

1978

Sherman G. Andrew v. Gordon B. Swapp, D/B/A Swapp Real Estate Company And Leonard M. Stillman, D/B/A Stillman Construction; Western Surety Company, A Corporation : Appellant's Brief

Utah Supreme Court

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work = if not worked out by agreement
if not final then Prelim is it.?

IN THE SUPREME COURT
OF THE STATE OF UTAH

SHERMAN G. ANDREW,

Plaintiff-Appellant,

v

GORDON B. SWAPP, d/b/a SWAPP
REAL ESTATE COMPANY and
LEONARD M. STILLMAN, d/b/a
STILLMAN CONSTRUCTION;
WESTERN SURETY COMPANY, a
Corporation,

Defendant-Respondent.

Case No.

~~42,303~~ 15145

APPELLANT'S BRIEF

Appeal from the Judgment of the Fourth Judicial
District Court of Utah County, State of Utah
Honorable Allen B. Sorensen, presiding

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FILED

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IN THE SUPREME COURT
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v

GORDON B. SWAPP, d/b/a SWAPP
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STILLMAN CONSTRUCTION;
WESTERN SURETY COMPANY, a
Corporation,

Defendant-Respondent.

Case No.

42,303 10/1/5

BRIEF OF APPELLANT

NATURE OF CASE

Plaintiff commenced an action against the defendant owner, seller and builder of a home in Provo, Utah. The contract was based on a Uniform Earnest Money Receipt and Offer to Purchase. The defendant failed to complete the house for plaintiff, it was sold under foreclosure to a third party and plaintiff seeks damages for breach of contract and the loss of his bargain under the contract.

DISPOSITION IN LOWER COURT

The case was tried to the court on September 22,

1976, the honorable Allen B. Sorensen, presiding, without jury. The complaint was dismissed as against defendant Stillman but proceeded against defendant Swapp. Plaintiff claimed damages as a result of breach of contract against defendant Swapp. The court found no enforceable contract but out of equity awarded plaintiff \$635.00 special damages and \$10.00 nominal damages together with costs in the sum of \$74.60.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the lower court in failing to find an enforceable contract and to award adequate and proper damages as a result of the breach of contract between the parties; to direct the trial court determine the proper damages as a result of the breach of contract or in the alternative grant appellant's Motion for a New Trial.

STATEMENT OF FACTS

Prior to June 4, 1974, plaintiff met with defendant Swapp, a real estate broker who was building homes. The purpose of the meeting was to see if defendant Swapp would build a house for plaintiff. During the discussions, existing house plans belonging to defendant were examined by the parties on the existing plans. (TR p. 40, 42) After a review and discussion of the plans and the identification of a

specific building lot belonging to defendant Swapp, the parties orally agreed upon the lot, the house plans and the price and terms of the sale. On June 4, 1974, defendant Swapp prepared an Earnest Money Receipt and Offer to Purchase which was signed by Swapp Real Estate as the real estate broker by Gordon B. Swapp, signed by Leonard Stillman as the Seller and by Gordon B. Swapp as the seller and plaintiff Sherman Andrew as purchaser. (Plaintiff's Exhibit No. 1) There was a discussion after the signing of the Earnest Money Receipt and Offer to Purchase between plaintiff and defendant to the effect that plaintiff did not have to pay any down payment or earnest money upon the house in that he could use the money that he presently had in his bank account and available for the down payment, to make additional improvements and perform work upon the house during construction. (TR p. 46, 47, 73 and 74) The total purchase price was \$39,900.00; defendant was to obtain a construction loan to build the house and plaintiff was to obtain a purchase money mortgage upon the house upon completion and pay the house in full under the terms of the contract. Defendant Swapp took the Earnest Money Receipt to Deseret Federal Savings and Loan Association, showed them he had a sale for the house to be constructed and obtained a construction loan to build the house based upon the Earnest Money Receipt. (TR p. 99) Deseret Federal Savings and Loan Association required this of defendant Swapp for the reason that defendant Swapp was then building a number of homes simultaneously and financing

the same through Deseret Federal Savings and Loan Association (TR p. 96 and 97).

Deseret Federal Savings and Loan advanced the construction loan funds to Mr. Swapp and the construction commenced under Leonard Stillman during the month of July, (TR p. 35) The house plans furnished by defendant were in error in that the foundation plan did not fit the house frame plan among other defects in said plans. During construction the contractors consulted with Mr. Andrew in an attempt to solve the problem as to how to correct the discrepancy in the plans and the defects therein. By reason of said defect there was considerable additional expense and time in constructing the home. (TR p. 134-135; Plaintiff's Exhibit No. 4)

Mr. Swapp was building other homes simultaneously through the same contractor, Mr. Stillman and was purchasing materials and using labor on other homes simultaneously with the home being constructed for plaintiff and using the same labor force on all homes. (TR p. 129)

During the construction, plaintiff Andrew checked progress of construction and performed labor and furnished materials himself to the improvement of the house and during its construction in the sum of \$8,196.08. (TR p. 44, 45)

Oral conversations were had between the parties prior to the signing of the contract to the effect that the house would be completed within 120 days of the date of the contract.

but was not done so due to the use of workmen and materials on other houses and the defective house plans furnished by defendant. (TR p. 49, 134-135, 140, 141) Plaintiff made several applications for purchase money mortgage loans to pay for the house, some applications being made to Deseret Federal Savings and Loan Association and one to Western Pacific Financial Corporation. (TR p. 50 and 51) Plaintiff fulfilled the requirements for said loan and the money was available to pay defendant Swapp and pay off the construction loan (TR p. 64). The house was not completed by defendant Swapp prior to its sale at foreclosure. (TR p. 113)

After work was stopped on the house the same was sold upon foreclosure by Deseret Federal Savings and Loan Association, Civil No. 43,309 before Judge Allen B. Sorensen. The house was not completed at the time of the foreclosure sale. (TR p. 81)

During the course of the trial plaintiff on many occasions attempted to put on evidence about the interest rate on mortgage money loan during the time in question, representing to the court that said interest rate and change in interest rate was a portion of the damages to the plaintiff. The court sustained objection to the testimony and did not permit the same to be testified to even though tendered by the plaintiff. (TR p. 83, 86) The plaintiff proffered evidence as to the valid of an equivalent house that is the subject matter between the parties to prove the loss of contract value and the resulting damages but the court refused to accept and hear said

testimony. (TR p. 120, 121)

The house was ultimately completed and sold to John Day in July, 1976. Plaintiff again proffered proof of the value of the house contracted between the parties that sold and the value of it at the time of the sale but the court sustained an objection to the testimony and refused to permit the same. (TR p. 113, 114)

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO FIND AN ENFORCEABLE CONTRACT BETWEEN THE PARTIES.

The evidence is uncontradicted that defendant Swapp, a real estate broker and building, prepared a Uniform Earnest Money Receipt and Offer to Purchase. The document states "This is a legally binding contract, if not understood, seek competent advice." The contract identifies the house to be built, the legal description of the building lot, the sales price, the work to be performed by plaintiff buyer, other consideration and the arrangement for construction financing. That buyer, plaintiff herein would receive title from seller on or before the completion of the home, there being no date specified as to the date of completion. It is uncontested that all of the parties signed the document on the date it bears; that defendant Swapp used said contract to obtain

construction loan with Deseret Federal Savings and Loan Association, and that plaintiff performed labor and furnished materials to said house in the amount of \$8,196.08. That both parties proceeded with the construction of the house based upon said Earnest Money Receipt. The contract is a fully integrated and unambiguous expression of the parties intentions. See Erickson vs. Bastian, 98 Utah 587, 102 P 2d 310.

Parole evidence may not be used to alter the terms of the written contract and particularly prior to negotiations to the signing of the contract. See National Surety Corporation vs. Christiansen Brothers Inc., 29 Utah 2d 460, 511 P 2d 731 (1973).

In the case of Bunnell vs. Bills, 1962, 13 Utah 2d 83, 368 P 2d 597, this court ruled as follows:

"Earnest money receipt and offer to purchase a motor lodge and personal property designated on attached list for a specified price with down payment to consist of purchaser's property at a certain location valued at \$15,000.00 along with a deposit of \$9,500.00 constituted a binding contract and was not merely an agreement to agree."

"A contract can be enforced by courts only if obligations of parties are set forth with sufficient definiteness that it can be performed."

"Fact that part of performance is that parties will enter into a contract in the future does not render original agreement any less binding."

In that case the Uniform Real Estate Contract was expressly declared to be a valid and binding contract. In

that case damages were sought and obtained by reason of the breach of contract but that the amount of damages were contested.

In Amoss vs. Bennion, 1966, 18 Utah 2d 251, 420 P 2d 47, this court affirmed a judgment of the lower court specifically enforcing an earnest money contract between the parties.

It is clear that this court has correctly ruled that an earnest money receipt and offer to purchase is an enforceable contract between the parties and not just an agreement to agree in the future. The facts of the case now pending before this court clearly demonstrate that the earnest money receipt was signed by the parties, unambiguous, and there was good and valuable consideration for the same. The defendant herein is estopped from denying the validity of the contract. In J. P. Koch Inc., vs. J. C. Penney Company, Inc. Utah, 1975, 534 P 2d 903, this court stated as follows:

"Invocation of estoppel does not necessarily involve any contract or agreement between the parties; thus, elements of contract are not involved in claim of estoppel and consideration is not required to invoke estoppel."

"In determining applicability of doctrine of estoppel, test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation."

The facts of the case pending before this court

clear that defendant represented to plaintiff and appellant that he had purchased the home; that he could go ahead and make improvements and expend funds upon the house during its construction and receive credit for the same; that he would acquire the house upon completion of construction for the price designated. Based upon those representations the plaintiff-appellant did in fact make improvements in the sum of \$8,196.08; that defendant failed to complete the house and that it was ultimately sold to a third party under foreclosure. See also, Ravarino vs. Price, 123 Utah 559, 260 P 2d 570.

There was adequate and full consideration for said contract. The labor and materials furnished by plaintiff-appellant were in conformity with the agreement of the parties.

In Gorgoza vs. Utah State Road Commission, Utah, 1976, 553 P 2d 413, this court stated as follows:

"Sufficiency of consideration is not necessarily measured in terms of money value equivalents. If one party asks for and receives something which he would not otherwise be entitled to from the other, that is adequate consideration."

In the case now before this court plaintiff-appellant had \$1,500.00 in the bank available for deposit. The defendant discouraged him from using the same and asked him to use the same on improvements to the house and that said amount would reduce the unpaid balance of his purchase price.

POINT 11

THE TRIAL COURT ERRED IN FAILING TO AWARD
PROVEN AND PROPER DAMAGES.

The contract before the court specifically provided
in part as follows:

"Construction loan will be in the name
of Swapp Real Estate and on or before
completion of home, title will be
transferred to buyers."

There is nothing in the contract specifying the
completion date. There were oral conversations between the
parties prior to the signing of the contract in question
promising the home to be built in 120 days time after
commencement of construction. The home was never completed
by the defendant before it was foreclosed upon and sold to
third party. The breach of this contract occurred when it
became impossible for the defendant to convey the property
to the plaintiff. The foreclosure sale occurred in June of 1976
and was completed by defendant July 23, 1976. (TR p. 113)
All previous discussions between the parties were integrated
into the contract as hereinabove described.

In Hurwitz vs. David K. Richards & Co., 20 Utah 2d
233, 436 P 2d 794, 1968, this court stated that a vendee
either sue immediately for breach of contract or wait for
time of performance. This plaintiff waited for time of performance
the completion of the house. It is true that the lawsuit
commenced in April of 1975, but this was to put defendant

notice of his intention to obtain damages in the event he did not complete and sell the house to plaintiff-appellant. When plaintiff commenced the lawsuit plaintiff was attempting to obtain court's aid in preventing a breach of contract and asked for damages in the alternative in the event specific performance became impossible. (See Complaint, Paragraph 8) At that time the defendant had not actually breached the contract because the time for performance was not yet due and it wasn't finally determined that defendant would refuse to perform the contract.

In Corporation Nine vs. Taylor, 513 P 2d 417, 30 Utah 2d 47, this court held as follows:

"Purchaser of realty should not be heard to complain that vendor does not have clear and marketable title unless it appears that it will be impossible or at least highly unlikely that vendor will be able to perform his contract when he is called upon to do so."

This court in that case declared that there must be impossibility or high unlikelihood of performance before there can be a default or breach. That is the case now pending before this court.

The damages are measured as of the time of the breach of the contract, in this case when performance became impossible. Appellant on several occasions attempted to show and prove express damages on the loss in value of the property at the time of the breach, the increased interest rates that had taken place, the value of the house that was originally sold to

appellant but was later sold to a third party at the time of the completion and the sale to show and prove appellant's loss of bargain in his contract. The court wrongfully refused to permit this testimony and excluded the same.

In Bunnell vs. Bills, 13 Utah 2d 83, 368 P 2d 597, this court expressly held:

"Measure of damages where vendor has breached land sale contract is market value of property at time of breach less contract price to vendee."

"To warrant recovery for breach of contract based on value of property covered by contract, there must be proof of its value or evidence of such facts as will warrant finding of value with reasonable certainty."

In the lower court appellant expressly attempted to put on evidence concerning the market value of the property at the time of the breach to prove the loss from the contract price. The court erroneously refused to allow this evidence. Appellant's position in the lower courts at all times was that his loss of bargain which amounts to the difference between the contract price and the market price at the time of the breach together with additional interest buyer was required to pay for a comparable home.

The evidence of the values and appraisals during the trial were attempted to be placed into evidence on pages 81, 83 and 100 of the transcript and the tendered evidence was as follows:

<u>Date of Appraisal</u>	<u>Value</u>
June 14, 1974	\$39,500.00
October 16, 1974	42,000.00
January 7, 1975	48,000.00

Utah has long recognized the value of appraisals in determining the value of property in condemnation proceedings. See Redevelopment Agency of Salt Lake City vs. Mitsui Investment Inc., Utah, 1974, 522 P 2d 1320.

The evidence is uncontroverted that the value of the property at the time of its sale was at least \$49,000.00 and the sale price under the contract was \$39,900.00 making a loss to the plaintiff of \$9,500.00. Even if the date of the breach were taken as of the date wehn appellatnt commenced his lawsuit, the evidence shows that the value of the house in question was \$48,000.00 (TR p. 83, 100) making damages to the appellant of at least \$9,500.00.

The lower court refused to ackn-wledge these damages and the contract between the parties and awarded \$645.00, plus costs, on an equitable basis and not on a contractual basis. All of which was severely inadequate and contrary to the evidence.

In addition, plaintiff neglected to put on evidence relating to the value of an attorney's fee in this matter. The court was petitioned to permit the hearing of evidence as to the amount of attorney's fees, the contract expressly calling for an attorney's fee. The court wrongfully refused and abused its discretion in failing to permit evidence of the value of

the attorney fee that appellant was entitled to under the contract.

As a direct result of the breach of the contract the defendant herein, plaintiff was required to pay additional interest on a newly acquired home of similar size, price and quality. Appellant respectfully submits that this additional interest required for him to pay is a direct and proximate result of the breach of contract by the defendant.

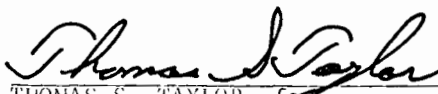
CONCLUSION

The uncontradicted evidence clearly proves there was a binding contract between the parties, that there was adequate consideration for the same. The defendant-respondent used said contract to acquire a construction loan and proceed to build the house accordingly. Based upon this contract, plaintiff expenses labor and materials in the sum of approximately \$9,000.00. Appellant sought either specific performance or breach of contract at the time of commencement of the suit. Pending the action, the house was foreclosed upon and sold to a third party and it became impossible at that point for specific performance and damages was the only alternative remedy.

As a result of the breach of respondent, appellant has suffered damages of \$9,500.00 in the loss of the house and additional damages for increased interest he presently has

pay together with a reasonable attorney's fee.

Appellant respectfully requests the judgment of the trial court to be reversed and adequate and appropriate damages be awarded to appellant.

A handwritten signature in cursive script, reading "Thomas S. Taylor". The signature is written in dark ink and is positioned above a horizontal line.

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