

1977

Melvin H. Jensen v. Manila Corporation of The
Church of Jesus Christ of Latter-Day Saints, A
Corporation Sole, And John Tinker And Genevieve
L. Tinker, His Wife v. Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN H. JENSEN,)
)
 Plaintiff,)
)
 vs.)
)
 MANILA CORPORATION OF THE)
 CHURCH OF JESUS CHRIST OF)
 LATTER-DAY SAINTS, a cor-)
 poration sole, and JOHN)
 TINKER and GENEVIEVE L.)
 TINKER, his wife,)
)
 Defendants.)

Case No. 14806

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AGAINST DEFENDANTS IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR DAGGETT COUNTY,
STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE,
PRESIDING.

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 Defendants.)

Case No. 14806

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a judgment in favor of respondent relative to a sale of property on contract.

DISPOSITION IN THE LOWER COURT

Appellant moved the lower court for a summary judgment, which was denied. Thereafter, respondents' Complaint and appellant's Counterclaim were tried without a jury before the Honorable J. Robert Bullock on June 17, 1976, at which time the lower court held in favor of respondent on the issue of breach of contract and attorney's fees, limited respondents' claim for damages to ONE DOLLAR (\$1.00), and denied appellant's Counterclaim.

* * *

* * *

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court decision and further seeks the granting of appellant's Counterclaim. In the alternative, appellant seeks modification of the judgment on the lower court.

STATEMENT OF FACTS

On November 1, 1965, appellant and respondent entered into a contract for the sale of property belonging to appellant located in Manila, Utah. The property described in the contract, shown as being one hundred feet by one hundred fifty feet (100 ft. x 150 ft.), was that property to which appellant held record title on the date of the contract. Prior to November 1, 1965, there had been an exchange of Quitclaim Deeds between appellant and defendants TINKER which cleared up certain boundary problems but which did not change the size of the property to which appellant held record title.

After the signing of the contract on November 1, 1965, respondent took possession of the property and immediately began plans for the erection of tourist accommodations on the premises. For this purpose he prepared certain drawings. (Tr. 36) (For purpose of the trial the drawings were marked as Exhibit 2.) The only part of the plans completed was the remodeling of the building already on the premises. (Tr. 24.)

* * *

* * *

Respondent was very slow in making any payments, beginning with the payment due a year after the contract was signed (Defendant's Request for Admissions, Ex. F). All of the subsequent payments were late (Defendant's Request for Admissions, Ex. G, H, I, L, and T) and the final payment was never paid to appellant but was tendered into court at the time of the filing of the Complaint. Prior to any legal action by respondent, appellant served proper notices on respondent requiring him to vacate the premises, which respondent failed to do. Respondent then brought action in the lower court against appellant and other defendants. The claim directed against appellant was that the contract should be reformed to show the property covered by the contract to include all the property within certain fence lines, which included property to which appellant had no record title.

On December 15, 1975, appellant moved the court for summary judgment, based largely on the parol evidence rule. Oral argument was heard and the motion was denied. Thereafter the case was tried without a jury.

Judgment was entered in the lower court ordering appellant to convey to respondent by warranty deed all the property in question, including property belonging to defendant TINKERS. In addition the court awarded respondent ONE DOLLAR (\$1.00) in damages, attorney's fees, and costs.

ARGUMENT

POINT ONE

PAROL EVIDENCE IS BARRED IF THE DESCRIPTION OF THE PROPERTY TO BE CONVEYED IS DEFINITE, CERTAIN, AND UNAMBIGUOUS.

The law in Utah is clear that where there is no ambiguity in the document conveying property regarding the description of the premises to be conveyed, "extrinsic evidence cannot be introduced to show that it was the intention of the grantor to convey a different tract or that he did not intend to convey all of the land described." Percival vs. Cooper, 525 P. 2d 41 (Utah 1974).

Applying that test to the facts in question, it is immediately apparent that there was no ambiguity in the description of the property to be conveyed. Not only was the description of the property exactly one hundred feet by one hundred fifty feet (100 ft. x 150 ft.), but it also showed an exact starting point and ending point. In fact, the contract exactly described all of the property to which the appellant had record title in the immediate area. Therefore, it was error on the part of the lower court to deny appellant's motion for summary judgment since the case, as it stood before the court at the time of the motion, showed the respondent not entitled to any more property than that specifically described in the contract.

POINT TWO

REFORMATION OF A CONTRACT CAN OCCUR ONLY WHERE THERE IS MUTUAL MISTAKE OR WHERE THERE IS FRAUD.

Even admitting for sake of argument that the lower court had a right to allow parol evidence to be admitted for the purpose of determining whether the contract in question could be reformed, there was no evidence which would permit reformation. The law is quite clear that reformation can only occur, if at all, where there is mutual mistake or where there is mistake on one side and fraud on the other. Powell on Real Property, Vol. 6, ¶903; Simmons Creek Coal Company vs. Duran, 142 U.S. 417, 12 Sup. Ct. 239, 335 L. Ed. 1063; Janke vs. Beckstead, 8 Utah 2d 247, 332 P. 2d 933 (1958). The lower court found no evidence of fraud on behalf of appellant. Therefore, the only question is whether the evidence showed that there was mutual mistake as to the property to be included in the sale by appellant to respondent.

It is true that there was a little bit of confusion regarding the exact property belonging to the appellant prior to the execution of the contract in question. Nevertheless, the testimony is clear that prior to the signing of the contract on November 1, 1965, the appellant had clarified its title to its property by exchanging Quitclaim Deeds with defendants TINKER. (Tr. 75) Moreover, at no time did appellant's corporation sole or

any of its representatives ever intend on selling more property than was owned by appellant in this particular area. In fact the testimony of the corporation sole was that at the time of the sale he looked up the deed on the property before even posting a "for sale" sign and determined, based on the measurements on the ground, that appellant owned a third of an acre. (Tr. 73.) One hundred feet by one hundred fifty feet (100 ft. x 150 ft.) equals fifteen thousand (15,000) square feet, or a little more than one-third acre. If the property had included everything within the fence lines, as contended by respondent, the property would have been closer to one-half acre. The corporation sole further testified he told the realtor with whom the property was listed that a survey would have to be taken to establish the property boundaries. (Tr. 73.) Obviously, there would be no need for a survey if the property included everything within the fence lines as alleged by the respondents.

The corporation sole's testimony is clear that he knew there was no more than a third of an acre to be sold. (Tr. 74.) The realtor also knew that the sale involved a third acre of land and he prepared the earnest money receipt which describes the property as "approx. 1/3 acre." (Tr. 37, 63.) The appellant could not intend to sell more property than it owned. Hence, there was no mistake by the appellant as to the property

it was selling. Moreover, it would have been a simple thing for respondent to verify the property description before signing the purchase agreement. Therefore, there was no basis to attempt reformation of the contract in question.

POINT THREE

RESPONDENT IS GUILTY OF LACHES AND THEREFORE CANNOT SEEK EQUITABLE ACTION.

At the outset of the trial, counsel for appellant asked for and was granted an amendment to appellant's answer in order to allege the affirmative defense of laches. This amendment was granted by the court without objection of the opposing counsel. (Tr. 6.)

Since the respondents' claim sounds in equity, appellant is free to assert the defense of laches. 27 Am Jur 2d, Equity, §152 et. seq. It is clear that the respondent is not the ordinary purchaser of property but rather a developer of land. (Tr. 14, 16, 43.) Testimony is that shortly after the signing of the contract on November 1, 1965, respondent personally measured the property in order to determine how best to improve the property in question. (Tr. 36.) Those measurements, as shown on Exhibit 2, indicate dimensions of one hundred twenty-nine feet by one hundred twenty-three feet (129 ft. x 123 ft.). The critical dimension is that of the frontage which the respondent shows as being one hundred twenty-nine

feet (129 ft.) and which in the contract is only one hundred feet (100 ft.). Respondent claims he made no measurements of the property prior to actually acquiring property by contract but there is no question that the measurements of the property shortly after the date of the contract put the respondent on notice that there was some problem with the property he thought he was receiving. In addition, respondent testified that when he placed a trailer on the South thirty-two feet (S. 32 ft.) of the property, defendant TINKER informed him that that property did not belong to respondent but rather to defendant TINKER and that respondent was to have his trailer moved. This occurred in approximately 1968 as testified to by respondent. (Tr. 24-25.) Appellant had to constantly remind respondent to make payments and yet nothing was ever mentioned to appellant by the way of any problem until 1969. (Tr. 28.) Nevertheless, even knowing that there was a problem in 1968 and certainly by 1969, appellant took no action to bring any lawsuit until 1975 at a time after he had received the second notice from appellant evicting him from the property in question. The testimony is therefore clear that respondent was most dilatory in trying to resolve the problem. He could have and should have made appellant aware of his confusion as to the boundaries of the property prior to the signing of the contract on November 1, 1965. In any case, he should

have done something no later than approximately 1966 or early 1967. Certainly the respondent knew of the problem or should have known of the problem long before any money had been invested in the remodeling of the old church. His failure to act promptly should now be the basis upon which this Court denies any recovery.

POINT FOUR

IN THE ALTERNATIVE, APPELLANT SHOULD ONLY HAVE TO QUITCLAIM PROPERTY TO WHICH IT DOES NOT HAVE TITLE.

In the Court's memorandum decision, it found that defendant TINKER was not a bona fide purchaser for value without notice and that his interest in the property in question "is inferior to the plaintiffs." There was nothing in the memorandum decision which indicated that appellant became fee title holder to any property other than that to which it had record title. Therefore, the judgment that the appellant "convey by good and sufficient warranty deed the real property described in the last preceding paragraph, free and clear of all encumbrances," is an unfair and improper burden upon appellant. Appellant has never received fee title to the property and can do nothing more than quitclaim the property in dispute to respondent. In the event this Court should find that respondent is entitled to have from appellant some deed of conveyance of the property to which defendant TINKER holds title, then the judgment of the lower court should

be modified to reflect that as to that property to which it does not hold title, appellant need only give a Quitclaim Deed and the title insurance need only cover that property to which it holds title.

POINT FIVE

UNDER ANY CIRCUMSTANCES, RESPONDENT IS NOT ENTITLED TO ATTORNEY'S FEES.

It was respondent's failure to make timely payment that brought about the need for appellant to serve an eviction notice and declare a forfeiture. Respondent had every opportunity to make all the necessary payments and then bring action for title to any additional property he thought he had right to have. His own failure to make appropriate payment was the default which caused the difficulty. As a consequence, because of that breach, respondent is not entitled to attorney's fees.

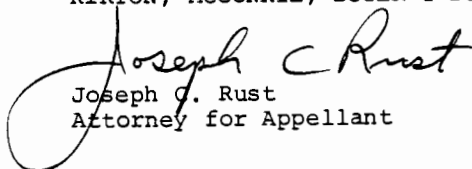
CONCLUSION

This Court has on numerous occasions upheld a vendor's right to terminate a contract upon its breach by the purchaser and to declare a forfeiture of that property. See, e.g., Jensen vs. Nielsen, 26 Utah 2d 96, 485, P. 2d 673 (1971). The respondent in this action gave ample justification to appellant to declare such a forfeiture. The terms of the contract, including the property description and payment dates, were very clear. Respondent

was experienced in the field of real estate and fully knew the consequences of non-payment. This Court should therefore remand this case back to the lower court and order it to deny respondent's Complaint and to grant appellant's Counterclaim. In the alternative, this Court should deny respondent attorney fees and should require that as to property to which appellant has no record title it be required only to quitclaim such property to respondent.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE

A handwritten signature in cursive script, reading "Joseph C. Rust". The signature is written in dark ink and is positioned above the printed name and title.

Joseph C. Rust
Attorney for Appellant