

1997

Daniel J. Phelps v. Jean Smith Sanders Trust : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

970575-CA
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DOCKET NO. _____

DANIEL J. PHELPS,

Appellee and
Cross Appellant,

vs.

Case No. 970575-CA

JEAN SMITH SANDERS
TRUST,

Appellant and
Cross Appellee.

REPLY BRIEF OF APPELLANT AND CROSS APPELLEE

Appeal from a Judgment of the
Second District Court of Davis County
Honorable Jon Memmott

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REPLY BRIEF OF APPELLANT AND CROSS APPELLEE

ARGUMENT

I.

THE LOWER COURT ERRED IN CONCLUDING
THAT THE CONDUCT OF THE PARTIES RESULTED
IN AN ENFORCEABLE CONTRACT OF SALE
REQUIRING DEFENDANT TO CONVEY ITS
PROPERTY TO THE PLAINTIFF.

The appellee in his brief has failed to address the arguments raised by Appellant relating to the failure of the appellee to properly accept the counter offer as was required by the terms of the contract itself. Instead, Plaintiff has made the same argument he did below that the fact that both parties may have mistakenly

believed that a contract had been properly executed somehow overrode the strict language of the contract itself. Plaintiff has cited no law to that effect.

The only reference to Defendant's arguments at all is the statement made by Plaintiff that "the plaintiff would simply be required to now sign the contract." (Plaintiff's Brief, p. 6). This argument, of course, has no validity. The language of the contract required strict time conditions and certainly a party who fails to properly accept a document cannot claim years later that the contract is binding by now signing it.

The remainder of Plaintiff's arguments are red herrings as to this appeal. Appellant has conceded the legal principle relating to renewed offers of those which have expired by their own terms. Again, Plaintiff attempts to vary the terms of the written document with the oral testimony of what the parties believed or mistakenly believed at the time the last meeting occurred. The entire purpose of written real estate contracts is to eliminate this type of dispute from ever coming up in the first place.

Likewise, Appellant has not raised in this appeal any argument concerning the statute of frauds since the lower court was correct in his assessment of the statute requirement. It should be noted, however, that the statute of frauds does control this transaction and that all elements of it must be observed by both parties.

II.

THE AWARD OF ATTORNEYS' FEES WAS
DISCRETIONARY BY THE LOWER COURT.

Defendant does not dispute that attorneys' fees are awarded in accordance with the terms of a contract. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). Although such an award is a matter of legal right, it must be reasonable and supported by adequate evidence. Hoth v. White, 799 P.2d 213, 219 (Utah App. 1990). Determination of such fees is within the sound discretion of the trial court and will not be overturned unless there is showing of clear abuse of discretion. Dixie State Bank, 764 P.2d at 989. An appellate court will "presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary." Goddard v. Hickman, 685 P.2d 530 (Utah 1984).

In this case Plaintiff submitted the matter to the lower court on summary judgment with no evidence as to reasonable attorneys fees. There is no evidence in the record as to what those fees would have been assuming that Plaintiff properly prevailed. On this basis alone the trial court properly denied attorneys' fees.

The question of attorneys' fees as to both sides presents an interesting twist because of the arguments made by the parties in this case. Plaintiff maintains that the real estate contract was in fact completed and that paragraph 17 controlled. Defendant, on the other hand, maintains that the contract was never completed because the plaintiff did not properly sign any counter offer allegedly made by the defendant. Under this scenario paragraph 17 would not be binding since there was no completed contract.

Under Utah law, Section 78-27-56.5 provides for reciprocal rights to recover attorneys' fees to the prevailing party in any action based upon a written contract as long as one party is allowed to recover. Thus, Defendant should be allowed to recover attorneys' fees in this action even if her argument is correct that the contract was never binding on both parties since the litigation still arises out of the contract regardless of whether it was a completed transaction.

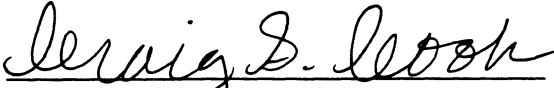
The question of attorneys' fees in the lower court should be left to that court's discretion in the same manner as attorneys' fees in this court must be left to the discretion of the deciding panel.

CONCLUSION

The decision of the lower court was incorrect in finding that a binding contract exists which requires Defendant to convey its property to the plaintiff. Plaintiff has failed to seriously address the arguments made by Defendant in its brief and has instead argued matters which are not in dispute.

The question of attorneys' fees should be left to the discretion of the trial court and this Court.

Respectfully submitted this 2nd day of November, 1998.

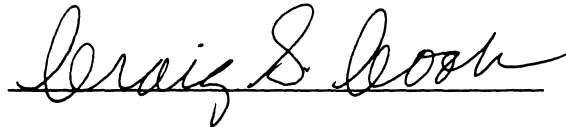

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing
Memorandum to Douglas Durbano, Attorney for Plaintiff, 3340 Harrison Blvd.,
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Craig S. Cook