

1988

Lawrence C. Kay, Joy Kay, Robert L. Kay and Teresa Kay v. Summit Systems : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

A10

DOCKET NO. 880234-CA

LAWRENCE C. KAY, JOY
KAY, ROBERT L. KAY,
and TERESA KAY,

Plaintiffs-
Appellants,

vs.

SUMMIT SYSTEMS, INC.,
a corporation; VAL E.
SOUTHWICK; et al.,

Defendants-
Respondents.

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CA

Case No. 870121

Category 14b

APPELLANTS' REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT OF
UINTAH COUNTY, STATE OF UTAH, THE HONORABLE
RICHARD C. DAVIDSON, PRESIDING.

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ATTORNEYS FOR DEFENDANTS-RESPONDENTS

FILED

JAN 5 1988

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Defendants-	:	
Respondents.	:	

APPELLANTS' REPLY BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS

Contrary to the statement on page 1 of respondents' brief, appellants (Kays) appealed from all portions of the Ruling granting Defendants' Motion for Summary Judgment and dismissing Kays' complaint. Although certain portions of that ruling were not addressed in appellants' initial brief, the correctness of those portions turns on the Court's ruling on the portions which were specifically addressed. Appellants are entitled to a reversal for trial on the merits on all issues.

ISSUES PRESENTED

Appellants object to respondents' (defendants') assertion, set forth in paragraph 1 of respondent's statement of Issues Presented, that appellants have "misinterpreted" testimony not previously presented to the trial court. Respondents do not

identify any specific testimony which they claim was misinterpreted. Appellants readily acknowledge that their interpretation of the testimony may be different from that of respondents. On a motion for summary judgment, however, it is very proper for appellants to draw all inferences from the testimony in the light most favorable to their position. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

STATEMENT OF THE CASE

Appellants object to the statements set forth in the first two paragraphs of the "Statement of the Case" section of respondents' brief, to the effect that appellants' problems are due solely to an economic decline in Vernal, Utah. Respondents cite to no evidence in support of their assertions, and none was presented to the trial court. More importantly, the evidence does establish that in spite of any economic decline which may have existed, the Kays obtained a valid offer for the purchase of the entire subdivision. (R. 504, 529.) The only factor which prevented Kays from accepting that offer was not the economy but rather respondents' failure to arrange for the reconveyance of lots in accordance with their contractual obligations.

STATEMENT OF FACTS

Kays object to the assertion, in the first paragraph of the Statement of Facts section of respondents' brief (page 6), to the effect that only the facts set forth by defendants were "established" before the lower court. Facts are not

"established" on a motion for summary judgment in the traditional sense of the word. Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). Both in the trial court and in this court, the statements in the record are viewed in the light most favorable to the party opposing the motion. Briggs v. Holcomb, 740 P.2d 281, 283 (Utah App. 1987). Those statements, together with all reasonable inferences from those statements, constitute the "facts" which are "established" for purposes of summary judgment.

Contrary to these well established principles, defendants have cited to this court only those facts and the inferences therefrom which are favorable to defendants, and further claim that the record is devoid of any other facts or inferences. As shown below and in the Argument which follows, several "facts" cited by defendants are inaccurate or were disputed. In addition, defendants omit several facts which were established by the record. Finally, defendants draw inferences from the facts only in their favor.

Defendants correctly assert in paragraph 2 of their Statement of Facts that Kays had applied for loans from three banks prior to seeking financing from Summit Systems, Inc. ("Summit"). The record cited to the trial court by Summit, however, further supports the inference that the decision of these banks to not extend financing was not related to any risks inherent in the transaction, and that some of the bank officers made affirmative statements as to the viability of the project.

The banks simply did not want to commit that amount of money to the Vernal area. (R. 431-32.)

In paragraph 5 of the Statement of Facts section of their brief, defendants assert that Summit paid certain closing and other costs beyond what would be expected for a "typical" loan transaction. Although defendants made this assertion before the trial court, Kays specifically disputed the assertion, and pointed out that the \$139,000.00 discount was more than adequate to cover the costs of these expenses paid by Summit. (R. 510.)

Defendants failed to include in their Statement of Facts, and incorrectly assert that the record did not establish, the fact as set forth in Kays' initial brief that Kays had been advised and had understood up until the time of closing that the discount would be approximately 10% and the interest rate would be 10%. (R. 499, 524.) They did not learn until closing that the discount would be approximately 17% and the interest rate would be 17%. (R. 500, 525.) Although Kays objected to the discount rate and interest rate, they had no reasonable alternative at that time but to sign the loan documents. (Deposition of Lawrence Kay, June 12, 1986, at pages 93-94.)

The record also "establishes" that at closing Val Southwick, president of Summit, advised and assured plaintiffs that the appropriate number of lots would be reconveyed upon the calling of the letters of credit, the same as with other payments of principal. (R. 500-01, 525-26.)

In paragraph 12 of their Statement of Facts, defendants refer to a second written request for release of lots. Defendants' Statement of Facts fails to acknowledge, and incorrectly asserts that the record did not establish, that plaintiffs made a written request for the release of 12 lots on January 10, 1985. (R. 503-04, 528-29.) In addition, plaintiffs made an additional (oral) request for the release of the lots about May 1, 1985, in response to which Summit promised to reconvey the lots. The June 2, 1985, letter was merely a memorialization of those prior discussions and agreements. (R. 504, 529.)

Although the issue is not material, the record indicates that the Complaint in this matter was filed on February 12, 1986, not on March 25, 1986, as asserted by defendants in paragraph 19 of their Statement of Facts.

SUMMARY OF ARGUMENT

Defendants assert that plaintiffs can not on appeal rely on evidence which was in the record but not brought to the attention of the trial judge. This Court need not reach that issue, because the evidence which was called to the trial court's attention establishes the existence of material issues of fact precluding summary judgment. If the Court does reach that issue, Rule 56(c) of the Utah Rules of Civil Procedure clearly provides that summary judgment is precluded if any disputed issues of material facts appear in the depositions, affidavits, and other materials on file. Although plaintiffs of course can not introduce new evidence on appeal, they may rely

on any statements in any of the depositions, affidavits, or other materials which were on file with the trial court, even if the existence of those statements was not specifically called to the trial court's attention.

Summary judgment on the accord and satisfaction issue was improper in any event because there exist disputed issues of material facts, even if the inquiry is limited solely to those portions of the record called to the attention of the trial court.

The contract between the parties required defendants to reconvey an appropriate number of lots upon receiving any payment of principal, including payments resulting from the calling of letters of credit. Such a construction is not unreasonable as contended by defendants, and defendants' proposed construction of the contract would be equally unreasonable. To the extent the contract was ambiguous, there existed a genuine issue of material fact as to what the parties intended by the contract.

The assertion that plaintiffs accepted the benefits of the contract and thereby waived any claim to seek reformation of the contract is raised for the first time on appeal, and should not be considered by this court. Similarly raised for the first time on appeal is the assertion that plaintiffs' claims for reformation are barred by Summit's assignment of the beneficial interest under the trust deed to various allegedly bona fide purchasers.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS PRECLUDED IF ISSUES OF FACT APPEAR IN ANY MATERIALS ON FILE, NOT JUST IN THE MATERIALS CITED TO THE TRIAL COURT.

Defendants assert on page 13 of their brief that "[i]n their appellate brief, the Kays rely heavily upon deposition testimony of the Kays and others which was never presented to the lower court." Defendants assert that this is improper.¹ This Court need not reach this issue. Kays acknowledge that they have cited to this Court certain deposition testimony which was not specifically called to the attention of the trial court prior to the ruling on the motion for summary judgment. This "extra" deposition testimony, however, merely highlights the existence of disputed issues of fact. Those disputed factual issues are also apparent from the affidavits and depositions which were cited to the trial court prior to its ruling. See Point III below.

Appellants may, nevertheless, rely on appeal on statements in the record which were not specifically called to the attention of the trial court. The test of whether summary judgment is appropriate is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

¹Defendants advisedly do not challenge the fact that the statements in the depositions clearly raise factual disputes. Defendants apparently concede that the summary judgment must be reversed if the deposition testimony is considered, and seek to avoid that result solely by objecting to the consideration of that testimony.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c) (emphasis added). This Court should apply the same standard on review. Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). See also Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987).

The critical inquiry, therefore, both at the trial level and before this court, is whether the depositions and other materials on file evidence disputed issues of material facts. See Conder v. A. L. Williams & Associates, Inc., 739 P.2d 634, 641 (Utah App. 1987) (Orme, J., concurring). If the depositions on file establish the existence of a disputed issue of material fact, a grant of summary judgment must be reversed, even if that portion of the deposition was not specifically called to the attention of the trial court.

In so asserting, appellants acknowledge that it would have been preferable to have called the trial court's attention to the portions of the deposition which establish the existence of disputed factual issues.² Appellants' failure does not,

² Appellants, through their present counsel, did call the portions of the deposition testimony to the attention of the trial court after the grant of summary judgment, and requested the court to vacate the judgment pursuant to Utah R. Civ P. 60(b). (R. 977-79.) Because Judge Davidson, who granted the summary judgment, had been appointed to the Court of Appeals, plaintiff's motion for an order vacating the grant of summary judgment was heard by Judge Boyd Bunnell. Judge Bunnell denied the motion on the grounds that it was in the nature of an appeal. (R. 1097-1100.) But see 58 Am. Jur. 2d New Trial § 184 (1971) (successor judge has full authority to hear and determine

however, abrogate the clear directive of Rule 56(c) that the propriety of summary judgment is governed by all material on file. Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 930 (1st Cir. 1983). The principle was explained by one federal court as follows:

It is bootless to contend, as defendants did on oral argument, that, although the deposition was filed in the record, it could properly be ignored by the judge in ruling on a motion for summary judgment because plaintiff's counsel did not in some manner bring it directly to the judge's attention. Fed.R.Civ.P. 56(c) provides in part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The rule does not distinguish between depositions merely filed and those singled out by counsel for special attention.

Higgenbotham v. Ochsner Foundation Hospital, 607 F. 2d 653, 656 (5th Cir. 1979).

Furthermore, regardless of whether it was called to the attention of the trial court, the deposition testimony which undisputedly establishes the existence of a material factual issue has now been cited both to the trial court and to this

motion for a new trial).

court. It would exalt form over substance, and unfairly penalize the Kays for the conduct of their counsel, to ignore those facts:

Having read [the record], we cannot ignore what we have found. "Appellate courts should not look the other way to ignore the existence of genuine issues of material facts"

Nicholas Acoustics & Specialty Co. v. H & M Construction Co., Inc., 695 F.2d 839, 846 (5th Cir 1983), quoting Mintz v. Mathers Fund, Inc., 463 F.2d 495, 498 (7th Cir 1972).

Defendants rely primarily on two Utah cases in support of their assertion that appellants may not now rely on deposition testimony not cited to the trial court. Cowan & Co. v. Atlas Stock Transfer Co., 695 P.2d 109, 113-14 (Utah 1984); Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044-45 (Utah 1983). Neither of these cases addresses the issue presented in the instant case. The issue in each case was whether the appellant could rely on appeal on evidence which was not part of the record before the trial court. In the instant case, the deposition testimony upon which appellants rely was clearly part of the record.

In summary, Rule 56(c) clearly prohibits summary judgment if evidence of a disputed issue of fact exists in the depositions and other materials on file. The deposition testimony relied upon by appellants in their initial brief was all "on file" with the district court prior to the grant of summary judgment. Defendants advisedly do not dispute that those

depositions establish the existence of a disputed material factual issue relating to the existence of an accord and satisfaction. Summary judgment was improper, and this case should be remanded for a trial on the merits.

POINT II

DEFENDANTS BREACHED THE CONTRACT BY FAILING TO TIMELY RECONVEY LOTS.

Point I of appellants' initial brief³ established that defendants had breached the trust deed and trust deed note by failing to reconvey twelve lots pursuant to a written demand made on January 10, 1985. Kays were entitled to the reconveyance of those lots by reason of principal payments resulting from the calling of letters of credit. Defendants respond to this argument by asserting that requiring defendants to reconvey the lots would have resulted in an impairment of their security, and argue that such a construction is contrary to what defendants view as the intent and purpose of the trust deed. Defendants then set forth a hypothetical example on pages 25 and 26 of their brief which they claim illustrates their point.

Defendants' argument might have some merit if Kays had agreed, as incorrectly asserted by defendants on page 22 of their brief, to "fully collateralize" the loan, and if the sole purpose of the trust deed was to protect the defendants. Kays made no such agreement, however, and the trust deed also

³ Defendants incorrectly refer to this issue in their brief as the Kays' "second" major contention, and refer to the fourth and final point in Kays' initial brief as Kays' primary argument.

contained provisions for the benefit of Kays. Just as the construction of the trust deed urged by Kays might seem to conflict with the purpose perceived by defendants of providing security for the loan, so the construction advocated by defendants conflicts with the purpose of allowing reconveyances of lots which could then be sold to generate the money necessary to make further payments. The hypothetical example⁴ postulated by defendants illustrates this point:

Borrower desires to develop 50 lots into an improved subdivision, and borrows \$100,000.00 to do so. Security for the loan is 50 lots valued at \$1,000.00 each, and two letters of credit, one for \$30,000.00 and one for \$20,000.00. Lender agrees to release one lot for each \$2,000.00 principal received.

Borrower fails to make the first payment due on the loan, so the lender draws on the \$30,000.00 letter of credit, but does not reconvey any lots. Because borrower has no lots which can be resold, he is not able to make the next payment and the lender draws on the \$20,000.00 letter of credit, again refusing to reconvey any lots.

⁴The hypothetical postulated by defendants does not, of course, conform to the facts in this case. First, the letters of credit in fact comprised only 35% of the total security even using defendants' assumptions as to the value of that security. (The evidence would also support a finding that the letters of credit were a much smaller proportion of the entire security, i.e., that the real estate was worth much more than \$526,000.00. (Deposition of Lawrence Kay, June 12, 1986, at Exhibit 9.))

More importantly, the trust deed provided that one lot would be reconveyed for each \$15,000.00 principal paid. There is no evidence which would justify this Court in assuming that the lots were valued at less than \$15,000.00 each, and certainly no basis to assume they were only worth \$7,500.00 each as implicitly assumed by the hypothetical.

Lender is now owed \$50,000.00, secured by \$50,000.00 in lots, and perceives the transaction as being fair. The borrower, however, has "paid" \$50,000.00 but has no lots to market.

If the borrower is somehow able to pay the remaining \$50,000.00, borrower would be entitled to a reconveyance of 25 lots. Just before the final payment is made, the lender will be owed only \$2,000.00, but will hold 26 lots, valued at \$26,000.00, as security.

This hypothetical, viewed from the perspective of the borrower, demonstrates the commercial impracticability of the construction of the contract urged by defendants. It does not make commercial sense from the borrower's viewpoint to be unable to obtain reconveyances of lots where the borrower has already paid several times the value of those lots.

Although each construction of the trust deed is reasonable when viewed from the perspective of the party advocating that construction, neither construction is wholly satisfactory. Under such circumstances, two rules of law dictate the result. First, the contract is to be construed against the drafter, Summit Systems, Inc., and in particular, release provisions in a trust deed "should be interpreted more strongly against the party required to give the release" Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982) (citations omitted). Second, to the extent that the contract is ambiguous, summary judgment was improper because there existed issues of fact as to what the parties intended by the agreement. Both Robert and Lawrence Kay testified by affidavit as follows:

On the occasion of the First Meeting and on the occasion of the Loan Closing, Southwick advised plaintiffs that in the event that it became necessary for Summit to resort to the letters of credit which were given by plaintiffs to Summit as additional security for the Subject Loan, any portion of the proceeds therefrom which was applied toward the reduction of the principal amount of the Subject Loan would entitle plaintiffs to a release of lots as otherwise provided in the documents evidencing the subject loan.

R. 500-01, 525-26.

Where a contract is ambiguous, the construction of the contract is a question of fact. Craig Food Industries, Inc. v. Weihing, 71 Utah Adv. Rep. 46, 48 (Ct. App. 1987). Summary judgment on this issue was improper.

POINT III

THE EVIDENCE SUBMITTED TO THE TRIAL COURT NEGATED THE EXISTENCE OF AN ACCORD AND SATISFACTION.

Defendants assert in their brief that Kays may not on appeal rely on any statements in the record which were not specifically called to the attention of the trial court. Point I of this Reply Brief establishes that this contention is contrary to the clear language of Utah R. Civ. P. 56(c). The court does not need to reach that issue, however, because the evidence which was called to the attention of the trial court negates the existence of an accord and satisfaction. As set forth more fully on pages 17 and 18 of Kays' initial brief, Lawrence Kay and Robert Kay each testified with respect to the release of lots as follows:

Southwick denied Summit had any obligation to provide plaintiffs with releases of lots until approximately May 1, 1985, but he thereafter repeatedly acknowledged Summit's obligation to provide plaintiffs with such releases and repeatedly promised Affiant that Summit would promptly provide such releases.

Affidavit of Lawrence C. Kay, paragraph 17 (R. 503-04); Affidavit of Robert L. Kay, paragraph 17 (R. 528-29).

A reasonable inference from these statements is that Summit determined to reconvey the seven lots not to compromise and settle a greater claim, but because Summit had finally acknowledged that Kays were entitled to the release of those lots and had agreed to perform its legal obligation.

In contrast to this evidence, defendants presented no evidence in support of their claim of accord and satisfaction, and certainly did not present any evidence clearly demonstrating that there was a definite meeting of the minds and that the parties understood that Kays, by accepting the seven lots, were waiving their claim to the greater number of lots. See Security State Bank v. Broadhead, 734 P.2d 469, 472 (Utah 1987); Tates Inc. v. Little America Refining Co., 535 P.2d 1228, 1230 (Utah 1975).

Even based upon the evidence which was specifically called to the attention of the trial court, therefore, when properly viewed in the light most favorable to Kays, summary judgment on the issue of accord and satisfaction was improper.

POINT IV

THE CLAIM THAT KAYS ACCEPTED THE BENEFITS OF LOAN AND RATIFIED IT AND ACCORDINGLY CAN NOT REFORM THE CONTRACT WAS RAISED FOR THE FIRST TIME ON APPEAL AND SHOULD NOT BE CONSIDERED.

Point IV.C. of respondents' brief asserts that Kays accepted the benefits of the loan and ratified it and accordingly are barred from seeking reformation of the contract. This claim is raised for the first time on appeal, and should not be considered by this court. James v. Preston, 71 Utah Adv. Rep. 49, 50 (Ct. App. 1987).

POINT V

THE CLAIM THAT THE TRUST DEED AND THE NOTE CAN NOT BE REFORMED BECAUSE THEY ARE HELD BY BONA FIDE PURCHASERS IS NOT SUPPORTED BY THE EVIDENCE AND IS RAISED FOR THE FIRST TIME ON APPEAL.

Point IV.D. of respondent's brief asserts that the trust deed and note were assigned to bona fide purchasers, and that the assignment bars reformation. No evidence was presented to the trial court as to whether the assignees of the trust deed and note took their assignments in good faith and without notice of any potential claims relating to the note. In addition, the claim is raised for the first time on appeal. Although there is an oblique reference to the issue in Defendants' Reply Memorandum in Support of Motion for Summary Judgment (R. 559), it does not appear that the issue was actually considered by the trial court and it can not be considered to have been raised before that court. Defendants are therefore barred from raising that

issue on appeal. James v. Preston, 71 Utah Adv. Rep. 49, 50 (Ct. App. 1987).

CONCLUSION

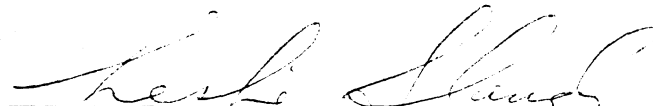
The evidence called to the attention of the trial court, viewed as required in the light most favorable to Kays, raises a disputed factual issue as to whether Kays understood that by accepting the reconveyance of seven lots they were thereby waiving their claim for a reconveyance of a greater number of lots. Summary judgment on that issue was therefore improper, even based on the limited evidence specifically called to the attention of the trial court.

Kays in addition called to the attention of the trial court in a post judgment motion, and have demonstrated to this court on appeal, that statements in depositions which were on file with the district court undisputedly raise an issue of fact with respect to the claim of accord and satisfaction. Respondents apparently concede that the statements in the deposition raise an issue of fact, but seek to have this court ignore those statements because they were not specifically called to the attention of the trial court. Rule 56(c) of the Utah Rules of Civil Procedure, however, clearly provides that summary judgment is precluded if a dispute of fact appears in the depositions on file. Furthermore, this Court, having been now apprised of the existence of the issue of fact, should not ignore what now clearly appears.

Summit breached the terms of the trust deed and note by failing to reconvey lots to which Kays were entitled. Two constructions of the trust deed are possible, and each construction is reasonable when viewed from the perspective of the party advocating that construction. The trust deed must accordingly be construed against Summit, who drafted it, or in the alternative, this court should hold that the contract is ambiguous and remand for the taking of evidence as to the intention of the parties.

The judgment of the district court dismissing plaintiffs' Complaint on Summary Judgment should be reversed, and this case remanded for trial on the merits on all issues.

DATED this 4th day of January, 1988.



JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that four (4) true and correct copy of the foregoing was mailed to the following, postage prepaid, this 4th day of January, 1988.

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