

1980

Bruce E. Holmes dba Holmes Realty v. DeGraff Associates, Inc. : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

BRUCE E. HOLMES, dba)
HOLMES REALTY,)
)
Plaintiff-Appellant,)
)
vs.)
)
DeGRAFF ASSOCIATES, INC.,)
)
Defendant-Respondent.)

REPLY BRIEF OF APPELLANT

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Parker v. Weber County Irr. Dist., 68 Utah 472, 251 P. 11 (1926)

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REPLY BRIEF OF APPELLANT

Plaintiff-Appellant Bruce E. Holmes replies to the
Brief of Respondents:

POINT I. AFTER THE REPUDIATION, RESCISSION, DISCHARGE OF
THE OPTION AND THE MERGER OF ALL AGREEMENTS OF THE PARTIES
INTO THE FINAL CONTRACT DOCUMENTS, THE OPTION CEASED TO
HAVE ANY LEGAL OR BINDING EFFECT UPON EITHER PARTY.

In the brief of appellant, Bruce E. Holmes ("Holmes")
has shown that the Option was repudiated (Point I), the option
was rescinded and discharged (Point II and Point IV), and that
all of the agreements of the parties merged into the final con-
tract documents (Point III). In addition, Holmes has shown
that the Option should be ruled void as a matter of law because
of the rule against perpetuities (Point V). The central issue
in this case is whether on July 15, 1977, when DeGraff Asso-
ciates and American Development Company signed the Purchase
Agreement, Assignment of Contract, Warranty Deed, Escrow In-
structions and Escrow Statements, (1) any portion of the Option
was valid and enforceable, or (2) the Option had been repu-

diated, discharged, rescinded or it was otherwise void in its entirety.

In this connection, the facts can be simplified as follows: After discussions between Holmes and Clara DeGraff, an officer of DeGraff Associates, on June 17, 1977 Clara DeGraff signed and delivered to Holmes an Option. Paragraph 8 of the Option contained a commission provision in which "0" was inserted in the blank space for the commission percentage. If paid strictly in accordance with its terms, the Option would never be paid in full: the interest which would accrue annually exceeded the minimum annual payments. From the date the Option was signed and received, DeGraff Associates asserted its unenforceability and expressly told Holmes that the Option would not be honored or performed by DeGraff Associates as written. Between June 17 and July 14, DeGraff Associates consistently reiterated its position that the Option was unenforceable. DeGraff Associates' legal counsel told Holmes that the Option was not valid, "there were about four or five reasons altogether why he considered that option invalid as written and therefore, the DeGraffs could not be held to it." In each instance, Holmes asserted the Option was valid and enforceable. Nevertheless, DeGraff Associates continued to assert its unenforceability and clearly indicated that it would not perform in accordance with the terms of the Option. On July 15, 1977, DeGraff Associates and American Development Company entered into a real estate contract. The only terms of the real estate contract which had any similarity to the terms of the Option

were the property itself and the purchase price. The payment schedule was substantially different, and the agreement and the documents signed concurrently therewith provided the following terms or provisions not mentioned in the option: (1) establishment of escrow, (2) payment into escrow, (3) delivery of deed to escrow, (4) partial conveyance, (5) payment to Farnsworth Associates, DeGraff Associates' contract seller, by American Development Company, (6) final payment on or before September 30, 1985, (7) DeGraff's obligation to pay off the Lockhart Company, to which DeGraff Associates had assigned its contract with Farnsworth Associates, (8) authority to subdivide, install roads, curbs, gutters, sidewalks, sewers and other improvements, and (9) default provisions. In addition to changes in the payment schedule, interest rate and down payments were changed.

As indicated in Appellant's Brief, it is Holmes' position that the Option was repudiated by DeGraff Associates, rescinded and discharged, and that all of the agreements of the parties merged into the final contract documents, discharging the Option, and that the Option was void because it violated the rule against perpetuities.

The irony of this case is that DeGraff Associates consistently refused to honor the Option, consistently and clearly indicated to Holmes that it would not honor the Option, and further asserted its position that the Option was void and unenforceable. Notwithstanding this position, DeGraff Associates would hold Holmes to paragraph 8 of the Option.

Holmes has no argument with the proposition that a real estate broker may negotiate or compromise his real estate commission, or even waive it entirely.¹ Further, Holmes has no argument that had DeGraff Associates honored the Option, he would not be entitled to a commission. However, the evidence is clear and unequivocal that DeGraff Associates refused to honor the Option, repudiated it, and not only asserted its unenforceability, but further clearly stated that it would not perform in accordance with the terms of the Option. Having taken that position, DeGraff Associates is bound by the consequences thereof. The consequences, under the circumstances of a new agreement with inconsistent terms, are that the Option is no longer valid or enforceable as against either party.

¹Respondent's brief states:

The evidence showed, further, that Holmes privately assumed that the rules and regulations of the Multiple Listing Service would mandate payment of a commission regardless of his clear and unambiguous written agreement to the contrary.

Although generally accurate, the foregoing statement is misleading because Holmes told DeGraff Associates his position at the time the Option was signed and thereafter. Nevertheless, Holmes' personal assumptions are irrelevant to the issues before this court. The relevant issues are the parties' agreements and their actions with respect to their agreements. Holmes' view at the time the Option was signed was that the Option and the parties' agreements with the Multiple Listing Service were inconsistent and that the Multiple Listing Service agreements would prevail as between the two. However, this was Holmes' personal view, without any benefit of legal counsel. Holmes acknowledges and has taken the position throughout this litigation that if DeGraff Associates had honored the Option and performed in accordance with its terms, he would have no claim for a commission.

DeGraff attempts to hold Holmes to the Option by saying that the Option was culminated in the execution of the agreement and related documents on July 15, 1977.² The facts and evidence are contrary to these assertions. Not only is it clear that DeGraff Associates repudiated the option (Tr. 90-93, 120-22, 147-48), DeGraff Associates considered that the option was not a final legally binding document. The testimony of Jay DeGraff, DeGraff Associates' president, is clear on the point:

- Q Mr. DeGraff, did you consider that there was a requirement for a subsequent contract of sale after the option was signed?
- A I considered the option to be an on-going, leading to a contractual passing of title.
- Q You considered that the terms of the option had to be expanded, clarified or redefined or renegotiated?
- A That has been said repeatedly. We talked about that.
- Q I am asking you if that was your treatment, your attitude before this option?
- A Certainly was. The option was binding with the exception of the fact that we had something that was never going to be paid off here.
- Q And that was not binding?

²In its brief, DeGraff Associates states:

Likewise, DeGraff, at all times, considered the option enforceable and treated the final closing of the sale as the culmination of the transactions contemplated in the option as negotiated. (Brief of Respondent, p. 4)

Although DeGraff did raise questions as to the enforceability of the option agreement, DeGraff nevertheless did carry through with the sale of the properties and chose not to refuse to perform on the basis of unenforceability, which was peculiarly DeGraff's to raise. (Brief of Respondent, pp. 13-14)

A Well, how can you have a contract that does not have an end to it?

Q That is what I am asking of you. Can you or can you not?

A Well, you can't --

(Tr. 138-139.)

DeGraff's assumption that he could repudiate the payment provisions of the Option but enforce other provisions does not make it so as a matter of law. On the contrary, a valid option, without more, is binding upon the parties thereto, requiring only proper exercise thereof to transform it to a binding contract. Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970). In J. R. Stone Co., Inc. v. Keate, 576 P.2d 1285 (Utah 1978), this Court stated: "[T]he granting of an option to sell, supported by a consideration, commits the offeror to sell according to the terms of the option until the option by its terms expires." (Footnote omitted.)

DeGraff Associates clearly and unequivocally refused to sell according to the terms of the Option. When DeGraff Associates repudiated the Option and relied upon the rule against perpetuities and other legal theories as a basis for doing so, DeGraff Associates must be held to the consequences of its actions. The consequences are that the Option was no longer binding on the parties. Just as American Development Company is not entitled to rely on the payment provisions of the Option, or any other provision, DeGraff Associates is not entitled to rely on paragraph 8 of the Option to deny Holmes the real estate commission.

POINT II. THE RULE AGAINST PERPETUITIES
RENDERS THE OPTION VOID.

After refusing to honor the option and specifically stating that it would not perform the option in accordance with its terms, DeGraff Associates asserted the option was invalid and unenforceable because of the rule against perpetuities. Holmes did not raise the rule, DeGraff Associates asserted it. Regardless of who asserted it, if the rule is applicable to the Option, the rule rendered the Option void from the inception. As stated by Professor Leach, Perpetuities In A Nutshell, 51 Harvard Law Review 638 (1938):

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being the creation of the interest.

Professor Leach explained the nature of the rule:

The rule against perpetuities is a rule invalidating interest which vest too remotely. Indeed, it is often called the rule against remoteness of vesting.

It is not a rule invalidating interests which last too long.

He explains certain of the elements of the rule:

A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities. Probability of vesting, however great, is not sufficient. Moreover, the certainty of vesting must have existed at the time the instrument took effect (i.e., the testator's death in the case of a will, the date of delivery in the case of a deed or trust). It is immaterial that the contingencies actually do occur within the permissible period or actually have occurred when the validity of the instrument is first litigated. (Emphasis added.)

With respect to contracts and options specifically, Professor Leach states:

The rule against perpetuities is a rule of property law, not a rule of the law of contracts. It is no objection to the enforceability of a contract that the liability thereunder does not accrue until a time beyond the period of perpetuities. Thus insurance and surety contracts (both contingent obligations) are valid without reference to the time when the contingency may occur or payment may be required.

However, if a contract for the transfer of property is specifically enforceable, there is created in the promisee an equitable interest in the property; and the question arises whether this equitable interest based upon the specific enforceability of a contract, is subject to the rule against perpetuities. At the outset it should be stated that this question ought to be answered in the negative. Assuming that it is desirable to have some restriction upon the equitable interests created by specifically enforceable contracts, the rule against perpetuities does not offer an appropriate limitation. The period of lives in being and twenty-one years, which works admirably in regards to gift transactions for family purposes, has no significance in the world of commercial affairs.

Options to purchase in gross. It has been held both in England and the United States that an option in gross to purchase land is void if it can be exercised beyond the period of perpetuities. The objection to this rule is not in the options that it strikes down but in those that it permits. An option in gross is an effective preventative of the improvement of the land over which it exists, unless (as is rarely, if ever, the case) the purchase price under the option fluctuates in accordance with the improved value of the land. As long as the option lasts the owner in possession cannot afford to make improvements which can be snatched away from him without compensation by the exercise of the option. To allow such a restraint to last for the period of perpetuities is monstrous. However, the common sense of land owners suffices to prevent this problem from being particularly important.

In the present case, the Option could not be exercised beyond the period of perpetuities. However, the Option when exercised became a contract which created only an equitable interest in the buyer (optionee) in the property described in the Option. The seller (optionor) retained the legal title.

Until the purchase price is paid in full, the seller has no obligation to convey. Since the purchase price is payable beyond the period of perpetuities, in fact in perpetuity, the legal title would not vest within the period allowed by the rule.

This Court, in the case of Hidden Meadows Development Co. v. Mills, 511 P.2d 737 (Utah 1973), addressed the question of the applicability of the rule against perpetuities to an option. Although this Court found the rule inapplicable to the option in question, the case is instructive:

A case most nearly supporting the contention of the defendants is that of Starcher Bros. v. Duty, 61 W.Va. 373, 56 S.E. 524, 9 L.R.A. (N.S.) 913 (1907), wherein an option was held void. There the contract provided for an option for one year and for additional years thereafter so long as the optionee paid a stipulated sum of money.

That case is not controlling here for the reason that the landowner was obligated to convey at a time in the future which could be beyond the lives in being plus 21 years. The landowner was impotent to prevent the option from continuing from year to year.

In the instant matter the optionee (plaintiff) has no such right. It only has an assurance of an option for the next ensuing year, and that by the permission of the landowners (defendants), to wit, by their failure to cancel prior to October 1. The option does not violate the rule against perpetuities. There was nothing in the contract to indicate that the parties intended the option to continue for an unlimited duration. It was merely a year-to-year option, subject to be defeated at the express desire of either party. It could not exist for more than 15 months after notice of cancellation was given, and for a lesser time if notice should be given prior to the end of September. The option is good for one year only, and it can be renewed by an additional year only in case the defendants want it to be renewed. They manifest that wish by failing to give notice of cancellation prior to October 1 of any given year.

As in the Starcher cash, cited in Hidden Meadows, in the present case the optionor, DeGraff Associates, was impotent to prevent the contract from continuing forever. If valid, the option when exercised would require DeGraff Associates to convey at a time in the future which could be beyond the lives in being plus 21 years.

Policy considerations behind the rule against perpetuities suggest that the Option should be void as against the rule. The Option, when exercised, would never pay out according to its terms. Jay DeGraff immediately recognized that this was not a desirable contract -- the seller (optionor) had no control over when the contract would be paid in full, if ever. This should be the result, especially since DeGraff Associates asserted the rule as a basis for avoiding what it was obligated to do under the Option.

Based upon the purpose of the rule against perpetuities, this Court should rule that the Option was void as a matter of law.

POINT III. THE EVIDENCE OF REPUDIATION, RESCISSION, AND DISCHARGE IS CLEAR AND CONVINCING, AND UNCONTRADICTED.

The evidence is clear that DeGraff Associates refused to honor the Option, declared the Option unenforceable, and specifically stated that they would not be bound by it or perform according to its terms. (Tr. 120-122, 93-94, 147-48.) This Court, by rules of appellate review, must defer to the findings of the trial court, if such findings are supported by the evidence. Further, the rules of appellate review require

this Court to review the evidence in the light most favorable to the successful party at the trial court. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977). This rule does not require or allow the evidence to be altered or misconstrued. The uncontradicted evidence in this case, even if viewed solely upon the testimony of DeGraff Associates' officers, requires findings that the Option was repudiated, rescinded and discharged, and that the parties' agreements merged into the final Agreement and documents signed contemporaneously therewith. Findings against uncontradicted evidence of unimpeached witnesses will be set aside. Parker v. Weber County Irr. Dist., 68 Utah 472, 251 P. 11 (1926).

This Court should reverse the trial court and enter judgment in favor of Holmes for the amount of the commission due.

POINT IV. THE BRIEF OF RESPONDENTS MISSTATES THE FACTS AND EVIDENCE.

In order that this court does not have a misunderstanding of the facts and the evidence before it, plaintiff deems it necessary to respond to certain statements contained in the Brief of Respondent.

Respondent states:

DeGraff, at all times, considered the Option enforceable and treated the final closing of the sale as the culmination of the transactions contemplated in the Option as negotiated. (Brief of Respondent, p. 4.)

This is clearly inaccurate. Bruce Holmes testified that from June 17, the day the Option was signed, and until July 15, DeGraff Associates consistently asserted that the Option was

unenforceable and stated that it would not perform in accordance with its terms (Tr. 120-122). This testimony was confirmed by the testimony of Clara DeGraff wherein she recited the response of Jay DeGraff to the Option:

DeGraff Associates was not going to sell the property under the Option, that under no circumstance would the Option go to fruition. (Tr. 93-94.)

DeGraff Associates' counsel asserted the unenforceability of the Option (Tr. 147-48). This contradiction, i.e., that the Option was enforceable while asserting its unenforceability, can only be explained by Jay DeGraff's view that the Option was only a preliminary contract and that he was entitled to negotiate additional and even inconsistent terms (Tr. 131-32, 138-39). As explained in Point I above, an Option commits the Optionor to sell according to the terms of the Option if it is exercised timely.

Respondent states in its Brief:

Negotiation of all terms of the sale with DeGraff were conducted by Holmes himself (Tr. 34, 43-44), and Holmes supplied to the title company the information to be included in the closing documents (Tr. 114).

. . .

The evidence disclosed however that DeGraff, at no time prior to closing of sale, was made aware of any buyer being involved other than Holmes himself; and, in fact, upon closing, DeGraff still assumed that American Development Company, the ultimate buyer, was still Holmes doing business in another name. (Brief of Respondent, pp. 5, 6.)

This suggests that Holmes concealed or withheld information from DeGraff Associates of a third-party. This is not accurate. Clara DeGraff testified that on May 24, 1977, when Holmes

called the very first time, he mentioned having a customer for it, and Clara DeGraff so noted in her log (Tr. 92). After the Option was signed, Holmes disclosed the involvement of Glen Saxton and American Development Company (Tr. 107). The final agreement of American Development Company and DeGraff Associates was negotiated by Holmes on behalf of American Development Company and by Craig DeGraff on behalf of DeGraff Associates, Holmes and Craig DeGraff dealing with their respective principals (Tr. 113-114). Finally, when the final real estate agreement and corresponding documents were signed, DeGraff Associates knew it was not dealing with Holmes (Tr. 57).

Respondent's Brief states:

Holmes, further, argues on page 18 of his Brief that American Development Company (who is not a party at any time to the agreements in issue involving a commission) somehow chose to discharge the contract between Holmes and DeGraff, and to negotiate a new agreement. Holmes does not explain the process by which any such action by this third party could purportedly operate to obviate a separate agreement between Holmes and DeGraff. Moreover, Holmes' argument ignores the facts that (1) Holmes never entered into any subsequent agreement with DeGraff altering the terms of the Option agreement relative to a commission and no documents purporting to do so were ever offered into evidence; (2) the final agreement with American Development Company makes no mention at all of a commission; and (3) Holmes' argument assumes facts contrary to the trial court's express findings. (Brief of Respondent, pp. 16-17.)

The foregoing is particularly interesting in view of the trial court's findings of facts, prepared by counsel for Respondent:

On July 15, 1977, the plaintiff assigned all of his right, title and interest in the Option Agreement to American Development Company. As a result of this assignment, American Development Company assumed all right, interest and standing of the plaintiff in and to the Option Agreement.

The process of discharge of the contract between Holmes and DeGraff is obvious. There is no inconsistency in American Development Company as the assignee of the Option excepting DeGraff Associates' offer of rescission and discharging the Option only upon DeGraff Associates' execution of a new agreement, especially in view of the clearly stated position of DeGraff Associates of the unenforceability of the Option. In other words, as assignee of the Option, American Development Company was entitled to rely upon and consider the Option valid and enforceable and to pursue remedies attendant therewith if it so chose, until DeGraff Associates executed a new agreement which rescinded and discharged the Option. The point which respondent seems to miss is that the law of repudiation, rescission and discharge terminates the Option. When thus terminated, being of no further force and effect, the agreements of Holmes and DeGraff Associates with the Multiple Listing Service were then applicable and based upon those agreements, Holmes is entitled to a commission.

Respondent's Brief states:

[T]he evidence indicated that Holmes (ostensibly in good faith) agreed in writing that no commission would be payable while he, at the same time, secretly intended to seek a commission regardless of the express agreement. (Brief of Respondent, p. 19.)

In response, see footnote 1, page 4, and accompanying text.

Holmes takes issue with Finding 13 of the trial court:

At all times the plaintiff's agreement was in effect whereby no commission would be payable from the defendant to the plaintiff in connection with the sale of the subject property.

This is a conclusion of law, but whether a finding of fact or conclusion of law, it is not supported by the evidence. The trial court did not enter any conclusions that DeGraff Associates repudiated, rescinded or discharged the Option nor that the Option was terminated by merger by the final Agreement and contemporaneous documents. The trial court did not enter any findings that the Option, by its terms would never pay the purchase price. Nevertheless, the evidence is clear, convincing, uncontradicted and undisputed which would lead to such findings and conclusions.

This Court must so find and reverse the trial court with instructions to enter judgment in plaintiff's favor.

CONCLUSION

It is respectfully submitted that the evidence in this case is clear, convincing, unrepudiated and unimpeached that the Option was (a) repudiated by DeGraff Associates, (b) rescinded and discharged, and (c) merged into the final agreements of American Development Company and DeGraff Associates. In addition, the rule against perpetuities rendered the Option void. Under any of these legal theories, the Option ceased to be binding upon DeGraff Associates or Holmes. This evidence requires this Court to reverse the trial court and enter judgment in favor of plaintiff-appellant in the sum of \$51,660.

DATED this 12th day of May, 1980.

Respectfully submitted,

MOYLE & DRAPER

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 1980, I served two copies of the attached Reply Brief of Appellant by mailing a copy thereof in a securely sealed, postage prepaid envelope to the following at the address indicated:

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