1949

Alice Farnworth v. Chris Jensen, Alma Jensen and Swen C. Jensen : Brief of Respondents

Utah Supreme Court

F. Leroy Shields; Grover A. Giles; Attorneys for Defendants and Respondents;

7378

IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE FARNWORTH,

Plaintiff,

vs.

CHRIS JENSEN, ALMA JENSEN and SWEN C. JENSEN,

Defendants.

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STATEMENTS OF FACTS

Defendants have examined the appellant's statement and accept as hereinafter specifically noted, said statement is a fair and concise presentation of the facts in this case.

On Page 4 of appellant's brief, first paragraph, appellant states: "The defendants wholly failed to make or tender the payment of the purchase price as specified in the contract." With this assertion we take issue. Tender

was made by the defendants in their answer to the first suit filed June, 1938. See Exhibit "2", file in Case No. 2379. Tender was also made by the defendants of the sum of $5,200.00, balance of principal plus interest at 6 per cent per annum on said balance from April 1, 1948, when the amount of outstanding liens and encumbrances on the 263 acres had been determined, plus $656.30 with interest thereon from May 15, 1939, at 6 per cent per annum, plus $400.00 with interest thereon at 6 per cent per annum from May 15, 1943, plus $598.37 with interest from May 15, 1948, plus interest at 6 per cent per annum on said sums from on or prior to May 1, 1949. This tender still remains available to plaintiff when appellant tenders a warranty deed to defendants; hence, it is manifest that the statement of the appellant charging that the defendants have wholly failed to make or tender the purchase price is not supported by the facts. See answer of the defendants dated November 20, 1948. True, if appellant's contention of what the contract of the parties specifies is correct as a matter of law, then the tender of the defendants fails to abide by the terms of the contract, but the sole issue which now divides the litigants revolves about what the contract requires by way of tender under all the facts and circumstances of the case as set forth by the appellant, with which defendants are in agreement and accord except as herein set forth.

Appellant assigns five errors in the conclusions of law and the decree of the court entered thereon. These errors are all addressed and directed to the sole issue involved upon this appeal; namely, when under the terms

and conditions of the contract and the conduct of the appellant were the defendants obligated to pay or tender the balance of the principal, to wit: the $5,200.00? Appellant insists that nothing in the conduct of the appellant relating to her efforts to clear the title of the bond liens against the land in question relieved the defendants of making the installment payments of principal as specified in the contract. The trial court found the liens to be in excess of the balance of principal specified in the contract and concluded until the total amount of such liens had been fixed and determined the defendants were not called upon to make further payments of principal or interest under their contract. Both parties remained in possession of the respective properties exchanged under the contract in the interim when appellant was acting to clear the liens.

The appellant has considered all errors and treated them together as one and the defendants have chosen to do likewise for as stated above we see but a single point involved, viz: were the defendants entitled under their contract as a matter of law to suspend payments of principal and interest until appellant had legally determined the total amount of the liens and encumbrances outstanding against the property?

ARGUMENT

We agree with counsel for appellant that no factual dispute is presented by this appeal. At the outset appellant brushes aside the consideration of Exhibit "2" (Tr. 87), to wit: the entire file in Case No. 2379, which

represents litigation between these parties wherein appellant sought to have the contract in question declared forfeited because defendants had paid nothing thereon except the $300.00 paid November 10, 1936. Appellant asserts the decision of the trial Judge, Hon. Lester A. Wade, now a member of this court, has no bearing whatever inthis case at this time. While this appeal does not stem from the decision in Case No. 2379, we think the file has considerable significance to the determination of this appeal. The pleadings of the parties and the findings, conclusions and decision rendered thereon in that case supply a historical background to the case now before this court which definitely and materially aided the trial Judge, Hon. John M. Hendricks, in the determination of the issues presented in Case No. 3708 from which this appeal is taken. In the first case the action was brought by appellant in April 1938 about two-and-a-half years after the contract was made. The trial court found the defendants (the buyers) to be in violation of the strict terms of this contract for failure to pay the installments of interest and principal as specified, but also found the seller in default for not diligently acting to determine and remove the liens as provided by the contract. In that decision from which the seller took no appeal the court pointed the way for the seller to bring the contract into good standing and obligate the buyer to make the principal payments as specified. The court declared the contract required the seller to bring a suit or suits to determine the amount of and remove the liens of the drainage bonds within a reasonable time. The trial Judge declared a reasonable period for the

completion of such action or actions to be six months from the date of the contract. Notwithstanding this decision the record shows proceedings to determine the liens and the extents thereof were not effectuated in the lower court until almost five years thereafter and then another four years elapsed before the matter was finally determined by this court.

Consequently, we contend that Exhibit "2" aforesaid, to wit: File No. 2379, should be examined closely and given the consideration accorded same by the honorable Trial Judge who took up the story of the case from where the former trial Judge left the parties. We believe the findings and conclusions of the trial court in the case at bar are amply supported by the evidence and the judgment rendered thereon the correct solution of the case.

AUTHORITIES

Let us first address ourselves to the authorities presented by the Appellant—We have examined Foxley vs. Rich, 35 Ut. 162, 99 Pac. 666, which as far as we are able to ascertain has very little, if any, application to the case at bar. Without briefing the case, we are content to agree with Appellant that in a case of the type presented, we may feel constrained, without committing ourselves, that under the facts presented in that case, the Vendor's conduct in conveying the property to a third party did not relieve the Vendee of making his payments as specified in his contract. The fact remains that the case is not applicable to this case. In parting, the litigants

here did not stipulate what the result of a breach would be, hence, the italics of the Appellant's brief at the top of Page 14 do not and could not possibly have any force or effect in the instant case.

Cases cited by Counsel in support of Foxley vs. Rich have no more application to the case at bar than the primary case, hence, we shall not waste effort here responding to same.

We come now to Appellant's citation, 27 R. C. L., Para. 271. We respectfully submit the cited authority has greater value to us than to the Appellant in the light of the facts involved, for if the contract in the instant case had been carried out as contemplated by the plain and unequivocable terms thereof the long period between the date of the contract and the determination of the amountof the liens would not have happened and the parties would have long since met their respective responsibilities under their contract.

In answer to Levine, et al., vs. Whitehouse, et al., 37 Utah 360, 109 Pacc. 2., we say, simply, ,that the case cannot possibly apply here. The final determination of the litigation between the Appellant and the Drainage District was absolutely necessary to apprise the Respondents of the amount they would be required to tender to the Appellant—manifestly, a tender by the Respondents before such a determination would be an idle gesture.

Responding to Appellant's citation of Empire Investment Co., vs. Mort. (Cal.), 153 P. 236, we are at a

loss to understand in what possible way that case applies to the case at bar. There were precedent duties to be performed by the Appellant Farnworth before the Respondents could be expected to perform their obligations under the contract. This is particulraly true in the light of the fact that the outstanding liens substantially exceeded the balance owing in the contract price of the property.

In response to Leafgreen v. LaBar cited by Appellant on Page 17 of her brief, the Respondents are content to say that if the case was in point as to the facts, we would still agree with the principle announced but the facts do not square with the case here and consequenly the announced principle is inapplicable.

Our answer to Miller vs. Jones, cited on Page 18 of Appellant's brief is that the facts in the Case before this Court do not lend themselves to the principle declared therein. The possession of the Defendant has no bearing on the point at issue. The Respondent buyers had no means of knowing how much to tender to the seller until the litigation involving the matter had been finally determined. Speculation as to the amount to be tendered would have been a futile gesture of performance to avoid the running of interest.

Finally, in answer, to authorities cited by the Appellant, we come to Jensen vs. Lichinstein, 45 Utah 320, 145 Pac. 1036, Page 19 of the brief. The facts of that case are not controlling here. The contract in the case at bar positively required the determination of the amount of

outstanding liens. The nature of the liens required the institution of litigation, the outcome of which was highly speculative—Moreover, the Appellant was in possession of the property exchanged by the Respondents under the contract throughout the period of the litigation involving said liens, and should not be heard to complain of Respondent's possession of the land here involved pending the uncertainty of the litigation required to settle the question of outstanding liens.

In support of their contention that the judgment of the trial court should be sustained, the respondents submit the following authorities:

> "If the failure to make payment of the principal debt is due to any improper act or omission of the creditor, or to such conduct on his part as prevents the debtor from complying with his contract to pay, interest on such debt is generally suspended during the time the debtor is so prevented from making payment.
>
> See Corpus Juris, Vol. 33, Page 239, Section 139, and cases cited in the footnotes.
>
> "Where it is the creditor's duty to ascertain the amount due to him by his debtor, interest will not be allowed to him in advance of such ascertainment."
>
> See Corpus Juris, Vol. 33, Page 240, Section 141.

The foregoing authorities are cited for the reason that in the instant case the appellant undertook to clear the title to the land in question of certain liens, the amount and extent of which were uncertain. Representations

were made that such liens amounted to the sum of $5,000.00 and the respondents agreed to mortgage the property to secure this amount and apply the proceeds to the payment of the liens as the amounts were ascertained. It later developed that the liens actually amounted to $6,800.00 and the court found that the appellant was guilty of laches in not pursuing the necessary litigation to determine the amount of such liens.

> "In an executory contract for the sale of land where the purchase price is payable in installments, the vendor must show that he has good title to the land before he can recover any installment of the price."
>
> Graves vs. Mason, 2 Alta. L. 179
> Graves vs. Mason, 1 Alta. L. 250

The reasons for this rule as stated in the cited authority, which is also supported by other cases found in the footnote, 66 Corpus Juris, Page 1381, Section 1404, are particularly applicable to the case at bar.

> "It would be extremely mischievous to hold that where the purchase money is to be paid by installments, and when it is paid the estate is to be conveyed, the purchaser could be compelled to pay all his purchase money without having a good title shewn, and without the estate being discharged from incumbrances. The result would be in nine cases out of ten that when the purchase money had been all paid and spent, the vendor would be unable to shew a good title or discharge the incumbrances and the purchaser would be in an unfortunate condition."
>
> Gamble vs. Gumerson, 9 Grant Ch. (Ont.) 193, 200

See also, Thompson, vs. Brunskill, 7 Grant Ch. (Ont.) 542, 547, where in a case such as the one before us the court reasoned as follows;

> "It appears to me that upon such a contract a purchaser is not bound to pay one shilling of the purchase money, or interest, unless a good title is shewn; and that he stands upon the same footing in that respect as if the whole purchase money were payable in hand. To hold otherwise would indeed work great wrong in many cases. In most contracts for the sale of land, when time is given for payment, the purchase money is made payable by instalments. To hold that the purchaser is bound to go on year after year, making his payment, perhaps a title of the whole before he can demand that a good title be shown, would be a practical negation of his ordinary equity to have a good title shown, before he parts with his purchase money; and to leave him to his personal remedy against the vendor would often be a remedy only in name."

In 27 R. C. L., Page 537, under Section 271, the following rule appears:

> "Unless it is otherwise stipulated in the contract, the unpaid purchase money does not draw interest before the stipulated time for its payment though the purchaser is given possession."
>
> Lofland vs. Maull, 1 Del. Ch. 359 12 Am. Dec. 106;
> Bouthemy vs. Ducournau, 6 Mart, O. S. (La.) 657, 12 Am. Dec. 486

True, the contract in the instant case provided for interest on deferred installments of principal, but it must be noted that these installments of principal were to be applied toward the liquidation of outstanding liens.

When the respondents learned that the appellant was making no efferot to determine the amount of the liens against the property and had failed to apply money paid in discharge of liens as per contract they determined to suspend payments until the appellant showed some effort to determine the amount of the outstanding liens. Manifestly, had the appellant commenced suit within a reasonable time after the execution of the contract to determine the amount of the liens, there would have been no excuse for the respondents to suspend the payment of purchase money as specified in the contract. But, upon the reasoning of the case above cited equity would not compel the purchaser to go on year after year paying the $500.00 annual installment with interest while the appellant was sitting idly by making no effort to reduce the amount of outstainding liens to a certainty. Moreover, as shown hereinabove, respondents learned that the amount of the liens substantially exceeded the $5,000.00 agreed upon in the contract.

In 30 American Jurisprudence, at Page 42, Section 52, appears the following rule:

> "Where a debtor is really and bona fide ready to make payment and intends to do so, but is prevented from doing so by the act or omission of his creditor, the latter will not be entitled to interest. A tender by the debtor of theamount of his debt, if made in the proper manner, will suspend the running of interest on the debt from the time of such tender."

Hart vs. Brand, 1 A. K. Marsh. (Ky.) 159 10 Am. Dec. 715

See also Shannon vs. Freeman, 117 SC 480 109 SE 406

There is nothing in the record to show that the respondents were not bona fide ready to make the payments provided in the contract and had the appellant not negligently allowed the time to run respondents would have had no complaint about the interest payments provided. Respondents were not in a position to make a tender because of the uncertainty of the amount necessary. However, when the amount of the liens had been determined by the final decision of the Supreme Court, respondents then made their tender, except interest on deferred installments between 1936 and 1948. The tender as made is still available to the appellant and in the custody of the clerk of the court in Davis County.

Failure or Refusal of Vendor to Cure Defect.
55 Am. Jurisprudence, Page 720, Sec. 275.

> "If the title of the vendor is defective and he makes no effort to cure the defect in his title, but, on the contrary, relies upon adverse possession, he cannot subsequently successfully claim he was not given a reasonable time in which to comply with his contract. Moreover, when the vendor wrongfully demands that the vendee accept a title which is not good, and brings an action to enforce forfeiture for the failure of the vendee to accept the title, any right which the vendor may have had, under other circumstances to an additional time in which to perfect defects in his title is lost." Anno. A. L. R. 1520.

Sorensen vs. Larue (1926) 43 Idaho 292, 252 Pac. 494.

In this case the vendor sought to effect a forfeiture o fthe contract ,although he had failed to present good title as called for by his contract. The court denied the

relief but likewise denied the vendee rescission of the contract on his cross-complaint. On appeal the Supreme Court reversed the trial court denying rescission to the vendee, and ruling that the vendor by his wrongful conduct in bringing the suit to forfeit when his title was not good foreclosed his right to any additional time to perfect his title.

This principle seems to be in accord with good conscience, equity and justice. As applied to the case at bar, the vendees would have been wholly justified in rescinding their contract when the vendor brought the action in June, 1938, to forfeit the contract. They then chose to make a tender of the $500.00 installment which had not been paid and asked the court to require the vendor to apply the money against outstanding liens. The court denied the vendor's prayer for forfeiture and ordered the deed to the land restored to the clerk of the court to await further action of the vendor in curing the defects in the title.

The vendor cries injustice and inequity because the trial court in the present action denied interest while she took ten years to clear defects of which she had full knowledge at the time she made her contract. Injustice certainly would have been done the vendes had the court required vendees to pay interest during the years the vendor took her own sweet time to clear the liens. Then, too, we must not overlook the fact that the bulk of the purchase price had already been paid in the exchange of properties.

We respectfully submit the judgment of the lower court should be affirmed and costs herein awarded to respondents.

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