

1998

KDAB v. Margaret Jane Gordon : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

KDAB, L.L.C.,

Plaintiff/Appellant,

vs.

Case No. 980236 - CA

Priority No. 15

MARGARET JANE GORDON,

Defendant/Appellee.

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM A JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT
OF TOOELE COUNTY, STATE OF UTAH
THE HONORABLE L. A. DEEVER

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COURT OF APPEALS

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction as stated by Plaintiff.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Defendant agrees with the statement of issues presented by the Plaintiff.

STATEMENT OF DETERMINATIVE LAWS

The Defendant does not believe that there are any determinative laws which

govern the decision in this matter.

STATEMENT OF THE CASE

The Defendant agrees with the statement of the case presented by the Plaintiff.

STATEMENT OF RELEVANT FACTS

The Statement of Relevant Facts presented by KDAB is incomplete in an important respect. That omission is critical to an understanding of Mrs. Gordon's position. KDAB contends that a notice to extend the Term was sent via regular mail. The Agreement requires that it be by certified mail, return receipt requested. Mrs. Gordon denies ever receiving any notice whatsoever, either by regular or by certified mail. KDAB fails to note that the notice, purportedly sent, did not include the extension money of \$8,125.00 as required by the Agreement. Agreement at Paragraph 3, page 3, KDAB's Appendix, Exhibit A; *see, e.g.*, Amended Order on Motion for Summary Judgment at Paragraph 3 at p. 2, KDAB's Appendix, Exhibit C. It was nearly two years later when KDAB contended for the first time in May 1996 that the Agreement was still in effect and produced the purported notice of extension purportedly sent in August of 1994. There has never been any contention that the extension money was tendered at any time.

KDAB's argument in the trial court below was that its failure to properly send the notice and/or remit funds was a default by it regarding the terms of the Agreement. *See, e.g.*, Order and Amended Order on Motion for Summary Judgment, KDAB's Appendix, Exhibits B & C. KDAB's contention was that a notice to cure was required from Mrs. Gordon, otherwise KDAB would continue to enjoy the Option and the right to extend the Term indefinitely. *Id.*

SUMMARY OF ARGUMENT

The Agreement expired by its terms on November 30, 1994, never having been extended by KDAB. An extension would have required a proper notice, timely sent, along with the additional payment of \$8,125.00. All of which did not happen. The wording of the Agreement at Paragraph 3 is directed to impairment, termination and/or forfeiture of KDAB's rights, title and interests. One of KDAB's interests was the right to extend the Term. That right was never impaired, terminated or forfeited. KDAB did not exercise the right to extend and the right to extend the Term thereafter expired. Mrs. Gordon never purported to impair, terminate or forfeit any rights, title or interest of KDAB. There is a clear difference between Mrs. Gordon terminating these rights or interests and KDAB not exercising the right to extend the Term.

KDAB wants to convert its nonextension of the Term into a "default" or "failure" requiring Mrs. Gordon to send a written notice detailing such "default" or

“failure” and requiring KDAB to “cure or remedy any such default or failure within thirty days.” Agreement at Paragraph 3, page 3, KDAB’s Appendix, Exhibit A. KDAB’s present argument is that Mrs. Gordon should have given KDAB notice of the “defective notification.” Appellant’s Brief at p. 6. Mrs. Gordon’s response is that she did not receive a “defective notice.” Mrs. Gordon swears that she received no notice at all. Mrs. Gordon cannot be expected to object to the notice being improperly sent or not including the necessary funds when she receives no notice at all. KDAB continues to suggest that the only problem is that the notice was incorrectly sent by regular mail. Mrs. Gordon’s position, reiterated repeatedly, is that no notice of any kind was received. The Agreement expressly resolves any controversy over the issue of proof of receipt of such notice by requiring that notices be sent by a specified procedure; to wit “postage prepaid, certified, return receipt requested.” Agreement at Paragraph 12, page 8, KDAB’s Appendix, Exhibit A. KDAB admits that even its purported notice was not sent “postage prepaid, certified, return receipt requested” as required and based thereon, the court found there was no notice and hence no extension of the Agreement. Order and Amended Order on Motion for Summary Judgment, KDAB’s Appendix, Exhibits B & C. The Agreement simply expired when no extension occurred.

ARGUMENT

The trial court disposed of this case upon respective motions for summary judgment filed by both of the parties. There is a central fact in dispute between the parties but the trial court found that disputed fact to be immaterial to its decision. KDAB alleged that it had sent a notice of extension by regular mail to KDAB on or about August 26, 1994. Mrs. Gordon denied receiving any such notice whatsoever. The trial court found that fact was immaterial to its decision on the motions and proceeded to render summary judgment for Mrs. Gordon finding the Agreement had expired by its own terms. The trial court's reasoning was that irrespective of how that disputed fact would be adjudicated, summary judgment for Mrs. Gordon was proper.

The trial court based its decision on the terms or methodology employed in the Agreement for proof of such a notice. The Agreement itself has a methodology to avoid the contentions which KDAB makes herein for it specifically requires a procedure be followed in giving notices. That procedure would have proved the delivery of any notice. KDAB obviously has no such proof of mailing and does not contend that this procedure was followed. KDAB does not have such proof because it did not follow this procedure or alternatively no notice was ever sent. Mrs. Gordon is not using this technical requirement to defeat an otherwise valid claim, it is her belief that KDAB never sent any notice as

required and as proof notes that the procedure was not followed and no funds were tendered.

Only after Mrs. Gordon's objection to further sales, did KDAB produce the "purported" notice of August 26, 1994. Mrs. Gordon's position is that notice was not given nor received. Obviously this notice of August 26, 1994 could be created subsequently and there is no protection against such activity except the disputed memory of the two participants. That is the precise reason that Paragraph 12 requires a method of notification which embodies proof of delivery. KDAB admits that no such procedure was followed. This precludes KDAB's present argument that Mrs. Gordon should be required to provide a thirty day notice allowing KDAB to cure or correct the "default" or "failure." That is the core weakness in KDAB's legal position. There is no way for Mrs. Gordon to issue such a notice to "cure" or "correct" a "default" or "failure" unless she has notice of an effort or attempt to exercise the extension rights. She has no notice of any effort or attempt.

The failure to exercise a right to extend the Term cannot be considered an event of default nor a contractual failure. The expiration of the time period for extension does not terminate, forfeit or impair any rights, title or interests of KDAB. In *Catmull vs. Johnson*, 541 P.2d 793 (Utah 1975) the Court discussed this aspect of option agreements; to wit:

Defendants urge the rule that when the time for the performance of a contract is indefinite, a party desiring no longer to be bound by the contract must place the other party in default by demanding the contractual performance and allowing the other party a reasonable opportunity thereafter to perform.

This argument misconstrues the nature of an option agreement. An option to purchase or to sell is not a contract to purchase or sell. The optionee has the right to accept or to reject the offer, in accordance with its terms; the optionee is not bound, and has discretion in regard to the action he will take under the option. **An optionee, prior to acceptance, cannot be placed in default by the optionor demanding performance**, because the optionee is not contractually bound to perform any duty. The rule cited by Defendants applies to bilateral contracts, wherein a party who has a valid and binding obligation to perform cannot be defaulted prior to the other party's demand for performance.

Id. at 79 (emphasis added). There is a general discussion of this topic in the treatises; to wit: “[a]n option to purchase real property may be defined as a contract . . . which imposes **no obligation** to purchase upon the person to whom it is given.” 77 Am. Jur. 2d, *Vendor and Purchaser*, Section 33 at 142 (emphasis added). “The distinguishing characteristic of an option contract is that it imposes **no binding obligation** upon the person holding the option [and] creates no enforceable indebtedness on the part of the person to whom it is granted.” *Id.* (emphasis added).

In *Geisdorf v. Doughty* the Utah Supreme Court found the nature of option contracts required strict and exact performance of the terms and manner in which the option is to be exercised. 345 Utah Adv. Rep. 16 (Utah 1998). *Geisdorf* found there is a “rule of law that barring special circumstances such as misrepresentation or waiver, exercise of an option must be made strictly in

accordance with its terms.” *Geisdorf* at p. 21. In reaching this conclusion, the Court recited its numerous decisions and that of other courts holding that the optionee must act “strictly,” “precisely” and with “exact compliance” in accordance with the requirements of such an agreement. *Geisdorf* at 18. In *Geisdorf* the Court held an oral notice of intention to renew was insufficient where the option contract required “written notice of intention to renew.” *Id.* The Court noted that this doctrine was not “arcane ritualism at work” nor “hocus pocus” but simple enforcement of the precise agreement of the parties. *Id.* The Court refused to even consider *Geisdorf*’s plea that “he had forgotten that exercise of the option needed to be in writing.” *Geisdorf* at 20. *Geisdorf* also contended that Doughty, the optionor, had an affirmative duty to request a “written notice of intent to renew” or at a minimum so inform *Geisdorf*. The Court firmly rejected such an affirmative duty. *Id.*

The general rules regarding options make it clear that KDAB’s non-exercise of the option cannot be considered a “default” or “failure” requiring a written notice to cure from Mrs. Gordon. KDAB, however, argues that the specific wording of Paragraph 3 of the Agreement modifies and changes these general rules by imposing such an affirmative duty upon Mrs. Gordon.

The wording used in the Agreement is clear and unambiguous that no such notice is required. The Agreement is titled “OPTION AGREEMENT;” the term “Option” is precisely defined in Paragraph 1 as that “option granted to Buyer in

Paragraph 2 to purchase all or any portion of the Property.” Agreement at page 1, KDAB’s Appendix, Exhibit A. Paragraph 2, titled “Option,” provides that “**Seller grants to Buyer an option during the Term to purchase all or any portions(s) of the Property for the Purchase Price.**” *Id.* at Paragraph 2, page 3 (emphasis added). A reading of that paragraph in conjunction with the Agreement as a whole makes it clear that the contract reference to “Option” is to the right to buy all or any portion of the property during the Term.

The word “Term” is defined as being that “initial period of the Option” adding that the Term **may be extended**, as set forth in Paragraph 3. *Id.*, at page 3 (emphasis added). Paragraph 3 then precisely defines that initial term as ending at 5:00 p.m., Salt Lake City time, on November 30, 1994. *Id.*, at Paragraph 3, page 4.

The Agreement in Paragraph 3 gives the Buyer the capacity to extend the Term by paying additional funds and giving written notice of the extension; to wit:

Buyer may extend the initial period constituting the Term for four (4) additional two (2) year periods by delivering to Seller the following sums on or before the commencement of each such extension period, accompanied by written notice of such extension:

| | |
|---|------------|
| First Two-Year Extension | \$8,125.00 |
| (On and after December 1, 1994 through and including November 30, 1996) | |

Id. at Paragraph 3, page 4. The extension of the Term is a different and distinct option granted to the Buyer. It is not the Option defined or discussed within the

definition nor within Paragraph 2. This is an option or right to extend the Term. When the Term is extended, there is a longer period of time during which the Option to purchase additional ground can be exercised. Thus, there are two options within this Agreement. The Option to purchase ground and the right to extend the Term. KDAB's arguments confuse and commingle the Option to purchase ground and the option or right to extend the Term.

The critical interpretative clause in the Agreement is the last portion of Paragraph 3. It uses precise language in describing with proper capitalization the distinct "Option" and the "right to extend the Term." The Agreement clearly describes these different rights or options of the parties. These are not intended to be different words used to describe the same rights but a listing of two separate and distinct sets of rights or options. In this case we are not concerned with the Option but with the "right to extend the Term."

According to the Agreement of the parties the "right to extend the Term" shall not be "impaired, terminated or forfeited" without written notice describing the "default or failure concerned (including, without limitation, that Buyer has failed to timely pay to Seller any consideration for the extension of the Term)" and allowing a thirty day period "to cure or remedy any such default or failure." *Id.*, at Paragraph 3, page 4. There is no suggestion, implication or reference whatsoever in this tightly worded paragraph that a written notice is required prior to simple expiration of the time period given for exercise of the "right to extend the Term."

The Agreement states, however, that if there is failure to pay “any consideration for the extension” that such a notice would be required. But that wording presumes that there is a notice to extend and some failure to send or provide the required funds with the notice. We do have a failure to pay the funds required herein, but that is not the core problem which is that there is no notice even triggering some duty on the part of the Mrs. Gordon to notify KDAB of a defective effort to exercise the “right to extend the Term.”

Clearly, Mrs. Gordon did nothing in this matter to impair, forfeit or terminate any rights of KDAB. The Agreement by its terms expires on a certain date if KDAB does not exercise its “right to extend the Term.” That inevitably leads to an expiration of the Agreement. There is no “default” or “failure” for which Mrs. Gordon should or can provide notice. There is no “cure” or “remedy” applicable to the expiration of a “right to extend the Term” of this Agreement.

KDAB contends that the use of the word “terminated” requires Mrs. Gordon to notify KDAB of this expiration. However, the word “terminated” does not reach or apply to a simple expiration of rights. They are different words and have different meanings. “Terminated” implies an actor acting in some affirmative manner to end the rights or interests of another actor. One does not say “Time” terminated my “right to extend the Term.” Presupposing that someone were to suggest such a twisted use of words, why under those circumstances would Mrs. Gordon have a duty to then provide notice to KDAB that “Time” had terminated

KDAB's "right to extend the Term." And, then just what would be the cure or remedy that KDAB would then exercise to reverse such a "default" or "failure."

What the clear wording of this Paragraph 3 of the Agreement means is that Mrs. Gordon is not to impair or terminate or forfeit KDAB's "right to extend the Term" without providing notice and an opportunity to cure such default or failure in performance. Mrs. Gordon bears no special responsibility to inform KDAB of the simple passage of time or the expiration of the time period for KDAB's "right to extend the Term." Any other interpretation of this Paragraph is nonsensical and tortured. KDAB's theory is that it would have a continuing "right to extend the Term" absent this default notice from Mrs. Gordon.

The "right to extend the Term" is an option given with a defined term beginning upon the execution of the Agreement and expiring on December 1, 1994.¹ Mrs. Gordon granted that option or right for a specified time period. There is no termination or impairment or forfeiture of the right when it expires after December 1, 1994, as the right was never given for a longer period than that set forth. After December 1, 1994, the right no longer exists. This is not because it has been terminated. It is simply that the right, as given, was only for a specified time period. The Agreement does not enlarge the right by making it exist until terminated by a

¹Note that the time period for exercise of the "right to extend the Term" includes "on or before commencement of each such extension period . . ." which includes the commencement date. Agreement at Paragraph 3 at p. 4.

written notice from Mrs. Gordon to KDAB. The right is defined and described by its commencement and expiration date. If Mrs. Gordon was purporting to “terminate” the right to extend the Term then she would be required to provide notice and an opportunity to cure. But she is not terminating the “right” as the “right” as given was only for a specified time period with a built in expiration date. Any other interpretation of the Agreement predisposes it to an interpretation that the right exists until such time as Mrs. Gordon gives written notice to KDAB and allows an additional thirty (30) days to cure or remedy any such default or failure by then exercising the right. That interpretation is exactly what the *Geisdorf* case found untenable in option contracts.

CONCLUSION

KDAB’s brief is a direct attack on the rule of law announced by the Supreme Court in the *Geisdorf* case. That brief suggests that the expiration of KDAB’s “right to extend the Term” is a “forfeiture,” or a “default” and that the court should relieve KDAB of the consequences of not exercising its “right to extend the Term.” The brief actually requests this court to relieve it of having failed to give notice, allowing a “cure” of the defective notice of 1994. Appellant’s Brief at pp. 12-13.

This court cannot, as a matter of law, allow KDAB to gin up a “defective notice” and thereby bootstrap itself into a “cure or remedy” for its default under the language of this Agreement. No one proposes to “terminate” or “forfeit” or “impair”

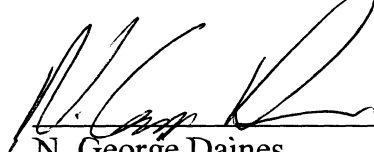
any right given to KDAB. The right given by Mrs. Gordon had a beginning and an ending date. The right simply expired. Mrs. Gordon was not required to take some affirmative action to terminate a right that the parties had already agreed had an expiration date. If she wanted to terminate the right prior to its expiration date, then such a notice would have been required. Perhaps, if KDAB had actually given a notice but tendered an insufficient sum of money or a check that didn't clear then such a notice might also have been required under the terms of the Agreement. But none of that happened. The parties have a factual dispute as to whether any notice at all was given. Mrs. Gordon denies receipt of any notice whatsoever. But apart from that factual disagreement there is a clear admission on the record that the notice was not sent as specifically required by the Agreement. Under the *Geisdorf* ruling that is enough; there was no exercise of the right to extend the Term. The Agreement has expired.

The decision of the trial court should be affirmed and the case remanded for finalization of the acreage between the parties.²

²The trial court's decision expressly provides, and Mrs. Gordon has always concurred, that additional acreage may be distributed to KDAB in accordance with Paragraph 6 of the Agreement. That distribution must necessarily await the court's decision and KDAB's formal election thereafter.

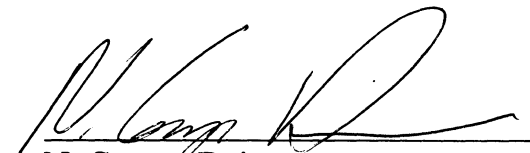
DATED August 21, 1998.

BARRETT & DAINES


N. George Daines

CERTIFICATE OF MAILING

I hereby certify that on August 21, 1998, I mailed a true and correct copy of the foregoing Brief of Appellee to Craig S. Cook, 3645 East Cascade Way, Salt Lake City, Utah 84109.


N. George Daines