1977

Hanover Limited, A General Partnership v. Deanna Fields, Plaintiff, And Appellant : Appellant's Brief

Utah Supreme Court

Olmstead, Stine and Campbell; Attorney for RespondenttL. Charles Evans; Attorney for Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

HANOVER LIMITED, a
General Partnership,

Plaintiff and
Appellant,

vs.

DeANNA FIELDS,

Defendant
Respondent.

Appeal from the
District
Honorable

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Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

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HANOVER LIMITED, a
General Partnership,

Plaintiff, and
Appellant,

vs. Case No. 14830

DeANNA FIELDS,

Defendant, and
Respondent.

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APPELLANT'S BRIEF

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Appeal from the judgment of the Second
District Court for Weber County
Honorable Calvin Gould, Judge

- - - - - - - - - - -

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STATEMENT OF THE KIND OF CASE

This is an action by Plaintiff to collect on a promissory note with a Counterclaim by Defendant to obtain a refund of her down payment on the purchase of a condominium and damages for wrongful attachment.

DISPOSITION IN LOWER COURT

The case was tried before the Court. From a decision and judgment granting the claim of Plaintiff and a portion of Defendant's Counterclaim, Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of that part of the judgment granting Defendant return of her down payment and, that failing, of the Court's refusal to allow offsets against any judgment awarded to Defendant, as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Synopsis

During the middle of January, 1975, Defendant, a single, divorced woman with minor children, visited some condominiums owned by Plaintiff and decided to purchase one of them. (R. 127). Defendant tried to obtain a loan in order to finance the purchase, but was turned down by Zions Bank because her debt-income ratio was too high. After discussing the matter with the Real Estate broker handling the condominium sales and with an agent for Plaintiff, Defendant decided she still wanted to purchase the unit and could make sufficient changes in her debt-income situation in order to qualify for financing at a later date. (R. 137). On March 18, 1975, Defendant entered in an 18 month Uniform Real Estate Contract with Plaintiff, which enabled her to move into the unit immediately while continuing to look for conventional financing. After making some positive changes in her income situation, Defendant, at the instance of Plaintiff, applied a second time to Zions Bank for financing. This time the application was approved by the bank, but was turned down by the mortgage insurance company, apparently by mistake. Because of Defendant's impending marital plans, the bank refused to

resubmit the application, and Defendant moved out of her unit after negotiations with Plaintiff failed. Plaintiff sued for return of some money loaned to Defendant, and Defendant counterclaimed for the return of her down payment. The main question before the Court is whether the Earnest Money Agreement submitted by Defendant at the time of the second loan application constituted a new agreement between the parties, replacing and cancelling the Uniform Real Estate Contract previously entered into on March 18.

Statement of Facts

The condominium unit purchased by the Defendant was part of a small complex owned by the Plaintiff known as Country Hills Square located at 1150 Country Hills Drive, Ogden, Utah. The units were being sold by the real estate brokerage, Real Estate Exchange, and the name of the salesman involved in the sale to the Defendant was Gary Iverson. Mr. Iverson helped to prepare the first Earnest Money Agreement and to explain it to the Defendant. (R. 114). The initial application to Zions First National Bank was turned down, however, for the reason that Defendant's debt-income ratio was too high. (R. 82, R. 111, R. 115, R. 129). Because Defendant appeared to be serious in her desire to purchase the unit and because it appeared Defendant would very likely

qualify for financing after some adjustments in her financial situation, Plaintiff offered to sell Defendant the condominium on an 18 month contract, thereby permitting her to move into the unit immediately and reapply for financing at a more favorable moment. (R. 109, R. 115-116).

The Uniform Real Estate Contract was signed by the Defendant and by Mr. Dennis G. Lawrence, a representative of the Plaintiff. The terms of the contract were that the Defendant would pay $2,350.00 down and would make $240.00 monthly payments of interest, taxes and maintenance until the remaining balance was paid on or before September 1, 1976. (P.Ex.A). Defendant read the contract over and has stated that the terms and conditions were clear and understandable to her. (R. 118, R. 137-138). Shortly after the contract was signed, the Defendant moved into the unit after the downpayment had been used to prepare the unit to her liking, including the remodeling of the utility room and the installation of a 14.5 cubic foot refrigerator. (P.Ex.B, R. 107).

After moving in, Defendant proceeded to reduce her debt burden and increase her income. With the assistance of Mr. Iverson, she obtained a loan to pay off various credito and to consolidate her obligations into one monthly payment to the bank. (R. 147-148, R. 117, R. 137). She also found

a higher paying second job, which, in addition to several pay raises in her main job, to the income from the renters of a house she owned and to her monthly child support and alimony payments, decreased her debt-income ratio. (R. 118, R. 122, R. 138).

In late July, 1975, the Defendant was approached by Mr. Lawrence who informed her that the low-interest federal monies which she had previously applied for were being withdrawn from the market on August 31. He suggested she apply for them again before their withdrawal. (R. 83). Although he had not been involved in her previous loan application, he indicated that he had made an analysis of her loan qualifications and was convinced that she would now qualify. (R. 111, R. 139). Defendant thereupon decided to reapply for financing through Zions Bank. The bank indicated, however, that it would be necessary to submit a new Earnest Money Agreement, since the federal monies were available only toward the purchase of new homes. (R. 83-84). According to Plaintiff, the bank was aware of the previous loan application and of the March 18 contract, but had decided that the purchase was recent enough to make it acceptable under the circumstances. (R. 100, R. 105).

Wishing to point out to reviewing authorities that the Defendant was already living in the unit, but believing

that a lease arrangement would be looked on more favorably than a short term contract specially designed to accommodate conventional financing, Plaintiff and Defendant indicated in the new commercial form Earnest Money Agreement, filled out by Mr. Lawrence and dated July 31, 1975, that the previous living arrangement had been a lease. (R. 85, R. 100, P.Ex.B). The agreement gave Defendant credit for her original down payment of $2,250.00 by calling it an advance on lease. (P.Ex.B). As is customarily the case with an Earnest Money Agreement, a provision was added that the sale would be subject to Defendant's obtaining financing for the purchase price, which was to have been accomplished by August 15, 1975. No discussion was had between Plaintiff and Defendant with regard to the Earnest Money Agreement replacing the March 18 contract, and Defendant understood that the purpose of the new agreement was to enable the loan application to be processed. (R 102, R. 140). Defendant stated in trial that she understood another purpose of the Earnest Money Agreement was to cross out the previous contract (R. 140), but Mr. Lawrence testified that such was definitely not the expressed intentions of the parties and certainly not Plaintiff's intention. (R. 100-102). In order to assist Defendant to meet closing costs, Plaintiff loaned Defendant $1,000.00, which was to be returned if financial negotiations

failed. (R. 25, R. 88, R. 141, P.Ex.C). Defendant continued to make her usual $240.00 monthly payments. (R. 101).

This second time around, Zions Bank approved the loan application and then submitted it to Mortgage Guarantee Insurance Corporation for its approval. (R. 85-86). On or about September 15, 1975, Zions Bank informed Mr. Lawrence that the loan application had been denied by MGIC on the grounds that there was not sufficient square-footage in the unit to accommodate the number of persons living there. (R. 86). Upon investigation, Mr. Lawrence discovered that a mistake in floor space had been made in the appraisal submitted to MGIC by the bank. (R. 86, R. 110). Zions Bank agreed to resubmit the loan application with the correct square-footage. (R. 86, R. 193).

On or about the same date, Mr. Lawrence contacted the Defendant and explained to her what had happened. (R. 86, R. 142-143). She consented to the resubmission of the loan application, but asked if the application could be hastened, since she was planning to marry within 10 days. (R. 87, R. 143, R. 193). Thinking that perhaps the intended husband's credit could lend support to Defendant's application, Mr. Lawrence asked the Defendant the condition of her intended husband's finances. She indicated that he had just been through bankruptcy. (R. 87, R. 143, R. 147). It being

obvious that marriage would not improve the status of her application, Mr. Lawrence asked the Defendant if she would be willing to postpone her marriage until a later date. (R. 87, R. 147). She indicated that she would not. (R. 87). Mr. Lawrence then went to Zions Bank, explained Defendant's marriage plans and asked if the bank would be in a position to obtain loan approval prior to her marriage Since Defendant had applied as a single woman and since the loan would not have actually come through until after she would have been married according to her announced plans, Zions Bank decided not to resubmit the application representi Defendant as a single woman. (R. 87, R. 193). Defendant testified that she also tried to obtain financing by herself at Bank of Utah where she had her checking and savings accounts. (R. 148, R. 152).

Although Defendant testified in Court that she reall never got married (R. 144), on or about October 16, Mr.Lawrem stated he met in Defendant's unit with Defendant and a man Defendant introduced as her husband to discuss Defendant's intentions with regard to future financing. (R. 90, R. 148, R. 194). The Defendant and her companion asked if certain provisions of the March 18 contract could be changed. They wanted unlimited time in which to find financing and wanted portions of the monthly payments to be applied to

principal. R. 90-91). Mr. Lawrence indicated that he could not give them unlimited time in which to find financing, but would continue to assist them in their search. (R. 108, R. 90). Mr. Lawrence offered Defendant a $1,000.00 discount on the old contract and agreed to carry a new 18 month contract on a principal-plus-interest basis with $271.12 monthly payments. (R. 91-92, R. 148, D.Ex.14). Defendant's purported husband refused Mr. Lawrence's offer and, upon request, refused to return the $1,000.00 loaned to Defendant for closing costs. (R. 92, R. 186). On October 31, therefore, Mr. Lawrence wrote Defendant a letter requesting she return the $1,000.00 loaned to her, since the August application had not been successful. (D.Ex.13).

On or about November 26, 1975, Plaintiff received a letter from the Defendant enclosing her payment for November and indicating that she would make another monthly payment upon receipt of certain checks which she had previously sent the Plaintiff. (P.Ex.D). She also indicated she was going to see an attorney. At that time, Defendant had made six monthly payments, paying her through the month of October. (R. 97). On or about December 8, 1975, Defendant moved out of her condominium unit, taking the refrigerator with her, and has made no further payments to the Plaintiff. (R. 134, R. 185, R. 188, R. 200). On or about December 19, 1977,

Defendant's attorney sent a letter to Plaintiff informing Plaintiff that Defendant was rejecting and rescinding the March 18 contract. (R. 192).

On January 21, 1976, Plaintiff filed an action to recover on the promissory note. (R. 1). Contemparaneous therewith, Plaintiff sued out a Writ of Attachment, without notice, against Defendant's automobile and bank accounts, believing the Defendant to be concealing her assets. (R. 12) The Writ was subsequently quashed on the grounds that the act of the Clerk of Court issuing the Writ without prior review of a Judge violated the due process clause of the Constitution of the United States. (R. 209, R. 10). Upon trial, the Court awarded damages for wrongful attachment and found that the July 31 Earnest Money Agreement constituted a new contract between the parties, replacing the March 18 Uniform Real Estate Contract. The Court also ruled that the down payment under the March contract should be returned to Defendant, after deducting the amount of the $1,000.00 promissory note. (R. 29-30). Plaintiff moved the Court for a new trial or, in the alternative, to amend the judgment,but Plaintiff's motion was denied. (R. 61).

ARGUMENT

POINT ONE

THE COURT ERRED IN CONCLUDING THAT THE JULY 31, 1975 EARNEST MONEY AGREEMENT WAS A NEW CONTRACT SUPPLANTING THE MARCH 18, 1975 UNIFORM REAL ESTATE CONTRACT.

The law generally states that a final expression of agreement, whether it is written or oral, prevails over a prior expression if the parties so intend. When the parties to an agreement reduce it to writing, with the intention that such writing be a final statement of their agreement, the agreement is said to be integrated. The critical question, then, is one of the intention of the parties. While some older cases have held that the question of integration is to be determined solely from the face of the writing and that the only question for the court is whether the writing appears to be a complete agreement, there is little question that the appearance test is insufficient today and should be rejected by the Courts. Murray on Contracts, Sec. 106, 2nd Rev. Ed (1974). To follow the appearance test would, as Murray and Corbin have indicated in their treatises on contracts, often overlook the actual, express intentions of the parties and create a fictitious intention which may or may not coincide with the actual

intention of the parties. Murray on Contracts, Sec. 196, 2nd Rev. Ed. (1974). Wigmore, in his treatise on evidence asserts that the intention of the parties controls and that such intention must be found in the language and conduct of the parties as well as in the surrounding circumstances. 9 J. Wigmore, Evidence Sec. 2413, 2430, 2431 (3d Ed 1940); Murray on Contracts, Sec. 106, 2nd Rev. Ed. (1974).

The Restatement of Contracts states that a writing cannot, of itself, prove its own completeness and that wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties. Restatement, 2d Sec. 236, Comment b (1973). Murray on Contracts, Sec. 197, 2nd Rev. Ed. (1974). When the principal purpose of the parties is ascertained, after reviewing all available evidence, further interpretation of an agreement is guided by such purpose. Murray on Contracts, Sec. 114, 2nd Rev. Ed. (1974); Restatement 2nd Sec. 228(1) (1973).

The Utah Courts have generally followed the course of interpretation outlined above. In the case of Bullfrog Marina, Inc. v. Lentz, 501 P. 2d (1972), the Court on Page 27(stated that when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusivel presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties. On the other

hand, the Court indicated that such principle was only correct when applied to an integrated contract. In order to determine the issue of integration, extrinsic evidence was admissible to show the circumstances under which the agreement was made and the underlying purpose for which the instrument was executed. The Court went on to state that when considering such extrinsic evidence, the interpretation given by the parties, themselves, as shown by their acts would be adopted by the Court. The Court reasoned that such actions would be persuasive evidence of what the true intentions of the parties were, even if such actions were quite different from the contract itself, and would, also, constitute the necessary ambiguity to permit examination of extrinsic evidence of intent. The Bullfrog Marina ruling and reasoning was strongly supported by the 1975 Utah case of Zeese v. Estate of Seigel, 534 P. 2d. 85 and also by the case of Bullough v. Sims, 400 P. 2d. 20, 16 U.2d. 304 (1965).

In the present case, it seems obvious to Plaintiff that the parties never intended that the July Earnest Money Agreement abrogate the March contract. First of all, at the time of the signing of the July Earnest Money Agreement no discussion whatsoever took place about the March contract. Mr. Lawrence explained to Defendant the purpose of the

agreement, which was to enable the loan to be processed, and Defendant signed it.

No discussion about replacing the March contract occurred after the signing, either. In fact, the first mention of such a possibility appeared in Defendant's Answer and Counterclaim, dated February 17, 1976, even though Defendant's attorney had previously sent Plaintiff a letter announcing and explaining Defendant's intention to rescind on December 19, 1975. Had Defendant already considered the contract to have been replaced, why didn't she mention the replacement issue until February? Since the defense of rescision is ~~district~~ distinct from the claim that a contract has been replaced, why did Defendant announce in December, through her attorney, that she was rescinding the March contract?

Furthermore, Defendant continued to make her $240.00 monthly payments, as outlined in the March contract, through October, 1975. She even stated in a letter to Plaintiff dated November 28, that she would be making her November payment shortly. Since no mention of monthly payments was made in the Earnest Money Agreement, she must have been operating under some other agreement. The only other agreement, oral or written, between the parties was the March contract.

Finally, if Defendant truly believed that the March Contract had been replaced, then why did she and her purported husband sit down with Mr. Lawrence on or about October 16 and discuss modifications to the contract? Why did they not state at the time that the March contract was no longer in effect and demand the return of the Earnest Money? Instead, they discussed lengthening the period of the contract, allowing a portion of the payments to be allocated to principal and decreasing the amount of the monthly payments. No mention was made of the Earnest Money Agreement. Their attempts to modify the March Contract, therefore, had the legal effect of reaffirming the ongoing validity of such contract.

POINT TWO

EVEN ASSUMING THE EARNEST MONEY AGREEMENT FRAMED A NEW AGREEMENT BETWEEN THE PARTIES, SUBSEQUENT ACTS ON THE PART OF DEFENDANT EFFECTED A RATIFICATION OR REINSTATEMENT OF THE MARCH CONTRACT.

Ratification is based upon the intentional relinquishment of a known right. Michel v. ICN Pharmaceuticals, Inc. 549 P.2d 519 (Or. 1976). Accordingly, one would be considered to have ratified a contract if he continued to perform under its provisions, even though he knew for one reason or another, that he didn't have to and could avoid it.

In the present case, had it been Defendant's understanding and intent that the July Earnest Money Agreement replaced the March contract, then she would not have had to make any further payments under the March contract nor would she have had to be further involved with the Contract in the case that financing didn't come through. She could have immediately requested return of the Earnest Money-down payment and moved out of the unit. Instead, Defendant continued making her usual monthly payments under the March contract and, upon denial of the loan application, met with Plaintiff to discuss modification to the Contract so that she could continue her purchase. In so doing, Defendant waived whatever rights she had to avoid the March contract and, in effect, ratified it.

Even if the parties had initially intended that the Earnest Money Agreement integrate their intentions, they, in effect, mutually abandoned the agreement by offering and receiving monthly payments under the former contract, by sitting down to negotiate a modification of terms of the former contract and by Defendant's later delcaring her intention to rescind the Contract. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967).

As did the Plaintiff in the Utah case of Dayton v. Gibbons & Reed Company, Defendant, in effect, adopted the March contract by continuing in the performance thereof, even though she could have, by law, avoided it. Dayton v. Gibbons & Reed Company, 12 Utah 2d 296, 365 P.2d 801 (1961).

POINT THREE

EVEN IF THE EARNEST MONEY AGREEMENT REPLACED THE CONTRACT, DEFENDANT WAS NOT ENTITLED TO RETURN OF THE EARNEST MONEY.

The Earnest Money Agreement, once signed by the parties, obligated them to the performance of certain duties; Plaintiff to have the home ready and title clear for transfer and Defendant to secure proper financing. Although not expressly stated within the Agreement, Defendant had a duty to attempt the acquisition of financing in GOOD FAITH. This implied good faith endeavor on a purchaser's part goes to the very crux of an Earnest Money Agreement, and absent it, there is at best an illusory contract which binds no party.

The record clearly indicates that Zion's Bank stood ready to approve the necessary financing until the statement by Defendant that she intended to enter the holy state of matrimony in a scant half-score days.

Testimony by Defendant at trial declared that she had not in fact married. The Defendant's male companion was, however, subsequent to the notification of intended marriage, introduced to Plaintiff as her spouse. Did Defendant use her supposed marriage as a means of insuring the defeat of her loan application? If Defendant's actions were calculated

to prevent financing and avoid the contract, then her financing attempts were not made in good faith. The ramifications of this situation are numerous. A bad faith effort by Defendant does not release her from the Earnest Money Agreement and she is still bound by the Agreement and liable for the whole purchase price. At the very least, Defendant is not entitled to a return of the $2,250.00 paid as Earnest Money.

Admittedly, Earnest Money generally is and should be, refunded when the purchase fails. However, there are exceptions:

> " . . . bad faith by the purchaser or some act intended to cause a refusal to approve the requested loan."

Wineman v. Guilmett, 60 Wash 2d 831, 367 P.2d 534, 535 (1962); also:

> "A purchaser who has made a deposit ordinarily is entitled to recover Earnest Money still in the possession of the broker, if the sale has failed through no fault of such purchaser . . . . but he is not entitled to recover where his own fault prevents the sale."

Medak v. DePrez, 236 Or. 31, 386 P.2d 805, 807 (1963).

Defendant's declaration of marriage intent was the sole cause for the failure of the loan application. If it was made in bad faith, or if her actions were unreasonable under the circumstances, she alone should bear the resulting burden.

POINT FOUR

EVEN WERE DEFENDANT ENTITLED TO A REFUND OF THE EARNEST MONEY, PLAINTIFF SHOULD BE ALLOWED OFFSETS AGAINST IT.

The evidence has established that Plaintiff prepared the condominium in question for Defendant's occupation thereof. To this end, the utility room was remodeled, a refrigerator was secured, and other necessary improvements were furnished. The sums expended by Plaintiff in preparation of the unit for Defendant were $1,823.55.

Defendant also owed Plaintiff $1,000 on a promissor note which the Court found to be due and owing the Plaintiff.

Under the March 18, 1975 Uniform Real Estate Contract, Defendant was to make monthly payments in the amount of $240.00 each, starting May 1, 1975. At the time of Defendant's moving out of Unit #308 on or about December 8 1975, without notice to Plaintiff, Defendant was in arrears as to rent in the amount of $304.00 plus $120.00 for failure to give two weeks notice of intent to vacate.

Even if the rental arrangement were not binding as to the amount due, nevertheless, a "reasonable rental" would be chargeable.

> ". . . the purchaser upon his rescission of the contract must also put the seller in the position he was in at the time of the execution of the

> contract. Thus, the purchaser would be chargeable with the reasonable rental value of the land during the time he held possession plus interest thereon. Tilbury v. Osmundson (1960) 143 Colo. 12, 352 P.2d 102; Kunde v. O'Brian (1932) 214 Iowa 921, 243 N.W. 594; Leavitt v. Blohm (1960) 11 Utah 2d 220, 347 P.2d 190."

Williams v. Dunas, 40 Ill. App. 3d 782, 352 N.E. 2d 266, 269 (1976).

Plaintiff should be allowed to offset the $2,500.00 Earnest Money deposit with the $1,000 promissory note, the value of the refrigerator ($247.21) taken by Defendant from the premises, the unpaid rent $424.00, and the sums expended by Plaintiff in preparing the condominium to suit Defendant's needs $1,576.34.

In a case wherein the recovery of Earnest Money was allowed a prospective purchaser (the Plaintiff of that action), the Court stated concerning the rights of Defendant seller:

> "A second question involves defendant's right to recover for expenditures incurred in altering the house for the plaintiffs in anticipation of plaintiffs' performance of the contract. With respect to this right, ample authority exists supporting the proposition that under proper circumstances a vendor or lessor may recover for work and material expended on his own property in reliance on a void or unenforceable contract for its sale or rental. The basis for the recovery is the prospective vendee's request that the property be suited to his needs. Although the vendees here received no benefit from the expenditure and are relieved from performance of the contract, they are not relieved of their promise, which the law implies,

> to reimburse defendant for the expenditures made in preparing the property for plaintiffs' use. The benefit to defendant's property, if any, is properly a matter in reduction of damages. . . . In addition to the expense of changing the house to suit the plaintiff's tastes, defendant allowed plaintiffs nearly four months' rent-free use of the house. The trial court correctly included in its $2,000 award a reasonable rental value for that period of time."

Abrams v. Financial Service Co., 13 U2d 343, 374 P.2d 309, 311 (1962).

CONCLUSION

The evidence and law both support Plaintiff's contention that the March Real Estate Contract was never replaced by the July Earnest Money Agreement. The judgment in favor of Defendant should be set aside, therefore, with direction that Plaintiff not be required to return Defendant's down payment. Alternatively, assuming a finding that the Earnest Money Agreement replaced the March contract, Plaintiff should not have to return the down payment either because Defendant bargained in bad faith or because there were sufficient offsets against it. Finally, in the alternative, the judgment should be reversed and remanded for a new trial.

Respectfully submitted,

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