

1977

Michio Tomino v. Greater Park City Company, A Utah Corporation : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

MICHIO TOMINO,

Plaintiff-
Respondent,

vs.

GREATER PARK CITY
COMPANY, a Utah
corporation,

Defendant,
Appellant.

APPEAL FROM THE

APPEAL FROM THE
DISTRICT COURT

Honorable

PARSONS, BEHLE & LATHROP
Gordon L. Roberts, Esq.
David S. Dolowitz, Esq.
79 South State Street
Salt Lake City, Utah
Attorneys for Respondent

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MICHIO TOMINO,)	
)	
Plaintiff-)	
Respondent,)	Case No. 14835
)	
vs.)	
)	
GREATER PARK CITY)	
COMPANY, a Utah)	
corporation,)	
)	
Defendant-)	
Appellant.)	

APPELLANT'S REPLY BRIEF

Defendant submits the following brief in response to
certain new matters raised in the Brief of Respondent:

I.

THE TRIAL JUDGE ERRED IN STRIKING DEFENDANT'S
AFFIRMATIVE DEFENSE, AND THIS ERROR IS PROPERLY
BEFORE THIS COURT FOR REVIEW

Defendant's principal contention on this appeal is that
the trial court erred when it struck the affirmative defense from
defendant's original answer. This order was erroneous, whether
the motion upon which it was based was made pursuant to Rule 12
or, as plaintiff now insists, Rule 56. In either event, plaintiff

fell far short of meeting the burden of a party moving for summary disposition of an affirmative defense. In Respondent's Brief, plaintiff refuses to discuss the standards that govern either a Rule 12 or a Rule 56 motion. Plaintiff realizes, it appears, that his showing on the motion did not meet the standards of either rule.

In Appellant's Brief, the showing that plaintiff had to make is discussed in terms of a Motion to Strike, since the Rule 12 designation that plaintiff had chosen for the motion runs afoul of the requirement that pleadings must be "closed" before a motion for judgment on the pleadings is proper, and the purpose of the motion was, in fact, to strike a defense.¹ In Respondent's Brief, plaintiff carefully avoids any discussion of the burden he had to carry on his motion. Instead, he dismisses any consideration of this burden as a "procedural bag of tricks." He is content to point out that his motion was perfectly proper as one for partial summary judgment and leave it at that.

Plaintiff's motion for summary disposition appeared to be a Rule 12 motion. No affidavits were filed with it. Only the opening round of pleadings were before the court. Even plaintiff thought it might be a Rule 12 motion and named it

1. Defendant does not claim as plaintiff implies at pp. 14-15 of Respondent's Brief, that it was error to hear the motion, but only that it was improper to consider it a motion for judgment on the pleadings.

"Motion for Judgment on the Pleading or . . .". However, when it is called to plaintiff's attention that, as a Rule 12 motion, it cannot be for judgment on the pleadings and appears to be a motion to strike, plaintiff asks that Rule 12 be forgotten, and that the motion be considered " . . . for Partial Summary Judgment."

Plaintiff points out there was nothing wrong with the motion as one for partial summary judgment. While this is true, the motion would more appropriately be considered as a motion to strike. Of course, a "Motion to Strike or for Partial Summary Judgment" would have had an odd ring and compelled more careful attention to plaintiff's burden. Professor Moore has stated, "If a motion for summary judgment is based solely on the pleadings, as it may be, then there is no functional difference between that motion and a motion for judgment on the pleadings."

6 J. Moore Federal Practice ¶ 56.09 at 65-166 (2d Ed. 1976).

The same thought would apply to a motion to strike and a motion for summary judgment. Clearly, if a motion denominated as a motion for partial summary judgment is equivalent on the face of the pleadings and the state of the records to a motion to strike, then it must be governed by the law of Rule 12, not Rule 56. If the rule were otherwise, a party could choose the relatively less stringent standards of Rule 56 over the standards of Rule 12 by merely choosing to name his motion one for summary judgment.

Even if plaintiff's motion is considered a motion for partial summary judgment, it did not meet the requirements of Rule 56. This rule requires that before a summary judgment may be granted, the moving party must show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This Court has said, "Such showing must preclude all reasonable possibilities that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor." Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 5, 354 P.2d 559 (1960).

The trial court erroneously accepted plaintiff's position that the Purchase Agreement itself established that plaintiff had no duty to act in good faith to obtain the franchise.² Plaintiff had made no showing that would justify

2. The trial court would have had to determine that the meaning of the contract was "plain and clear" without any knowledge of the circumstances surrounding its formation. The error of this is discussed at pages 16 through 22 of Appellant's Brief. On the same subject, Corbin says,

"It is sometimes said that if the words of a contract are plain and clear, evidence of surrounding circumstances to aid interpretation is not admissible. But some of the surrounding circumstances always must be shown before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." 3 Corbin on Contracts § 542 (1961)

this conclusion in the face of the burden that it must appear to a certainty that plaintiff would succeed in spite of any facts that could be proved in support of the defense,³ or that there was no reasonable possibility that defendant could, given a trial, produce evidence which would reasonably sustain a judgment in his favor. The trial court's conclusion to the contrary disregarded the rule stated by this Court in Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975):

"We accept the correctness of [the] argument that there is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the other's performance or his obligations thereunder; and that one party may not . . . take advantage of the non-performance he has caused." (Emphasis added).

The trial court also ignored the language in the contract concerning the "intention of the parties" which was called to its attention,⁴ the contradictions between its determination and the language of the agreement, and the substantive legal principles governing the construction of contracts of purchase and sale and conditions precedent. These matters are discussed in detail in Appellant's Brief in terms of

3. This is the burden on a motion to strike. Lehmann Trading Corp. v. J & H Stollow, Inc., 184 F.Supp. 21 (S.D.N.Y. 1960).

4. See p. 10, *infra*.

of the standards for a motion to strike. The arguments made there are equally applicable to a motion for summary judgment.

Plaintiff's bare assertion that this motion was not improper as a motion for summary judgment does not establish that the necessary showing was made to have the motion granted. In fact, plaintiff's only statement with respect to "burden," at page 17 of his brief, is that the burden was on defendant to raise issues of fact. Plaintiff does not talk about this subject because he has nothing to say. He clearly failed to meet his burden. This court has said repeatedly that upon a motion for summary judgment the contentions of the party opposing the motion should be considered in a light most favorable to that party, with all doubts resolved against the moving party and in favor of permitting the issue to go to trial. Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966). A somewhat elaborate statement of this burden, incorporating many federal cases is as follows:

"The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law.

The courts hold the movant to a strict standard. To satisfy his burden, the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.

Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting the movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden."

6 J. Moore Federal Practice ¶ 56.15[3] at 56-463-472.

Defendant submits that when plaintiff's motion was granted, substantial doubts remained as to what the truth was, and these doubts were resolved in favor of plaintiff, the moving party. The Purchase Agreement was treated indulgently in support of plaintiff's contentions, and scrutinized closely (or ignored completely) insofar as it supported defendant's contentions. These errors fatally infected the subsequent proceedings.

Plaintiff wants the motion considered one for summary judgment, not because he complied with his burden on such a motion, but because he can impute a certain remissness to defendant's counsel for not having affidavits before the court concerning the Sheraton Franchise. Plaintiff says:

"Therefore, [because the hearing on the motion had been continued several times], counsel for Defendant had four months in which to raise any issue they wanted to raise, in which to file affidavits, in which to submit memoranda (which they did . . .), or to raise any questions they desired." (Resp. Brief at 16).

If it was a Rule 56 motion, these statements make some slight sense, not in relationship to the rules governing the motion, but in a crude practical sense: shouldn't one file affidavits on a motion for summary judgment, even if the opposition has not. If the sense of this is granted, then one can also impute a quality of ungentlemanly conduct to present counsel for even broaching the subject of what standard governs the motion for summary disposition on an affirmative defense:

"[C]ounsel for Defendant, not having represented Defendant at the time of Judge Croft's Summary Judgment, are seeking to raise issues for the first time on appeal in hopes of relitigating, virtually de novo, issues previously handled by other counsel, who, in their own judgment, either neglected or did not feel it appropriate to raise the issues now raised

* * *

. . . now being dissatisfied with the previous handling of the case and with the benefit of 'twenty-twenty hindsight', counsel seeks to raise newborn issues, de novo on this appeal." (Resp. Brief at 14 & 16).

And defendant's present counsel may not appreciate certain facts that were once clearly recognized:

"Both parties went forward on the motion, full-well knowing that the only evidence before the Court was the written contract itself The parties clearly recognized that the issue presented on the motion was one which could be resolved by the contract itself and without the need for additional evidence." (Resp. Brief at 16-17.)

All of this, of course, is nonsense. Defendant's original

counsel had every right to proceed on plaintiff's motion as they did, and to rely on the pleadings, the contract, and the standards governing such motions for summary disposition, without filing an affidavit or submitting extrinsic evidence.

Plaintiff claims that the presentation of the standards governing motions to the attention of this court, raises "new issues on appeal." (Resp. Brief at 14-17). These standards are not "issues", but rules of law governing the disposition of motions to strike or motions for summary judgment. Such fundamental rules governing motion practice cannot be disregarded merely because they are not explicitly argued to the trial judge. They are one of the fundamental premises from which consideration of any motion for summary disposition begins.

Plaintiff also claims that the parol evidence rule was never presented as an issue to the trial court. Again, the parol evidence rule is not an "issue"; it is rule of law for determining whether an issue should be decided only from the contract itself or whether extrinsic evidence may be considered. In this case, defendant pled, as an affirmative defense, that plaintiff failed to use good faith efforts to obtain the franchise. Clearly, the question of whether the parties to the Purchase Agreement intended that good faith be a part of the contract was in issue. It might

be determined, on a more appropriate hearing, that the contract was integrated, but, for the reasons set out in Appellant's Brief, it was not appropriate to make this determination on a motion for summary disposition. Yet it is obvious that such a preliminary determination was necessary to the trial court's ruling.

In fact, the issues raised by the parol evidence rule were presented to the trial judge, although the rule was not called by name. The memorandum filed by defendant in opposition to the motion for summary disposition of its affirmative defense begins as follows:

"THE TERMS OF THE PURCHASE CONTRACT AND THE PLEADINGS HEREIN RAISED AN ISSUE AS TO THE DUTY OF THE CONTRACT PURCHASER TO MAKE A REASONABLE EFFORT TO OBTAIN A FRANCHISE.

"Paragraph 26 of the Contract between the parties provides in its entirety as follows:

"26. It is the intention of the parties that the Inn and all other facilities constructed by Purchaser upon the Subject Property will be operated pursuant to a franchise granted by Sheraton Inns, Inc., which shall identify the same as a Sheraton Inn or by a similar name and shall provide for reservation, supervisory and other services customary with Sheraton Inns, Inc., franchises. [Here the memo sets out the balance of ¶ 26] [Emphasis in original memorandum.]

"The above-quoted language stresses the intention of the parties that a Sheraton Franchise can be obtained and the importance of obtaining such a franchise. It is clear that a reasonable and good faith effort be made by

the purchaser to secure the franchise"
(Emphasis added) (R. 65-66)

clearly, defendant argued that the Purchase Agreement itself showed that plaintiff must use "reasonable and good faith efforts to secure the franchise." Plaintiff, on the other hand, argued that the intent of the parties was clearly that no good faith efforts to obtain the franchise were required. Thus, the intent of the parties was squarely before the trial judge. Whether or not on oral argument the parol evidence rule was mentioned, the evidentiary problems that the parol evidence rule governs were before the trial court.

Plaintiff confuses "issues" with "arguments" when he states that these "issues" were not raised below. In 5 Am.Jur.2d Appeal & Error §546 at 32, it is said:

"The rule requiring adherence to the theory relied on below does not mean that the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue."

See also First Nat'l Bank of Mayfield v. Gardner, 376 S.W.2d 311, 314 (Ky. 1964); Dewey v. City of Des Moines, 173 U.S. 193, 43 L.Ed. 665, 19 Sup. Ct. 379 (1899). The issue below was whether or not the affirmative defense was so clearly insufficient that it could properly be stricken upon a motion to dispose of it summarily. This is precisely the issue presented to this Court.

The cases cited by plaintiff in support of his

contention concerning "new issues on appeal" in fact involved new issues or theories, not arguments, that had not been presented in the trial court. In Meyer v. Deluke, 23 Utah 2d 74, 457 P.2d 966 (1969), the defendant sought for the first time on appeal to interpose a defense of unconscionability or unclean hands, 23 Utah 2d at 78. In In Re Estate of Ekker, 19 Utah 2d 414, 432 P.2d 45 (1967), appellant, a protestant in a will contest, contended for the first time on appeal "that the will is void because of material mistake of fact and law appearing on the face of the will; [and] that the testator was suffering an insane delusion at the time he executed the will;" In both of these cases this Court clearly rejected the consideration of new "issues" or "theories" on appeal. In neither of them nor any other case which defendant could discover has this Court stated that it will not consider arguments in support of an issue raised in the trial court if the argument was not explicitly presented to the trial court.

II.

WHETHER OR NOT THE PURCHASE AGREEMENT IS AN ALTERNATIVE CONTRACT, THE ORDER WAS ERRONEOUS

After dismissing as a "procedural bag of tricks" any consideration of the standards governing his motion for summary disposition, plaintiff deigns to discuss the "merits

of Judge Croft's Order" granting the motion. It must be remembered that this discussion is in reference to an order granting a "Motion for Judgment on the Pleadings or for Partial Summary Judgment," which, of course, presupposes that the moving party had met a stringent burden. Plaintiff would have it assumed, without discussion, that there is no other reasonable possibility than that the parties to the Purchase Agreement intended that the purchaser could "obtain the Sheraton Franchise and proceed with the contract or . . . alternatively . . . not obtain the Sheraton Franchise, reconvey the property, and pay interest . . . to the period [sic] of termination." (Resp. Brief at 24.) Plaintiff relies, too, on the unspoken assumption that even with all inferences from the contract drawn against him and for defendant, and with plaintiff's position on the contract closely scrutinized and defendant's position indulgently treated, it is still quite clear what the truth is: no real doubt exists that any considerations of plaintiff's good faith in the Sheraton Franchise application should be sticken from the proceedings. All this is true, plaintiff contends, because the Purchase Agreement is a contract for alternative performance.

It is necessary for plaintiff to leave certain pre-mises unspoken and ambiguous in this argument. It might be thought, if it were not for other language to the contrary.

that defendant is arguing that an alternative contract cannot have conditions on the alternatives.⁵ This is contradicted by the Utah case plaintiff cites, Bradbury v. Fillingame, 84 Utah 178, 35 P.2d 772 (1934), in which the contract required that one alternative be performed by a certain date. In the Purchase Agreement in our case, these words seem to state a condition to an election to terminate under paragraph 26: "In the event that such franchise . . . is not obtained" Plaintiff does not argue that, if these words state a condition, no promise to use good faith efforts to obtain the franchise is implied. Such an argument would fly in the face of overwhelming authority.⁶

Instead, plaintiff takes a much more daring position: "That such franchise is not obtained" is not a condition at all, but an element of performance:

"In the instant case, under paragraph 26 as it is written, the purchaser may fulfill the contract in one of two ways - he may obtain the Sheraton Franchise and proceed with the contract

5. "Nor is this a case where the purchaser is seeking to avoid liability by refusing to perform a condition precedent Appellant has conveniently ignored the entire concept of alternative performance even though that was stressed and argued extensively before Judge Croft at the time the motion was originally heard." (Resp. Brief at 23.)

6. Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975); see generally, 3 Corbin on Contracts § 570 (1961), "Implied promises to perform a condition or to render co-operation that is necessary to another's performance."

or he may, alternatively, not obtain the Sheraton Franchise, reconvey the property, and pay interest on the total purchase price for the period from the date of the contract to the period of termination." (Resp. Brief at 24-25, emphasis added.)

And again:

"[T]he failure to obtain the . . . franchise was . . . merely an alternative performance under the contract" (Resp. Brief at 25.)

This is a remarkable argument. It is difficult to believe, particularly with the certainty required for summary judgment, that the parties to the Purchase Agreement had any interest in the purchaser abstaining from efforts to obtain the Sheraton Franchise, or acting so as not to obtain it. Why would the seller require that the franchise be obtained if the contract is performed according to its primary purpose but require that it not be obtained if the purchaser wishes to perform pursuant to another alternative. If it is not a condition on the alternative of termination, it is difficult to see why "not obtaining the franchise" is mentioned at all. Why did the parties not say simply, "In the event purchaser gives GPCC notice not later than June 15, 1974, it shall have the right to reconvey the property to GPCC and pay interest." How can a "failure to obtain" a franchise be performance. What reasonable (or rational) parties would include it as an element of performance.

Of course, parties can enter into enforceable contracts that seem irrational or unreasonable, but the

rules of construction require a reading that is reasonable, if possible.⁷ In this action, all that is required to impute to the parties something approaching rationality is to construe the words "franchise is not obtained" to be a condition, not a statement of performance expected. Plaintiff's construction impels to the conclusion that the parties were somewhat daft.

Paragraph 26 of the Purchase Agreement does not fit the concept of an alternative contract very well in any event. The purchaser's first "alternative" - payment of the full purchase price and construction of the Sheraton Hotel - is bargained for in return for the conveyance of the land in fee by the seller. The second "alternative" - reconveyance and payment of interest - is bargained for in return for the return by the seller of all purchase monies paid and the termination of all other obligations under the contract. The seller's obligation is clearly different, depending on the "alternative" chosen by the buyer. The concept of alternative performance, as stated by the authorities, does not comprehend such a difference:

"If, upon a proper interpretation of the contract, it is found that the parties have agreed that either one of the alternative performances is to be given by the promisor and received by

7. See, e.g., Western & Southern Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938).

the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee, the contract is a true alternative contract." Corbin on Contracts § 1082 (1964).

The case of Pearson v. Williams, 24 Wend. 244 (N.Y. 1840), cited by plaintiff, illustrates this principle: the plaintiff conveyed land, a single performance, for the return performance by defendant of erecting two brick houses or, in the alternative, paying \$4,000.00.

Plaintiff points out that there are differences between paragraphs 8 and 26 of the Purchase Agreement. Paragraph 8 makes explicit mention of diligence in the pursuit of certain permits. Paragraph 26 makes no explicit mention of diligence in pursuit of the Sheraton Franchise. Plaintiff claims for this comparison that it leads "to the obvious conclusion that . . . [the parties] knew the language with which to accomplish [the] result" of imposing "some affirmative obligation on the part of the purchaser to use diligence in obtaining the Sheraton Franchise." Defendant submits that with this same linguistic talent the parties could easily have made of paragraph 26 the simple statement of alternative performance that plaintiff claims for it. That they did not do so lends absolutely no credence to the interpretation of the contract urged by the plaintiff. Certainly, there is no logical reason to infer that because a promise or condition is express with respect to one subject,

it must be express with respect to another subject or not exist at all.⁸

III.

THE TRIAL COURT'S CONCLUSION CONCERNING FORFEITURE WAS IMPROPER

Plaintiff enumerates seven "facts" which, he contends, were "present glaring, and totally persuasive" of the proposition that, even if plaintiff is not entitled to invoke paragraph 26, the provisions of paragraph 25 are unconscionable and the sum to be paid under paragraph 26 is about right in any event.

These "facts" are arithmetical and appear on the face of the contract or the pleadings: The purchase price was \$630,000.00; the period between February 7 and June 13 is approximately four months; interest on the purchase price for four months is \$21,024.99; and the purchaser had paid \$125,000.00 toward the purchase price. Plaintiff gets three separate facts from the statement that a deed was never delivered to plaintiff and plaintiff never took possession.

These facts are indeed "clear." But not one of them goes to the question of what "realistic view of loss . . . might have been contemplated by the parties" when the liquidated damages provisions were agreed to. Jensen v. Nielsen, 26 Utah 2d 96, 485 P.2d 673 (1973). Plaintiff

8. See generally, 3 Corbin on Contracts § 564 (1961)

would rather disregard any consideration of what the parties intended when they entered the contract and decide whether liquidated damages are an unconscionable forfeiture on the basis of such criteria as "percentage" and "time lapse." However, this court has said repeatedly that it will not interfere with the bargained-for provisions of a contract to declare a liquidated damage provision a forfeiture, unless it appears that the forfeiture could not reasonably have been within the contemplation of the parties when the contract was entered. There is simply no evidence in the record to indicate what the parties might have had in mind when the liquidated damage provisions were drafted. Without such evidence, the conclusion that this provision is unconscionable is clearly improper.

Even if the conclusion were proper, there is absolutely nothing in the record in this case or any place else to support plaintiff's statement that "Chase brass [sic?] interest on the total purchase price (\$21,000.00) is certainly a sufficient and reasonable award to defendant for any damages it could conceivably suffer." (Resp. Brief at 35.) If, indeed, the liquidated damages provisions are an unconscionable and unenforceable forfeiture, then damages must be determined according to the usual rules (see authorities cited at page 33 of Appellant's Brief.). Plaintiff does not even

attempt to justify the damages of \$21,000.00 as complying with these rules, but makes the simple declaration that it "is certainly a sufficient and reasonable award to defendant for any damages it could conceivably suffer." There is no law that supports such a measure.

VI.

CONCLUSION

The judgment in this case cannot be supported either by arguments that good faith was not required of plaintiff or by arguments that the liquidated damage provisions were a forfeiture. Nor is there any merit in plaintiff's argument that the finding that Development Services acted in good faith is supportable.

However, it is not the judgment that is so much in error as the first order entered in this case. This order striking the affirmative fatally infected the remaining proceedings. The subsequent partial summary judgments were the logical consequence of this order. The presentation of evidence at trial was limited by it. The procedural imbroglios that plaintiff recounts with repressed delight were the result of defendant's attempts to impress into the record the evidence that the trial court improperly decided it did not need to hear.

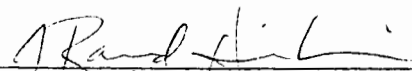
Defendant should be given a fair chance to have

its case heard. The judgment should be reserved.

Respectfully submitted,

PRINCE, YEATES, WARD & GELDZAHLER

By



F. S. Prince, Jr., Esq.

J. Rand Hirschi, Esq.

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing APPELLANT'S REPLY BRIEF to be hand delivered to Gordon L. Roberts and David S. Dolowitz of Parsons, Behle & Latimer, Attorneys for Respondent, at 79 South State Street, Salt Lake City, Utah 84111, this 9th day of September, 1977.

