

1941

John Christy and Kathryn E. Christy v. Edward L. Guild and Mabel C. Guild : Brief of Appellants

Utah Supreme Court

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6320
No. 6320

In
The Supreme Court
of the
State of Utah

JOHN CHRISTY and KATHRYN
E. CHRISTY, Husband and Wife,
Plaintiffs and Respondents,
vs.

EDWARD L. GUILD and MABEL
C. GUILD, Husband and Wife,
Defendants and Appellants

Appeal From Third District Court, Salt Lake County
Hon. Oscar W. McConkie, Judge

APPELLANTS' BRIEF

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STATEMENT

This is a suit for restitution of the premises described in the complaint, brought under the provisions of the unlawful detainer statute. It is alleged in the complaint that on or about the 24th day of January, 1935 the plaintiffs agreed to sell

to the defendants certain real estate particularly described, for the sum of \$3200. Among other things the contract provided that the defendants were to build certain improvements consisting of a front porch built out of firebrick on a concrete foundation and the remodeling of the rear by application of plaster and California stucco. The contract provided for \$30 monthly payments and it was alleged that the defendants have failed to make the monthly payments and that on the 30th day of April, 1940 the defendants were delinquent on account of monthly payments in the sum of \$130 and were delinquent in the payment of taxes and insurance, aggregating \$297.20.

It was alleged that although on April 30, 1940 the plaintiffs caused to be served on the defendants a notice in writing terminating the contract and had on May 6, 1940 served on the defendants a notice demanding delivery of the premises to the plaintiffs, the defendants had nevertheless failed and refused to deliver possession. The prayer was for restitution of the premises and damages for the rents and profits at the rate of \$75.00 per month. The complaint was amended by attaching the sales agreement, Exhibit A, in evidence. (Ab. 1-8).

The defendants answered, admitting the execution and delivery of the contract of sale described, admitting that they had agreed to make certain improvements and alleging that the defendants had made improvements on the property to the approximate cost and value of \$2,000, and that the plaintiffs had, after execution of the contract, considered the improvements specified in the contract

to be undesirable and had waived the provisions of the contract with respect thereto.

The defendants further alleged that since the date of the contract, they had made 49 payments on the contract aggregating \$1647.67, and that on the 21st day of November, 1939 the parties had made a computation of all payments which had then matured and all charges of every character and had determined that there was due on back interest and taxes, including the 1938 taxes, and on lumber purchased and used in making improvements upon the said building, the sum of \$485.82 and that defendants had delivered to the plaintiff their negotiable promissory note for the said sum, payable in installments of \$35 per month.

It is further alleged in the answer, that on the 31st day of March, 1940, the defendants paid to the plaintiffs the sum of \$80 on the contract and before the institution of suit they tendered to plaintiffs the total amount due upon the contract, exclusive of the said note, to wit: \$130. That they have kept said tender good and now offer to make the payments on the contract to the clerk of the court and to fully comply with the terms and conditions thereof. All other material allegations of the complaint are denied.

The case was tried before a jury, evidence was adduced by the plaintiffs and defendants as to the payments made, as to the circumstances surrounding the execution and delivery of the promissory note, Exhibit 2, dated November 21, 1939, and as to the improvements referred to in the contract. The evidence was in conflict as to the waiver of the contract requirements regarding the building of the front porch and stuccoing of the rear. The

defendants offered proof to the effect that they had, since the execution of the contract, improved the property to the extent of \$2,000. An objection to this offer was sustained by the court.

When both parties rested, the plaintiffs moved to strike all of the testimony of the defendants relating to the waiver of the requirements in the contract for the construction of a front porch and the stuccoing of the rear of the building, and moved the court to direct the jury to find in favor of the plaintiffs and against the defendants as prayed in the complaint.

After hearing argument on the motion, the court stated that he would direct a verdict for the plaintiffs, but that he would give the defendants an opportunity to protect their investment by paying the full balance on the contract, together with \$300 attorney's fees, and court costs, which would not exceed \$35. (Ab. 28-30).

The court stated that he would hold up the entry of any judgment for a period of one week, if the defendants agreed during that period, to attempt to get the money. During the ensuing week, as shown by the colloquy between court and counsel, the defendants endeavored to raise the necessary money but fell short of getting the required amount. The court thereupon granted the plaintiffs' motion to strike all testimony respecting the agreement to the effect that the front porch need not be constructed nor the back porch repaired by the application of stucco and granted the plaintiffs' motion for a directed verdict. (Ab. 32).

A judgment was entered on the verdict, providing for the recovery of the possession of the real estate

and the recovery of \$412.50, representing treble damages. (Ab. 34-35).

ASSIGNMENTS OF ERROR

Defendants assigned as error the sustaining of objections to the following question:

“About how much money did you spend on making the improvements on the inside?”

and in sustaining objections to the following question:

“I will ask you to state whether or not an offer to make accruing installment payments on the contract was made, and if so, what the offer was?”

The court erred in making and entering an order striking all evidence from the record relating to the modification of the contract by oral agreement and conduct. (I, III).

The court erred in directing the jury to return a verdict for the plaintiffs. (IV, VI).

The court erred in imposing a condition on the defendants that they pay in addition to the amount due on the contract, \$300 attorney's fees and court costs not exceeding \$35, and in limiting the time in which the defendants were required to make such payments. (V).

The court erred in considering the equitable issues and in holding as a matter of law that the notice of forfeiture was reasonable and sufficient. (VIII, IX).

The court erred in making and entering Judgment. (VII, X, XI).

ARGUMENT

The assignments of error will be argued under the following headings:

1. The court erred in directing a verdict for the plaintiffs and in making and entering judgment thereon. (Assign. 4, 6, 7, 9, 10 and 11).
2. The court erred in ruling on the evidence. (Assign. 1-3).
3. The court erred in failing and refusing to consider equitable issues. (Assign. 5 and 8).

The pleadings disclose issues upon the following questions:

- (1) The amount delinquent on the contract when suit was brought;
- (2) Whether the contract provisions which required the defendants to make improvements had been waived;
- (3) Whether the contract as modified had been substantially performed by the defendants;
- (4) Whether strict performance of the contract by the defendants had been waived;
- (5) Whether the notice, Exhibit A, was sufficient to terminate the contract, and
- (6) Whether in equity the court should declare a forfeiture of a contract for the purchase of a house and lot upon which more than one-third of the principal amount

has been paid and where \$2,000 in valuable improvements have been placed on the property.

Some of the issues were undoubtedly legal issues which should have been submitted to the jury and some were equitable issues for the determination of the court. This action is for the recovery of specific real property with damages, and falls squarely within the provisions of

Section 104-23-5 of the Revised Statutes of Utah, 1933.

It provides :

“In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must first be disposed of. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury or referred to a referee as provided in this code.”

It has been held by this Court that where a case involves both legal and equitable issues, the court should decide the equitable issues and submit the questions of fact to the jury.

Park v. Wilkinson, 21 Utah 279; 60 P. 945.

It is well settled that where there is substantial evidence both ways on a material question of fact, it is error for the trial court to direct a verdict.

Iverson v. Carrington, 60 Utah 79; 206 P. 707.

2 Bancroft's Code Practice and Remedies,
Section 1442, p. 1908 et seq.

For the purpose of arguing the error of the court in directing a verdict for the plaintiffs, let us for the time being disregard the equitable issues. To make a case, the plaintiffs must show a default by the purchasers for which the contract could, under its terms, be forfeited. The defaults relied upon are set out in the notice, Exhibit A, which is by reference, made a part of the complaint. They are:

- (1) Failure to pay monthly payments totalling \$130.
- (2) Failure to pay taxes and insurance totalling \$297.20.
- (3) Failure to make specified improvements.

Since the suit is based upon these defaults, the questions as to whether defendants are guilty of the defaults charged were material. We shall discuss the evidence as to these items in the order mentioned.

The evidence disclosed that \$130 was tendered to the plaintiffs May 20, 1940. (Ab. 19-20). The notice does not call for payment of additional installments. The defendants offered to pay all installment payments called for by the notice before suit was brought. They testified further that they made a payment of \$80 on March 31, 1940. Other payments made after January, 1940, were as follows:

\$70.00 payment on the note February 14, 1940, (Ex. 3); \$88.15, February 14, 1940,

(Ex. E); \$19.00 February, 1940, (Ab. 17-1S), and \$40.00 March, 1940, (Ab. 17).

Mrs. Christy testified that if another payment of some \$25 was made earlier in March in Salt Lake City, it would be on the contract.

The application of payments upon specific months is not made on the contract. From the beginning, it will be noted by examination of Exhibit 1, payments made at irregular intervals, were credited upon the total purchase price. So, under the evidence, there is no support for the contention of the plaintiffs that the delinquencies covered the months from December to April. They did not. The alleged delinquencies of \$130 covered the entire period from the date of the contract, January 24, 1935, to March 31, 1940. As observed above, the last payment of \$80 was made on March 31, 1940. It is well settled that the acceptance of late and irregular payments on a real estate contract, which provides for monthly installment payments, waives the provision in the contract to the effect that time is of the essence and waives the right of the sellers to forfeit the contract without a timely and reasonable notice.

Leone v. Zuniga, 84 Utah 417; 34 P. (2d) 699.

What is a timely and reasonable notice is a question of fact for the jury.

66 C. J. 724, Note 87.

Williamson Heater Co. v. Whitmer, 183 N. W. 404; 191 Iowa 1115.

By accepting the \$80 payment on March 31, 1940, the sellers waived the right to terminate the contract for failure to pay the March payment of \$30 and the April 1st payment of \$30, there being no agreement as to whether the \$80 payment was to

cover old delinquencies on the contract or current monthly payments. \$80 would pay for two and two-thirds months. The notice of forfeiture was served before the May payment fell due. The question of intent of the parties as to application of payments was one for the jury.

The second issue, the delinquent taxes and insurance, involves the note, Exhibit 2. Although it was at first hotly denied by Mrs. Christy, one of the plaintiffs, that the note had anything to do with the contract of purchase, it was finally admitted that the notations in ink on page 2 of the note covered the delinquent taxes and insurance and other items and that they were placed on the note before it was signed and delivered. (Ab. 14). Although the note states that it was for money loaned, and that it has no connection with the contract of purchase, the notations on both the first and second pages clearly indicate the contrary and they are obviously part of the agreement. The evidence shows payments which were applied on the note. Mr. Guild testified that he had paid approximately \$95 on the note. (Ab. 20).

The evidence is in conflict as to whether the note was given and accepted as *payment* of the delinquent taxes and insurance. If the note was given as *payment* of the delinquent taxes and insurance, there was no default under the contract and the court erred in directing a verdict for failure to pay the items of delinquent taxes and insurance when due. The question as to whether the note was given as payment of an installment or as additional security was a question for the jury.

Rathke v. Dexter Horton Bank, 161 Wash.
434; 297 P. 181.

If the note was not given in *payment* it was certainly a written modification of the contract as to

the time of payment of the delinquent taxes and insurance. The contract contained no provision to the effect that if the \$35 monthly installment payments were not made when due, that the holder of the note, whoever it might be, could declare a forfeiture of the real estate contract. In the case of

Spedden v. Sykes, 98 P. 752, 754,
the Court said:

“But where, not only under the contract, but by subsequent agreement of the parties, notes are given for the payment of the purchase price which, in the absence of any agreement to the contrary, would extend the time of payment over the period of limitation fixed by the statute for recovery upon overdue contracts, thus eliminating the implication or express understanding, as the case may be, that time is the essence of the contract, a more difficult question is presented, for it is upon this theory that forfeitures are sustained. 1 Pomeroy’s Equity, Para. 445; Clark v. Lyons, 24 Ill. 105; Shater v. Niver, 9 Mich. 253; Linscott v. Buck, 33 Me. 530 . . .”

“This Court has held the general doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh and at times unjust remedy of forfeiture, a remedy which is oftentimes too freely granted by those who have taken no account of the misfortunes and disappointments which conditions, unforeseen

and beyond a party's control, have raised as a bar to performance, however honest may be his intent. *Whiting v. Doughton*, 31 Wash. 327; 71 P. 1026. Equity will enforce forfeitures when it is the contract of the parties that it shall be so. But before making its decree it will consider every agreement, every declaration, and every relation of the parties arising out of the contract; and, if there be anything that warrants a finding that the parties have resolved anew, it will so decree."

It was error for the court to refuse to submit to the jury the issue of fact as to the intention of the parties with respect to the note, Exhibit 2.

Another issue of fact, which should have been submitted to the jury, concerns the alleged default in making the improvements. There is testimony by both Mr. and Mrs. Guild that the plaintiffs knew that the front porch had not been built and the back porch stuccoed, over a period of several years, and that Mr. Christy, in the presence of Mrs. Christy had agreed that it was not the style to put front porches on apartment houses and had "sanctioned" the placing of lumber on the back porch in lieu of stucco. (Mr. Guild, Tr. 110-117; Ab. 16-17). (Mrs. Guild, Tr. 136-138; Ab. 21). This was denied by Mrs. Christy. (Tr. 167; Ab. 25-26).

A plasterer, Parley Powell, testified that about one year ago, he had given Mr. Guild an estimate on the stuccoing job. (Ab. 22). Here was a substantial issue of fact on a material matter — one of the alleged defaults upon which a claim of forfeiture was based. It is well settled that a requirement of a written contract may be orally waived.

The Supreme Court of Utah held in the case of *Hogan v. Swayze*, 65 Utah 380; 237 P. 1097, that a written contract required under the statute of frauds to be in writing may be modified and specific provisions waived by oral agreement. This case is directly in point, both on the facts and the law. See cases from other jurisdictions collected:

66 C. J. 726, Note 25.

The appellants assigned as error the order of the trial court sustaining objections to the question:

“About how much money did you spend on making the improvements on the inside?”

The court also sustained objections to the following question:

“I will ask you to state whether or not an offer to make accruing installment payments on the contract was made, and if so, what the offer was?” (Assign. I, II).

The trial court failed to consider equitable issues presented by the pleadings, and the rulings complained of were consistent with that position. The Supreme Court of Utah has held that in actions for the forfeiture of a real estate contract, the court should determine whether, upon the forfeiture of a contract, it will impose a penalty. If, under the circumstances of the particular case, the forfeiture results in a penalty, it has been held the forfeiture provisions would not be enforced.

Croft v. Jensen, 86 Utah 13; 40 P. (2d)

In this case if forfeiture of the contract is permitted it will impose a penalty. The sellers not only got more than one-third of the principal and all the interest, but were enriched by the improvements.

The defendants offered to prove that the house had been remodeled on the inside and that the reasonable value of the improvements was \$2,000. The evidence shows that payments aggregating \$1647.67 had been made. Thus the plaintiffs had put into the property \$3647.67 in improvements and in money paid. Of the money paid, approximately \$1153.00 was credited to principal. The total purchase price of the property was \$3200. The trial court ignored these facts. It declared a forfeiture for failure to pay a single monthly payment. The evidence shows under the plaintiffs' theory only \$160 was due on the installments on the contract on the date the notice of forfeiture was served. The notice called for only \$130, and not any accruing installments, and accordingly, \$130 was tendered. The note, Exhibit 2, provided for monthly payments of \$35 per month, commencing on the 12th day of December, 1939. Edward L. Guild testified that he paid \$95 on the note, Exhibit 2. This would have paid the December payment, the January payment, and \$25 on the February payment. There is no provision in the note to the effect that upon default the real estate contract may be forfeited. Even if there had been such an agreement at the time the notice was served, there was only one full payment, (April 12) and \$10 on the March payment due. Certainly a court of equity should not direct the forfeiture of a contract upon which

more than one-third of the principal had been paid and where \$2000 in improvements had been made, for such slight defaults.

The California case of

Webber v. Herbert, 46 Cal. App. 84; 188
P. 819,

is closely in point. In that case the purchasers had paid \$2000 of a \$4000 purchase price and they thereafter became delinquent in the payment of interest. The sellers promptly took advantage of the default and declared a forfeiture. The trial court ruled that because of equitable considerations the forfeiture could not be claimed and the Appellate Court not only sustained the trial court, but ordered the appellants to pay to the respondents the sum of \$250 as a penalty for a frivolous appeal. The Court said:

“Such a suit is addressed to the equitable powers of the court. Equity has always looked with marked abhorrence upon forfeitures, and it has been said many times that any unquestioned evidence of sharp practices and over-reaching is sufficient to defeat a complainant in equity who has been guilty of such practices. Neither serious consideration nor citation of authority is necessary to support the conclusion that no party to a contract can insist on the performance of a current condition, such as the payment of taxes, and thereafter repudiate the contract for a prior breach of which he must have known. A court of equity does not permit parties who seek its aid thus to blow hot and cold. Neither may a seller for years disregard a provision

making time of the essence of a contract, litte by litte getting half the value of his land, and then, without notice to the buyer who has been lulled to a false sense of security, enforce a forfeiture for a trifling delay in the payment of interest. (Cases cited).''

The only sign of equitable consideration given by the court may be found in the court's statement on pages 28 to 30 of the abstract. The court said that if the defendants would pay the total amount due on the contract and in addition, \$300 attorney's fees, and \$35 in costs, within one week's time, he would hold up the entry of a judgment.

The Supreme Court of Utah has held that in actions of this kind the sellers cannot recover an attorney's fee.

Forrester v. Cook, 77 Utah 137; 292 P. 206.

Leone v. Zuniga, 84 Utah 417; 34 P. (2d) 699.

Yet the trial court not only refused to let the purchasers pay up the defaults or even the entire balance due on the contract, but added a penalty of \$300 attorney's fees. Under the present business conditions such a proposal could not be complied with in the time given. It was stated to the court that the defendants had been able to raise all but "maybe a hundred or \$200 of the amount due." But the court nevertheless directed a verdict for the plaintiffs and entered a judgment for restitution of the premises and for treble damages, which aggregated \$412.50. Thus, although the documen-

tary evidence shows that the defendants paid more than one-third of the principal amount due on a \$3200 purchase price, and the defendants offered to prove that an old building had been turned into an apartment house at the cost of \$2000, thus putting the property in a condition where it would net \$75 a month, the court entered a judgment for \$412.50 damages. This loss of the payment and investment, was an unjust and unconscionable penalty imposed upon the defendants.

It is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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