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Vardon Woolsey and Clea Woolsey, his wife v. Ellen B. Brown : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

VARDON WOOLSEY and CLEA WOOLSEY, his wife,
Plaintiffs and Appellants,

vs.

ELLEN B. BROWN,
Defendant and Respondent.

Case No. 13884

APPELLANTS' BRIEF

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Allen B. Sorensen, District Judge

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STATEMENT OF THE CASE

This is an action by the plaintiffs for specific performance under a verbal agreement to purchase real estate. The defendant counterclaims for possession and for $125.00 per month reasonable rental. The defendant, at the trial, amended her answer and counterclaim to allege the defense by reason of the Statute of Limitations, § 78-12-25, Utah Code Annotated, 1953, as amended. Judgment was rendered in favor of the defendant in the

amount of $9,717.00 and $12.50 per day rental until dispossessed.

STATEMENT OF FACTS

On or about the 12th day of April, 1961, plaintiffs entered into an agreement with the defendant and her husband, who is now deceased, to purchase a home known as Lot 3, Block 1, Columbia Village, a subdivision, recorded in the Utah County Recorder's Office, the address of which is 9 Roosevelt Avenue, American Work, Utah (Tr., p. 9, 10, 11, Ex. 2, 3, 4, Tr., p. 35, 49, 50 and 51).

With the terms of the agreement, according to plaintiffs' testimony, was that they would pay $707.00 down payment and assume the balance of a mortgage with the Walker Bank and Trust Company, Provo, Utah. These terms are substantiated by the receipts as received by the plaintiffs from the defendant, Ellen B. Brown (Ex. 2, 3 and 4). Further, the plaintiffs have made every payment on the mortgage with the bank, which mortgage was paid off on August 30, 1973 (Ex. 5). Part of the payment on the mortgage was a $1,200.00 check from the insurance company paid on February 20, 1973 (Ex. 5), which check was a payment for proceeds from insurance for a fire on the garage of the property in question, which fire occurred in 1970 (Tr. 14). This insurance payment was made out to Mr. Woolsey and Mr. Brown and Walker Bank and Trust Company and was paid on an insurance policy, the premium of which had been made by the plaintiffs.

Mrs. Brown, in November of 1970, had a different insurance policy issued on the premises in question and paid the premium direct without notifying the plaintiffs (Ex. 11). However, the policy that paid for the $1,200.00 fire insurance loss which was applied to the loan was the policy that was provided by the plaintiffs.

On or about April 26, 1966, defendant made a demand for the plaintiffs to pay the special improvement liens, the balance of the down payment which the plaintiffs understood to be $49.00, which they did (Ex. 6, 9 and 15).

The defendant claims that the terms of the sale of the home was to have been $1,337.00 down, $707.00 down if paid within 30 days, $1,337.00 if paid after 30 days (Tr. p. 49). They were to receive credit for the first nine months of the rental if they paid the down within the 30 days, which the plaintiffs did not do. Mrs. Brown indicated that she agreed to the terms of the sale (Tr. p. 49). Mrs. Brown further indicated that she signed all of the receipts (Ex. 2 and 3), and that the receipts, even though after the 30 day period in which the plaintiffs were to receive the rental credit, did not reflect the additional amount due because of the non-timely payment (Tr. p. 51). Further, Mrs. Brown never made a demand for any balance from the plaintiffs (Tr. p. 55).

The plaintiffs made some capital improvements to the home such as carpeting the home and painting and replacing plumbing fixtures in the bathroom (Tr. p. 34),

as well as paying the special improvement lien as demanded by the defendant.

The plaintiffs tendered to the Court at the trial the balance of the down payment as claimed by the defendant, although denying the liability thereof as an offer of settlement. The last $49.00 payment on the down payment was in the possession of defendant's former attorney (Tr. p. 61, Ex. 16). The plaintiffs paid the taxes at all times except for the year of 1973. The taxes for 1973 were paid by the defendant (Tr. p. 70). The defendant received $183.58 from the bank from the Escrow Account after the loan was paid off (Tr. p. 75). The payment that the defendant made in 1973 was in the amount of $135.31, the insurance premium paid by Mrs. Hrown totals $68.00 (Ex. 11). The total payment that the defendant, Mrs. Ellen B. Brown, has made on the property in consideration from 1961 when the plaintiffs entered into possession under the verbal agreement to purchase was $203.31, of which she received back from the Escrow Account $183.58, which means that the total amount that could possibly be attributed to her on the payment of the mortgage at Walker Bank and Trust Company would be $19.73. The period of time that plaintiffs paid off the mortgage and were in possession was a total period of approximately 13 years.

In 1966 plaintiffs sent to defendant, after receiving a verbal threat from the defendant to dispossess, a proposed Uniform Real Estate Contract which carried the provision that the defendant pay interest and taxes. This

mistake was probably caused by the plaintiffs' attorney's lack of understanding of what the plaintiffs outlined as the terms of the agreement (Ex. 7). The defendant turned the Contract over to her attorney who wrote a letter to plaintiffs' attorney (Ex. 15), and plaintiffs' attorney replied (Ex. 14).

On the request of the defendant through her attorney, the plaintiffs took care of the special improvement lien and forwarded the balance of the down payment, which was $49.00, which $49.00 was in the defendant's former attorney's possession. The plaintiffs heard nothing further from the defendant until they received a Landlord's Notice to Quit (Ex. 8), on the 9th day of October, 1973, which Notice to Quit was forwarded after the total payment on the mortgage had been made. The District Court dismissed plaintiffs' Cause of Action and awarded the defendant a Judgment for $9,717.00 plus $12.50 per day rental on a theory of reasonable rental value due.

ARGUMENT

POINT I.

THE VERBAL AGREEMENT OF SALE BETWEEN THE PLAINTIFFS AND DEFENDANT WAS A VALID AGREEMENT AND SHOULD BE SPECIFICALLY ENFORCED.

The plaintiffs entered into the possession of a home under a rental agreement, which rental agreement was

later converted to an agreement to purchase a home located in American Fork, Utah. The agreement to purchase was entered into the 12th day of April, 1961, which agreement provided for the payment of $707.00 as a down payment and assuming the balance of a mortgage with the Walker Bank and Trust Company in Provo, Utah. The plaintiffs received from the defendant, Ellen B. Brown, and sgned by her, receipts for the down payment, which receipts outlined the balance of the down payment. The plaintiffs paid the total amount of the down payment and paid off the balance of the mortgage. The balance of the mortgage was paid off in full on August 30th, 1973.

The provisions of § 25-5-8, Utah Code Annotated, 1953, as amended, states:

> "Nothing in this chapter contained shall be construed to abridge the powers of Courts to compel the specific performance of agreements in case of part performance thereof".

If Mrs. Brown did, in fact, terminate the agreement of purchase, such termination should have been carried out with an eviction. It is wholly unjust and inequitable to allow the defendant to receive all of the benefits under the contract of purchase and then receive the property back. Particularly is this so with the accrual of value to the property during the ensuing years.

In the case under consideration, we not only have part performance, we have complete performance. The

only question that could possibly be considered is the question of the total amount of the down payment, the defendant claiming a total down payment o f$1,337.00 instead of $707.00, which would leave, if you assume defendant's story to be correct, a balance of $630.00. The defendant's claim for the additional $630.00 is in controvention to the signed receipts.

The plaintiffs tendered to the Court the balance of $630.00, thereby complying to all the requirements of sale agreed to by defendant, assuming the defendant's understanding of the agreement to be correct. Defendant's understanding of the agreement is in controvention to the receipts signed by the defendant (Ex. 2 and 3).

There is no question of the terms of the agreement in the defendant's mind. She spelled them out in detail, she agreed to them (Tr. p. 49), she signed all of the receipts. So, under the very worst of interpretations on behalf of plaintiffs, there is no question but what they would be entitled to recover if they paid the total amount due according to Mrs. Brown. She made no demand for payment of the down payment. According to Mrs. Brown the $630.00 would not have come due until 30 days after the day of agreement in 1961 and there was no time limit agreed upon for the payment of the down payment or the balance of the down payment when plaintiffs thought they had the total down payment paid in 1966.

> *In re Roth's Estate*, 2 U. (2d) 40, 269 P. 2do 278, "Where the existence of the oral contract is established by an admission of the party resisting

> specific performance or by competent evidence independent of the acts of part performance, the requirement that the acts of part performance must be exclusively referable to the oral contract is satisfied."
>
> Further, "part performance was established where it was shown that the defendant had moved onto the property, made improvements and paid half of the purchase price to the plaintiff."

Also see *Christensen* v. *Christensen*, 9 U. (2d) 102, 339 P. 2d 101, and *Adams* v. *Taylor*, 15 U. (2d) 296, 391 P. 2d 837.

In this case, the terms of the agreement in plaintiff Vardon Woolsey's mind was firm and clear, to pay $707.00 down and assume the balance of the loan. In the mind of the defendant the terms were perfectly clear to pay $707.00 down if paid within 30 days, and $1,337.00 if paid after the 30 days, and the balance of the mortgage.

There is no question that there was an agreement to sell, and since the plaintiffs tendered to the Court the balance of the down payment under the terms as alleged by the defendant, it doesn't seem that there could be any question but what the plaintiffs would be entitled to receive the property under the terms of the agreement to sell, all of the conditions of taking the contract from under the Statute of Frauds having been met.

The defendant alleges that she terminated the real estate agreement in 1966. However, her actions show

otherwise. She demanded that the plaintiffs pay the special improvement liens, which they did. She demanded the balance of the down payment from the plaintiffs which was $49.00, which the plaintiffs forwarded to her attorney. She demanded the termination of the joint tenancy between herself and her husband, which the plaintiffs did not do and which the defendant did not do (Ex. 1), but which she indicated in her testimony was done (Tr. p. 53), and she left them in possession continuing to pay the balance due on the mortgage without further complaint. For an excellent discussion of the law on this subject, see the Note in 9 Utah Law Review 103, *The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah.*

The doctrine of specific performance is an equitable one and to allow the defendant to recover possession of this real property after the plaintiffs having been in possession 13 years and having paid off the mortgage thereon, and having paid the special improvement liens, the taxes, the fire insurance and made such other capital improvements as an owner of property would ordinarily make, is not doing equity in any sense of the word. This agrement is supported by testimony from the plaintiffs and the defendant and three receipts signed by the defendant.

The only question in regard to what the agreement was is the question of whether or not the defendant was entitled to an additional $630.00 down payment. This additional $630.00 was not supported by the information

on the written receipts signed by the defendant. Notwithstanding this, the plaintiffs made a proffer in Court to pay the additional $630.00. The defendant at no time has made a demand for any additional money under her understanding of the down payment

POINT II.

THE PROVISIONS OF THE STATUTE OF LIMITATIONS, § 78-12-25, UTAH CODE ANNOTATED, 1953, AS AMENDED, DO NOT APPLY TO THE TERMS OF THIS REAL ESTATE CONTRACT WHETHER VERBAL OR WRITTEN.

§ 78-12-25, Utah Code Annotated, 1953, as amended, states:

> "Within four years: (1) An action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also, on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received. (2) An action for relief not otherwise provided for by law."

In the instant case, the last payment was made and received on August 30, 1973, and the action in this matter was commenced on the 13th day of December, 1973.

Under no sense of the terms of the agreement could four years have passed from the time of the last payment made until the commencement of the action.

POINT III.

THE DEFENDANT IS NOT ENTITLED TO RECOVER FOR THE REASONABLE RENTAL VALUE.

The plaintiffs were originally put into possession of the property under consideration under a rental agreement, said rental agreement provided for the payment of $70.00 per month. Thereafter, the plaintiffs' payments were increased to cover the mortgage insurance and taxes under the purchase agreement. If, in fact, there was no enforceable purchase agreement, then the purchase agreement terms would be the rental agreement.

In no snse of the word would the defendant be entitled to the reasonable rental value if she, in fact, had a rental agreement (purchase agreement) and made no demand for any increase in rent or payments over the 13 year period plaintiffs were in possession. If she agreed that plaintiffs could have possession of the house for the payments they were making and consented to their possession without making any additional demands, the reasonable rental value is immaterial and to grant to the defendant a Judgment based on the reasonable rental value supported by her testimony alone after making no demand for any increase in rental and agreeing to

their possession for the amounts paid, is inequitable and unjust in the extreme. The rental value would be that to which the parties had agreed and there is no evidence that the defendant did not agree to the rental for the payments per month that were made. In fact, there was no evidence of any demand for an increase over the $70.00 per month rental originally agreed upon.

CONCLUSION

Plaintiffs entered into an agreement to purchase a home between the defendant and her husband, now deceased, on or about the 12th day of April, 1961.

Defendant's understanding of the terms of the agreement of purchase were spelled out and agreed to by the defendant in the testimony as found on Page 49 of the Transcript, thereby taking it from without the Statute of Frauds in the provisions of § 25-5-8, Utah Code Annotated, 1953, as amended, and this contract to purchase should be enforced.

The Statute of Limitations had not begun to run until after the last payment was made in August of 1973.

This is an equity matter and is expected that substantial justice in this sort of action will be enforced.

Plaintiffs have been in quiet possession of the property for approximately 13 years under an agreement to purchase and if, in fact, the agreement to purchase is not in force or effect, then under a monthly rental agreement wherein the parties agreed to accept the payments

being made under the purchase agreement, then the questio nof the reasonable rental value is completely immaterial and defendant is in no way entitled to recovr on any theory under reasonable rental value.

Therefore, the plaintiffs-appellants should be entitled to receive from the defendant a good and valid Warranty Deed and that the Judgment rendered against the plaintiffs for the reasonable rental value should be stricken.

Respectfully submitted,

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