

1977

William J. Johnson And Patricia Johnson v. C. E. Carman, Aka Cal E. Carman : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM J. JOHNSON and
PATRICIA JOHNSON,

Respondents,

vs.

C. E. CARMAN, aka CAL
E. CARMAN,

Appellant.

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:

Case No. 14807

BRIEF OF APPELLANT

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Clerk, Supreme Court, Utah

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CARMAN,	:	
Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the lower court's determination that respondents should not forfeit all payments made under a Uniform Real Estate Contract after respondents defaulted on the contract.

DISPOSITION OF THE LOWER COURT

A non-jury trial was held on September 9, 1976 in the Fourth Judicial District Court of Duchesne County, State of Utah, the Honorable J. Robert Bullock presiding. By a memorandum decision dated September 13, 1976, the lower court entered judgment for respondents in the sum of \$8,845.00 with interest, determining that to allow appellant to retain this amount as liquidated damages was unconscionable.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the lower court's decision reversed.

STATEMENT OF FACTS

Appellant and respondents entered into a contract for the sale of appellant's land to respondents (R.4). Pursuant to the Uniform Real Estate Contract dated May 3, 1975, the contract price was \$170,000.00. On May 3, 1975, respondents paid \$20,000.00 down, leaving a contract balance of \$150,000.00. Under the terms of the contract, respondents were to pay the balance commencing June 15, 1975, at the predetermined rate of \$1,477.11 per month for 12 months. A balloon payment would then be due in the sum of \$15,000.00. For the next 12 months respondents were again to have paid \$1,477.11 per month for 12 months. At the end of this second period, a balloon payment would be due of \$7,649.36. After this second balloon payment the balance, together with interest at the rate of 8-1/2% per annum would be paid in equal monthly installments of \$1,428.57 for 120 months.

Respondents performed under the terms of the contract until the early part of 1976, when respondents went into default. Respondents also failed to maintain insurance on the subject property. It was agreed between the parties that the contract would be altered to give some relief to respondents. The contract

tract was altered on March 22, 1976 (R.6). The alteration provided that the contract balance would be \$150,000.00, but that respondents would owe no balloon payments in any given year and, further, the monthly payment was reduced to \$1,301.80. The provisions were incorporated into the original contract (R.7) and it was agreed that all other provisions, including forfeiture and penalty clauses, would remain in force.

Payments under the altered contract were to commence April 1, 1976. Respondents made the first payment and then defaulted on the altered contract. In May, 1976 the record shows (T.8,9) respondents approached appellant and indicated that they were unable to continue with the contract. Appellant then sent respondents a proper demand notice (R.9). According to the record, respondents called appellant to take over the property on May 24, 1976 (T.28).

After having entered the premises, appellant was approached by respondents to see if he could arrange something about retaining their equity (T.9). From the record no particular agreement appears. On June 3, 1976 respondents, through counsel, sent a letter to appellant asking appellant to quit the premises (T.56) or a suit would be instituted on behalf of respondents. This suit was filed on June 17, 1976.

The Court made findings of fact (R.31) pursuant to its memorandum decision (R.30) finding that payments had been made by plaintiffs to defendants as follows:

Downpayment	\$20,000.00
Payments on principal	3,839.31
Payments on interest	10,756.79
TOTAL	<u>\$34,495.75</u>

Further, the court found that defendant had sustained damages as follows:

Interest on \$150,000.00	
to May 24, 1976, at	
8-1/2% per annum	\$14,485.00
Benefit of bargain	5,500.00
Attorneys fees	1,165.00
Reasonable costs to	
restore premises	4,500.00
TOTAL	<u>\$25,650.00</u>

Based thereon the court found that the forfeiture of \$8,845.00 as liquidated damages was disproportionate to defendant's actual loss and entered judgment accordingly.

ARGUMENT

THE LOWER COURT'S FINDING THAT APPELLANT SHOULD RETAIN NOTHING BEYOND ACTUAL DAMAGES IS CONTRARY TO LAW AND UNDER THE CIRCUMSTANCES OF THIS CASE IS CLEARLY ERRONEOUS WHEN CONSIDERING ALL OF THE EVIDENCE.

The Uniform Real Estate Contract which is the subject of this litigation appears at pages 4 and 5 of the record. Paragraph 16A of that contract contains the following language:

"A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of

said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller;"

As is evident from the language, this paragraph is the forfeiture clause which is the subject of this suit. No one, at this late date in the development of contract law, can seriously contend that forfeiture clauses are per se unconscionable. The question is not the validity of forfeiture clauses as such, but whether or not the forfeiture is so grossly disproportionate to the actual damages that the conscious is abhorred by the enormous windfall granted. This is in fact the rule in the State of Utah. Perkins v. Spencer, 121 Ut. 468, 243 P.2d 446 (1952); Jacobsen v. Swan, 7 Ut.2d 420, 326 P.2d 712 (1954); Peck v. Judd, 7 Ut.2d 420, 326 P.2d 712 (1958); Cole v. Parker, 5 Ut.2d 263, 300 P.2d 623 (1956); Carlson v. Hamilton, 8 Ut.2d 272, 332 P.2d 989 (1958); Strand v. Mayne, 14 Ut.2d 355, 384 P.2d 396 (1963); Kay v. Wood, Utah, 549 P.2d 709 (1976).

The question before this Court must then be, is it unconscionable for appellant to retain all monies paid to him by respondents, i.e. \$34,495.79. The answer to that question must be an unequivocal no.

In Cole v. Parker, supra, this Court had occasion to indicate what criteria were to be taken into account to determine whether or not a forfeiture was a penalty. This Court said

at 5 Ut.2d 267:

"The criteria for determining whether a provision in a contract amounts to a penalty or a fair estimate of damages sustained by the vendor upon a breach of the contract was outlined in the case of Perkins v. Spencer, supra. It is there stated that at the time of the forfeiture, the court will consider the following elements in approximating the damage suffered by the vendor:

"1. Loss of an advantageous bargain;

2. Any damage to or depreciation of the property;

3. Any decline in value due to change in market value of the property not allowed in items Nos. 1 and 2;

4. For the fair rental value during the period of occupancy."

(emphasis added)

It can be readily seen from this criteria that the lower court did not even use the proper formula to arrive at appellant's measure of damages. The court used interest rather than a fair monthly rental value. The court gives no reason for the discrepancy and under all the above cited cases, interest is not criteria. The criteria is rental. The lower court was perhaps misled by respondents' reliance on Kay v. Wood, supra, in which Justice Ellett cites figures in his dissenting opinion. Even a cursory reading of that dissent will indicate that Justice Ellett is merely comparing figures for his own purposes. It does not purport to give any formula.

Appellant testified that a fair rental value was between \$1500.00 and \$1700.00 per month (T.26). He indicated

that a rule of thumb was 10% of the fair market value and that his figure was based on his previous earnings over the four years prior to the sale. None of these sums were contested by counsel for respondents. In fact, at page 54 of the trial transcript respondents introduced evidence that for the fiscal year 1974, the net profit was \$16,956.00, or an average of \$1,413.00 per month.

Pursuant to appellant's suggested fair rental value of between \$1500.00 and \$1700.00 per month, the yearly rental would be between \$18,000.00 and \$20,400.00. Consequently, for the 13 months of dispossession the fair rental value would be between \$19,500.00 and \$22,100.00. If one adds to these figures the other credits allowed appellant as determined by the lower court, appellant's total credit is between \$29,165.00 and \$31,565.00. Therefore, the amount actually forfeited by respondents would be between 2% and 3% of the total contract purchase price.

Once the lower court determined what the actual or reasonable damages were to appellant it seemed to work on the assumption that everything paid over and above that figure belonged to respondents. Such is not the law in this jurisdiction and never has been. In Jensen v. Nielsen, 26 Ut.2d 96, 485 P.2d 673 (1971), this Court specifically rejected such a doctrine at 26 Ut.2d 97:

"The plaintiffs' demand seemed to be premised on the idea that those decisions stand for a general proposition that if the buyer under such a real estate contract can-

not perform, he can relinquish the property and demand reimbursement under an accounting which, roughly stated, charges him for the reasonable rental value plus any damages suffered by the seller, and credits him with any amounts he has paid in excess thereof. Those cases do not give support for any such general proposition as advocated by plaintiffs."

(emphasis added)

Furthermore, in Carlson v. Hamilton, supra, where the issue was raised with specific figures and percentages in much the same circumstances as the case at bar, this idea was clearly and correctly rejected. At 8 Ut.2d 274, this Court had the following to say:

"The trial court made findings as to the amount of damage done and added to it a reasonable two-year rental value, concluding the plaintiffs had paid \$2,119.94 more on the contract than defendants actually had been damaged. Plaintiffs were awarded judgment for that amount, apparently under the theory that in Perkins v. Spencer¹ we determined that a defaulting buyer could require the return of all sums paid in over and above actual damage caused the seller.

"Perkins v. Spencer is no authority for such doctrine. The spirit of that case calls for adhesion to a principle that equity historically has indulged,--that it abhors unconscionability shocking to such degree that the function of equity would be misconceived and misapplied by the enforcement of such unconscionability, even though it may have been the subject of contract.

"Such unconscionability is obvious in the Perkins case, where, after a breach committed only four months after execution of the contract, an exaction of over 27% of the entire purchase price was attempted,--\$2,725.00 where the price was \$10,000.00, and where the seller demanded the entire balance of the price before

conveying the property. In the instant case, the amount of damage that the contract said could be considered as liquidated damages was \$2,119.94. Occupancy had been enjoined a full two years. The bona fides of the sellers generously was demonstrated by a volunteered waiver of the principal for the time being if the buyers would but pay the taxes and interest. The amount of damages here was but 9-1/2% of the purchase price, an amount that would exceed but little the real estate commission that would have to be paid on resale of the property that defendants took back without fault on their part, from those who caused all the difficulty by breaking the contract.

"The two cases are poles part, the one obviously being punctuated by unconscionability, the other appearing to call only for the exaction of a reasonably small percentage of the price for a breach that would cause delay for repairs, time lapse for re-sale, and possibly other items of damage susceptible of little but conjectural measurement."

(emphasis added)

It will be noted that in Carlson v. Hamilton, supra, the sale price was \$22,000.00. The 9-1/2% mentioned by the Court has reference to the amount retained by seller after he had already been credited with his damages. In the instant case, based on the rentals suggested by appellant, the amount retained by the seller after credits for damages would only be 3%, at the most, of the contract price. Even under the lower court's figures, the amount retained by appellant would only be 5.2%. In every particular, except as to length of time, Carlson is on "all fours" with the instant case and appellant contends that it should be controlling and dispositive of this case.

CONCLUSION

It is clear from a review of the evidence and law in this case that the lower court was clearly wrong in awarding anything to respondents and appellant respectfully submits to this Court that the lower court's decision should be reversed with costs to appellant.

DATED this 24th day of March, 1977.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to Mr. Matt Biljanich, Attorney for respondents, 7355 South 9th East, Midvale, Utah 84047, on this 25th day of March, 1977.

