

1980

Management Services Corp. et al v. Development Associates : Brief of Appellant in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

MANAGEMENT SERVICES CORP., *
a Utah corporation, *

Plaintiff and *
Respondent, *

vs. *

Case No. 16341

DEVELOPMENT ASSOCIATES, a *
Utah corporation, and JOHN *
and JANE DOES One through *
Eight, *

Defendants and *
Appellants. *

* * * * *

BRIEF OF APPELLANT IN SUPPORT
OF PETITION FOR REHEARING

* * * * *

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE PETER F. LEARY, JUDGE

* * * * *

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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a Utah corporation,

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Plaintiff-
Respondent,

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vs.

Case No. 16341

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DEVELOPMENT ASSOCIATES, a
Utah corporation, and JOHN
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Eight,

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Defendants-
Appellants.

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BRIEF OF APPELLANT
DEVELOPMENT ASSOCIATES
IN SUPPORT OF
PETITION FOR REHEARING

* * * * *

STATEMENT OF THE NATURE OF THE CASE

This is an action commenced by Plaintiff-Respondent Management Services Corporation ("Management Services"), purchaser, against Development Associates ("Development Associates"), seller, for the alleged breach of a Uniform Real Estate Contract dated December 7, 1976 ("the contract"), wherein Management Services agreed to purchase eight (8) lots in the Daybreak Phase III Subdivision for \$80,000.00.

DISPOSITION IN LOWER COURT AND SUPREME COURT

At the trial of this matter, the Honorable Peter F. Leary, sitting without jury, held that the contract was divisible; that Management Services defaulted with respect to an installment payment of \$19,800.00 due on or before March 1, 1977; that Development Associates properly forfeited Management Services' interest in two of the eight lots purchased under the contract; and that Development Associates wrongfully terminated the contract with respect to the remaining six lots. The Court awarded judgment to Management Services on its Third Cause of Action for the amount of \$7,700.00 in lost profits; \$2,438.00 lost commissions; \$600.00 in earnest money; and attorneys fees in the amount of \$1,850.00. This Court, in a decision filed September 11, 1980, affirmed the decision of the trial court and remanded the case to the District Court for its determination of reasonable attorneys fees to be granted to Plaintiff for the appeal.

RELIEF SOUGHT ON PETITION FOR REHEARING

Development Associates seeks reversal of this Court's affirmance of the judgment of the trial court, together with reasonable attorneys fees incurred by Development Associates in the defense of this action and in the prosecution of this appeal.

STATEMENT OF MATERIAL FACTS

On December 7, 1976, Management Services entered into a Uniform Real Estate Contract with Development Associates for the purchase of eight (8) lots in the Daybreak Phase III Subdivision in Salt Lake County, Utah (R. 129, 266). The following language appears on the face of the contract:

"2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the County of Salt Lake, State of Utah, to-wit: More particularly described as follows:

Lots #309, #310, #311, #312, #313, #314, #315, #316 Daybreak Phase III Subdivision as recorded in the Salt Lake County Recorder's Office.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Eighty Thousand Dollars (\$80,000.00) payable at the office of Seller, his assigns or order 307 W. 200 S., SLC, Utah 84101 strictly within the following times, to-wit: Eight Hundred Dollars (\$800.00) cash, the receipt of which is hereby acknowledged, and the balance of \$79,200.00 shall be paid as follows:

Beginning March 1, 1977, buyer to complete payment on two (2) lots (\$19,800.00) and thereafter to close two (2) lots on the first of each

month. Total amount to be paid on or before June 15, 1977. Possession of said premises shall be delivered to buyer on the 7th day of December, 1976." (R. 9, 10).

The contract does not specifically state which particular lots Management Services intended to pay for on March 1, 1977, or any subsequent month (R. 9).

Management Services never made the \$19,800.00 payment which was due on or before March 1, 1977. On March 19, 1977, Development Associates caused a contract forfeiture notice to be served upon Edward A. White ("Mr. White"), President of Management Services (R. 4, 11). On March 25, 1977, Development Associates received a letter from Management Services dated March 23, 1977, signed by Mr. White, President, stating in part as follows:

"(2) We are ready to take title to lots 311 and 312 immediately. The funds are now in escrow at Western States Title Insurance Co. for Lot 311. The funds will be deposited with them immediately for Lot 312 upon their notification that they have all of the closing documents ready." (R. 13, 251).

Paragraph 16 of the contract provides in part that in the event Management Services fails to comply with the terms of the contract, or upon their failure to make payments when due or within fifteen days thereafter, Development Associates has the option to be released from all obligations in law and equity upon Management Services' failure to remedy the default within five days. The contract further provides that all payments made by Management Services prior to that time would be forfeited to

Development Associates as liquidated damages for non-performance of the contract (R. 10).

Mr. White was very familiar with real estate transactions generally, having been involved in the real estate business either as an agent or broker since 1961 (R. 153). Mr. White further testified that between 1961 and 1976, he had participated in at least two or three hundred transactions involving Uniform Real Estate Contracts similar to the one here at issue (R. 154, 155). Indeed, shortly before Management Services filed this action against Development Associates, Mr. White was a party in another action wherein default was alleged under Paragraph 16 of a Uniform Real Estate Contract. Mr. White testified that he was thoroughly familiar with the language of Paragraph 16 and the basic idea of forfeiture (R. 155, 156).

Development Associates refused to accept the conditions imposed by Mr. White in his response to the contract forfeiture notice; deemed Management Services' interest in the subject lots forfeited; and retained \$800.00 in earnest money as liquidated damages. Management Services subsequently commenced this action, seeking title to the eight lots in question, or in the alternative, damages for breach of contract.

ARGUMENT

POINT I

THE APPELLATE COURT ERRED IN CONCLUDING THAT THE LOTS TO BE PURCHASED BY MANAGEMENT SERVICES FROM DEVELOPMENT ASSOCIATES WERE "FUNGIBLE" AND THAT MANAGEMENT SERVICES WAS NOT OBLIGATED TO PURCHASE THE "ENTIRE TRACT" WHICH CONSISTED OF EIGHT LOTS IN THE DAYBREAK PHASE III SUBDIVISION.

The evidence on which this Court affirmed the judgment of the lower court is as follows:

"The testimony at trial showed that plaintiff is a corporation organized for the purpose of buying and selling property, and that its president, Edward A. White, is a real estate broker. Plaintiff was purchasing the lots for resale, and as a part of this agreement, though it is not expressed in the written contract, Edward A. White was to be paid 60 percent of the usual 6 percent real estate commission for selling the lots to third parties. Plaintiff was to choose which two of the eight lots would be closed each month." Majority Opinion at Page 3.

The following language found in Management Services' response to the contract forfeiture notice served by Development Associates clearly reveals that Management Services intended to take the "entire tract" consisting of eight lots in the Daybreak Phase III Subdivision:

"1) According to the terms of the Uniform Real Estate Contract dated December 7, 1976, it is implied that we are purchasing totally improved lots. One of the reasons for delaying payments on the lots until March 1977 was to give you time to complete the improvements. In view of the fact that the improvements are not yet complete; in fact the lots are still as of this date inaccessible to passenger cars. Therefore, there has been no default on our part. However, if we must take title to lots prior to finalization of the improvement work on your part, we will then be obliged to have escrowed a sum of \$6,000.00

per lot in order to protect our subsequent buyers. This amount represents one and one-half times the estimated cost of improving each lot. Upon final installation of all of the improvements, receipt of lien releases from all subcontractors and suppliers, and final release and acceptance by the local governing authority, the escrowed sum can then be released to you.

2) We are ready to take title to Lots 311 and 312 immediately. The funds are now in escrow at Western States Title Insurance Co. for Lot 311. The funds will be deposited with them immediately for Lot 312 upon their notification that they have all of the closing documents ready.

3) We must in all circumstances protect our investment in the lots. Any actions on your part to interfere with the orderly sale and conveyance of these lots by us to potential buyers will be construed as a default on your part.

4) Your notice of default was uncalled for and totally spurious in its allegations. Therefore, your claims to attorneys fees are not reasonable." (Emphasis added)

At the taking of his deposition on October 14, 1977, and throughout the trial of this matter, Mr. Edward A. White, President of Management Services, neither contradicted nor departed from any statement set forth in his response to the contract forfeiture notice. In point of fact, the issue of severability was not even raised by Management Services or its counsel until the morning of May 31, 1978, the day the case was tried in the District Court (R. 80-82).

Development Associates, therefore, respectfully submits that, ". . . the contract in the instant case is not uncertain. Its meaning may be construed from its own terms and it was error

for the trial court to admit parol evidence on the issue of severability." (Dissenting opinion of Mr. Justice Hall, concurred in by Mr. Justice Stewart ("dissenting opinion") at Page 5) Development Associates further submits that the majority opinion herein ". . . effectively emasculate(s) the provision that payments were to be made 'strictly within the (named) times' whereby the buyer could effectively 'tie up' all of the property (until at least June 15) while consistently defaulting on the monthly payments." (Id. at Pages 5, 9)

POINT II

THE APPELLATE COURT ERRED IN HOLDING THAT THE DISTRICT COURT HAD RATIONAL BASIS FOR CONCLUDING THAT THE UNIFORM REAL ESTATE CONTRACT DATED DECEMBER 7, 1976, WAS INTENDED TO BE SEVERABLE AND NOT ENTIRE.

The majority of this Court, in concluding as it did, apparently had the mistaken impression that evidence connected with the issue of severability was adduced at the trial of this matter. A careful review of the entire trial transcript, however, clearly reveals that no evidence whatsoever was adduced on that issue. To the contrary, Management Services intended to and did in fact enter into a contract to purchase eight lots in the Daybreak Phase III Subdivision:

- "Q. (By Mr. Scott) I'm showing you here what's marked as Exhibit Plaintiff's 2, would you identify that document please?
- A. Yes. It's a Uniform Real Estate Contract dated December 7th, 1976 wherein Management Services Corporation agrees to purchase

eight lots in Daybreak III Subdivision from Development Associates.

* * *

Q. (By Mr. Stewart) Now, so when you entered into this transaction which is dated December 7th, '76, is that also the date it was signed?

A. Yes.

Q. You're aware, then, that the contract is for a total amount of \$80,000.00 as it specifies; is that correct?

A. Yes.

Q. And that according to the terms of the paragraph, the Paragraph 3 which is the payment paragraph, it says

Beginning March 1, 1977, buyer to complete payment on two (2) lots (\$19,800.00) . . .

You understood that; didn't you?

A. Yes.

Q. (Reading)

. . . and thereafter to close two (2) lots on the first of each month.

That would mean to you that you would have to pay \$19,800 on the first of April, the first of May and the first of June as well; is that correct?

A. That is correct.

Q. And you understood all that?

A. Yes." (R. 129, 156-157)

Nor did the trial court make any finding of fact on the issue of severability (R. 98, 99).

Development Associates respectfully submits, paraphrasing the dissenting opinion herein, that the agreement

clearly provided for the sale of eight lots; that it was not intended that the buyer be permitted to accept certain lots and reject others; that Paragraph 16C of the contract further supports the argument that the individual lots were not severable, since that paragraph gives the seller the option to sue for the entire unpaid balance of the contract should the buyer fail to make any payment within fifteen days of the due date; and that Paragraph 16A relieves the seller of the obligation to convey all the property in the event Management Services did not remedy its default within five days after written notice. We further agree that the rule of law established by the majority opinion herein "effectively emasculates" the contract and punishes a non-defaulting seller, while rewarding a defaulting purchaser. The fact that Management Services could take title to two lots upon the payment of each installment was clearly to its own advantage and should not render the contract "severable". Indeed, absent that provision, Development Associates would not have been obligated to convey title to any of the lots until the entire purchase price (\$80,000.00 plus interest) had been fully paid.

CONCLUSION

The majority of this Court has, it is respectfully submitted, unjustly rewarded Management Services for its own default. Development Associates respectfully urges this Court, therefore, to adopt the dissenting opinion herein and remand this action to the District Court for a determination of attorneys

fees to be awarded to Development Associates.

Respectfully Submitted,

STEWART, YOUNG, PAXTON & RUSSELL

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CERTIFICATE OF DELIVERY

I hereby certify that on the 1st day of October, 1980,
I delivered a true and correct copy of the foregoing Brief of
Appellant in Support of Petition for Rehearing to Kent B. Scott,
Senior & Senior, Attorneys for Respondent, 1100 Beneficial Life
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STEVEN H. STEWART