

1996

PDQ Lube Center Inc., a Utah Corporation v. R. Lowell Huber : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
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PDQ LUBE CENTER, INC., a)
Utah Corporation,)
)
Plaintiff/Appellant,)
vs.)
R. LOWELL HUBER,)
)
Defendant/Appellee, and)
Third-Party Plaintiff,)
vs.)
JUNE T. BOWEN, THE ESTATE OF)
DARRELL J. BOWEN, DENNIS)
GREENE, PETE RIGGS, BOB)
RIGGS, REED HOOLEY, TROY)
HOOLEY and JOHN AND JANE)
DOES 1-10,)
)
Third-Party Defendants.

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DOCKET NO. 960617-CA

Case No. 960617-CA

Trial Court No. 94 038

REPLY BRIEF

Appeal from an Order of the
First Judicial District Court
Cache County, Utah
The Honorable Ben H. Hadfield Presiding

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Utah Court of Appeals
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Marilyn M. Branch
Clerk of the Court

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REPLY TO COURSE OF PROCEEDINGS

R. Lowell Huber's "Course of Proceedings and Disposition in the Court Below" incorrectly asserts that the underlying dispute between the parties was the "failure of the real estate agent to order a performance in the contract." The trial court specifically found in Findings of Fact paragraphs 6-10, and 12, and concluded in Conclusions of Law paragraphs 1-5 (R at 595-604) that the contract required R. Lowell Huber to remove the tanks and provide environmental clearance, that R. Lowell Huber failed to make a good faith effort to do so, and that R. Lowell Huber "engaged in bad faith conduct in an attempt to kill the deal."

REPLY TO ARGUMENT

R. Lowell Huber correctly pointed out in the argument of Brief of Appellee that PDQ Lube Center's tender was ruled insufficient by the trial court because "the funds (\$84,150.00) were not unrestricted." However, R. Lowell Huber cites no authority in the trial court's July 3, 1995 Judgment in this case, December 22, 1995 and February 3, 1996 Memorandum Decisions, statutory law, or case law, to support the trial court's ruling.

The trial court ruled in its July 3, 1995 Judgment as follows:

1. (b) both parties are ordered to comply with the contract terms.
2. Lowell Huber is required to convey the property to PDQ Lube Center if PDQ Lube Center is able to tender the full purchase price within 84 days following proof to PDQ Lube Center of environmental clearance for the site.

The foregoing order of the trial court required that PDQ Lube Center tender the full purchase price within the 84 days allowed by the court.

The trial court went beyond its July 3, 1995 Judgment when it ruled in its December 22, 1995 and February 3, 1995 Memorandum Decisions that proper tender additionally meant that the funds had to be "available for distribution on November 30, 1995." The trial court readily found in its December 22, 1995 Memorandum Decision "that sums totaling the amount required were left with Derald Clark as Escrow Officer for Hickman Land Title Company on the afternoon and evening of November 28, 1995." In its February

PDQ Lube Center's LLC and corporation may well have been properly registered by the required date of November 30, 1995, but that because that fact was not relayed to the escrow holder, the funds were not "available for distribution."

The additional requirement that funds be "available for distribution" went beyond the trial court's requirement of tender, and was in any event satisfied by PDQ Lube Center having its funds with the escrow holder and its LLC and corporation properly registered by November 30, 1995.

The Utah statute on tender, Utah Code Ann. § 78-27-1, provides that an "offer in writing, if not accepted" is equivalent to tender. On November 28, 1996, besides placing the required sums with an escrow agent, PDQ Lube Center delivered R. Lowell Huber a written tender of the full purchase price. R. Lowell Huber did not then nor has he since "accepted" the tender by providing PDQ Lube Center with clear title to the property. R. Lowell Huber stated in his brief that his counsel had a warranty deed ready to give to PDQ Lube Center upon disbursement of the funds. However, R. Lowell Huber did not then nor does he now have clear title to give. As testified by Derald Clark in his affidavit, for clear title to be given, R. Lowell Huber would need to provide a Warranty Deed from R. Lowell Huber and a Notice of Reconveyance of Trust Deed from a third party on a Trust Deed given to the third party by Lowell Huber. In addition, not until mid-December, 1995 did Derald Clark obtain a deed needed to complete the chain of title to R. Lowell Huber and

obtain a document clearing a 1968 option to the property. R at 708-714.

The Utah case law, as stated in Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1243 (Utah 1992), defines an unconditional tender as one that does not impose on the other party a new condition or requirement not already imposed by the contract. PDQ Lube Center's tender imposed no new conditions or requirements on R. Lowell Huber.

PDQ Lube Center's tender was proper under the July 3, 1995 Judgment, Utah statute, and Utah case law.

R. Lowell Huber incorrectly argued in his brief that "[R. Lowell Huber] and the trial court determined that the attempt by PDQ to make a tender by an offer in writing pursuant to § 78-27-1 was insufficient and clearly rejected by the Mark Hancey letter." The trial court made no such ruling. As a matter of fact, PDQ Lube Center's November 28, 1995 tender letter and Mark Hancey's November 28, 1995 letter are not even mentioned in the trial court's December 21, 1995 and February 3, 1996 Memorandum Decisions and February 15, 1996 Order Terminating Defendant Huber's Obligation to Convey.

PDQ Lube Center made a tender of the full purchase price by both its November 28, 1995 written letter of tender and depositing of the required sums with the escrow holder.

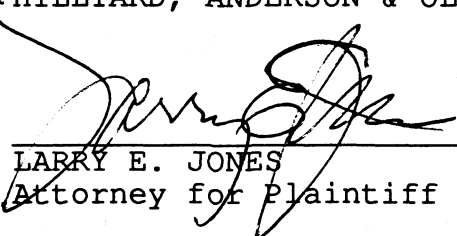
R. Lowell Huber failed to object to the tender as required by Utah Code Ann. § 78-27-3 and thereby waived any objection that he may have had to the tender.

CONCLUSION

The trial court's Order Terminating Defendant Huber's Obligation to Convey should be reversed and PDQ Lube Center, Inc.'s Motion for Order Compelling Compliance with Contract Terms and Conveying Property should be granted.

Dated this 4th day of November, 1996.

HILLYARD, ANDERSON & OLSEN



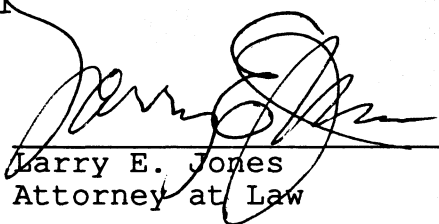
LARRY E. JONES
Attorney for Plaintiff

(original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing APPELLANT'S REPLY TO BRIEF OF APPELLEE were mailed, postpaid, to the following this 4th day of November, 1996:

Joseph M. Chambers
Attorney for Defendant
31 Federal Avenue
Logan, UT 84321



Larry E. Jones
Attorney at Law

(original signature)