

2008

Miller Family Real Estate, LLC, a Utah limited liability company v. Saied Hajizadeh, an individual, and Exclusive Cars, Inc., a Utah corporation: Brief of Appellee

Utah Court of Appeals

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MILLER FAMILY REAL ESTATE,
L.L.C., a Utah limited liability company,

Plaintiff/Appellee,

v.

SAIED HAJIZADEH, an individual, and
EXCLUSIVE CARS, INC., a Utah
corporation,

Defendants/Appellants.

Appellate Case

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court
in and for the County of Salt Lake, State of Utah
Honorable John Paul Kennedy

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2008).

ISSUE

The issue in this case is whether, in dismissing the plaintiff's complaint in this matter for failing to first seek mediation, the district court correctly ruled that the dismissal should be "without prejudice."

STANDARD OF APPELLATE REVIEW: The district ruled as a matter of law pursuant to a motion to dismiss the complaint. Accordingly, the district court's rulings are reviewed for correctness. *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742, 744 (Utah Ct. App. 1992). In reviewing the grant of a motion to dismiss, the Court views the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.*; see also, *Hobbs v. Labor Comm'n*, 991 P.2d 590, 592 (Utah Ct. App. 1999).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The defendants in this case are Saied Hajizadeh and Exclusive Cars, Inc. (collectively "Hajizadeh"). After Hajizadeh refused to close on the sale of certain real property ("Property") to Miller Family Real Estate, L.L.C. ("Miller") as required by the parties' contract, Miller filed a complaint (the "Complaint") seeking a decree of specific performance ordering Hajizadeh to convey the Property to Miller in accordance with the written Real Estate Purchase Contract ("REPC") between the parties.

Hajizadeh moved to dismiss the Complaint on the grounds that Miller, prior to

filing the Complaint, failed to send an offer of mediation to Hajizadeh pursuant to Section 15 of the REPC. Upon receipt of the Hajizadeh's motion, Miller immediately offered mediation in writing, but Hajizadeh declined to mediate.

Miller believed that because his cause of action was for specific performance, the express language of the REPC did not require an offer of mediation prior to filing suit. However, Judge Kennedy ruled that Miller could not seek specific performance under the REPC without first making an offer of mediation pursuant to Section 15 of the REPC. He therefore ordered that the Complaint should be dismissed "without prejudice," thereby specifically and expressly allowing Miller to refile the complaint after it had made an offer of mediation to Hajizadeh.

STATEMENT OF THE FACTS

1. Hajizadeh is the owner of certain land and buildings located at 5712 and 5720 South State Street, Murray, Utah (the "Property"). R. 2.
2. Hajizadeh offered and listed the Property for sale with a real estate agent, advertised the Property for sale, negotiated a purchase price for the sale of the Property and then agreed to sell the Property to Miller pursuant to the REPC. Id.
3. The parties agreed to close the sale of the Property on or before April 30, 2007. Id.
4. Miller caused the entire balance of the purchase price to be wired to the escrow account for closing on April 30, 2007. Id.
5. On April 30, 2007, Hajizadeh refused to close and, via a letter from his attorney, informed Miller that he would not close on the sale of the Property as he

contracted to do. Hajizadeh has never offered any legal excuse or defense for his refusal to close. R. 3.

6. Miller filed the Complaint on or about May 8, 2007, seeking specific performance of the REPC. R. 1.

7. Counsel for Hajizadeh, without contacting Miller's counsel, requesting mediation, or discussing a delay in responding to the Complaint in any way, filed a motion to dismiss the Complaint on the basis that an offer of mediation was a condition precedent to filing a lawsuit. R. 45.

8. As stated above, Miller does not believe that an offer of mediation was required prior to filing a specific performance action under the express language of Section 15 of the REPC. However, upon receipt of Hajizadeh's motion to dismiss the Complaint, rather than arguing about the meaning of the language in Section 15, Miller's counsel offered in writing to mediate Hajizadeh's breach of the REPC. R. 75.

9. At a September 6, 2007 hearing on Hajizadeh's motion to dismiss the Complaint, Judge Kennedy ruled that Section 15 of the REPC required an offer of mediation to be made *concurrently with or prior to* the filing of the lawsuit. Judge Kennedy therefore granted Hajizadeh's motion to dismiss, but he expressly indicated that the dismissal was "without prejudice." R. 338 at 22:20-21.

SUMMARY OF THE ARGUMENT

The district court properly concluded that the Complaint should be dismissed "without prejudice." The Utah Supreme Court has clearly stated that failure to comply

with a contractual mediation clause does not result in the case being dismissed with prejudice. *State v. Ison*, 135 P.3d 864 (Utah 2006).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT DISMISSAL OF MILLER’S COMPLAINT SHOULD BE “WITHOUT PREJUDICE.”

Hajizadeh’s contention that the dismissal of Miller’s Complaint should have been with prejudice is completely without merit. Hajizadeh argues that because Miller failed to make an offer of mediation (pursuant to Section 15 of the REPC) within 30 days after Miller noted the existence of a dispute, Miller is forever barred from filing suit against Hajizadeh. Stated otherwise, Hajizadeh contends that Section 15 of the REPC contains the equivalent of a 30-day statute of limitations to offer mediation. This contention is completely without merit as it is not supported by the plain language of the REPC nor is such supported by the relevant case law concerning invoking alternative dispute resolution provisions.

A. HAJIZADEH’S CONTENTION THAT THE DISPUTE RESOLUTION CLAUSE CONTAINS A 30-DAY STATUTE OF LIMITATIONS IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE REPC.

Section 15 of the REPC provided as follows:

15. DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit and the breach or termination of this Contract, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Mediation shall take place within 30 days after notice by either party of the existence of a dispute or claim. Any agreement signed by the parties pursuant to the mediation shall be binding. If mediation

fails, the procedures applicable and remedies available under this Contract shall apply. Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of summons or as otherwise permitted by law, and recording a *lis pendens* with regard to the action; provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. Also the parties may agree in writing to waive mediation.¹ (Emphasis added.)

The language that Hajizadeh attempts to rely on to support his 30-Day Statute of Limitations contention—i.e., “Mediation shall take place within 30 days after notice by either party of the existence of a dispute or claim”—was clearly intended to mean that any mediation shall occur within 30 days after one of the parties gives notice to the other party of its willingness to mediate the relevant dispute. In other words, this provision was intended to prevent the non-requesting party from impeding the requesting party’s right to file a complaint by simply failing to timely respond to an offer of mediation or otherwise stringing out the mediation process.

Such provision does not mean, as Hajizadeh contends, that a party only has 30 days to make an offer of mediation after first noticing a potential dispute between the parties and that failure to do so forever bars a party from bringing any action to enforce the REPC. Such an interpretation would not make sense because it would not allow an opportunity for the parties to attempt to resolve their differences informally or for one

¹ Again, Miller maintains that the next to last sentence of Section 15 allows the Buyer (i.e., Miller) to file a complaint for specific performance before making an offer of mediation, which Miller attempted to do. (See REPC, § 15 at sentence stating “Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court.”)

party to cure the default before the other party was forced to initiate the litigation process. Indeed, a 30-Day Statute of Limitations Period would likely violate the open court provision of article I, section 11 of the Utah Constitution, which guarantees that litigants will have their “day in court.” *Miller v. USAA Casualty Ins. Co.*, 44 P.3d 663, 673 (Utah 2002).

The language at issue in Section 15 has nothing to do with whether the REPC is valid (which it clearly is), or whether Hajizadeh is in default (it is undisputed that he is), it only addresses the sequence in which a party shall exercise its remedies and the speed with which a requested mediation must take place.

B. HAJIZADEH’S CONTENTION THAT THE DISPUTE RESOLUTION CLAUSE CONTAINS A 30-DAY STATUTE OF LIMITATIONS IS NOT SUPPORTED BY THE RELEVANT CASE LAW.

Hajizadeh has failed to cite any case law from any jurisdiction where a court ordered a dismissal with prejudice on the merits merely because one party failed to comply with a contractual mediation clause. Rather, Hajizadeh cites statutes that provide for mandatory mediation in certain situations and, thereafter, attempts to analogize the REPC dispute resolution clause as a “condition precedent” that relieves Hajizadeh of any obligation he had under the REPC and bars any subsequent lawsuit concerning the substantive breach. (*See* Appellant’s Brief at 7-9.) A condition precedent, however, concerns the parties’ fundamental obligations under the contract and not the timing or sequencing of any action addressing a party’s failure to perform his or her contractual obligations. In this case, it is undisputed that Miller performed its material obligations under the REPC and Hajizadeh did not.

Any failure to comply with a mediation requirement would not excuse Hajizadeh's nonperformance and/or forever bar Miller from taking legal action to remedy the same. *See State v. Ison*, 135 P.3d 864 (Utah 2006) (which clearly indicates that failure to comply with a contractual mediation clause does not result in the case being dismissed "with prejudice."). In *Ison* the Utah Supreme Court stated "[a]s a general proposition of contract law, a failure to properly invoke a dispute resolution provision will not excuse a breach of a substantive contract term." *Ison*, 135 P.3d at 873 (emphasis added). The Utah Supreme Court went on to say that "We are aware of no contract law authority ... to support the proposition that a party's failure to pursue an agreed-upon alternative dispute resolution method would excuse the breach that created the dispute." *Id.* at 874.

Miller disputes that it failed to properly comply the subject dispute resolution provision but even if it initially did, it would not be precluded from seeking redress for Hajizadeh's undisputed breach of the REPC by making an offer of mediation and, thereafter, filing a complaint. Thus, Hajizadeh's contention that Millers' Complaint should be dismissed "with prejudice" because Miller failed to properly comply with the dispute resolution provisions of Section 15 was properly rejected by the trial court, and Miller is entitled to have his case heard on the merits.

Similar to the Utah Supreme Court's holding in *Ison*, a number of other courts have also held that that the purported failure to properly comply with a mediation clause does not result in the action being dismissed "with prejudice." *See, e.g., Quick Print of New Orleans, Inc. v. Danka Office Imaging*, 2004 WL 1488656 (E.D. La.) (The court (citing *Texaco Exploration and Production Co. v. AmClyde Engineered Products Co.*,

Inc., 243 F.3 906, 908 (5th Cir. 2001)) stayed the suit pending mediation, but did not dismiss the action); *Haertt Wolff Parker, Inc. v. Howard S. Wright Const. Co.*, 1989 WL 151765 (D.Or.) (finding that when a party files a complaint without first attempting mediation (as required by the agreement), the court has the power to either stay the suit pending mediation, or to “dismiss the . . . claim with leave to refile without prejudice if the disputes are not resolved after referral to [the Mediator].”); *Willis Corroon Corp. of Utah, Inc. v. United Capitol Ins. Co.*, 1998 WL 30069 (N.D. Cal.) (wherein the party filed a court action one day too early (as the agreement between the parties required the party to wait until 30 days had expired after mediation), the court dismissed the action “without prejudice” to its refiling on the merits of the dispute stating “Dismissal without prejudice of a premature action gives force to the binding agreement, and does not alter the parties’ ultimate right to recover.”); *Eastbrook v. Piper Jaffray Companies*, 492 F. Supp 2d 922 (N.D. Illinois 2007) (which held that where the issues are all subject to alternative dispute resolution, “the preferable course is dismissal without prejudice.”). In the face of the foregoing case law (including the controlling Utah precedent of *Ison*), Hajizadeh has failed to cite a single case granting a dismissal with prejudice for failing to properly comply with an alternative dispute resolution clause.

In any event, Hajizadeh's ability to litigate the claim on the merits has not been prejudiced in any way.² Further, when Miller offered mediation in writing, Hajizadeh declined.³ In addition, mediation would not result in any kind of binding decision on the merits because mediation is merely a supervised negotiation. Thus, the trial court properly ruled that Miller was entitled to have its claim heard on the merits and that the Complaint should be dismissed "without prejudice."

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's ruling that the Complaint was dismissed "without prejudice."

DATED this 7th day of September, 2008.

RAY QUINNEY & NEBEKER P.C.



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² In fact, since Hajizadeh's counsel gave notice on April 30, 2007 that his client intended to default on the REPC, it was just as much the obligation of Hajizadeh's counsel under the REPC to request mediation of his breach, as it was the Miller's. (*See* REPC at § 15, which states: "Mediation shall take place within 30 days after notice by either party of the existence of a claim." (Emphasis added).)

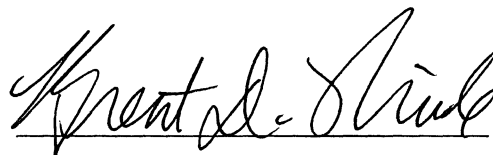
³ Consequently, Hajizadeh legally "waived" mediation within the meaning of the REPC as such states: "... the parties may agree in writing to waive mediation." (*See* REPC at § 15.)

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2008, I caused two copies of the foregoing BRIEF OF APPELLEE to be served, via United States Mail, first-class postage prepaid, on the following:

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