars to foreclose, and Sellars counterclaimed against Blomquist for breach of contract, claiming that Blomquist was unable to deliver good

title to the property. Blomquist argued that Sellars could not bring an action until he had made or tendered all payments on the property and that although the property was foreclosed, it was still possible for him (Blomquist) to redeem the property. It appears, however, that such a possibility could not reasonably give much hope to Sellars, because the Court said:

> In the circumstances discussed above, where the vendors (Blomquists) had first been guilty of such a substantial breach of their obligations under the contract, and where it appeared to be an obviously futile thing for the Sellars to continue making payments, it was not obligatory upon them to do so; but they were entitled to treat the contract as broken, refuse further performance and seek redress in damages resulting to them for the breach.

465 P.2d at 355-56

In the instant case, following the judgment for the plaintiffs of adverse possession, the respondents had no interest remaining in the property. If the respondents were to perform, they would have to obtain title from the plaintiffs. However, such a possibility should be considered insignificant here in that no evidence was presented in trial that the plaintiffs were willing to sell the property and because, most probably, the respondents would have had to pay as much to purchase the property as Warr has asked for damages in this action. That this is true is borne out by the sale of the property in question by plaintiffs to a third party subsequent to the trial in this case. Because the respondents are unwilling to pay the damages as asked by Warr there is no reason to believe they would have purchased the property at a similar price from the plaintiffs. Therefore, in line

with the American Savings case, Warr should now be able to seek redress in damages.

Although the issues of tender and ripeness for decision are not now properly before this Court, as stated in Point One above, Points Two and Three show that Utah law would allow Warr to obtain contract damages against the respondents.

POINT FOUR

THE RESPONDENTS HAVE MISSTATED THE CASE OF BUNNELL V. BILLS CONCERNING ITS EFFECT ON THE MEASURE OF CONTRACT DAMAGES.

The case of Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962), is Utah authority directly on point that the "benefit of the bargain" rule should be applied in determining damages in this case. The respondents, in an attempt to distinguish the Bunnell case, misstate the facts or draw unsupported inferences therefrom.

In Bunnell, Bills sold certain real property to Stevens on contract. Subsequently, Stevens contracted to sell this property to Bunnell. Later, Stevens became aware that he would not be able to meet his obligations under the contract with Bills. Bills and Stevens worked out a rescission agreement so that Stevens could receive back his $10,000 down payment. Bills then entered into a contract to sell the property to another party. This, however, did not resolve the problem with the contract between Stevens and Bunnell. In Bunnell's action against Stevens, this Court affirmed the trial court's decision that Stevens had

breached his contract with Bunnell and that he should be required to compensate Bunnell according to the "benefit of the bargain" rule.

In the instant case, the respondents breached their contract with Warr when it became impossible for them to convey the real property in question. The only significant difference between the two cases is that in Bunnell the seller was unable to convey good title because the agreement to purchase for himself had been rescinded; in the instant case, the respondents were not able to convey good title because the plaintiffs had taken title by adverse possession.

Respondents Boyce and Connell, at page 5 of their brief, state that Bunnell involved a "bad faith" situation because of the "underhandedness of the seller in selling to a second buyer without regard to the rights of a prior buyer." These respondents obviously misread the case. Stevens did not sell to a second buyer. He was the major defendant in the case, the one who directly breached his contract with Bunnell. Although Bills contracted with a third party after Stevens and he rescinded their contract, Bills' involvement in the case was as a conspirator to induce the breach of contract between Stevens and Bunnell. This Court held that Bills was justified in his action and hence not liable. Also there is nothing in the case that suggests that Stevens acted in "bad faith." A seller is not in bad faith in entering a contract to convey real property when he does not have title to that property if he reasonably believes that he can obtain title when it

comes time for him to perform. Therefore, Stevens was not in bad faith by signing the contract with Bunnell. Although it later developed that Stevens was unable to meet the payments due under his contract with Bills, there is no statement or inference therefrom that would indicate that he had any doubt about being able to meet his payments at the time he contracted with Bunnell. There simply is nothing in the Bunnell case to indicate that this Court believed that Stevens was acting in "bad faith."

Respondent Ehlers, in his brief, at page 9, claims that Bunnell involved "bad faith" on the part of the vendor and that Stevens "must have known that he would never receive legal title to the property due to his financial situation." Again, it must be said that the Court makes no mention of "bad faith." Moreover, there is no indication from the case that Stevens should have known at the time he entered his contract with Bunnell that he would never receive legal title to the property due to his financial situation. This is merely conjecture on the part of Ehlers.

It is submitted that Bunnell puts Utah among those jurisdictions that follow the "benefit of the bargain" rule in situations not involving bad faith.

POINT FIVE

RESPONDENTS SHOULD NOT BE ABLE TO ARGUE THAT THE TIME OF THE BREACH WAS AT THE TIME THE CONTRACT WAS SIGNED BECAUSE THIS CONTENTION WAS NOT MADE IN THE TRIAL COURT BELOW.

Respondent Ehlers, in Point Three of his brief, attempts to establish the date of the contract as the date that the fair market value of the property should be determined. However, none of the respondents raised this issue in the trial court below. In fact, Warren D. Osgood, Warr's expert witness as to the value of the real property, testified concerning the present value of the property, not the value of the property at the time the contract was signed. None of the respondents objected to his testimony on that basis, although several objections as to his qualifications, the foundation for his opinion, the value of other pieces of property, and hearsay were made. (Tr. 20-32) Moreover, Mr. Boyce, counsel for respondent Ehlers, represented that his witness as to the value of the property, Mr. Stan LeCheminant, would testify that the property was worth $6,000 per acre without access. (Tr. 64-65) Mr. LeCheminant's testimony as to value must refer to the same point in time as that of Mr. Osgood because Mr. Osgood also testified that without access, the property would only be worth about $6,500 per acre. (Tr. 26)

Furthermore, it should be noted that Ehlers' Memorandum fo the Court, submitted in lieu of closing argument, at pages 3 and 4, argues that the maximum damages that can be recovered are $6,500 per acre, stating that Warr's expert testified that "without the adjacent acquisition, the present market value" is $6,500 per acre.

Because the respondents have not argued the time of the breach in the Court below, they should not be allowed to raise

it for the first time before this Court. Contentions or issues raised for the first time on review should not be considered. State v. Larkin, 27 Utah 2d 295, 495 P.2d 817, 821 (1972); Riter v. Cayias, 19 Utah 2d 788, 431 P.2d 788, 790 (1967); Tygesen v. Magna Water Co., 13 Utah 2d 397, 375 P.2d 456, 457 (1962); Carson v. Douglas, 12 Utah 2d 424, 367 P.2d 462, 463 (1962).

POINT SIX

IN ORDER TO DETERMINE "BENEFIT OF THE BARGAIN" DAMAGES, THE VALUE OF THE PROPERTY AS OF THE DATE RESPONDENTS COULD NOT DELIVER TITLE IS DETERMINATIVE.

Appellant Warr contends that the issue of when to value the property in question should not be before this Court for the reasons explained above. Nonetheless, if this issue is now properly before the Court, it is submitted that the proper rule is that "benefit of the bargain" damages should be determined by reference to the property value at the time respondents could not deliver title.

Appellant Warr in this action seeks contract damages from the respondents for their failure to deliver title to the property in question. The claim was brought in the nature of a crossclaim against codefendants in an adverse possession action. Title to the property was the only issue involved in the main action and the crossclaim. None of the defendants counterclaimed against the plaintiff for possession of the property.

The fact that the plaintiffs had possession of the property or that the plaintiffs had commenced an action to quiet title did not mean that the respondents would not be able to deliver title to the property. It was not until the Court had entered its judgment against the respondents and the time for appeal had run that it was clear the respondents would not be able to deliver title to the property.

Prior to judgment in favor of plaintiff in this case, Warr had no right to rescind the contracts because any attempt to rescind would have been met with an action for damages by the respondents. Moreover, whether the respondents would have succeeded against the plaintiffs below on the adverse possession question depended on facts over which Warr had no control and of which he had no knowledge except through the respondents. The fact that the respondents defended against the claim of the plaintiffs to the extent of going to trial shows that they believed they had a good defense to the adverse possession claim.

The case law also supports the concept that Warr would not have been able to succeed in an action against respondents before the appeal time had run on the judgment because a vendor need not be able to deliver title to the property until he is required to transfer title. See Leavitt v. Blohm, 11 Utah 2d 220, 375 P.2d 190 (1960); Woodard v. Allen, 1 Utah 2d 220, 265 P.2d 398 (1953). Under the "benefit of the bargain" rule, damages should be determined as of the time of the breach. Because the breach did not occur until the time for appeal had expired on the judgment for adverse possession, the value of the property should

be determined as of that time, not the date that the contract was signed.

The lawsuit by plaintiffs for adverse possesion of the property in question was filed and the complaint and summons was served less than one half year after Warr signed the contracts to purchase the property. Yet the testimony was unequivocal that Warr continued to pay on the contracts for two years thereafter without any suggestion from the respondents that the contracts should be rescinded. Warr was thus committed to the purchase of the property until the District Court found in favor of the plaintiffs. It was only then that Warr was really free to use the money which would have gone toward the purchase of the property in question to begin acquiring another piece. But in the meantime, the general rise in real estate prices would now prohibit him from purchasing a similar piece for the same purchase price.

It is therefore only sensible and reasonable to value the property at the time when Warr knew that the respondents could not deliver good title and that he had full right to take action on that breach.

POINT SEVEN

RESPONDENTS BOYCE AND CONNELL ARE PRECLUDED FROM ARGUING THAT THEIR AGREEMENT TO GIVE A SPECIAL WARRANTY DEED PREVENTS THE COURT FROM AWARDING CONTRACT DAMAGES AGAINST THEM.

The District Court below ordered contract damages against all of the respondents, despite the arguments by respondents

Boyce and Connell that they promised to give only a special warranty deed to Warr. They now argue in Point One of their brief that this promise to give a special warranty deed insulates them from damages. However, Boyce and Connell have not cross-appealed from the judgment of the Court. Therefore, they are precluded from raising that argument before this Court. See the arguments raised in Point One above.

POINT EIGHT

A COVENANT OF SPECIAL WARRANTY DOES NOT PUT A VENDEE ON NOTICE OR INQUIRY OF DEFECTS OF TITLE

Even if the issue of the special warranty is properly before the Court, that matter should be resolved in favor of Warr because a covenant of special warranty does not put a vendee on notice or upon inquiry as to defects of title. A case in point is Paul v. Houston Oil Co., 211 S.W.2d 345 (Tex. Civ. App. 1948), where the Court stated:

> It is true that this deed contains a special warranty but under the great weight of authority, such special warranty does not carry any notice of defects of title to the grantee. The rule is: "So, too, a 'special warranty deed'--that is to say, one that is in terms a general warranty deed except that it warrants the title only against those claiming 'by, through or under' the grantor--conveys the land itself; the limited warranty does not, of itself, carry notice of defects of title."

211 S.W.2d at 356.

Even assuming, arguendo, that Warr was put on notice of possible defects by the special warranty covenant, this does not

help the respondents because, as stated above, the vendor does not need good title at the time he contracts. He has the entire contract period in which to perfect his title.

Moreover, the facts of this case show that Warr's claim under the Connell and Boyce contract arises because of the activities of Connell and Boyce in allowing the adverse possession to take place during the time they held title to, or at least had control of, the property. The testimony introduced in the principal action and on the crossclaim shows that Laron Boyce, the husband of respondent Evelyn P. Boyce, was the agent for respondents Boyce and Connell for the payment of property taxes of property in the estate of Mr. Pender, their father, from the date of his death in 1963 to the present. (Tr. 37-39) Paragraph 1 of the Conclusions of Law in the principal action shows that the plaintiffs, and no others, timely paid the property taxes for, at least, the years of 1958 and 1965, inclusive, and that this was the reason that the plaintiffs were entitled to judgment. If Boyce had paid the taxes in 1964 and 1965 on behalf of respondents Boyce and Connell, the plaintiffs would not have been successful in their claim for adverse possession. Moreover, had respondents Boyce and Connell kept plaintiffs from using the property from and after the date they obtained control of the property until the time of sale to defendant Warr, any claim of adverse possession would have been negated by a claim of adverse possession against the plaintiffs. Further, although Boyce knew

that respondent Ehlers was a part owner in the property in question, Boyce had no discussions with Ehlers, as to the payment of taxes or otherwise, prior to the trial on the principal action. (Tr. 39-40) It would have been so easy for the respondents to stop the adverse possession of the plaintiffs, but they failed to do so.

Because the acts that caused the respondents Boyce and Connell to lose the property and that gave title to the plaintiffs occurred through or under respondents Boyce and Connell, they must answer in damages to Warr based upon the "benefit of the bargain" rule.

POINT NINE

REGARDLESS OF THEORY OF RECOVERY, THE APPELLANT IS ENTITLED TO ATTORNEY'S FEES AND COSTS.

None of the respondents responded directly to appellant's argument that he is entitled to an award of attorney's fees and costs based on the contracts between respondents and appellant. Their basic argument, of the respondents is that because the Lower Court did not award appellant all that he had asked for, attorney's fees should not be granted.

This lame argument completely ignores the explicit language of the contracts in question which provide for attorney's fees and costs in the event of a default. The Court below specifically found such a default, as discussed in Points Three and Four of appellant's brief. The case is therefore clear; there was a breach for which Warr is entitled to attorney's

fees and costs. Any discussion of settlement offers is extraneous and superfluous. The only question of breach has been resolved in favor of Warr.

POINT TEN

IF "BENEFIT OF THE BARGAIN" DAMAGES ARE NOT AWARDED, THE JUDGMENT SHOULD BE INCREASED.

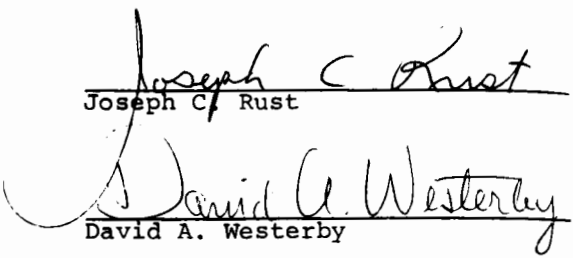
If "out-of-pocket" damages are to be retained in this case, all parties agree that damages of $8,249.80 are insufficient. Ehlers does not contend otherwise; Boyce and Connell state that the amounts inserted in the judgment were furnished by Warr and that Boyce and Connell are "willing to pay or repay the difference between the face of the judgment and the actual total of the appellant's payments on the contract." (Brief of Boyce and Connell, P. 8)

CONCLUSION

Appellant Warr is entitled to damages from the respondents under the "benefit of the bargain" rule to compensate him because he has been deprived of the benefit of a good investment decision. There is no adequate reason to deny Warr the major portion of his damages under an anomoly in the law of damages applied by only a few states. Utah law (Bunnell) suggests that the "benefit of the bargain" rule should be followed even in a "good faith" case. Even if a "good faith" exception is found, the conduct of the respondents should not be considered "good

faith" because adverse possession in Utah can be avoided by the simple act of paying taxes, which the respondents neglected to do. Warr should not be forced to suffer for their neglect.

Respectfully submitted,



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