1979

Alan C. Reed v. Vaughn Alvey et al : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ALAN C. REED, :

Plaintiff-Appellant, : District Court No. 253295

vs. :

VAUGHN ALVEY, et al., : Supreme Court No. 16150

Defendants-Respondents: :

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BRIEF OF PLAINTIFF-APPELLANT

- -

APPEAL OF A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY,
THE HONORABLE DEAN E. CONDER,
PRESIDING

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NATURE OF CASE

Plaintiff, as purchaser under a standard form earnest money receipt and offer to purchase (hereinafter the "Agreement"), commenced this action against Defendants, as sellers under the Agreement, seeking to compel the Defendants to convey to Plaintiff title to certain improved real property (hereinafter sometimes the "Property") purchased by Plaintiff from Defendants under and described in the Agreement. In addition, Plaintiff requested the Trial Court to remove certain encumbrances on the Property within a time certain and upon failure of Defendants to do so, then, in the alternative, to offset the monetary amount of such encumbrances against the balance of the purchase price owed by Plaintiff to Defendants.

DISPOSITION IN TRIAL COURT

The Trial Court concluded that the Agreement was too vague and ambiguous to be binding upon Defendants and, therefore, not capable of specific performance. The Trial Court entered judgment dismissing Plaintiff's Complaint and ordering Defendants to return to Plaintiff the $500.00 consideration paid by him to Defendants at the time of execution of the Agreement.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order reversing the judgment of the Trial Court and directing entry of judgment for Plaintiff compelling Defendants to convey title to the Property to

Plaintiff and requiring Defendants within a time certain to remove certain encumbrances on the Property. In addition, Plaintiff requests that upon Defendants failure to do so, then, in the alternative, to allow offset of the monetary amount of the encumbrances against the balance of the purchase price owed by Plaintiff to Defendants.

STATEMENT OF FACTS

During the spring of 1976, Plaintiff was contacted by Richard Lambert (hereinafter "Lambert"), a real estate agent acting as agent for Defendants and a loan officer at Zions First National Bank, Salt Lake City, Utah (hereinafter "Zions Bank"), regarding the sale of certain real property located at the intersection of Hillview Drive and Ninth East Street, Salt Lake City, Utah. Lambert informed Plaintiff that Defendants would be in the process of constructing three four-plex units on such property and that he, Lambert, was attempting to arrange a sale to Plaintiff on behalf of Defendants of one of the fourplex units (sometimes hereinafter the term "fourplex" is used to describe the property purchased by Plaintiff under the Agreement).

On or about April 23, 1976, Lambert presented Plaintiff with the Agreement (Exhibit 1.) which he had prepared as agent for Defendants (R. 56). The Agreement provided, among other things, for (i) the sale of real property situated at "the corner of Hillview and Ninth East", Salt Lake City,

Utah, and (ii) a $500.00 deposit was to be paid and held for application toward payment of a $70,000 total purchase price. The Agreement also included the words "terms to be arranged", which terms, according to the Agreement and understanding thereof by Plaintiff, Defendants and Lambert, meant that Plaintiff was to arrange his own permanent financing of the Property and with that financing to pay the Defendants the balance due at the closing of title. Defendants paid Lambert a commission for arranging this sale of the Property to Plaintiff (R. 68-69).

Within approximately two or three weeks after the execution date of the Agreement, Plaintiff sought financing from Zions Bank for a loan in an amount of eighty percent (80%) of the purchase price of the Property and received a commitment from Zions Bank for that financing (R. 58). Based solely upon Plaintiff's financing commitment from Zions Bank, Defendants received from Zions Bank a loan for the construction of a fourplex on the Property (R. 103, 104 and Exhibit 16).

No completion date for construction of the fourplex on Plaintiff's Property was inserted into the Agreement at the instruction of Defendant Michael Alvey to Lambert. Lambert was told that the fourplex could be completed on Plaintiff's Property within three months of the execution date of the Agreement, but since it might take as long as four months to complete, he should not put a completion date in the Agreement

(R. 123, 127). Notwithstanding the fact that the fourplex was to have been completed on Plaintiff's Property within three or four months and title closed after April 23, 1976, Plaintiff received no communications from Defendants until after March 23, 1977. However, during the period from April 23, 1976 to March 23, 1977, Plaintiff continuously observed the construction of the fourplex unit on his Property. On numerous occasions Plaintiff complained to Lambert regarding Defendants' dilatory construction of such fourplex.

On March 23, 1977, Plaintiff received a letter bearing that date and advising him that the fourplex unit being built on the Property would be ready to close within two or three weeks. Such letter requested that Plaintiff deposit $13,500 in a non-interest bearing escrow account at Zions Bank as a downpayment for his fourplex unit. Plaintiff had not theretofore been advised that such a deposit would be required and it was Plaintiff's understanding that such $13,500 was due and payable at closing of title to the Property. After repeated unsuccessful attempts by Plaintiff to communicate with Defendants to determine the basis upon which such deposit was being requested by Defendants, Plaintiff learned that such deposit was to evidence his financial ability to complete the closing of title to his Property. Despite Plaintiff's disagreement with Defendants' demand for such deposit, and in anticipation of the purchase and sale of the Property being

closed within two or three weeks of March 23, 1977, Plaintiff did deposit $13,500 with Zions Bank on April 8, 1977 (R. 59-61).

From April 8, 1977 to approximately May 20, 1977, Plaintiff drove by his Property not less than once a week and observed that the fourplex unit being constructed on his Property was not complete and ready for rental and closing of title, and very little, if any work, was being done in order to complete construction. On or about May 20, 1977, Plaintiff withdrew the $13,500 sum from the escrow account, not because he did not intend to complete purchase of the fourplex unit, but rather because of the construction delays on Defendants' part, his inability to contact Defendants and the fact that the funds were in a non-interest bearing account (R.62).

After more unsuccessful attempts to communicate with Defendants, Plaintiff brought this action for specific performance by Defendants of the terms to be performed by the Agreement.

ARGUMENT

Introduction

The Trial Court concluded that:

1. The Agreement was "vague, ambiguous, uncertain, contingent and incomplete on its face, and . . . not capable of specific performance" (R.42) because no specific fourplex was agreed upon by Plaintiff and Defendants and because the phrase in the Agreement of "terms to be arranged" was not

discussed, negotiated or agreed to, but was left to future agreement" (R. 41, 42).

2. The Plaintiff failed to establish a valid legally enforceable contract because he had not complied with its terms by performing or offering to perform the obligations to be performed by him under the Agreement (R.42). This conclusion was based upon the Court's findings that Plaintiff had never obtained financing for the purchase of the Property and had never tendered to Defendants the purchase price thereof (R. 42).

It is submitted that the Court erred in its Findings and Conclusions and that it is the prerogative and the duty of this Court in an action in equity such as this to review the law and the facts and to make its own findings, substituting its judgment for that of the Trial Court if that judgment is not supported by the evidence. UTAH CONST. Art. VII §9; Del Porto v. Nicolo, 495 P.2d 811, 812 (Utah 1972); Nokes v. Continental Min. & Mill, 308 P.2d 954, 955 (Utah 1957); Crocket v. Nish, 147 P.2d 853, 854 (Utah 1944).

POINT I

THE COURT ERRED IN ITS CONCLUSION THAT THE AGREEMENT WAS VAGUE AND AMBIGUOUS AND NOT CAPABLE OF SPECIFIC PERFORMANCE IN THAT THE FOURPLEX TO BE SOLD TO PLAINTIFF WAS IDENTIFIED AND THE PARTIES KNEW, UNDERSTOOD AND HAD AGREED AS TO THE MEANING OF THE PHRASE "TERMS TO BE ARRANGED".

A fundamental rule of contract construction is that the terms of the agreement or contract in question must be

construed realistically in light of circumstances under which it was entered into and that if the intent of the parties can be ascertained with reasonable certainty, the Agreement must be given effect despite the uncertainty of the language of the Agreement.

This Court has adhered to this principle in several of its recent decisions. In Kier v. Condrack, 478 P.2d 327 (Utah 1970) an action was brought for specific performance of a contract to sell real property. This Court held that where the contract is uncertain "the Trial Court could then look to the circumstances and testimony of the parties to ascertain what appeared to be their intent and determine their obligations based thereon." Id. at 329.

In Continental Bank and Trust Co. v. R. W. Stewart, 291 P.2d 890 (Utah 1955), a bank, as a third party beneficiary, brought an action against the purchaser of property based on the purchaser's agreement to pay to the bank the debts of the seller. The earnest money receipt by which the purchaser had agreed to acquire the real property did not state what debts were to be paid by the purchaser or the time and manner of payment. In view of these ambiguities, this Court held that it was proper for the trial court to consider "the situation of the parties, the facts and circumstances surrounding the making of the contract, the purpose of its execution and the respective claims thereunder to ascertain what the parties intended. Id. at 892.

From these decisions it is apparent that an agreement which is vague and uncertain on its fact cannot be denied effect where the meaning of the agreement or contract can be ascertained from the circumstances surrounding its negotiation, execution and the parties' conduct with respect thereto. The Agreement specifies the amount of the earnest money deposit, the total purchase price of the Property, and the names of the contracting parties. The identity of the fourplex unit to be purchased by Plaintiff and the meaning of the phrase "terms to be arranged" become unequivocal and unambiguous by an analysis of circumstances surrounding negotiations, execution of the Agreement and the parties' conduct, as shown by the pleadings on file in this case and the evidence introduced at trial.

A. Identity of Fourplex

At the time Plaintiff was contacted by Lambert as agent for Defendants regarding the purchase of the fourplex, Defendants were engaged in negotiations to obtain a parcel of real property extending eastward from the corner of Ninth East Street and Hillview Drive, Salt Lake City, Utah. Defendants obtained such parcel and the lots therein contained were sold to three purchasers by Lambert pursuant to three similar earnest money agreements (R. 93-98, 114-118). Plaintiff was one of such three purchasers. At the time the three earnest money agreements were executed, a decision had not been made by Defendants with respect to identifying each of the three

lots to specified buyers (R. 97, 118). Defendants, however, did not rely on that fact as a basis for refusing to perform its earnest money agreements with the two buyers other than Plaintiff (R. 97). Any uncertainty in the property descriptions did not present an obstacle to the consummation and closing of the transactions with the other two buyers, and Defendants' conduct in connection therewith actually established and eliminated any question as to the identity of the fourplex to be purchased by Plaintiff; namely, as a result of the consummation of the transactions with the other two buyers, there was only one lot and fourplex remaining for Plaintiff to purchase.

It is anomalous under these circumstances, especially after Defendants have admitted in their answer to entering into the Agreement with Plaintiff (R. 9), that Defendants now contend for the first time that there exists an uncertainty with respect to the identity of the fourplex to be purchased by Plaintiff. Further, Defendant Michael Alvey testified at trial that there was no question that one of the fourplexes was to be sold to Plaintiff (R. 98). Such testimony of Michael Alvey, together with the foregoing facts, and the conduct of Defendants, unequivocally shows that Defendants' refusal to perform their part of the Agreement is not due to any confusion or ambiguity with respect to the identity of the Property, but is simply a specious excuse attempting to justify their refusal to perform and their breach of the Agreement.

B. Terms to be Arranged

The circumstances surrounding execution of the Agreement also dispel any contention that the Agreement is uncertain with respect to the manner of payment. The literal language of the Agreement provided that the financing terms were to be arranged. The phrase "terms to be arranged" referred to Plaintiff's arrangements to obtain permanent financing of the fourplex. Such phrase in no manner whatsoever pertained to any arrangements or agreements between Plaintiff and Defendants.

Plaintiff and Lambert, who was also a loan officer with Zions Bank, discussed the terms of the permanent financing prior to the execution of the Agreement by Plaintiff. Lambert informed Plaintiff of the terms he thought would be available from Zions Bank based on Plaintiff's financial statement (R. 57). After this discussion, Lambert presented the Agreement to Defendant Michael Alvey for execution by Defendants. Lambert informed Defendants that the Plaintiff was going to arrange his own financing with Zions Bank and pay Defendants the full balance of the purchase price at the closing of title to the fourplex. Defendants did not object to this financing arrangement with Zions Bank (R. 123). As further evidence of this understanding, Plaintiff applied to Zions Bank for a loan of 80% of the purchase price of the fourplex. Such loan would have been closed at the same time the construction of the fourplex was projected to be completed. Such action on Plaintiff's part

regarding application for and approval of such financing is substantiated by his own testimony (R. 58), the testimony of Douglas Giver, a former loan officer with Zions Bank (R. 164, 165), the records of Zions Bank indicating application for such a loan, and the fact that the application had been presented to Zions Bank loan committee (R. 104 and Exhibit 16).

The Trial Court's conclusion that the phrase "terms to be arranged" was left to future agreement is clearly erroneous with proper understanding of certain facts. The evidence has established that Plaintiff's loan application had to be approved by Zions Bank as a condition precedent to Zions Bank granting a construction loan to Defendants to build Plaintiff's fourplex (R. 103, 104 and Exhibits 8, 9, 10 and 15). Therefore, the approval by Zions Bank of the construction loan regarding Plaintiff's fourplex removes all doubt, if indeed any was present, regarding the meaning of the phrase "terms to be arranged". Such phrase was not intended to and did not in fact have any application to Plaintiff's and Defendants' application.

The evidence of discussions between Plaintiff and Lambert, Defendants and Lambert, and the approval of loans by Zions Bank for Defendants and Plaintiff, established that Defendants did not consider any part of the Agreement to be ambiguous. All major aspects of the Agreement are clear and

unambiguous. Clearly, the position of Defendants is to take advantage of the provisions of the Agreement prepared by their agent Lambert because, among other reasons, Defendants had encumbered the Property in addition to the construction loan at Zions Bank for $55,000, for an additional $60,750 (R. 84, 85 and Exhibit 6).

A similar challenge to an agreement uncertain on its face was rejected by this Court in Kier v. Condrach, supra. The agreement under review in that case provided for payment of the price for purchase of realty upon "terms to be negotiated." Id. at 329. This Court, however, agreed with the trial court's view that "when the parties had reached an agreement and committed themselves on the major aspects of the transaction, that is, that defendants would sell and the plaintiff would buy at the agreed price of $23,500 . . . reserving only the 'terms' of payment, they should be obliged to act in good faith in keeping their promises . . . But neither party should be permitted to use the reservation of 'terms' to get more than they had promised . . . nor to renege on the bargain . . ."

As shown, the Kier case is similar on its facts to this case on appeal. In Kier, this Court determined that the parties had committed themselves on the major aspects of the transaction: that the defendants would sell, that the plaintiff would buy at the agreed price of $23,500. In this case we have an agreement definite as to each of those aspects. Defendants

admittedly agreed to sell and Plaintiff agreed to purchase the fourplex at a price of $70,000. In Kier, the terms of payment were alleged to be indefinite and unenforceable. The $23,500 purchase price was to be "(O)n payment and terms to be negotiated . . ." Id. at 329. In this case the purchase price was to be financed upon "terms to be arranged". Despite the Kier case, and the facts in this case, the Trial Court concluded that there existed uncertainty and held the Agreement incapable of specific performance. Clearly, the Trial Court erred in this conclusion because the application of the Kier rationale to the facts in this case require the inseparable conclusion that the major aspects of the Agreement had been agreed upon, and the circumstances surrounding the execution of the Agreement, including the parties' conduct with respect to the Agreement, unequivocally and unambiguously identify each and every term of the Agreement.

POINT II

THE COURT ERRED IN HOLDING THAT PLAINTIFF HAD FAILED TO COMPLY WITH THE TERMS OF THE AGREEMENT BY NOT OBTAINING NECESSARY FINANCING OR NOT TENDERING THE PURCHASE PRICE.

The record clearly shows that Plaintiff complied in every respect with all obligations on his part to be performed and all requests made upon him by Defendants. Also, Plaintiff made any and all tenders of performance required by the Agreement or by law.

Plaintiff signed the Agreement, delivered the sum

of $500.00 to Lambert as a deposit on the purchase price, and contrary to his understanding of the Agreement, he complied with Defendants' request to deposit $13,500 in a non-interest bearing escrow account with Zions Bank. He also applied to Zions Bank for financing for the balance of the purchase price and was told that he had qualified for the financing (R. 75). Defendants produced no evidence that Plaintiff at any time was not ready, willing and able to perform or could not in fact have tendered and paid the purchase price of the fourplex.

The general rule in equity regarding the tender of performance is that even though the plaintiff has not tendered performance, the court can decree specific performance by the defendant by making enforcement conditional upon plaintiff's rendering the return performance into court. Equitable principles do not require that the plaintiff must of necessity make a tender before suing for specific performance, so long as plaintiff is ready, willing and able to tender performance.

> The court of equity suffered from no such limitation of power (as compared to courts of law). It could decree specific performance by the defendant, and at the same time make enforcement conditional on the plaintiff's rendering the return performance into court (e.g. the payment of a price in money or the delivery of a deed). If the plaintiff's performance was one that required some continued performance incapable of being rendered into court, the decree might require specific performance either after full performance by the plaintiff or by requiring it pari passu as the plaintiff's performance proceeded. In many fewer cases does justice require that the plaintiff should make a tender before suing for specific performance; and therefore tender is much less often held to be a condition precedent to the granting of a decree.

5A Corbin on Contracts, §1175, P. 299.

The only evidence available to Defendant that Plaintiff did not comply with all of Defendants' requests or which tends to indicate that he did not intend to perform his obligations under the Agreement is that he withdrew the $13,500 from the escrow account at Zions Bank after having deposited the same. However, Appellant asserts that such escrow arrangement is not part of the Agreement. Assuming, arguendo, that such escrow arrangement is a term of the Agreement, such action of withdrawing the funds is explainable and was explained at trial. When the fourplex was not near completion at the time projected in Defendants' letter to Plaintiff of March 23, 1977 (R. 61, 62) and because the money was in a non-interest bearing escrow account, Plaintiff withdrew the same. By doing so, Plaintiff did not intend to breach the Agreement or to not complete it as required by him. Instead, Plaintiff testified his action was prompted by the combination of factors of Defendants long delays in completion of the fourplex and the fact that such a large sum of money was in a non-interest bearing escrow account. In addition, Plaintiff profferred testimony at trial that he had been informed by an employee at Zions Bank that Defendants, without Plaintiff's permission or knowledge, had attempted to remove the $13,500 from the escrow account prior to having finished the construction of Plaintiff's fourplex and the closing of title thereto. Such testimony was excluded by the Trial

Court, however, and it is unclear whether the exclusion was on the basis that such profferred testimony was hearsay or whether an inadequate foundation had been laid for its acceptance. If excluded on the basis of hearsay, such exclusion was improper in that the testimony, as stated at the time (R. 63), was not being introduced for the truth of the matter asserted but simply to show another reason why Plaintiff was withdrawing his funds from the escrow account, and not being introduced for the truth of the matter asserted, the testimony would obviously not be hearsay. In the event the testimony was excluded on grounds of lack of a proper foundation, it is submitted that a proper foundation was laid, or in any event, Defendants' counsel failed to state the grounds upon which he based his objection of lack of foundation. The profferred testimony should have been received.

Contrary to the finding of the Trial Court that Plaintiff has not complied with the terms of the Agreement by obtaining financing or tendering the purchase price, the testimony as reviewed and analyzed clearly shows that Plaintiff has performed and has always been ready, willing and able to perform the obligations required of him under the Agreement. It has been Defendants who failed to perform. Notwithstanding Defendants' own statements, as testified to by their agent Lambert (R. 123), that Plaintiff's fourplex would be completed within three to four months, it was eleven months before

Defendants notified Plaintiff that his fourplex unit would be completed in two to three weeks after date of that notification; namely, March 23, 1977. Furthermore, the Plaintiff's fourplex was still not completed within that two to three week period and remained uncompleted as long as five to six weeks after March 23, 1977 (R. 61, 62). Also, without any basis in the Agreement, Defendants required Plaintiff to deposit $13,500 in a non-interest bearing escrow account as evidence of his ability to perform. But Defendants failed to perform their part of the Agreement by not timely completing Plaintiff's fourplex. Despite Defendants' utter lack of good faith in not performing their obligations under the Agreement, Defendants nevertheless raised defenses as to vagueness of the Agreement and lack of performance on Plaintiff's part. Proper application of equitable principles to the facts of this case requires and compels specific performance of the Agreement, as was recognized by this Court in the Kier case.

> We recognize the validity of the rule relied upon by Defendants that to be enforceable a contract must be sufficiently definite in its terms that the parties know what is required of them. But like all rules, which are necessarily stated in generality, it is only applicable in the proper circumstances, where the justice of the case requires: as a shield to protect the party from injustice, and not as a weapon under which to perpetrate an injustice.

Kier v. Condrack, supra, at 330. To uphold the Defendants' position in this case will allow them to use legal principles as a "sword" to perpetrate an injustice upon Plaintiff. The

facts of this case compel that Plaintiff be protected and shielded against the kind of activities Defendants and their agent Lambert have perpetrated upon him and equitable principles demand the same.

CONCLUSION

The precedent upon which to decide this case is found in the holdings of Kier v. Condrack, supra, and Continental Bank & Trust Company v. Stuart, supra, Id. at 892. It is, therefore, not only proper but obligatory to consider the facts and circumstances surrounding the making of the Agreement and the negotiation and actions of the Plaintiff and Defendants. When such matters are considered, it is unequivocal that a specific fourplex does exist and that not only was it the intent of the Plaintiff and Defendants that such fourplex be the one purchased by Plaintiff, but also it is the only fourplex that could be the subject of the Agreement. It is also unequivocal that Plaintiff, Defendants and Lambert all were aware and contemplated that the balance of the purchase price of the fourplex would be paid by Plaintiff at closing to title thereto with funds he arranged by his own financing efforts. Defendants admitted the Agreement in their answer. Defendants' activities and conduct with respect to the Agreement for a period in excess of a year indicates knowledge and intention on their part that an Agreement existed under which they were to sell a specific fourplex to Plaintiff to be totally paid for by Plaintiff at closing. The Court, if it does not enforce the

Agreement, would be allowing Defendants to use the defenses raises by them as a weapon to thwart justice and fair dealings rather than as a shield to prevent injustice as equitable principles were intended to be used.

It is hereby requested that the Court should not let stand the decree of the Trial Court that will allow Defendants, who abruptly, without notice and to the detriment of Plaintiff who had justifiably relied on the Agreement and Defendants' conduct, refuse to abide by and specifically perform their obligations under the Agreement. The judgment of the Trial Court should be reversed and Defendants ordered to specifically perform the Agreement by conveying the Property to Plaintiff, and that if the encumbrances on the Property as shown in the record are not removed by Defendants within a reasonable time specified by the Court, Plaintiff be allowed an offset in the total amount of such encumbrances against the balance of the purchase price of the Property to be paid by him to Defendants.

DATED February 9, 1979.

Respectfully submitted:

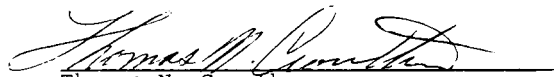
PARSONS & CROWTHER

By John Parsons
John Parsons

By Thomas N. Crowther
Thomas N. Crowther

CERTIFICATE OF SERVICE

Two copies of the foregoing brief were served upon Defendants by mailing a copy thereof, postage prepaid, to their attorney, Harold A. Hinsey, at 2000 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, this 9th day of February, 1979.



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