

2001

James F. Trees v. Walter M. Lewis : Petition for Rehearing

Utah Supreme Court

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Thompson, Hughes, and Reber; Michael D. Hughes; Attorney for Respondent.

Bell and Bell; J. Richard Bell; Attorney for Appellant.

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DOCKET NO. 19333

IN THE SUPREME COURT
OF THE STATE OF UTAH

JAMES F. TREES,)
)
 Plaintiff, Respondent,)
)
 vs.) Case No. 19333
)
 WALTER M. LEWIS,)
)
 Defendant, Appellant.)

RESPONDENT'S PETITION FOR REHEARING

Petition for Rehearing requesting attorney's fees from
opinion rendered by Utah Supreme Court on April 21, 1987.

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Respondent-Petitioner

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FILED
MAY 4 1987

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SUMMARY OF ARGUMENT

Petitioner as the prevailing party on appeal is entitled under Exhibit P-5 to attorney's fees as a matter of contractual right. The Supreme Court's opinion omitted discussion of this issue.

APPENDIX

Plaintiff's Exhibit P-5

AFFIDAVIT OF PETITIONER'S COUNSEL

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES F. TREES,)	
)	
Plaintiff, Respondent,)	
)	PETITION
vs.)	FOR REHEARING
)	
WALTER M. LEWIS,)	
)	
Defendant, Appellant.)	No. 19333

POINT I

THE CONTRACT BETWEEN APPELLANT AND RESPONDENT
PROVIDED FOR ATTORNEY'S FEES; RESPONDENT IS ENTITLED
TO ATTORNEY'S FEES ON APPEAL AS A MATTER OF RIGHT

In the instant case, Appellant and Respondent entered into a real estate option, which appears in the appendix. In the district court, Respondent successfully enforced that option and was awarded attorney's fees by the trial judge. The Utah Supreme Court affirmed that decision on April 21, 1987.

Paragraph 14 of the option provides as follows:

Both parties agree that should either default in any of the covenants or agreements herein contained, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this contract, or in obtaining possession of the premises, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

In the case of Turtle Management, Inc. v. Haggis Management, 645 P.2d 667 (Utah 1982), Justice Durham, speaking for a unanimous court, correctly stated the Utah rule that "attorney's fees generally cannot be recovered unless provided for by statute or by contract." Id. at 667. Two years previous thereto, this Court succinctly ruled that in contract actions, the prevailing party is entitled to attorney fees on appeal as well as at trial. Management Services v. Development Associates, 617 P.2d 406 (Utah 1980). In so ruling, Justice Wilkins quoted favorably from Zambruck v. Perlmutter Third General Building, Inc., 510 P.2d 472 (Colo. App. 1973) which held:

The purpose of a provision for attorney's fees is to indemnify the creditor or the prevailing party against the necessity of paying an attorney's fee and to enable him to recover the full amount of the obligation. Management Services, supra, at 409.

The Management Services opinion has been repeatedly followed by this Court. See, e. g., Jenkins v. Bailey, 676 P.2d 391 (Utah 1984). More recently, in Cabrera v. Cottrell, 694 P.2d 622 (1985), Justice Stewart held that attorney's fees, "when awarded as allowed by law, are awarded as a matter of legal right." Id. at 625.

In Respondent's brief before this Court, Respondent's counsel, citing Jenkins v. Bailey, supra, requested a further award of attorney's fees on appeal in the event Respondent prevailed. See Respondent's Brief filed July 5, 1984, at pp. 38-39. In sustaining the district court's ruling, however, this Court omitted addressing this issue. The Court's concluding paragraph states as follows:

In short, we think that seller's actions in this matter prevent us from reviewing the merits of his appeal. Dismissed. Costs to respondent.


It is respectfully submitted that Respondent is also entitled to an award of attorney's fees on appeal as a matter of right. See Cabrera, supra. This matter, Respondent urges, can be handled summarily.

CONCLUSION

Respondent respectfully requests that the concluding paragraph in Trees v. Lewis, No. 19333 filed April 21, 1987, be amended to include the following underlined words:

In short, we think that seller's actions in this matter prevent us from reviewing the merits of this appeal. Dismissed. Costs and attorney's fees to respondent.

RESPECTFULLY SUBMITTED this 5th day of May, 1987.


MICHAEL D. HUGHES
Attorney for Respondent

CERTIFICATE OF MAILING

I do hereby certify that on the 5th day of May, 1987, I mailed two true and correct copies of the above and foregoing PETITION FOR REHEARING to J. Richard Bell, attorney for Appellant, at 303 East 2100 South, Salt Lake City, Utah 84115, postage prepaid.


SECRETARY

APPENDIX

REAL ESTATE OPTION

1. THIS CONTRACT, entered into this 4th day of December, 1980, by and between Walter Lewis, hereafter called "Optionor", and James F. Trees and/or assigns, hereafter called "Optionee".

2. WITNESSETH THAT Optionor hereby grants and sets over to Optionee an option on the terms herein set forth, to buy the following described real property located in Washington County, State of Utah, more particularly described in Exhibit A attached hereto.

3. As consideration for the granting and continuing existence of this option, Optionee agrees to pay for the same according to the following terms. Sums are payable at Optionors address above given, or to Optionor's assigns:

One Thousand Dollars (\$1,000.00), receipt of which is hereby acknowledged.

4. The purchase price of the property shall be Two Hundred Sixty-Nine Thousand Dollars (\$269,000.00) payable as follows:

a. Thirty Four Thousand Dollars (\$34,000.00) to be deposited concurrently with the exercise of this option.

b. Thirty Five Thousand Dollars (\$35,000.00) payable during the month of January, 1981, in lawful money of the United States.

c. With interest accruing on the unpaid balance of Two Hundred Thousand Dollars (\$200,000.00) at the rate of fourteen per cent (14%) per annum with a payment schedule as follows:

December 31, 1981	\$28,000.00	interest
December 31, 1982	\$28,000.00	interest
December 31, 1983	\$28,000.00	interest
December 31, 1984	\$28,000.00	interest
December 31, 1985	\$28,000.00	interest
December 31, 1986	\$68,000.00	principal & interest
December 31, 1987	\$62,400.00	principal & interest
December 31, 1988	\$56,800.00	principal & interest
December 31, 1989	\$51,200.00	principal & interest
December 31, 1990	\$45,600.00	principal & interest

5. Optionee may exercise its option to purchase the above described property only as to its entirety, by depositing in the U.S. Mail, postage prepaid, written notice to Optionor of exercise, addressed to Optionor accompanied by Thirty Four Thousand Dollars (\$34,000.00) in lawful money of the United States, cash, cashiers check or money order. Said notice must be given on or before December 31, 1980.

6. In the event of exercise, Optionor shall furnish marketable title in all respects, free and clear of encumbrances.

7. Optionor, within 30 days of exercise of this option, shall deliver to Optionee a commitment for title insurance on the property to be sold.

8. Within 30 days after exercise this option shall close, Optionor conveying to Optionee by warranty deed, the premises purchased, and Optionee executing in favor of Optionor a mortgage note and mortgage in the statutory form to secure two-thirds of the real property described in Exhibit A.

9. ~~There shall be no~~ Prepayment penalty in the event Optionee elects to prepay the mortgage note *SHALL BE NEGOTIATED BETWEEN BOTH PARTIES.*

10. All escrow costs of this agreement shall be shared and borne equally by the parties, except as otherwise specifically provided herein. Title insurance in the principal amount of the contract of purchase shall be provided by Optionor at final conveyance hereunder. *144/50 TWENTY*

11. Should Optionee fail to comply with any of the terms hereof, Optionor shall give Optionee written notice giving particulars in which Optionee is in default, and should Optionee fail to cure such default within ten (10) days of mailing of said notice, this contract shall be terminated without further act of either party.

12. This document is intended as the final and exclusive agreement of the parties, and all other agreements related to this property, between these parties are superseded hereby and merged herein. This document may not be amended, modified or revoked unless by a writing signed by the parties.

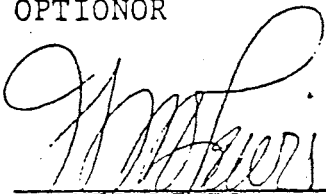
13. The operative and contractual provisions of this agreement shall be governed by the laws of Utah.

14. Both parties agree that should either default in any of the covenants or agreements herein contained, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this contract, or in obtaining possession of the premises, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

15. This contract is binding on the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

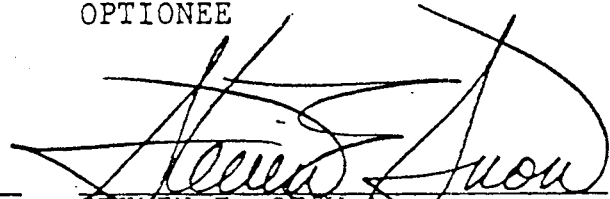
IN WITNESS WHEREOF, the parties have set their signatures on the day and year first above written.

OPTIONOR



WALTER LEWIS

OPTIONEE



STEVEN E. SNOW Attorney
In Fact for JAMES F. TREES

* ADDITIONALLY, IT IS UNDERSTOOD THAT THERE EXISTS AN AGREEMENT BETWEEN OPTIONEE & OPTIONOR FOR MUTUALLY AGREEABLE VISITATION RIGHTS FOR OPTIONOR.

12/4/80
WLS

EXHIBIT "A"

PARCEL #1. All of Lot 1 of the James A. Lemmons Entry in the Northwest quarter of the Southwest quarter of Section 5, Township 42 South, Range 10 West, Salt Lake Base and Meridian, containing 9.80 acres, more or less.

PARCEL #2. BEGINNING at the Northeast Corner of the Northwest $\frac{1}{4}$ Southwest $\frac{1}{4}$ of Section 5, Township 42 South, Range 10 West, Salt Lake Base and Meridian, thence South 895.5 feet to a point North 7.00 chains from the Southeast Corner of said 40 acres; thence West 660 feet; thence South $48^{\circ}50'$ West 702 feet; thence West 132 feet to the Southwest Corner of said 40 acres; thence North 274 feet; thence North $47^{\circ}15'$ East 972 feet to a point South 424 feet and East 713 feet from the West $\frac{1}{4}$ Corner of said Section 5; thence North $69^{\circ}45'$ East 353 feet; thence North $30^{\circ}15'$ East 350 feet; thence East 100 feet, more or less, to beginning, and containing 15.54 acres of land.

PARCEL #3. BEGINNING at the Southwest Corner of Section 3, Township 42 South, Range 10 West, SLB&M, and running thence North 710.0 feet, thence East 740.0 feet, thence South 710.0 feet to the South Line of said Section 3, thence West 740.0 feet to the point of beginning, containing 12.061 acres.

PARCEL #4. All of the North half ($N\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) and the Southeast quarter of the Northwest quarter ($SE\frac{1}{4} NW\frac{1}{4}$) of Section 10, Township 42 South, Range 10 West, SLB&M, containing 120 acres, more or less.

Located within Washington County, State of Utah
(157.4 acres more or less)

EXHIBIT A (Continued)

Together with all appurtenances and improvements thereunto belonging and including all mineral rights.

Together with all water rights pertaining to said real property including but not limited to:

- a) 0.49 cfs of class 1 water for twenty-seven acres which is diverted from Shones Creek in NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 10, Township 42 South, Range 10 West.
- b) A domestic well right located in the SW $\frac{1}{4}$ of Section 5, Township 42 South Range 10 West SLB&M.

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES F. TREES,)	
)	CERTIFICATE BY
Plaintiff, Respondent,)	AFFIDAVIT RE
)	PETITION
vs.)	
)	
WALTER M. LEWIS,)	
)	
Defendant, Appellant.)	No. 19333

STATE OF UTAH)
 : ss.
County of Washington

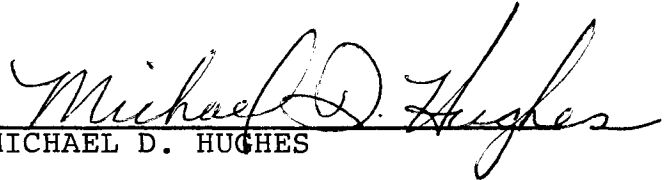
MICHAEL D. HUGHES, being first duly sworn, deposes and says:

1. I am the attorney for Petitioner in the instant case.
2. The petition herein is presented in good faith and not for delay.
3. I desire that my original signature hereto verify the above pursuant to Rule 35 U.R.A.P. and Rule 11 U.R.C.P.

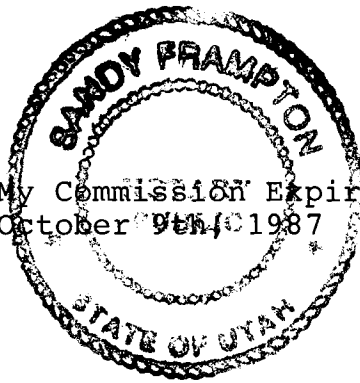
4. I further desire that this original signature suffice as my signature for purposes of the brief submitted herein.


FURTHER AFFIANT SAITH NAUGHT.

DATED this 5th day of May, 1987.


MICHAEL D. HUGHES

SUBSCRIBED AND SWORN TO before me this 5th day of May, 1987.




NOTARY PUBLIC
Residing at St. George, Utah