

1980

Steve Eliason And Marilyn Eliason Husband & Wife v. Richard C. Watts : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

* * * * *

STEVE ELIASON and MARILYN ELIASON
husband and wife,

Plaintiffs and Appellees,

vs.

RICHARD C. WATTS,

Defendant and Appellant.

No. 16402

* * * * *

APPELLANT'S REPLY BRIEF

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APPEAL FROM THE JUDGMENT OF THE FIRST
DISTRICT COURT FOR CACHE COUNTY
HON. VENOY CHRISTOFFERSON, JUDGE

* * * * *

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Clerk, Supreme Court, Utah

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No. 16402

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APPELLANT'S REPLY BRIEF

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This brief is to reply on behalf of the Appellant, Richard C. Watts, to certain statements and legal arguments presented by Steve Eliason and Marilyn Eliason, the Respondents, in their brief. Appellant shall not reply to each factual averment or legal argument presented by Respondents in their brief because to respond to each difference is felt to be an unnecessary duplication. By responding to only limited areas where the Appellant believes the Respondents' statements or legal arguments are perhaps misleading or incorrect, the Appellant is not conceding the other areas of dispute and difference in the briefs and the record.

PLAINTIFF, RESPONDENT, AND CROSS-APPELLEES FAILED TO COMPLY WITH UTAH RULES OF CIVIL PROCEDURE REGARDING A CROSS APPEAL AND THEREFORE CROSS APPEAL POINTS A, B, AND C SHOULD BE DISMISSED.

The procedure for a respondent who wishes to raise issues on appeal by a cross appeal is clearly provided under Rule 74(b) and 75(d) U.R.C.P., which states:

Where any one or more parties have filed a notice of appeal as required by Rule 73, other parties may separately or together cross appeal from the order or judgment of the lower court without filing a notice of appeal; provided, however, such party or parties shall file a statement of the points on which he intends to rely on such cross appeal within the time and as required by subdivision (d) of Rule 75. [Rule 74(b)]

If the respondent desires to cross appeal, or if the appellant has filed a statement of the points on which he intends to rely and the respondent desires to have the appellate court consider other or additional matters, the respondent shall, within 10 days after the service and filing of appellant's designation, or if the parties stipulate as to the record on appeal, within 10 days from the filing of such stipulation, serve and file a statement of respondent's points, either by way of such cross appeal or for the purpose of having considered other or additional matters than those raised by appellant. [Rule 75(d)]

The record shows that the Respondents have failed to serve and file a statement of Respondents' points by way of a cross appeal as required. The only notice the Appellant has received of Respondents' cross appeal are the arguments set forth in Respondents' brief filed September 18, 1979.

If the Court should still consider Respondents' three issues raised on cross appeal, the Appellant responds to those issues as follows:

POINT A: Appellant in his brief reviewed the problems of speculation already indulged in by the trial court in awarding damages in the original order. The law is clear that the only damages the Respondents are entitled to, if any, are the actual damages they have proven and not for supposed and estimated claims. The Respondents failed to prove at the trial the actual rent of the land in question and offered only estimates based on speculation and guess.

This was raw land without utility services. The testimony of people involved with developing commercial business in this area all agreed--despite what the N. L. city officials or the health officials stated, no commercial buildings were in fact being allowed. The foreseeability of increases in interest rates and building costs are offset by the foreseeability of land value increases. The record is clear that Respondents' claims were at best estimates couched in "if's" and "when's" and that to award such damage claimed by Respondents would clearly not be in the best interest of justice and the actions of the parties and be at best a guess. The Respondents as part of their complaint asked for punitive damages which was dismissed by the trial court with little objection by Respondents after they completed their case. To award Respondent's requests would in effect reinstate that prayer.

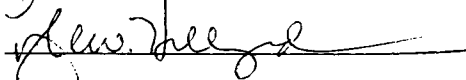
POINT B: The award of attorney fees as set forth by the trial court in his memorandum, set forth the many factors he considered and it cannot be shown that he abused his discretion in that regard.

POINT C: The record shows that Appellant had a legitimate question about the performance and interpretation of this contract. They were ready for trial on the original date set by the Court, but Respondents chose to amend their complaint raising new issues just prior to that date. The original trial date would have been met had Respondents wanted to rely on the original complaint. Respondents may have some merit in this argument if the delay had been caused by Appellant.

The Earnest Money Receipt and Offer to Purchase sought to be specifically enforced by Respondents', provided for carpeting and its installation as part of the total purchase price of \$30,000.00, with the balance being paid in cash. Respondents even included in their complaint a cause of action for the lost profit due to this non-performance which profit claimed was approximately 20% of the total contract price. Steve Eliason admitted in his testimony that this right of the Appellant to receive carpet and have it installed was a valuable right for Appellant as part of their negotiations (June 15, 1978, testimony page 88). Appellant accepts the trial court's finding that the price was definite at \$30,000.00 but contends that the method of payment is not, that is part payment in cash and part with installed carpet. By allowing performance by Respondents in cash, Appellant was deprived an important item which had been included by Respondents as part of their offer and clearly does not follow the rules of this Court in finding sufficient equity to grant Specific Performance.

Respectfully Submitted,

HILLYARD, LOW & ANDERSON



Lyle W. Hillyard
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed postage prepaid two copies of the foregoing REPLY BRIEF to David R. Daines, Attorney at Law, 128 North Main, Logan, Utah 84321, this 7th day of February, 1980.

