

1979

Terry Lynne Jones v. William K. Hinkle and Kathryn P. Hinkle : Defendants' Petition for Rehearing

Utah Supreme Court

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Joseph L. Henriod; Stephen L. Henriod; Attorneys for Plaintiff-Appellant;
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IN THE SUPREME COURT
OF THE STATE OF UTAH

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| | | |
|-------------------------|---|----------------|
| TERRY LYNNE JONES, |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | Case No. 16525 |
| v. |) | |
| |) | |
| WILLIAM K. HINKLE and |) | |
| KATHRYN P. HINKLE, |) | |
| |) | |
| Defendants-Respondents. |) | |

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DEFENDANTS' PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

Appeal from the Third Judicial District
Court of Salt Lake County, Utah
Honorable Christine M. Durham, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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| TERRY LYNNE JONES, |) | |
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| |) | Case No. 16525 |
| v. |) | |
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| WILLIAM K. HINKLE and |) | |
| KATHRYN P. HINKLE, |) | |
| |) | |
| Defendants-Respondents. |) | |

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DEFENDANTS' PETITION FOR REHEARING

COME NOW the Defendants-Respondents (hereinafter referred to as the Defendants) by and through their counsel and pursuant to Rule 76(e), Utah Rules of Civil Procedure, and respectively Petition this Honorable Court for a Rehearing in the above-entitled matter.

This Petition is based upon the following grounds:

POINT I

THIS HONORABLE COURT ERRED IN FINDING THAT THE AFFIDAVITS OF THE PARTIES FAILED TO DEMONSTRATE ANY GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF ON THE ISSUE OF SPECIFIC PERFORMANCE

POINT II

THIS HONORABLE COURT ERRED IN RIGIDLY APPLYING CERTAIN PROVISIONS OF RULE 56(e), U.R.C.P. TO PENALIZE DEFENDANTS FOR FAILING TO SPECIFICALLY RESPOND TO THE ALLEGATIONS OF PLAINTIFF'S AFFIDAVIT, UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE

Respectfully Submitted this 5th day of June, 1980.

GUSTIN, ADAMS, KASTING & LIAPIS

BY


GARY E. ATKIN

BY

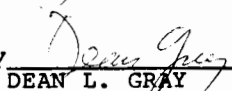

DEAN L. GRAY
Attorneys for Defendant-
Respondent

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DEFENDANTS' BRIEF IN SUPPORT
OF PETITION FOR REHEARING

POINT I

THIS HONORABLE COURT ERRED IN FINDING THAT THE AFFIDAVITS
OF THE PARTIES FAILED TO DEMONSTRATE ANY GENUINE
ISSUES OF MATERIAL FACT PRECLUDING SUMMARY
JUDGMENT IN FAVOR OF PLAINTIFF ON THE
ISSUE OF SPECIFIC PERFORMANCE

In view of this Court's interpretation of the Uniform
Real Estate Contract involved in this matter, Defendants
acknowledge that the Summary Judgment rendered in their
favor before the Lower Court was reversed. However, in
directing that Summary Judgment should be entered on the
issue of specific performance in favor of the Plaintiff, it
is respectfully submitted that this Court has overlooked
substantial genuine issues of material facts existing on the

issue of Plaintiff's entitlement to specific performance, which preclude such Summary Judgment in favor of the Plaintiff.

The arguments on the Motions for Summary Judgment before the Trial Court went solely on the issue of whether or not the Plaintiff would be entitled to assume the Deseret Federal mortgage, even if she had complied with all of the prerequisites for such assumption under the provisions of paragraph 8 of the contract. The issues relative to the existence of compliance with the prerequisites for such assumption were never passed upon by the Trial Court and were rendered moot by its determinations denying the Plaintiff the right to assume the Deseret Federal mortgage under any circumstances. Plaintiff indicated in her own Brief, at page 12:

The issue of whether or not the provisions of paragraph 8 were met by Plaintiff was not considered by the Lower Court, although raised by both parties.

The Plaintiff then concluded that:

The Court should interpret the contract to reflect the intent of the parties and the intent is shown as set forth above to the effect that Plaintiff was entitled to conveyance of title from Defendants upon demand and when the conditions precedent of paragraph 8 were performed. . . (Plaintiff's Brief, p. 14).

As Plaintiff herself recognized, issues as to whether proper demand and the other conditions precedent had been performed remained to be decided before specific performance could be decreed. Plaintiff's Affidavit when considered

with Defendants' Affidavit, does not resolve these issues of material fact. Some of these issues are set forth below and can only be resolved by testimony of the parties.

First, Plaintiff asserts in paragraph 5 of her Affidavit that on July 1, 1977, "Affiant contacted Defendants directly and requested that they transfer title to her. . ." (R. 51), however, she also asserted at paragraph 3 that the balance of the contract had not been paid down to the amount of the Deseret Federal mortgage until ten days later and, further, at paragraph 4, that it was not until 10 days later that "Affiant had received from Deseret Federal. . . a commitment to loan \$31,601.24 (enough to pay off said obligation) to Affiant at 9.50% interest." As such, even under the terms of her own Affidavit, the request for "transfer of title" was not properly made.

Second, the Affidavit of the Plaintiff fails to indicate that any demand was made by the Plaintiff for a transfer of title subject to the Deseret Federal mortgage. Rather, from Plaintiff's own Affidavit and attachment, as indicated above, it appears that she had received a commitment on July 10, 1978, for a loan to pay off the Deseret Federal mortgage. Defendants never refused to allow Plaintiff to pay off the mortgage with a new loan, which was a right given to her by paragraph 9 of the contract, nor has the Plaintiff ever asserted such a refusal nor was any attempt ever made to arrange such a payoff with the Defendants. Consequently, it

is not clear from Plaintiff's Affidavit just what Defendants' duty was, i.e.: to convey subject to the Deseret Federal mortgage or not.

Third, the payment schedule attached as Exhibit "A" to Plaintiff's Motion for Summary Judgment was clearly contrary to the contract itself in that it attempted to apply \$8,726.11 of the \$8,863.33 paid on April 24, 1978, toward principle, while the contract clearly provided that only \$8,163.22 was to be applied toward principle and the balance of that payment was the 9-1/2% interest the contract required to be paid on that sum from the date of the contract to April 24, 1978, the date paid. If the Plaintiff was, indeed, seeking to assume the mortgage, even in view of this Court's decision, it was incumbent upon her to establish that the unpaid balance due under the contract had been reduced to the mortgage balance due Deseret Federal [and that said loan was assumable] at the time of the request for such transfer.

Plaintiff's Affidavit in short did not entitle Plaintiff to a decree of specific performance and raised material factual issues which required resolution under the circumstances. The Affidavit of the Defendants that, "None of the terms and conditions required were fulfilled" (paragraph 3, Defendants' Affidavit, R. 44-45), which incidentally was not refuted by Plaintiff, should be considered as a specific denial of Plaintiff's Affidavit relative to the balance due and other conditions required to be performed. That conten-

tion was clearly established throughout the pleadings and documents on file in this matter. In this same regard, the matters of tax prorations, insurance prorations, reserve prorations and similar matters need to be resolved by the Trial Court prior to any decree of specific performance.

POINT II

THIS HONORABLE COURT ERRED IN RIGIDLY APPLYING CERTAIN PROVISIONS OF RULE 56(e), U.R.C.P. TO PENALIZE DEFENDANTS FOR FAILING TO SPECIFICALLY RESPOND TO THE ALLEGATIONS OF PLAINTIFF'S AFFIDAVIT, UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE

A major problem with the Court's decision is the weight placed by the Court on the fact that Defendants' Affidavit did not specifically refute the allegations of Plaintiff's Affidavit, "does not allege any specific unfulfilled conditions", and fails ". . .to identify with specificity any material issues of fact. . .". (See Supreme Court Decision, p. 4)

Based on the circumstances, the Court explained:

Pursuant to Rule 56(e), Utah Rules of Civil Procedure, when a motion for summary Judgment is made, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973); Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021 (1968). Defendants have failed to identify with specificity any material issue of fact, and plaintiff, as a matter of law, is entitled to conveyance of the title.

In concentrating the basis for its decision on this premise, it is respectfully submitted that the Court did not

consider the circumstances surrounding the respective Motions and Affidavits of the parties. The Defendants' Motion for Summary Judgment (R. 47), along with the Affidavit of Kathryn Hinkle (R. 45-46) in support thereof, was filed on May 2, 1979, and copies thereof were mailed on that date to the attorney for the Plaintiff, along with a Notice setting the hearing on that Motion for May 17, 1979, at 10:00 o'clock a.m. (R. 48). This was done in conformity with Rule 56, Utah Rules of Civil Procedure and the applicable local Rules of the Third Judicial District Court. Nearly two weeks thereafter, and on the evening of the day prior to that hearing (May 15, 1980, at 4:48 p.m.), Plaintiff filed her own Motion for Summary Judgment and Affidavit in support thereof (R. 49).

No opposing Affidavits were filed by either party. The timing of the filing of the Plaintiff's Motion and Affidavit, which was contrary to Rule 56, Utah Rules of Civil Procedure, was such that the Defendants had no reasonable opportunity to respond specifically to the allegations thereof, assuming, for purposes of argument, that such was required in light of the deficiencies in Plaintiff's own Affidavit as discussed above. Rule 56, Utah Rules of Civil Procedure and Rule 6(g) of the Third Judicial District Court Rules of Civil Procedure set forth procedures for the timing of the filing of such Affidavits and Motions, the latter of which provides:

(g) Affidavits not filed within the time
required by any Rule of Civil Procedure

shall not be received except upon stipulation of the parties or for good cause shown.

No good cause for the delay and filing of the Affidavit of the Plaintiff appears in the record nor does any stipulation of the parties relative thereto. What does appear is a clear situation where the Defendants had no reasonable opportunity to respond in writing with specificity to that Affidavit. Under such circumstances, an unbending presumption that such party has no basis for controverting the facts of such Affidavit becomes wholly inequitable and should not be countenanced by this Honorable Court, particularly where Plaintiff's own Affidavit does not meet the requisite burden of proof entitling Plaintiff to the specific performance sought. After all, the primary directive for the application of all of the Rules of Civil Procedure is that they be ". . . liberally construed to secure the just, speedy, and inexpensive determination of every action" (Rule 1(a), Utah Rules of Civil Procedure).

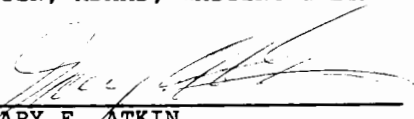
CONCLUSION


All of these factors, as heretofore set forth, combine to establish that this Court's conclusion relative to the legal effect of paragraph 8 of the Contract, while reversing that of the Lower Court, does not resolve major genuine issues of material fact which still exist and still need to be resolved, prior to the determination of judgment for

either party. These issues were not considered by the Trial Court at the hearing on May 17, 1979, and do involve factual issues which may not be ascertained strictly by the terms of the contract or from the record before this Court. As a result, it is respectfully submitted that the Summary Judgment directed by this Court on behalf of the Plaintiff on the issue of specific performance was not proper and Defendants respectfully request this Court to reconsider its earlier decision to the extent that such Summary Judgment was directed and that the entire matter, including the award of attorney's fees, be remanded to the Lower Court for determination consistent with the determinations of this Court relative to the legal affect of the Uniform Real Estate Contract involved herein.

Respectfully Submitted this 5th day of June, 1980.

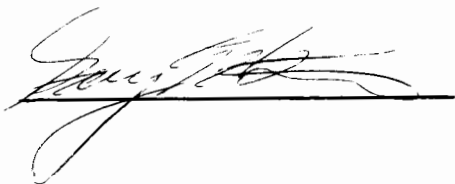
GUSTIN, ADAMS, KASTING & LIAPIS

BY 
GARY E. ATKIN

By 
DEAN L. GRAY
Attorneys for Defendant-
Respondent

DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Defendants' Petition for Rehearing and Brief in Support Thereof was hand-delivered to Joseph L. Henriod and Stephen L. Henriod, Attorneys for Plaintiff-Appellant, 400 Newhouse Building, Salt Lake City, Utah, 84111, on this 5th day of June, 1980.

A handwritten signature in dark ink, appearing to read "Joseph L. Henriod", is written over a horizontal line.