2001

# Clyde Harvey v. Owen L. Sanders, Kenneth E. Coombs, Lunn H. Coombs, Grow West No. 2, Huntington Park, Inc. v. Albert W. Horman, A. Horman & CO. : Reply Brief

Utah Supreme Court


Ralph J. Marsh; Backman, Clark and Marsh; Attorneys for Appellants.
Arthur H. Nielsen; Nielsen, Conder, Hansen and Henriod; Attorney for Respondent.

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

CLYDE E. HARVEY,
*Plaintiff,*

vs.

OWEN L. SANDERS, et al.,
*Defendants,*

KENNETH E. COOMBS, LYNN H. COOMBS, GROW WEST NO. 2, and HUNTINGTON PARK, INC.,
*Third-Party Plaintiffs-Appellants,*

vs.

ALBERT W. HORMAN, d/b/a A. HORMAN & CO.,
*Third Party Defendant-Respondent.*

Case No.
~~13741~~
13731

## APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court of Salt Lake County, Honorable G. Hal Taylor, Judge

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## APPELLANTS' REPLY BRIEF

Because Respondent has chosen to ignore the numerous authorities cited by Appellants and to gloss over the main contentions of Appellants, but instead has raised additional issues not dealt with in Appellants' Brief, Appellants deem it necessary to file this reply to the new issues raised.

## STATEMENT OF FACTS

Appellants reaffirm their statement of facts in their initial brief and make the following clarifications of assertions made in Respondent's statement of facts:

On page 2 of Respondent's Brief it is asserted that Appellants failed to make payments due Intermountain, were therefore in default under Contract "B" and that this default caused the payments under Contract "A" to become delinquent. This assertion is only an allegation of Respondent's Cross-Claim (R. 31-32) which was denied by Appellants (R. 34-36) and is yet to be determined by the court. Furthermore, Intermountain's obligation to the Plaintiff under Contract "A" was an independent obligation and its default under that contract was its own fault and was in no way caused by Appellants.

## ARGUMENT

### THE COOMBS' ALLEGATION OF ANTICIPATORY BREACH OF CONTRACT "B" WAS DENIED BY INTERMOUNTAIN AND PROVED UNTRUE WHEN INTERMOUNTAIN PURCHASED AT THE SHERIFF'S SALE. THE ALLEGATION WAS MADE TO AVOID A MULTIPLICITY OF SUITS AND CONSTITUTED NO ELECTION TO GIVE UP ANY CLAIM TO THE PROPERTY.

The Respondent's sole contention in his brief is that the Coombs, by claiming anticipatory breach of contract

by Intermountain, "elected" to treat the contract as broken and are estopped from changing their minds to claim an interest in the property. This contention is based entirely on the allegation of anticapatory breach in the Coombs' Cross-Claim. The alleged anticipatory breach was based upon Intermountain's failure to make payments as required under Contract "A" which resulted in the foreclosure action by Plaintiff. Had Intermountain lost its interest in the property in this foreclosure, it would have been unable to provide title to the property to the Coombs as required under Contract "B". This would have been a breach of Contract "B" for which the Coombs would have been entitled to recover damages. However, Intermountain denied that it had committed anticipatory breach and, by purchasing the property at Sheriff's sale, obtained title to the property and made it possible to provide good title to the Coombs under Contract "B". Therefore, the claim of anticipatory breach proved untrue. There being no anticipatory breach, the Coombs had no election of remedies to make. Contract "B" is still in effect and the Coombs are not estopped from claiming the property sold to them under the contract.

Horman's reliance upon *Hurwitz* v. *David K. Richard's Company*, 20 Utah 2d 232, 436 P. 2d 794 (1968), is misplaced. That case does not hold "that where anticipatory breach of contract is alleged, the party so alleging has the following options . . ." as claimed by Horman. Instead, by way of dictum, it states that "if there had been an anticipatory breach, Richards had three options

. . ." The court held there was no anticipatory breach because there had been no "positive and unequivocal manifestation" that the contract would not be performed. Furthermore, it stated that a repudiation may be withdrawn before the time for performance arrives unless the other party manifests an election to rescind the contract or materially changes his position in reliance on the repudiation. Likewise, there was no anticipatory breach in the case before the court and therefore the options stated in that case were not available to the Coombs here.

Since the claim of anticipatory breach was premature and proved untrue, the only claim yet to be resolved was the allegation by Intermountain, in its Cross-Claim, that the Coombs were in default under Contract "B" and that Intermountain should be "released from all obligations in law and equity to convey said property." This allegation of default was denied by the Coombs and is yet to be resolved by the court. There has been no trial or other hearing concerning this issue. It was Intermountain that requested the court to terminate the interest of the Coombs. Yet Intermountain has taken no action to have the court rule on this issue. Until this question of default by the Coombs has been tried, and until the interest of the Coombs in the property under Contract "B" has been properly terminated, the Coombs still have an interest in the property of which all purchasers (including Horman) must take notice. The purpose of the Third-Party Complaint against Horman is to declare his deed null and void or at least to subject his deed to any

interest in the property that might eventually be decreed in the Coombs in this lawsuit.

Why then did the Coombs allege anticipatory breach and why are the allegations of breach retained in its subsequent pleadings? The answers should be obvious. The claim was originally made in order to settle all claims in one suit in the event Intermountain did not purchase the property at Sheriff's sale nor redeem it after the sale. The claim of breach would then have been valid. The reason for retaining the damage claims against Intermountain is to protect the Coombs' claim in the event Horman should prevail on this appeal and the property is therefore beyond the reach of the Coombs. But if the interest of the Coombs in the property is still effective and the property can be conveyed by Intermountain, then the damage claims are no longer valid. The Coombs are not attempting to affirm the contract in part and to rescind it in part, as claimed by Horman, but merely to pursue alternative claims which depend upon the outcome of this appeal.

It should be remembered that it was Intermountain that asserted a default in this case. The long delay in this case is the fault of Intermountain for not having pursued its claim of default. And without ever proving its case, and while its own Cross-Claim was still pending, Intermountain attempted to dispose of the property subject to that Cross-Claim. The Coombs are only asking for a resolution of the claims asserted by Intermountain.

If in fact the interest of the Coombs has been forfeited or otherwise terminated, then they have no claim against Horman. But if the interest of the Coombs is still valid and effective, then Horman took his deed subject to that interest.

Because Horman relies entirely on his claim that the Coombs elected to sue for damages, he has failed to respond to the main contentions in Appellants' Brief. It is therefore assumed that he agrees with the arguments that purchase at the Sheriff's sale by Intermountain reinstated Contract "B" and that the recorded Contract "B" and lis pendens effectively gave Horman notice of the interest of the Coombs. He also does not dispute that he had actual notice of the interest of the Coombs. Rather, he chose to ignore these facts, of which he had actual and constructive notice, and took a deed from Intermountain under the mistaken assumption that the Coombs had elected to rescind the contract — which they have never done. For this mistake he has recourse against his seller, Intermountain.

## CONCLUSION

The Coombs' allegation of anticipatory breach did not establish such a breach. In fact the lack of such a breach has been established. They, therefore, had no remedy to elect. They have waited for Intermountain to prove its claim of default and until that, and proper

termination of the contract are proved, they retain their interest in the property. Since Horman had both actual and constructive notice of the interest of the Coombs, his deed should be made subject to that interest, whatever the court may determine that interest to be.

Respectfully submitted,

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