1998

KDAB v. Margaret Jane Gordon : Reply Brief

Utah Court of Appeals

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Craig S. Cook; Attorney for Plaintiff-Appellant.

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.

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the
Third Judicial District Court, Tooele County, State of Utah
Honorable L. A. Deaver

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INTRODUCTION

"...and that shows that there are three hundred and sixty-four days when you might get un-birthday presents..."

"Certainly," said Alice.

"And only *one* for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument.'" Alice objected.

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again. "They've a temper, some of them—particularly verbs: they're the proudest—adjectives you can do anything with, but not verbs—*however, I can* manage the whole lot of them! Impenetrability! That's what *I* say!"

"Would you tell me, please," said Alice, "what that means?"

"Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life."

"That's a great deal to make one word mean," Alice said in a thoughtful tone.

"When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra."

"Oh!" said Alice. She was too much puzzled to make any other remark.

"Ah, you should se 'em come round me of a Saturday night," Humpty Dumpty went on, wagging his head gravely from side to side, "for to get their wages, you know."

Lewis Carroll, Through the Looking-Glass, pp. 268-270, 3rd Ed. (1968).

ARGUMENT

THE LOWER COURT ERRED AS A MATTER OF LAW IN APPLYING GENERAL PRINCIPLES OF OPTION LAW RATHER THAN THE SPECIFIC LANGUAGE OF THE BINDING CONTRACT

If the assertion by Humpty Dumpty is correct that words must be paid when they are worked overtime by making them mean what the speaker wishes, then the defendant in her Brief would be deeply indebted to the numerous words she has "overworked".

First, Defendant attempts to transform this highly specialized contract between the parties into a run-of-the mill option agreement by citing cases and authorities applicable to the normal option agreement. (Appellee's Brief, pp. 6-9).

Plaintiff does not dispute any of the legal principles stated by Defendant in this elaborate discourse. There is no question but that these general principles of option law would clearly support the lower court's decision were it not for the unique language contained in this highly technical agreement between the parties.

None of the authorities cited by Defendant deal with the unique "words" of this agreement. For example, the Utah Supreme Court in Geisdorf did not deal with a specific clause requiring an affirmative duty on the part of the seller to notify the buyer of certain defaults in the exercise of the option. Thus, this broad generalization attempted by the appellee is of no value in an analysis of the contract in the instant case.

Second, it is apparent from examination of all of the provisions of this contract that this is not a run-of-the mill option agreement found in Defendant's authorities. For example, while the purchase price of an acre of land is defined as $6,500 pursuant to paragraph 1 of the agreement, paragraph 5(b) provides that the initial payments would be at 125 percent of the purchase price. Under the undisputed facts of this case, Plaintiff's predecessor in interest had exercised the option in the past and had purchased approximately 11.5 acres of the property for $93,386. Plaintiff also exercised the option in the past and purchased approximately 14.17 acres for $115,155. Therefore, approximately 25.67 acres had been purchased for $208,542 at this $8,125 rate required by paragraph 5(b) of the agreement.

Thus, at the time the parties entered into the present dispute it was undisputed that Plaintiff had overpaid the defendant $41,704 for the property Plaintiff had in its actual possession. The parties stipulated before the lower court that this credit entitled the plaintiff to select another 6.4 acres of property even assuming that the entire agreement had been terminated by Plaintiff's failure to timely exercise the option. It is obvious that the structure of this agreement did not fit the definition of a normal option contract since in such cases there is no ongoing relationship between the optionor and optionee once the option has not been exercised. Clearly, under a normal option agreement neither party has any further duty to the other once the option has expired.

Moreover, paragraph 6(b) speaks in terms of a "termination of the agreement" which goes beyond the scope of any normal option. This paragraph states:

> Buyer may, at any time, give Seller written notice that Buyer has elected to terminate this agreement. As of the expiration of the Term or any sooner termination of this agreement (whether as a result of notice given pursuant to the immediately preceding sentence or for any other reason), Buyer may elect to apply some or all of such excess monies and/or any consideration paid by Buyer to Seller pursuant to paragraph 3 (to the extent that such consideration has not previously been credited to Buyer in any prior closing) to the purchase of any portion of the property not purchased as of the day of such expiration or sooner termination. Buyer shall set forth such election in a writing delivered to Seller, and Seller shall promptly comply with the election made by Buyer.

This paragraph clearly creates a duty for the seller to perform an act after the contract has ended regardless of how it is terminated. This is far from the norm of a hornbook option agreement.

Third, with this in mind it now remains to examine the "words" of paragraph 3 of the contract. Appellee concedes that if Plaintiff failed to pay the consideration required for the extension that a default notice from Defendant would have been required. (Appellee's Brief, pp. 10-11). Appellee then argues, "But that wording presumes that there is a notice to extend and some failure to send or provide the required funds with the notice." Appellee clearly ignores the "words" contained in the last paragraph of paragraph 3 which defines "default or failure concerned" to "including, without limitation, that Buyer has failed to timely pay the Seller any consideration for the extension of the term."

The term "without limitation" clearly indicates other conditions aside from lack of payment. If the actual notice of extension is excluded from triggering Defendant's duty to notify Plaintiff for cure, what other failures would be included? Plaintiff was obligated to send written notice to the defendant of its desire to exercise the option and to pay for that exercise. Certainly, failure to send notice must necessarily be a defined failure "without limitation" or the entire phrase is meaningless. Appellee wishes this Court to rewrite the paragraph to only apply for failure to "timely pay to Seller any consideration for the extension of the term."

The reason for this unique language requiring an affirmative duty on the part of the seller was to protect the interest of the buyer who was accelerating payment for the initial purchases of the property at 125 percent of the value. Since the defendant in this case had already been prepaid over $41,000 by the plaintiff and its predecessors, it was clearly a bargained for provision that the buyer receive protection from any inadvertent failure to comply with the terms of the contract. This prepayment of the purchase price clearly benefited the defendant who had the use of this money prior to when it would normally be due. In exchange, Plaintiff required the defendant to notify it and give it the opportunity to cure any perceived default or failure to protect Plaintiff's interests under the contract.

Fourth, Appellee maintains that there was a failure to pay the funds required regardless of the lack of notice given to the defendant. (Appellee's Brief, p. 11). This assertion is clearly incorrect since it is clear from paragraph 5 of the agreement that the "payments" described are for the actual purchase of an acre of land and not for the mere privilege of exercising the agreement. The Affidavits of Kent Buie (R. 160-61) and George Buzinias (R. 178-80) are uncontradicted that the previous purchases in accordance with paragraph 3 of the agreement did not include any "fee" but was merely the purchase price of an acre of land at the 125 percent price of $8,125. Since Plaintiff already had a credit of over $40,000 at the time this option would have been exercised, it had currently met the requirement

for payment and there was no requirement of any further tender of payment as now claimed by the defendant.

Finally, the undisputed conduct of the parties also supports Plaintiff's interpretation of this agreement. If the defendant truly believed that the agreement had terminated in 1994 when no notice had been received from the plaintiff, Defendant was obligated to tender the prepaid land to the plaintiff in accordance with the termination provisions of the contract. This was not done and, in fact, Plaintiff had to aggressively seek specific performance from the court in order to enforce the obligation to convey the additional 6 acres of property.

CONCLUSION

Plaintiff has previously cited case law and authority regarding the interpretation of contracts by courts. (Appellant's Opening Brief, pp. 10-12). Paragraph 14 of the contract itself states, "This agreement shall be construed according to its fair meaning and not strictly for or against seller or buyer, as if both seller and buyer had prepared it." Plaintiff submits that this "fair meaning" can only be determined by reading the entire agreement as a whole and focusing on the interaction of the various requirements of both parties.

While Defendant wishes to pick and choose these provisions and to transform this agreement into a hornbook option agreement such effort cannot be allowed without contorting both the words of the contract and the conduct of the parties. Defendant agrees that normally the seller of property is under no

affirmative obligation when the buyer fails to correctly notify the seller of the exercise of an option. Likewise, however, it is not normal for a buyer to pay 125 percent of the value of the land and to give the seller a windfall credit during the pendency of the agreement. Both of these exceptions were negotiated by the parties and both parties are now bound by the uniqueness of this contract and cannot rely upon general principles of option law.

It is respectfully submitted that the District Court fell into the trap of superficial hornbook analysis and therefore failed to correctly analyze the correct obligations and duties required by this specific document. As such, therefore, the decision of the lower court should be reversed and judgment should be entered on behalf of Plaintiff.

DATED this 16th day of September, 1998.

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to George Daines, Esq., 108 North Main, Suite 200, Logan, Utah 84321 this 16th day of June, 1998.