

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 : Brief of
Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHERMAN G. ANDREW,	:	
	:	
Plaintiff-	:	
Appellant,	:	
	:	
vs.	:	Case No. 15,145
	:	
GORDON B. SWAPP, dba SWAPP	:	
REAL ESTATE COMPANY and	:	
LEONARD M. STILLMAN, dba	:	
STILLMAN CONSTRUCTION;	:	
WESTERN SURETY COMPANY, a	:	
Corporation,	:	
Defendant-	:	
Respondent.	:	

BRIEF OF RESPONDENT

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

JUL 27 1977

Clerk, Supreme Court, Utah

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WESTERN SURETY COMPANY, a	:	
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Respondent.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff commenced an action against the defendant, Gordon B. Swapp, as the owner, seller and builder of a home in Provo, Utah. The action was based upon an alleged Uniform Earnest Money Receipt and Offer to Purchase. The plaintiff claimed that the respondent failed to complete his agreement according to the terms of the alleged Uniform Earnest Money Receipt and Offer to Purchase.

DISPOSITION IN THE LOWER COURT

This matter was tried before the Honorable Allen

B. Sorensen, in the Fourth Judicial District Court of Utah County, sitting without a jury. The complaint was dismissed as against the defendant Stillman and was heard as to defendant Swapp. The Court found that there was no enforceable contract upon which plaintiff could recover but did award to the plaintiff out of equity the sum of \$635.00 special damages and \$10.00 nominal damages together with Court costs in the sum of \$74.60.

RELIEF SOUGHT ON APPEAL

It is the position of the respondent that the judgment of the trial court should be affirmed and that respondent be awarded his costs and attorney's fees incurred in responding to this appeal.

STATEMENT OF FACTS

Sometime in the spring of 1974, March through May of that year, the appellant, Sherman Andrew, came into the office of the respondent, Gordon Swapp, and indicated that the respondent had recently completed a home for a friend of Mr. Andrew; and he wanted to know if a home could be built for him on a lot owned by the respondent in the Provo area. Discussion was had between the parties with regard to down

payment and the possible cost of the home. Mr. Andrew indicated that he did not have enough money for a down payment but what he proposed to do was have Mr. Swapp build the home cheaply enough to get a high appraisal so that he could use 80% to 90% of the difference in the two figures for his down payment. Mr. Swapp explained to him that this was strictly against the law; and in his opinion, it could not be done. In order for that to be accomplished, Mr. Swapp would have to certify that the appraisal price was also the sales price which Mr. Swapp was not willing to do.

Over the next two to three months, Andrew was in Swapp's office almost weekly until finally Mr. Swapp indicated that he would build a house on a lot owned by Mr. Swapp; and when the home was finished, and if Mr. Andrew could raise a down payment to secure a loan and pay the purchase price of the home, Mr. Swapp would sell the home to him. Mr. Andrew inquired what type of a house was to be built. Mr. Swapp said that a four level split with a two car garage was to be constructed. Mr. Andrew asked if two changes in the regular floorplan for him could be made and also if Mr. Andrew could pick the color of brick, paint etc. Mr. Swapp agreed to those requests provided that the color of the brick would be compatible with what others would want if Mr. Andrew could not get the loan for the purchase of the property. There

was a verbal agreement between the parties as to that condition. Thereafter, Mr. Swapp went to Deseret Federal Savings and Loan in Provo and inquired concerning another construction loan for the construction of the home in question. Deseret Federal indicated to him that he had seven loans on spec homes in process and that they were reluctant to let him obtain another loan. However, they did indicate that if Mr. Swapp had one pre-sold or one or two of the homes under construction were sold, they would go ahead and allow the construction of the home discussed between Andrew and Swapp. Swapp explained to Deseret Federal what Andrew's proposal was and what Mr. Swapp was willing to do. Deseret Federal indicated that if Mr. Swapp could show some evidence that Mr. Andrew was interested in purchasing the home that they would go along with the financing for Mr. Swapp.

Mr. Swapp contacted Mr. Andrew and asked him to come into his office wherein Mr. Swapp explained the problem to him indicating that if he wanted to sign an Earnest Money Agreement showing that he wanted to buy the home, Mr. Swapp would see if Deseret Federal would let him start on the home without the financing by Mr. Andrew. Mr. Swapp also explained that inasmuch as they did not know what the final price would be on the home to be constructed they would use the appraisal figure and make the adjustment later as to the ultimate price.

He also explained to Mr. Andrew that he could not take any money down and that the details on financing would have to wait until the home was nearing completion so they could establish the final price. Mr. Andrew agreed to this and, thereafter, the Earnest Money Agreement in question in this matter dated June 4, 1974, was prepared. The Earnest Money Agreement was taken to Deseret Federal by Mr. Swapp. When Deseret Federal obtained the agreement, they indicated to Mr. Swapp that as a practical matter the agreement had no value to them; but if Mr. Swapp would have Mr. Andrew come into the office and make an application for a loan and give them opportunity to check Mr. Andrew's credit, they would issue to Mr. Swapp the construction loan, which was ultimately issued on June 17, 1974, for \$29,600.00.

During the time that the home was under the early stages of construction, Mr. Andrew was constantly on the job harassing the workman there and interfering with the construction of the home. Mr. Swapp agreed to make the two changes which the parties had originally talked of. However, many other changes were made by Mr. Andrew without the consent of the contractor or Mr. Swapp. Many of the problems experienced in being able to complete the home were caused by Mr. Andrew's constant interference during the period of construction. Mr. Swapp found that change after change was being

made or requested by Mr. Andrew which was never okayed by Mr. Swapp. Mr. Swapp ran out of money and had to increase the construction loan to \$31,500.00. In January or the early part of February, 1975, Mr. Swapp asked the Andrews to come into his office as he desired to discuss with them the purchase of the home. Mr. Swapp found that Mr. Andrew had never applied for a loan and had made changes in the home totaling several thousand dollars. Mr. Swapp advised Mr. Andrew of the difficulties in construction, of his interference with the home, and of the changes involved, and also advised him of the increased costs in the construction of the home. On April 9, 1975, Mr. Swapp again ran out of money in constructing the home and increased the construction loan to \$38,400. The total amount on the home was due and payable on or before September 1, 1975. During the period of approximately 18 months from the time of the initial discussion between the parties and the time the home was foreclosed against by Deseret Federal Saving and Loan, Andrew never applied for a loan as he promised he would.

No money was ever received from the appellant and no contract was ever signed by the parties with regard to the ultimate construction of the home, completion date, etc. The Court's findings that there was not, in fact, an enforceable contract and that the only recovery allowed by Andrew

against Swapp was based upon equity should be affirmed.

ARGUMENT

POINT I

EVEN WHEN THE PROCEEDINGS TO BE REVIEW ARE IN EQUITY, THE TRIAL COURT'S FINDINGS AND JUDGMENT ARE PRESUMED CORRECT AND SHOULD BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT

The relief prayed for by the respondent herein is based upon equity. Article VIII, Section 9 of the Utah Constitution allows the Supreme Court to review questions of law and fact in equity cases. Crockett v. Nish, 106 Utah 241, 147 P.2d 853 (1944). In an appropriate case, this court can substitute its judgment for that of the trial court, Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974), but it has been made abundantly clear that this does not amount to a trial de novo on the merits. The appellant has the burden of proving by a clear preponderance of the evidence that the trial court's findings and judgment are erroneous. The Supreme Court will review the evidence and all inferences fairly to be drawn therefrom in the light most favorable to the trial court's findings and judgment. Olsen v. Park Daughters Investment Co., 29 Utah2d 421, 511 P.2d 145 (1973).

As the Court stated in Del Porto v. Nicolo, 27 Utah2d 286, 495 P.2d 811 (1972):

It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule, it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict we do not upset his findings merely because we may have reviewed the matter differently, but do so only if the evidence clearly preponderates against them.

It is the position of this respondent that the ruling of the trial court should not be disturbed and that the standard of review should be adhered to in this case. The language in the case of Nielson v. Rasmussen, 558 P.2d 511 (Utah 1976) is applicable in the case before the court:

This court will not disturb the trial court in its findings unless we say as a matter of law that no one could reasonably find as that trial court did.

POINT II

THE TRIAL COURT'S FINDING IS CORRECT THAT NO LEGAL AND ENFORCEABLE CONTRACT EXISTED BETWEEN THE PARTIES.

One of the first principles of contract law is that there be a mutuality of assent in the formation of a contract.

The principle is fundamental that a party cannot be held to have contracted if there

was no assent, and this is so both as to express contracts and contracts implied in fact. There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract.

(F) or a contract to be binding, the parties thereto must have a distinct and common intention which is communicated by each party to the other. 17 Am Jur 2d 354-355, Contracts §18.

The Utah Supreme Court has affirmed this principle on many occasions. In Morgan v. Board of State Lands, 549 P.2d 695 (1976) the court stated:

In order to find any contract, . . . it is essential that it appear there was an express or implied meeting of the minds of the parties on the agreement.

Also, in E.B. Wicks Co. v. Moyle, 103 Utah 554, 137 P.2d 342, the court stated that "The 'mutual assent' essential to a contract requires assent by all parties to the same thing in the same sense, so that their minds meet as to all the terms."

The court indicated in its finding that the plaintiff was entitled to recover against the defendant Gordon Swapp out of equity only. At the trial of the case, the burden was upon the appellant to prove the matters presented to the court. The court found that "The only evidence sufficient to carry plaintiff's burden, thereby allowing the plaintiff to recover judgment against the defendant, Gordon B. Swapp, . . ." was on the basis of equity rather than contract.

The trial court's finding that there was not a binding contract was in accordance with all of the testimony placed before it. The Earnest Money Agreement in question was not a fully integrated agreement incorporating all of the terms and conditions which the parties had discussed. In this instance, it was merely a tool used in negotiations by the parties. In the case of Erickson v. Bastian, 98 Utah 587, 102 P.2d 310 (1940), the court stated that the purpose of a written contract is to put in definite and evidentiary form the terms upon which the minds of the parties have met. Inasmuch as the minds of the parties herein did not meet as to all of the terms, and since the complete terms were never incorporated into the proposed Earnest Money Agreement, the document which appellant claims is a contract is not a definite and evidentiary form of the terms about which the parties should have agreed.

The trial court was correct in concluding that the parties had not reached an agreement which was definite, enforceable and in an evidentiary form. It is obvious from the testimony given to the trial court that it was never the intention of the parties to rely upon the Earnest Money Agreement as the ultimate contract for the purchase of the home which respondent was constructing. The court in Bunnell v. Bills, 13 Utah2d 83, 368 P.2d 597 (1962) stated that a bind-

ing contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms. In the case in chief, neither party intended to be bound by the total and complete terms of the proposed Earnest Money document. Furthermore, in the Bunnell case, the court asked two pertinent questions which should be asked in the present case. First, "Is there substantial evidence to support the trial court's finding that the defendant had manifested an intention to be bound by the terms that were offered by the plaintiff?"; and second, "And if so, in light of the circumstances under which the agreement was entered, can the intention of the parties be ascertained with reasonable certainty?" In the instant case, the trial court answered both of these questions in the negative. That finding should not be disturbed.

"The creation of a contract requires a meeting of the minds of the parties; the burden of so proving is on the party who claims there is a contract." B&R Supply Co. v. Bringham, 29 Utah2d 442, 503 P.2d 1216 (1972). From the evidence before the trial court, the court could not conclude that there had been a meeting of the minds. The court in its findings specifically states that the appellant had failed to meet its burden by way of proof. In addition to the difficulties with regard to the requirement of a meeting

of the minds, the proposed agreement is ambiguous since it does not include details as to financing, completion dates, etc.

Where the offerer, using ambiguous language, reasonably means one thing, and the offeree reasonably understands differently, there is no contract. 17 Am Jur 2d 358, Contracts §22.

In the case before the court, the proposed contract is not only ambiguous but fails to specify many of the terms and conditions required to meet the requirements for a written agreement. In Paulsen v. Coombs, 253 P.2d 621, 123 Utah 49 (1953), the court said that the principle of preserving the sanctity of a written contract only applies when the contract represents the intent of the parties. The court has on many instances stated that in interpreting a contract, the objective is to determine what the parties intended at the time the document was executed. Barrus v. Wilkinson, 16 Utah2d 204, 398 P.2d 207 (1964).

In ascertaining the meaning of the words in a contract, the intention of the parties is controlling; and where it is susceptible to different interpretations, the extraneous evidence is admissible to show intention. Bennett v. Robinson's Medical Mart Inc., 18 Utah2d 186, 417 P.2d 761 (1966). In the document in question, the interpretation of the parties and the intention of the appellant and respon-

dent cannot be specifically ascertained without reference to other evidence.

An examination of the document in question presents a patent ambiguity in the document itself as it is drawn. The Agreement is but a cursory outline of vague negotiations made by the parties. There is no specific date of completion, no specific form of financing, and merely an appraisal of the price of the home yet to be built. Since such ambiguity exists, parol evidence should be admitted to show the intention of the parties.

The intention of the parties to a written contract must ordinarily be determined by an examination of the writing, but if it is ambiguous and the intention of the parties cannot be determined from the writings itself, parol evidence is admissible to show such intention. Milford State Bank v. West Field Canal and Irrigation Co., 108 Utah 528, 162 P.2d 101.

Finally, it may be said that ambiguity, such as exists in the Earnest Money Agreement proposed by the appellant herein, allows the court to look to the total circumstances involved in the case to determine the intent of the two parties. Roy S. Ludlow Investment Co. v. Salt Lake County, 28 Utah2d 139, 499 P.2d 283 (1972).

It is a fact that no money exchanged hands between the appellant and respondent with regard to an Earnest Money payment. Therefore, no good and valuable consideration existed

for the formation of the contract. The plaintiff did not give legal consideration to the defendant. In Gasser v. Horne, 557 P.2d 154 (1976), the court stated that the principal must be bound to give some legal consideration to the other party by conferring a benefit upon them or by suffering a legal detriment at their request. No legal consideration nor detriment was proved to have been given by the appellant in the case at hand.

Finally, the court in its Finding of Fact, No. 4, found that:

. . . plaintiff is entitled to recover against the defendant as stated herein on the basis of unjust enrichment and equity only. The Court, therefore, finds that the plaintiff is not entitled to an award of attorney's fees inasmuch as the Court finds that no recovery is allowed the plaintiff on the basis of contract.

In addition thereto, the trial court refused evidence on this matter on petition since the plaintiff neglected to place such evidence as there might have been before the court at the proper time. The plaintiff claimed that the contract expressly called for an attorney's fee. However, if it is established that there is no contract in fact, then there can be no award of attorney's fee. Furthermore, even if a contract were held to be in existence, the Utah Supreme Court has held that attorney's fees are awardable only if expressly contracted for or provided by statute and if there is evidence


as to the necessity and the reasonableness of such fees.

Walker v. Sandwick, 548 P.2d 1273 (1976). The court's findings that the award to the plaintiff was based upon equity only and not upon contract is sufficient to allow the matter to be resolved on appeal in favor of the respondent.

CONCLUSION

It is, therefore, the position of respondent that the trial court's findings and conclusions should be affirmed; that this court should conclude that no contract existed between the parties upon which the trial court could legally act in favor of the appellant; and in light of the record as it appears, that respondent should be awarded his costs and fees in connection with this appeal.

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify that two true and exact copies
of the foregoing Brief of Respondent were mailed to Thomas
S. Taylor, 55 East Center, Provo, UT 84601, this 27 day
of July, 1977.

_____