

1978

Ranch Homes , Inc. v. Greater Park City Corporation : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. F.S. Prince, Jr. and Donald J. Wonder; Attorneys for Appellant Bryce E. Roe; Attorneys for Respondent

Recommended Citation

Reply Brief, *Ranch Homes v. Greater Park City Corp.*, No. 15467 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/886

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

RANCH HOMES, INC., :
 :
Plaintiff- :
Respondent, :
 : Case No. 15467
vs. :
 :
GREATER PARK CITY :
CORPORATION, :
 :
Defendant- :
Appellant. :

REPLY BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SUMMIT COUNTY
STATE OF UTAH

Honorable James S. Sawaya, Judge

PRINCE, YEATES & GELDZAHLER
F. S. Prince, Jr., Esq.
Donald J. Winder, Esq.
455 South Third East
Salt Lake City, Utah 84111
Attorneys for Appellant

ROE AND FOWLER
Bryce E. Roe, Esq.
David E. Leta, Esq.
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Respondent

FILED

SEP 29 1978

Clk. Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
I OUT-OF-POCKET EXPENDITURES ARE ITEMS OF SPECIAL DAMAGE. AT THE TIME OF CONTRACTING, GPCC DID NOT HAVE NOTICE OF ANY SPECIAL CIRCUMSTANCES CREATING UNUSUAL RISKS	2
II RANCH HOMES COULD HAVE MITIGATED ITS DAMAGES BY ENTERING INTO A NEW CONTRACT WITH GPCC	10
III CONCLUSION	13

AUTHORITIES CITED

CASES

	<u>Page</u>
<u>American Scale Mfg. Co. v. Zee</u> , 120 Utah 402, 235 P.2d 361 (1951)	9
<u>Beckstrom v. Beckstrom</u> , 578 P.2d 520 (Utah Sup. Ct. 1978)	2
<u>Bunnell v. Bills</u> , 13 Utah 2d 83, 368 P.2d 597 (1962)	2
<u>Capaldi v. Burlwood Realty Corp.</u> , 350 Mass. 765, 214 N.E.2d 71 (Mass. Sup. Jud. Ct. 1966) . .	2-3
<u>Cohen v. Lovitz</u> , 255 F. Supp. 302 (D.D.C. 1966)	2
<u>Cottrell v. Grand Union Tea Co.</u> , 5 Utah 2d 187, 299 P.2d 622 (1956)	9
<u>Globe Refining Co. v. Landa Cotton Oil Co.</u> , 190 U.S. 540 (1903)	6-7
<u>Mendoyoma, Inc. v. County of Mendocino</u> , 8 Cal. App. 3d 873, 87 Cal. Rptr. 740 (1970) . . .	3, 7, 8
<u>Platts v. Arney</u> , 50 Wash. 2d 42, 309 P.2d 372 (1957)	3
<u>Prince v. Peterson</u> , 538 P.2d 1325 (Utah Sup. Ct. 1975)	2, 4
<u>Stafos v. Missouri Pacific R.R. Co.</u> , 367 F.2d 314 (10th Cir. 1966)	9

	<u>Page</u>
<u>Stanspec Corp. v. Jelco, Inc.</u> , 464 F.2d 1184 (10th Cir. 1972)	12
<u>Travelers Indemnity Co. v. Chumbley</u> , 394 S.W.2d 418, 19 A.L.R.3d 1043 (Mo. Ct. App. 1965)	3
<u>Wirz v. Wirz</u> , 96 Cal. App. 2d 171, 214 P.2d 839, 15 A.L.R.2d 1129 (1950)	9

TEXTS

46 <u>A.L.R.</u> 1192, Anno.: "Duty to minimize damages by accepting offer modified by party who has breached contract of sale"	11
72 <u>A.L.R.</u> 1049, Anno.: "Employer's offer to take back employee wrongfully discharged as affecting former's liability".	10
17 <u>A.L.R.2d</u> 1300, Anno.: "Right to recover, in action for breach of contract, expendi- tures incurred in preparation for performance"	3
22 <u>Am. Jur.</u> 2d "Damages" \$ 15	2
\$ 33	10
\$ 34	11
\$ 35	11
\$ 59	4
5 <u>Corbin on Contracts</u> \$ 1014 (1964)	4
\$ 1043 (1964)	12
<u>McCormick on Damages</u> \$ 8 (1935)	3
\$ 140-141 (1935)	4
<u>Restatement of Contracts</u> \$ 330	2
\$ 333	8
\$ 336	10, 11

IN THE SUPREME COURT OF THE
STATE OF UTAH

RANCH HOMES, INC.,)

Plaintiff-)
Respondent,)

vs.)

Case No. 15467

GREATER PARK CITY)
CORPORATION,)

Defendant-)
Appellant.)

REPLY BRIEF

Appellant Greater Park City Company (hereinafter "GPCC") files this reply brief because of two rather surprising arguments made by appellee Ranch Homes in its brief. First, contrary to an admission at trial, Ranch Homes' brief asserts that only the general character of its reliance damages need have been foreseeable. All of the authorities, however, agree that out-of-pocket expenditures are items of special damage. Special damages are not recoverable unless GPCC had notice of the special facts creating the unusual risk at the time of contracting.

Second, Ranch Homes argues in its brief that the doctrine of mitigation of damages does not require it to make another contract with GPCC, even though that contract would result in avoiding any loss. GPCC submits that the better-reasoned authority is contrary. If Ranch Homes could reasonably have mitigated its damages by entering into a new contract with GPCC, the law requires it to do so.

I

OUT-OF-POCKET EXPENDITURES ARE
ITEMS OF SPECIAL DAMAGE. AT THE TIME OF
CONTRACTING, GPCC DID NOT HAVE NOTICE OF
ANY SPECIAL CIRCUMSTANCES CREATING UNUSUAL RISKS

General damages are those which would naturally be expected to result from the type of breach, while special damages result from the circumstances particular to the case at hand. Prince v. Peterson, 538 P.2d 1325 (Utah Sup. Ct. 1975); see generally, Restatement of Contracts § 330; 22 Am. Jur. 2d "Damages" § 15.

General damages in Utah for breach of a land sales contract are the market value of the property at the time of sale less the contract price. Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962). This gives to the vendee the benefit of his bargain. Beckstrom v. Beckstrom, 578 P.2d 520 (Utah Sup. Ct. 1978). The measure of general damages for breach of an option agreement is the same. See Cohen v. Lovitz, 255 F. Supp. 302 (D.D.C. 1966); Capaldi v. Burlwood

Realty Corp., 350 Mass. 765, 214 N.E.2d 71 (Mass. Sup. Jud. Ct. 1966).

Out-of-pocket expenditures are clearly items of special damage. All of the authorities agree. Mendoyoma, Inc. v. County of Mendocino, 8 Cal. App. 3d 873, 87 Cal. Rptr. 740 (1970); Platts v. Arney, 50 Wash. 2d 42, 309 P.2d 372 (1957) ("Preparatory expenses, and expenses in part performance, are . . . special damages"); McCormick on Damages § 8 (1935); 17 A.L.R.2d 1300, 1308-09, Anno.: "Right to recover, in action for breach of contract, expenditures incurred in preparation for performance"; cf. Travelers Indemnity Co. v. Chumbley, 394 S.W.2d 418, 19 A.L.R.3d 1043 (Mo. Ct. App. 1965). Counsel for Ranch Homes also agreed at trial that its expenditures were items of special damage. (R. 314).*/

GPCC argued in its opening brief that the general measure of damages for breach of an option agreement should be the exclusive measure of damages, and that no damages should be awarded for expenditures made. If the Court holds that special damages may be considered for breach of an option agreement, then the "foreseeability" test for special

*/ Counsel for GPCC apologizes for the somewhat confusing nature of the citations to the First and Second Transcripts in its opening brief. GPCC's initial brief would have cited this reference as (1st Tr., 2 at 1). The First Transcript (1st Tr.) starts at R. 193. The first page of the first volume (1 at 2) begins at R. 201, volume 2 (2 at 1) commences at R. 314, and the third volume (3 at 1) starts at R. 464. The Second Transcript (2d Tr.) starts at R. 565. The first page of the proceedings (2d Tr. at 2) commences at R. 569.

damages must be closely examined. GPCC respectfully submits that the Lower Court erred in finding that Ranch Homes' expenditures were foreseeable by the parties (Finding No. 13, R. 166).

Special damages are not recoverable unless GPCC had notice of the special facts creating the unusual risk at the time of contracting. Prince v. Peterson, supra, at 1328 (special damage should be specially "proved by evidence showing such circumstances in the individual case."); 22 Am. 2d "Damages" § 59; 5 Corbin on Contracts § 1014 (1954); McCormick on Damages §§ 140-141 (1935). Only two arguments made by Ranch Homes could be construed as putting GPCC on notice of special risks. First, Ranch Homes asserts in its brief that GPCC had notice of the special circumstances because of a single conversation which occurred on an airplane between principals of the two parties. Second, Ranch Homes asserts that the option agreement itself gave GPCC notice. GPCC submits that both of these arguments are insufficient, and that reasonable minds cannot differ -- it never had sufficient notice of the special circumstances creating the unusual risk at the time of contracting.

In the spring of 1974, Jim Fahs of Ranch Homes and Bob Wells of GPCC were seatmates on an airplane trip to California. (R. 233). Fahs told Wells only that he had a group of investors who wanted to "develop a single-family

residential community," and that they foresaw a real need for an FHA-approved type of subdivision. (Id.). Nothing more specific than this was ever said. Fahs never mentioned that Ranch Homes would definitely seek FHA financing, only that there appeared to be a market in Park City for such a housing project. Fahs never stated that financing would be sought before exercise of the option, or that all of the design work and planning would be completed for all of the phases of the project, including the housing units, prior to the exercise of the option. Also, Fahs never related that Ranch Homes was going to design its housing development in an extraordinary manner with "cluster" housing at the end of cul-de-sac streets, and with unusual planting islands in the middle of each cul-de-sac. Can it be said that GPCC had notice of these and all of the other special and extraordinary circumstances at the time of signing the Option Agreement when Ranch Homes' intent "from the outset", according to Fahs, was that a purchaser could have bought a lot and built his own house upon the property without using their plans? (R. 956-960).

The option agreement itself does not provide any notice to GPCC of the special items of damage which may be suffered by Ranch Homes. It contains typical option provisions, and, upon exercise, it was to serve as a land sales contract. Most of the provisions cited in respondent's brief related to conveyances of the property after exercise of the option.

(See pp. 3-5, 11 and 12 of Ranch Homes' brief). The only restriction upon the use of the property contained in the option agreement is that Ranch Homes, upon exercise of the option, utilized it for the development of a single-family residential homesite for a period of 20 years, unless specific approval is obtained from GPCC to utilize it for some other purpose. (See Plaintiff's Ex. 2, the Option Agreement, at ¶ 10. All exhibits are found at R. 192). The option agreement does not give notice to GPCC of the type of financing, if any, Ranch Homes proposes for the property; the type of design it contemplates for the housing development; the type of expenditures it will incur prior to exercise of the option; or any clue to the other unusual types of expenditures as outlined on pages 5 through 7 of Appellant's opening brief. Whether Ranch Homes chose to exercise the option one week after it was executed without making any expenditures or seven months later after making extraordinary preparations was completely within its discretion. Only Ranch Homes could control what expenditures were to be made, and the option agreement never gave GPCC any notice of special circumstances.

The authorities support the position that mere knowledge of Ranch Homes' intent to develop a single-family housing project cannot impose upon GPCC the legal responsibility to foresee the unusual types of expenditures incurred prior to the exercise of the option. In the leading case of Globe Ref.

Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903), Mr. Justice Holmes had occasion to consider an action for breach of a sales contract. In addition to claiming damages for the difference between the contract price of the commodity (oil) and the market value at the time of breach, plaintiff sued for special damages. The contract was silent as to how plaintiff intended to transport the oil. Plaintiff, however, alleged that both parties understood it would rent tank cars to be filled at defendant's location. Because of defendant's breach, plaintiff claimed it had been specially damaged because of the commitment it made to send the tank cars 1,000 miles to defendant's location.

In affirming the granting of defendant's motion to dismiss, the Court stated:

"It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage [I]t is obvious that the plaintiff was free to bring its tanks from where it liked,-- a thousand miles away or an adjoining yard,--so far as the contract was concerned. The allegation hardly amounts to saying that the defendant had notice that the plaintiff was likely to send its cars from a distance. ***The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

Id. at 545.

Similarly, in Mendoyoma, supra, the appellant sought to recover, inter alia, for \$14,237.33 interest paid on loans which it had

obtained to fund the initial development of its business venture. In excluding this item of special damage, the California Court of Appeals stated:

"In the present case the record is devoid of any evidence that performance of the contract was to be financed through loans. * * * Certainly it cannot be said that appellant's resorting to borrowing, and the subsequent obligation to pay interest, was foreseeable by either party at the time of contracting . . ."

87 Cal. Rptr. at 744.

In the instant case, GPCC had no notice at the time of contracting of the special circumstances creating the unusual risks. If this Court sustains the findings of the Trial Court, it will be equivalent to a pronouncement that all types of expenditures are foreseeable during an option period. It is improbable that GPCC undertook to guarantee performance with such extreme special damages in mind. The option price of \$10,000 was a mere 2% of the sales price of \$510,000. There is simply no evidence to show that GPCC had notice of any special circumstances at the time of contracting.

One final point raised in Ranch Homes' brief needs response. To be recoverable as special damages, out-of-pocket expenditures must not only be specifically foreseeable, but they must also be "reasonably" incurred. Restatement of Contracts § 333. Assuming arguendo that GPCC did have notice of the special circumstances, the testimony of Mr. Trayner and Professor Hashimoto vividly demonstrates that the expenditures made by Ranch Homes were not reasonably incurred. The testimony of these two expert witnesses was the only testimony

outlining the industry standards which should be followed by a reasonably prudent developer after obtaining an option but before exercising it. Their testimony was not impeached, nor was it controverted by the testimony of Ranch Homes' principals or its witnesses. In fact, Max Engeman, executive vice president of First Security State Bank, one of plaintiff's witnesses who was called to explain the customary practices of bankers with respect to the making of real estate loans, confirmed Mr. Trayner's testimony. (R. 901).

Although a trier of fact is vested with broad discretion, it is not without limit. It is a fundamental rule of evidence that the uncontroverted testimony of a credible witness may not be arbitrarily disregarded by the trier of fact. Cottrell v. Grand Union Tea Co., 5 Utah 2d 187, 299 P.2d 622 (1956); Wirz v. Wirz, 96 Cal. App. 2d 171, 214 P.2d 839, 15 A.L.R.2d 1129 (1950). Where the testimony of a witness, whether expert or lay, is uncontradicted and not inherently improbable, and there are no circumstances, such as impeachment, to raise a doubt as to its truth, the facts so proven must be taken as conclusively established and a decision entered accordingly. American Scale Mfg. Co. v. Zee, 120 Utah 402, 235 P.2d 361 (1951); Stafos v. Missouri Pacific R.R. Co., 367 F.2d 314 (10th Cir. 1966).

Based upon the foregoing, GPCC submits that the clear weight and credibility of the evidence points to only

one conclusion -- that it did not have notice of the special facts creating the unusual risks at the time of contracting, and that the expenditures made by Ranch Homes were not reasonable.

II

RANCH HOMES COULD HAVE MITIGATED ITS DAMAGES BY ENTERING INTO A NEW CONTRACT WITH GPCC

Ranch Homes argues in its brief that the doctrine of mitigation of damages does not require it to make another contract with GPCC, even though that contract would result in avoiding any loss. This argument is contrary to the policy behind the doctrine of mitigation and the better-reasoned authority.

The policy behind the rule of mitigation is that a plaintiff must use a "reasonable effort" to avoid his own damages. See generally, Restatement of Contracts § 336 & 22 Am. Jur. 2d "Damages" § 33. Therefore, as a general rule an employee who has been wrongfully discharged is bound to accept his employer's offer of reemployment in the same or a similar position in order to reduce the damages, where such reemployment may be accepted without prejudice to the employee's rights under the original contract. 72 A.L.R. 1049, 1054, Anno: "Employer's offer to take back employee wrongfully discharged as affecting former's liability." In the case of failure by a contractor to deliver goods or render services, it is usually required that the plaintiff through reasonable effort secure other similar goods.

or obtain another workman. Restatement of Contracts § 336, Comment b on Subsection (1). If a reasonably prudent person acting under the circumstances in which the plaintiff found himself would have minimized the claimed losses by entering into another contract with a third party, this may also be shown in mitigation of damages. 22 Am. Jur. 2d "Damages" § 34.

In the instant case, GPCC was unable to perform on the option agreement because of its financial inability to bring a road and utilities to the subject property, which was located at the northerly edge of an area known as the Holiday Ranch. ^{*/} GPCC made several offers of other more accessible property to Ranch Homes. These offers would not have required the expenditure of additional sums of money by Ranch Homes. GPCC proposed to sell these other tracts of land at substantially less than the \$17,000 per acre Ranch Homes agreed to pay for the optioned property.

There is a split of authority as to whether a plaintiff may be required to enter into a new contract with the defaulting party. 22 Am. Jur. 2d "Damages" § 35; 46 A.L.R. 1192, Anno: "Duty to minimize damages by accepting offer modified by party who has breached contract of sale." As Professor Corbin stated:

*/ The facts dealing with mitigation of damages are set out in detail on pp. 22-25 of GPCC's opening brief. Only a concise summary is given here.

"Courts have held that it is not necessary for the plaintiff to make another contract with the defendant who has repudiated, even though he offers terms that would result in avoiding loss. Other courts have held otherwise, however, if no personal humiliation or great inconvenience is involved in making the new contract."

5 Corbin on Contracts § 1043 (1964).

GPCC submits that the better-reasoned authority would deny recovery to Ranch Homes for failing to enter into a new contract with GPCC because it could have reasonably mitigated its damages by doing so. Any other rule would be contrary to the policy of the doctrine in requiring a plaintiff to act reasonably in reducing his damages. There is no valid distinction between the instant circumstances and those requiring an employer to accept an offer of reemployment, those which require a merchant to cover by purchasing other goods or services, and those circumstances which generally require a plaintiff to enter into another contract with a third party. As the Tenth Circuit recently held:

"A damaged party entitled to the benefit of a contract is under a duty to mitigate his damages, and generally speaking his rights are not diminished if the circumstances force him to deal with the party in default."
Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184, 1187 (10th Cir. 1972).

GPCC submits, and reasonable minds cannot differ, that under the circumstances Ranch Homes could have reasonably mitigated its damages by entering into one of several possible contracts with GPCC. Therefore, its failure to do so bars its right to recovery, and the judgment below should be reversed.

III

CONCLUSION

GPCC respectfully submits that it did not have notice of any special circumstances creating unusual risks at the time of contracting, and that Ranch Homes' out-of-pocket expenditures were not reasonable. Therefore, the judgment below should be reversed and a new judgment entered for GPCC.

GPCC also submits that the doctrine of mitigation of damages required Ranch Homes to enter into a new contract with GPCC. Ranch Homes' refusal to do so was not reasonable under the circumstances of the case. Therefore, the judgment below should be reversed and a new judgment entered in GPCC's favor.

Respectfully submitted this 28 day of September, 1978.

PRINCE, YEATES & GELDZAHLER
F. S. Prince, Jr.
Donald J. Winder

Attorneys for Defendant-Appellant

By Donald J. Winder

CERTIFICATE OF DELIVERY

I hereby certify that on this 29th day of September, 1978, I caused to be hand-delivered two copies of the foregoing Reply Brief to Bryce E. Roe, Esq., and David E. Leta, Esq., attorneys for plaintiff-respondent, 340 East Fourth South, Salt Lake City, Utah 84111.

Donald J. Winn