

1986

Wendell L. Butcher and Irene B. Butcher v. Frank K. Gilroy and R.C.H., Inc., a Utah Corporation : Brief of Appellant

Utah Supreme Court

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs and
Appellants,

MS.

FRANK K. GILROY and
R.G.H., INC., a Utah
Corporation.

Defendants and Respondents.

Supreme Court
No. 20593.2

860111 - CA

APPELLANTS' BRIEF

Appeal from the Order of the
Third Judicial District Court
in and for Salt Lake County,
State of Utah
Hon. John A. Rokich, Judge

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Attorneys for Respondents

JUN 21 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

WENDELL L. BUTCHER and	:	
IRENE B. BUTCHER,	:	
	:	
Plaintiffs and	:	
Appellants,	:	
	:	
vs.	:	Supreme Court
	:	No. 20593
	:	
FRANK K. GILROY and	:	
R.G.H., INC., a Utah	:	
Corporation.	:	
	:	
Defendants and	:	
Respondents.	:	

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Attorneys for Respondents

PARTIES

PLAINTIFFS: WENDELL L. BUTCHER and IRENE B. BUTCHER

DEFENDANTS: FRANK K. GILROY and R.G.H., INC., a Utah
Corporation

Attorneys

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APPELLANTS' BRIEF

STATEMENT OF ISSUES PRESENTED UPON APPEAL

This is an action for an accounting and review of the reasonableness of the terms of the sale under a settlement agreement where the proceeds of the sale of certain real estate were to be divided 32% to appellants and 68% to respondents.

DISPOSITION OF THE LOWER COURT

The lower court granted respondents' motion to dismiss appellants' complaint upon the grounds that the statute of limitations had run. From the order dismissing appellants' complaint, this appeal was taken.

SUMMARY OF THE ARGUMENT

The lower court dismissed appellants' action for an accounting and review of the reasonableness of the terms of sale of certain real property on the grounds that the statute of limitations had run. Appellants challenge this ruling upon the grounds that where one mutual obligor received the proceeds from the land sale within the statute of limitations time period, it extended the statutory time period to run another six years from receipt of the sale proceeds. This cause of action was initiated within the extended time period of the statute of limitations, and therefore the lower court's ruling should be reversed and remanded for an accounting and review of the reasonableness of the terms of the sale.

STATEMENT OF FACTS

The following facts alleged in appellants' complaint are deemed admitted for purposes of the appeal.

On October 18, 1972, the parties entered into a written settlement agreement concerning a dispute over 34 acres abutting the Mountain Dell Golf Course owned by the Butchers and wrongfully conveyed by the Butcher's attorney, Peter Lowe, to respondents.

The settlement agreement required both appellants and respondents to use their best efforts to sell the 34 acres and divide the proceeds proportionately. In the interim, appellants were to quit-claim to respondents title to the property and were to attempt to acquire subdivision approval within the next thirty-six months to sell the property. If appellants could not obtain subdivision approval, respondents Gilroy had the obligation to sell the property during the next eighteen months, which period ended April, 1986. Upon the sale of the property both appellants and respondents were to mutually account to one another and apportion the proceeds.

Both appellants and respondents repeatedly tried to sell the property. Finally, without accounting to or notifying appellants as to the terms of the sale, the Gilroys sold the property in March, 1982, within six years from the date of last performance specified in the agreement. Respondents then failed to account to or apportion the proceeds received. This action was then brought for review of the terms of the sale and an accounting to insure that the respondents acted in good faith and sold the property for fair market value.

ARGUMENT

POINT I

CAUSE OF ACTION NOT BARRED BY STATUTE OF LIMITATIONS

An action based upon a written contract must be commenced within six years after the cause of action occurred; see Section 78-12-1, Section 78-12-32(2), U.C.A., 1953, as amended. Thus, the cause of action had to be initiated on or before April, 1982 (Six years after the date of last performance on April, 1976), unless respondents engaged in some type of conduct to extend the statutory period.

Under Section 78-12-44, U.C.A., 1953, as amended, if respondents received payments of any part of the principal or interest due under the contract, the statute of limitations runs anew from the date of receipt of payment. Section 78-12-44, U.C.A., 1953, as amended, reads as follows:

" 78-12-44. Payment-acknowledgment-promise to pay extends period. In any case, founded on contract, when any part of the principal or interest shall have been paid . . . an action may be brought within the period prescribed for the same after such payment, . . ."

Respondents Gilroy received payment for the property under the contract in March, 1982. Receipt of this payment extended the statute of limitations for another six years from the date of payment - i.e. March, 1988. Suit for an accounting and review of the terms of sale was brought in 1984 well within the extended period of time since the contract in question required both the appellants and respondents to mutually attempt to sell the property and then account to one another for the profits received.

As a consequence, the statute of limitations began to run anew the moment the cause of action for an accounting and review of the sale terms arose when the funds were received; see Frederickson v. Knight Land Co., 667 P.2d. 34 (1983) where the Utah Supreme Court indicated that on a contract to mutually account for proceeds received from the sale of the land, the statute of limitations begins to run again on the date of the breach for failure to account for funds received from the land sale.

Respondents sold the land in question in March, 1982, within the statute of limitations, and failed to have the terms of the sale approved by or account to appellants for their portion of the sale proceeds. As a consequence, a breach occurred within the statutory time period and restarted the statute to run from the date that respondents received the funds. As suit was brought within six years from the date of this breach, the statute of limitations does not bar the action. The motion to dismiss was therefore, improperly granted, under the Frederickson case criteria reaffirming the mutual accounting doctrines contained in Toponce v. Corinne Mill and Stock Company, 6 Utah (1890) affirmed 152 U.S. 405, 38 L. Ed. 493, 14 S. Ct. 632.

Based on the foregoing case law, and the fact that respondents repeatedly promised to try and sell the property to prevent appellants from suing, they are estopped from raising the defense of the statute of limitations; see Rapp v. Rapp, 218 Cal 505, 24 P.2d. 161 (1933).

There is also a question of fact as to whether the Gilroys,

who maintain a Nevada residence, were absent from the state to prevent the tolling of the statute. Respondents extended stays in Nevada would delay the tolling of the statute of limitations, until their return under Section 78-12-35, U.C.A., 1953 as amended; see Snyder v. Clune, 390 P.2d. 915, 15 U.2d. 54 (1964).

In summary, the cause of action was initiated within the extended statute of limitations time period, and the lower court erred as a matter of law in granting the motion to dismiss.

CONCLUSION

For the foregoing reasons, appellants respectfully request the court to reverse the lower court's order and remand the case for an accounting and review of the reasonableness of the terms of sale. Respondents are seeking a windfall of the fair market value proceeds which were to be divided 32% to appellants and the balance of 68% to respondents. Respondents have converted the proceeds of the sale and should not be rewarded for their clandestine bad faith actions.

DATED this ^{21st}~~23rd~~ day of ^{June}~~May~~, 1985.

Respectfully submitted,

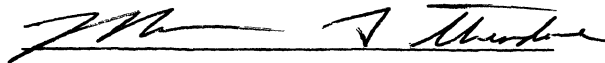
By *M. G. Theodore*
Marcus G. Theodore
Attorney for Appellants
M. G. Theodore

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Appellants' Brief were served by mailing the same, first class, postage prepaid, this 21st day of June, 1985 to each of the following:

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APPENDIX

Order signed by Judge John A. Rokich, 12 March,
1985.

Order signed by Judge John A. Rokich, 12 March,
1985.

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CL. G. CLERK

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WENDELL L. BUTCHER and)	
IRENE B. BUTCHER,)	ORDER
)	
Plaintiffs,)	
)	
v.)	
)	
FRANK K. GILROY and R.G.H.,)	Civil No. C 84-1826
INC., a Utah corporation,)	Judge John H. Rokich
)	
Defendants.)	

* * * * *

Defendant R.G.H., Inc.'s motion to dismiss came on regularly for hearing before the Honorable John H. Rokich on Monday, February 25, 1985 at 10:00 o'clock a.m. Plaintiffs were represented by Marcus G. Theodore and defendant R.G.H., Inc was represented by Steven L. Tyler. Based upon defendant's motion and the arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that the action filed against defendant R.G.H., Inc. is hereby dismissed without prejudice because the complaint filed herein fails to state a claim upon which relief can be granted.

DATED this 12 day of _____, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

By John A. Rokich,
Deputy Clerk Third District Court Judge

Approved as to Form:

By Marcus G. Theodore,
Attorney for Plaintiffs

Date _____

By Steven E. Tyler,
Attorney for Defendants

Date Feb. 27, 1985

FILED
MAR 13 4 08 PM '85
H. D.
BY [Signature] CLERK

Attorneys for Defendants

STATE OF UTAH

* * * * *

ORDER

v.

Civil No. C 84-1826
Judge John H. Rokich

* * * * *

The motion of defendants Frank K. Gilroy and R.G.H., Inc., to dismiss the above-titled action for failure to state a claim upon which relief may be granted by reason that all claims made therein are barred by the appropriate statute of limitations, came on regularly for hearing before the Honorable John H. Rokich on Monday, February 25, 1985 at 10:00 o'clock a.m. Plaintiffs were represented by Marcus G. Theodore and

defendants were represented by Steven E. Tyler. Based upon the arguments of counsel and the Court's review of the memoranda filed herein, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. All claims alleged in the plaintiffs' First Amended Complaint are hereby dismissed with prejudice because they are barred by the applicable statute of limitations. See Utah Code Ann., Section 78-12-23 (Repl. 1977).

2. In the event that plaintiffs have not filed an Amended Complaint stating a claim against defendants which is not barred by the statute of limitations on or before March 11, 1985, this action is dismissed with prejudice.

DATED THIS 12 day of Feb, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

[Signature]
John H. Rokich,
Third District Court Judge

Approved as to Form:

By [Signature] Date _____
Marcus G. Theodore,
Attorney for Plaintiffs

By [Signature] Date Feb. 27, 1985
Steven E. Tyler,
Attorney for Defendants