

1978

# Loren R. Brockbank et al v. Jay B. Baldwin Jr. et al : Brief of Appellants-Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOREN R. BROCKBANK and  
ROSALIND W. BROCKBANK, his  
wife, and VON R. BROCKBANK  
and VICKY J. BROCKBANK,  
his wife,

Plaintiffs and  
Respondents,

vs.

JAY B. BALDWIN JR. and DONNA  
B. BALDWIN, his wife; JOHN  
W. LONGSON and EMMA S. LONGSON,  
his wife; FREDERICK W.  
MCGOLDRICK and TERESA F.  
MCGOLDRICK, his wife; and  
DONALD SMITH and ELISABETH  
SMITH, his wife, and all  
other persons and concerns  
similarly situated (a class  
action),

Defendants and  
Appellants

Case No. 16009

BRIEF OF APPELLANTS-DEFENDANTS

Appeal from a Judgment  
Of the Third Judicial District Court  
Of Salt Lake County, Utah  
Honorable David B. Dee, Judge.

FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOREN R. BROCKBANK et al.,	)	
Plaintiffs and	)	
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	)	
vs.	)	Case No. 16009
	)	
Jay B. Baldwin, Jr. et al.,	)	
	)	
Defendants and	)	
Appellants	)	

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BRIEF OF APPELLANTS-DEFENDANTS

---

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs, owners of Lot 1 in Mt. Olympus Subdivision in Salt Lake County, sued a class consisting of other lot owners in the subdivision, seeking a determination that a covenant, restricting all lots in the subdivision to residential use, did not apply to Lot 1 which plaintiffs were attempting to develop as a shopping center.

DISPOSITION BY LOWER COURT

Plaintiffs moved for summary judgment. After oral argument, the Court took the motion under advisement and subsequently granted plaintiffs' motion. The Court entered extensive Findings of Fact and Conclusions of Law determining, in brief, that the restrictive covenant was never

intended to apply and does not apply to Lot 1, that no purchaser ever reasonably relied on the covenant and that it would be unreasonable to apply the restrictive covenant to Lot 1. Having so ruled, the Court further determined that it was not necessary to consider defendants' argument that the covenant by its terms applies to Lot 1 and that any attempt to reform the written covenant on grounds of mistake is barred by the statute of limitations.

#### RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the summary judgment in favor of plaintiffs and a declaration that summary judgment was not proper because material facts are in dispute. In the alternative, if the Court finds that no material facts are in dispute, defendants seek summary judgment in their favor on grounds that, as a matter of law, the covenant is applicable to Lot 1.

#### STATEMENT OF FACTS

Plaintiffs are the owners of a five-acres lot in the Mt. Olympus Subdivision in Salt Lake County. The subdivision was originally developed in 1956 by Bernard P. and Nada R. Brockbank, the immediate predecessors in interest of plaintiffs. The subdivision plat which Bernard and Nada Brockbank recorded in 1956 in the Salt Lake County recorder's

office, shows several hundred lots of similar size and one larger ten-acre lot. The larger lot is numbered Lot 1 and is marked "Commercial Zone/Shopping Center." After the plat was recorded, the Brockbanks had prepared and recorded a restrictive covenant covering all lots in the subdivision (R. 114). The pertinent part of the covenant (R. 15) states: "All the lots in said tract shall be known and described as residential lots and shall be used for residential purposes only." The covenant also specifically excepts certain enumerated lots from this restriction; Lot 1 is not so excepted. Nevertheless, in 1958, Lot 1 was zoned commercial, C-1.

Several years later Bernard and Nada Brockbank sold to the State approximately half of Lot 1 when the State Road Commission threatened to condemn that part of Lot 1 which it needed for road expansion. The Brockbanks later transferred the remaining five acre portion of Lot 1 to their sons, Loren and Von, who with their wives, are plaintiffs in this action.

In 1971 the plaintiffs attempted to obtain financing from Zions Bank in Salt Lake City and proposed that Lot 1 be used to secure the loan (R. 239). A title report dated September 7, 1971, was provided to the Bank by Brockbank Realty and Brockbank and Sons (R. 240). The report indicated

that Lot 1 was subject to a restrictive covenant. James Kiholm, an officer and employee of the Bank, called this fact to the attention of plaintiffs (R. 240) and, because of this restriction, financing was refused.

In 1975, plaintiffs attempted to develop Lot 1 as a shopping center, but were still unable to obtain financing because lending institutions refused to finance the project without a judicial determination as to whether the restrictive covenant applied to Lot 1 (plaintiffs' complaint, R. 5). Therefore, plaintiffs brought suit against the named defendants, property owners in the subdivision. It was subsequently ordered that the action be maintained as a class action against all property owners in the subdivision (R. 52).

Plaintiffs' complaint alleges that the restrictive covenant was never intended to apply and does not apply to Lot 1 (plaintiffs' complaint, first cause of action, R. 5). In the alternative, plaintiffs argued that if the covenant does apply to Lot 1, then such resulted from mistake or inadvertance and the court should order reformation of the covenant to reflect the true intent of the developers (plaintiffs' second cause of action, R. 7).

Plaintiffs further argued that the plat, which was recorded first, should take precedence over the restrictive

covenant (third cause of action, R. 7), that the C-1 zoning classification should permit the development of the shopping center despite the restrictive covenant (fourth cause of action, R. 8), that the restrictive covenant is against public policy (fifth and sixth causes of action, R. 10, and 11), and that the restrictive covenant is void (seventh cause of action, R. 12).

Defendants answered with a general denial of most of the allegations in the complaint. In addition, defendants affirmatively alleged in their verified answer (R. 34) that virtually all of the defendants purchased their property in reliance on the covenant, that plaintiffs had actual or constructive notice that the covenant restricted Lot 1 and that plaintiffs' request for reformation is barred by the statute of limitation, Utah Code Annotated 78-12-26(3), which provides that an action for reformation of a mistake must be brought within three years of the discovery of the mistake.

*If this is a suit to Reform*  
The Court granted plaintiffs motion for summary judgment, ruling, as previously stated, that the restrictive covenant did not apply to Lot 1. This holding was essentially a judgment on plaintiffs' first cause of action. Having so ruled, the Court determined that the plaintiffs' second cause of action for reformation of mistake and defendants'

statute of limitations defense was "without merit" (Memorandum Decision, R. 241) or was immaterial and that it was unnecessary to consider such defense (Conclusions of Law, R. 250). Plaintiffs' other causes of action were not argued.

## LEGAL ARGUMENT

### POINT I

UNAMBIGUOUS LANGUAGE CANNOT BE VARIED  
BY EXTRINSIC EVIDENCE AS TO THE INTENT  
OF THE PARTIES. THE COURT ERRED IN  
CONSIDERING THE INTENT OF THE DEVELOPER  
OF THE SUBDIVISION

The language of the covenant clearly makes the residential restriction applicable to Lot 1. The covenant states: "All the lots in said tract shall be known and described as residential lots and shall be used for residential purposes only" [emphasis added]. In addition, the covenant specifically excepts from this residential restriction certain lots, specifically named, which are earmarked for "school, Church and Recreational purposes." Lot 1 is not excepted, nor does the covenant make any mention of any lot in the subdivision being set aside for commercial and/or shopping purposes.

Given this unambiguous language, it is clear that the restrictive covenant was made applicable and is still applicable to Lot 1. The clear and plain language makes it impossible to conclude otherwise.

Plaintiffs argue, however, that despite this clear and unambiguous language, the covenant should be held inapplicable to Lot 1 because it was never intended

to be applied to Lot 1. Bernard Brockbank, in his affidavit, states that he was the developer of the subdivision, that he caused the plat and the covenants to be prepared and recorded and that it was never his intention that Lot 1 was to be subject to the restrictive covenant (R. 114). But the developer's intention is immaterial where the language of the covenant is plain and unambiguous and evidence as to his intent cannot be used to vary terms which are clear and definite.

In the case of Commercial Building Corporation v. Blair, 565 P.2d 776, Utah, 1977, there was a dispute as to what portion of leased property the lessor was obligated to set aside for parking spaces. The lease said parking was to be on "Lots 25 to 30" but the trial court ruled that the language was ambiguous, considered evidence that the lessor did not intend that only Lots 25 to 30 could be set aside for parking, and ruled in favor of the lessor. The Utah Supreme Court reversed saying:

The rule in the State of Utah, as elsewhere, is that parol evidence may be admitted to show the intent of the parties if the language of a written contract is vague and uncertain. On the other hand, such evidence cannot be permitted to vary or contradict the plain language of a contract...If it was in fact the intention of the parties that the parking area could be located

anywhere on the south half of the lessor's property, they had only to say so. To say now that the parties did not mean what they said in clear and plain language is to vary and contradict the terms of the contract.

The Court ruled the same way in Clyde v. Eddington Canning Co., 10 Utah 2d 14, 347 P.2d 563 (1959):

Under the clear language of the writing we are not impressed with [defendant's contention as to his intention], particularly since intentions cannot vary the terms of clear, concise, unambiguous language employed by him who says he did not intend what he said.

See also Pulsipher v. Tolboe, 13 Utah 2d 190, 370 P.2d 360 (1962), where the Utah Supreme Court ruled that where language of a contract is clear and unambiguous, there is no basis for interpreting it by showing by extraneous evidence the intent or understanding of a party.

Plaintiffs rely on the rule as stated in Parrish v. Richards, 8 Utah 2d 419, 336 P.2d 122 (1959), that in the "construction of uncertain or ambiguous restrictions the courts will resolve all doubts in favor of the free and unrestricted use of property." Defendants do not contest that proposition but such a rule has no bearing here as we are not attempting to interpret uncertain or ambiguous restrictions. "Where the language of the restriction is clear and unambiguous, the parties will be confined to the

meaning of the language which they have employed, and it is unnecessary and improper to inquire into the surrounding circumstances or the objects and purposes of the grant or restrictions for aid in its construction." 26 C.J.S., Deeds, Sec. 163, p. 1104.

In light of the foregoing, the court erred in considering the developer's intention where the language of the covenant was clear, plain, definite and unambiguous.

## POINT II

WHETHER ANY PURCHASER OF A LOT IN THE SUBDIVISION RELIED ON THE RESTRICTIVE COVENANT IS A MATERIAL FACT, SHARPLY DISPUTED, THEREBY MAKING IT ERROR FOR THE COURT TO GRANT SUMMARY JUDGMENT.

In granting plaintiffs' motion for summary judgment, the trial court further ruled that no purchaser of any lot in the subdivision could have relied on the covenant or believed it restricted Lot 1 to residential use. Whether any purchaser relied is an issue of fact that is sharply disputed.

Defendants filed two affidavits of persons who had purchased lots in the subdivision. Each stated that he relied on the covenant when he purchased his lot.

Earl Spafford, who purchased a lot in 1963 and later sold it, stated: "That at the time of said purchase

affiant was informed of and relied upon the language of said restrictive covenant" (R. 220). Don Smith, one of the defendants in the instant action, stated that, when he purchased his lot in 1972, he "examined the title report and the restrictive covenant contained therein" and further that he "knew of the restrictive covenant covered by [sic, presumably he meant covering] Lot 1 and relied thereon in his purchase of the property" (R. 237).

These statements are in direct conflict with the affidavit of Bernard Brockbank, who stated: "I do not know of any purchaser or owner of any of the lots in the subdivision who relied, in purchasing a lot or lots, on the restrictive covenant as restricting.... Lot 1...." (R. 117).

Nevertheless, the court failed to recognize this dispute of fact and entered the following Finding of Fact:

21. None of the purchasers, owners of, or any person having any interest in any of the lots in the aforesaid subdivision ever reasonably relied in purchasing a lot or lots in said subdivision on the restrictive covenants as restricting...Lot 1 to noncommercial residential development. (R. 247).

The court also entered the following Conclusions of Law:

6. None of the purchasers, owners of, nor any person or entity having any interest of any kind whatsoever in any of the lots in the aforesaid subdivision

ever reasonably relied, in purchasing a lot or lots in said subdivisions, on the restrictive covenants as restricting...Lot 1 to noncommercial residential development...

11. There are no issues of fact raised by the affidavits or records herein...

13. The affidavit of Earl S. Spafford does not raise any issues of material fact and is deficient in setting forth any facts that Earl S. Spafford relied on the aforesaid restrictive covenant...

14. The affidavit of Don Smith does not raise any issues of material fact and is deficient in setting forth any facts that Don Smith relied on the aforesaid restrictive covenants...(R. 250, 251).

Clearly these Findings and Conclusions are not correct. Whether purchasers of lots relied on the covenant as being applicable to Lot 1 is sharply in dispute since the developer claims no one relied and two purchasers claim they relied. Therefore, summary judgment is clearly in appropriate and the court erred in granting it.

The Utah Supreme Court has repeatedly ruled that summary judgment is a drastic remedy and should be granted only with reluctance and with great caution. Housely v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967).

This principle is stated plainly in Welchman v. Wood, 9 Utah 2d 25, 337 P.2d 410 (1959):

Summary judgment is a drastic remedy and the Court should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial. It should be granted only when under the facts viewed in the light most favorable to [him against whom it is directed] he could not recover as a matter of law.

See also Frederick May & Co. v. Dunn, 13 Utah

2d 40, 368 P.2d 266 (1962):

To sustain a summary judgment, the pleadings evidence, admissions, and inferences must show that there is not a genuine issue of material fact and that the winner is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial.

The court apparently attempted to reconcile the disputed facts as to reliance by finding that there was no "reasonable" reliance. Whether the reliance claimed by Mr. Smith and Mr. Spafford was reasonable is to be determined by a trier of fact; such is not a determination to be made on a motion for summary judgment and without any evidence as to reasonableness. "It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence...if there is any dispute as to any issue material to the settlement of the controversy, the summary judgment should not be granted." Holbrook Co. v. Adams, 542 P.2d 191, Utah, 1975.

The very fact that the court ordered plaintiff to prepare Findings of Fact (R. 242) indicates that the court had indeed determined facts. In considering a motion for summary judgment, it is not the judge's role to find facts, but only to look at the facts presented to him to determine if material facts are in dispute. Holbrook v. Adams, supra.

Plaintiffs attempt to discredit Mr. Smith's and Mr. Spafford's affidavits by arguing that their statements regarding their knowledge of and reliance on the restrictive covenant are not statements of fact but unsubstantiated conclusions (R. 212 and 214). The case of Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973), requires that statements set forth in an affidavit "must be made on personal knowledge of the affiant, and set forth facts that... show that the affiant is competent to testify to the matters stated therein." The statements made by Mr. Smith and Mr. Spafford were made of their own personal knowledge and belief. Mr. Smith and Mr. Spafford are purchasers who state flatly that they relied. It is ridiculous to characterize their statements as unsubstantiated conclusions. A far better example of an unsubstantiated conclusion is Mr. Brockbank's statements that he knew of no purchasers who relied.

Plaintiffs also attack Mr. Spafford's affidavit as being immaterial and irrelevant since Mr. Spafford is not a defendant in the case and presently owns no property in the subdivision. It matters not that Mr. Spafford no longer owns property in the subdivision. Mr. Brockbank said in his affidavit that he knew of no purchaser who had relied. Mr. Spafford is a purchaser who did rely. Evidence is immaterial and irrelevant only if it sheds no light on the question; conversly, evidence is relevant if it tends to prove or disprove a fact in issue. 31A C.J.S., Evidence, Sec. 138. Mr. Spafford's affidavit meets this criteria. If his affidavit is immaterial because he is not a defendant, then Bernard Brockbank's affidavit should be immaterial because he is not a plaintiff. Such absurdity needs no elaboration.

### Point III

SINCE PLAINTIFFS ADMITTED THAT THE RESTRICTIVE COVENANT WAS BY MISTAKE MADE APPLICABLE TO LOT 1, THE COURT ERRED IN REFUSING TO CONSIDER DEFENDANTS' DEFENSE THAT REFORMATION OF THE MISTAKE WAS BARRED BY THE STATUTE OF LIMITATIONS AND SUMMARY JUDGMENT ON THE ISSUE IS IMPROPER BECAUSE THE TIME OF DISCOVERY OF THE MISTAKE IS IN DISPUTE.

As shown in Point I, the clear and unambiguous language of the covenant makes the restriction applicable to Lot 1. Therefore, one must conclude either that the

covenant was intentionally made applicable to Lot 1 or the language making it applicable was a mistake.

Plaintiffs make no contention that the covenant was intentionally applied to Lot 1; rather, they repeatedly admit that a mistake was made. See the following admissions:

1. "...said document [the restrictive covenant] by accident mistake and/or inadvertance failed to exclude Lot 1..."(plaintiffs' answers to interrogatories, R. 104).
2. "It was also never intended that the large ten-acre tract be marked '1' and in so indicating that on the plat, a mistake was made" (Bernard Brockbank's affidavit, R. 114).
3. "He first discovered that a mistake had been made in marking '1' on the portion of the plat..." (Loren Brockbank's affidavit, R. 118). See similar statements in the affidavits of the other three plaintiffs on R. 120, 122 and 124.
4. "The upshot is that the mistake on the plat identifying this large ten acre parcel as Lot 1 arguably subjected that piece of property...to the restrictive covenant." (Oral argument of plaintiffs' attorney, R. 302).
5. "Now, Bernard Brockbank's affidavit, your Honor, makes it very clear that there was a mistake that was never intended...there was a mistake..." (Oral argument of plaintiffs' attorney, R. 303).
6. "Your Honor, it's simply our position on this motion that there has been a mistake made... (Oral Argument of plaintiffs' attorney, R. 304).

Plaintiffs' admissions that a mistake was made is also an admission that the language of the covenant makes the restriction applicable to Lot 1. If the covenant did not apply to Lot 1, there would be no reason to admit that a mistake had been made.

In light of these admissions that a mistake was made, defendants must be given the opportunity to present their defense that the statute of limitations bars reformation of the covenant.

Utah Code Annotated 78-12-26(3) provides that an action for relief on the ground of mistake must be brought within three years.

Defendants contend that plaintiffs knew about the mistake as early as September of 1971, five years before this action was instituted. James Kiholm, an officer and employee of Zions Bank, stated in his affidavit that on or about September 20, 1971, he pointed out to plaintiffs that a restrictive covenant encumbered Lot 1 (R. 240). A title report prepared in 1971 and furnished to Zions by plaintiffs also indicated the existence of the covenant (R.221).

In direct contradiction to these facts are statements in plaintiffs' affidavits that they did not discover that a mistake had been made until mid-1975 (R. 118, 120, 122, 124).

In light of these contradictions, summary judgment on the issue of mistake and the defense of the statute of limitations would be clearly improper. "This court has a consistent policy of resolving doubts in favor of permitting parties to have their day in court on the merits of the controversy." Ruffinengo v. Miller, 579 P.2d 342, Utah, 1978. See also the cases cited under Point II with regard to the propriety of summary judgment.

#### Point IV

##### ZONING CANNOT SUPERSEDE COVENANT RESTRICTIONS.

Despite the language of the covenant making the residential restriction applicable to Lot 1, the property was zoned commercial in 1958. This rezoning, however, has no bearing on whether the covenant is applicable to Lot 1. It is a basic rule of law that a zoning ordinance does not impair restrictions on property and that restrictive covenants remain paramount. Chuba v. Glasgow, 61 N.M. 302, 299 P.2d 774 (1956); Kosel v. Stone, 146 Mont. 218, 404 P.2d 894 (1965); Finley v. Batsel, 67 N.M. 125, 353 P.2d 350 (1960); 20 Am.Jur. 2d, Covenants, Conditions and Restrictions, Sec. 277.

The case of Fox v. Miner, 467 P.2d 595, Wyoming, 1970, presented a situation similar to the instant case. In Fox, as here, plaintiffs were attempting to void covenants

restricting their property to residential use, arguing that the property had been rezoned for business use. The Supreme Court upheld the lower court's ruling against them: "However, it is well settled that zoning ordinances cannot override, annul, abrogate or relieve land from building restrictions or covenants placed thereon."

The proposition is laid out in 26 C.J.S., Deeds, Sec. 171(2):

A valid restriction on the use of real property is neither nullified nor superseded by the adoption or enactment of a zoning ordinance, nor is the validity of the covenant thereby affected. Thus, the action of the zoning authorities of a city declaring land on a restricted area to be a business district does not have the effect of destroying the restrictive covenants...

*Can't  
abrogate  
Contract*

To hold in the instant case that because of the commercial zoning the restrictive covenant is not applicable to Lot 1 would be clearly against the accepted rule of law.

#### POINT V

THE PLAT CANNOT CHANGE THE TERMS  
OF A RESTRICTIVE COVENANT.

The fact that the recorded plat of the subdivision shows Lot 1 marked "Commercial Zone/Shopping Center" is not sufficient to destroy the covenant restricting all lots to residential use.

It is a well established principal of law concerning building contracts that if a conflict is found to exist between the written contract and the plans or specifications, the language of the written contract controls, even if the contract specifically incorporates the plans and specifications. Inland Engineering & Construction Co. v. Maryland Casualty Co., 76 Utah 435, 290 P. 367 (1930); Guerini Stone Co. v. P.J. Carlin Construction Co., 240 U.S. 264, 36 S.Ct. 308, 60 L.Ed. 636 (1916); Mahoney v. Galokee Corp., 214 Kan. 754, 522 P.2d 428 (1974).

The rule should be no different for a covenant and a plat, especially as here, where the covenant was recorded after the plat.

Where words of conveyance in a deed conflict with the plat, the deed controls. "[A] reference to a plat is for the purpose of description and cannot be resorted to enlarge or diminish the effect of the words of conveyance in the deed." 26 C.J.S, Deeds, Sec. 101, p. 899.

In the case of Stanley v. Greenfield, 207 Ga. 390, 61 S.E. 2d 818, 21 A.L.R. 2d 1256 (1950), the deed referred to a plat which indicated a building line 69 feet from the street. But the restrictive covenant stated, "No residence shall be erected on any lot nearer...than

80 feet from the property line as shown by the plat." The court held that the reference in the plat must yield to the specific wording of the restrictive covenant. See also 20 Am.Jur. 2d, Covenants, Conditions and Restrictions, Sec. 179 and 268.

### CONCLUSION

The language of the restrictive covenant is plain, definite and unambiguous; the covenant restriction is clearly applicable to Lot 1.

Despite this clear language, the court found the covenant not applicable because it was never intended to be applicable to Lot 1 and because no purchaser ever relied on it. Such was in error because:


(1) Parol evidence as to intent cannot be used to vary the terms of a writing which is clear and unambiguous.

(2) The issue of reliance is in sharp dispute, thereby precluding summary judgment.

Plaintiffs admitted that language making the covenant applicable to Lot 1 was a mistake. Defendants contend that the statute of limitations has run as more than three years have elapsed since plaintiffs discovered the mistake, a contention plaintiffs' dispute. Since plaintiffs admit a mistake, it is error for the court to refuse to consider

defendants' statute of limitations defense; and since the time of discovery of the mistake is disputed, summary judgment is improper.

DATED this 10 day of November, 1978.

  
EARL S. SPAFFORD

  
BRUCE LAVAR DIBB

MAILING CERTIFICATE

I hereby certify that a copy of the foregoing to William T. Thurman, Sr., attorney for plaintiffs and respondents, at 500 Kennecott Building, Salt Lake City, Utah 84133, this 10 day of November, 1978.

