

1980

Paul M. Gardner v. Shannadean Dipo Christensen : Respondent's Brief

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Gardner v. Christensen*, No. 16615 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL M. GARDNER

Plaintiff and Appellant

vs.

Case No. 16615

SHANNADEAN DIPO CHRISTENSEN

Defendant and Respondent

RESPONDENT'S BRIEF

Appeal from the judgment of the Third Judicial District
Court in and for Salt Lake County, State of Utah
Honorable Ernest F. Baldwin, Judge

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FILED

JUN 3 1980

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SHANNADEAN DIPO CHRISTENSEN

Defendant and Respondent

Case No. 16615

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for the recovery of damages claimed by plaintiff by reason of defendant's failure to convey real property, pursuant to an option agreement.

DISPOSITION IN LOWER COURT

The trial court awarded plaintiff as damages the sum of \$2,000, finding that the market value of the real property subject to the option agreement, at the time the option was to be exercised, was \$80,000, which was also the option purchase price, less \$2,00 paid for

the option, which sum was to be credited to the purchase price, and which sum constituted plaintiff's damage. The court did not award special damages or attorney's fees. From the judgment, the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the judgment of the trial court sustained as being a proper award.

STATEMENT OF FACTS

On May 18, 1977, defendant executed an option agreement to one Mike Heyrend for the purchase of a parcel of unimproved real property located in Salt Lake County, herein referred to as the "Christensen Property". The option agreement (Ex. 3-P), provided for the payment of \$1,000 as consideration for the option, and provided for a purchase price of \$80,000, with the option fee of \$1,000 to be applied to the purchase price, if the option was exercised. The option was subsequently extended for an additional \$1,000, to October 18, 1977 (Ex. P-9). All negotiations were conducted by David Helm, as agent for Mike Heyrend. The option was obtained in an attempt to put

together a development, which would include other property, including property hereinafter referred to as the DeGooyer Property". The proposed development also involved zoning approval and other requirements (Ex. P-137). The final preparation of the option was done by defendant's attorney, but was not subject to any restrictions or requirements involving the purchase of the DeGooyer Property.

An earnest money offer to the purchase of the DeGooyer Property was made by Mike Heyrend on May 11, 1977 (Ex. P-2), subject to the obtaining of the Christensen Property.

Defendant's option, by its terms, had to be exercised by August 18, 1977 (Ex. P-3), and the DeGooyer earnest money agreement had to be closed by August 15, 1977 (Ex. P-2).

On August 17, 1977, defendant's option was extended for an additional 60 days, or until October 18, 1977 (Ex. P-9); however, the DeGooyer earnest money agreement had expired by its own terms. Prior to the extension of the option agreement, Mike Heyrend entered into an earnest money agreement on August 3, 1977 (Ex. P-12), agreeing to sell to Probe Construction Company his

interests in the Christensen option and other property, which agreement was to be performed by September 15, 1977. This agreement was not completed within the time required of September 15, 1977.

On September 27, 1977, Heyrend submitted an earnest money agreement to DeGooyer for the purchase of their property, which agreement was not accepted until October 27, 1977 (Ex. P-8). In the meantime, Heyrend, on October 14, 1977, assigned the Christensen option to Probe Realty, Inc., by a written assignment (Ex. P-13D); however, the assignment did not include the proposed DeGooyer earnest money agreement (Ex. P-8), so that Probe Realty, Inc., had only the bare option to purchase the Christensen property, and nothing else. Probe Realty, Inc., on October 18, 1977, assigned the option agreement to Probe Realty, Inc., who assigned it to the plaintiff (Ex. P-21); again, only the Christensen option, and nothing else, was assigned to the plaintiff (R 190). Plaintiff expended no money, plaintiff received no assignment of monies spent, and plaintiff had nothing other than an assignment of an option that was to expire on the day of the assignment.

Plaintiff claims that he is entitled to damages consisting

of monies spent by Mr. Heyrend for engineering expenses in connection with a development plan for not only the Christensen Property, but also the DeGooyer Property and other property. He also claims damages based upon the increased value that could be attributed to the Christensen Property, when considered together with the DeGooyer Property as a combined property; this, although plaintiff did not own or even have a right to purchase the DeGooyer Property.

On October 18, 1977, when plaintiff attempted to exercise the Christensen option, the earnest money offer (Ex. P-12) by Probe, Inc., to purchase the Heyrend interest in these properties had expired by its terms, because it had not been completed on September 15, 1977 (R-188); the DeGooyer Property had an unaccepted offer by Mike Heyrend pending, and the plaintiff had an assignment of the subject option, subject to no qualifications or restrictions.

From the evidence, the court found that the measure of damages was only the market value, without considering the possible value increase that may have been associated with the acquisition of the DeGooyer Property. The court further concluded that the engineering

costs and other expenses were not a less resulting from defendant's failure to convey the property.

Since no evidence of attorney's fees was presented to the court, the court did not make an award of fees.

ARGUMENT

POINT I

THE COURT PROPERLY ASSESSED DAMAGES AS THE DIFFERENCE BETWEEN MARKET VALUE AND OPTION PRICE.

The general rule followed by Utah courts is that a purchaser, in a claim for wrongful refusal to convey under an agreement of purchase, is entitled to damages equal to the difference between the market value of the land at the time of the breach, and the agreed purchase price. This, in effect, gives the purchaser, as damages, the benefit of his bargain in the event that the land appreciates in value.

In the case of Beckstrom v. Beckstrom, 578 P. 2d 250, this court said:

"The general rule as to damages in such circumstances is that where a vendor breaches his

contract to convey property, the vendee is entitled to the benefit of his bargain; that is, he is entitled to the market value of the property at the time he would be entitled to receive conveyance thereof, less the amount he agreed to pay."

Justice J. Allan Crockett, in writing the foregoing opinion, cited the cases of Smith v. Warr, Ut 1977, 564 P. 2d 771, and Bunnell v. Bills, Ut 1962, 368 P. 2d 597. In the Smith case, the court ruled as follows:

"The rule followed by Utah is that benefit-of-the-bargain damages are to be awarded for breach of contract for the sale of real estate, regardless of the good faith of the party in breach."

In Bunnell, the court held:

"The measure of damages, where the vendor has breached a land sale contract, is the market value of the property at the time of the breach, less the contract price to the vendee."

In each of the foregoing cases, the court cited the case of Andreason v. Hansen, 335 P. 2d 404, for the rule that:

"Proper measure of damages is the difference between the offer and the market value."

In this case, the plaintiff seeks damages in excess of those allowed by the court, on the basis that he has been damaged

because of the fact that the subject property, if owned together with surrounding properties, would be worth a great deal more than its separate value as determined by appraisal (Ex. P-16, P-17). The court correctly found that the market value at time of the option was to be exercised was the same as the option price, to-wit: \$80,000, and that therefore plaintiff was only entitled to the \$2,000 paid on the option and to be credited against the purchase price.

Since the facts established that the option was given without consideration for any other properties, and was an option to purchase the subject property for \$80,000, notwithstanding any other purchases, the claim that failure of the defendant to convey is the basis for lost profit damages, is without basis. This is particularly true where the DeGooyer Property was neither owned by the plaintiff, nor was it ever under an accepted earnest money agreement in favor of the plaintiff or anyone else, at the time the option was to be exercised (Ex. P-8).

POINT II

THE COURT DID NOT ERR IN REFUSING TO
AWARD SPECIAL DAMAGES FOR COSTS AND
EXPENSES.

It is generally the rule that no recovery can be had for loss of profits which is dependent upon a subsequent or subordinate agreement, even if the subsequent agreement was entered into upon the faith of the principal contract, when the collateral contract was not in the contemplation of the defaulting party at the time the principal contract was entered into. See Am Jur 2nd, Damages, P 95.

In addressing the question of special damages, such as are here requested by plaintiff, this court, in Ranch Homes, Inc., v. Greater Park City Corp (Ut 1970), 592 P. 2d 620, stated:

"The rule is that the damages to be awarded for breach of contract are those that are foreseeable as a natural and probable consequence of the breach. In other words, the only damages recoverable are those that could reasonably be foreseen and anticipated by the parties at the time the contract was entered into. Mere knowledge of possible harm is not enough; the defendant must have reason to foresee, as a probable result of the breach, the damages claimed."

The court further stated:

"The particular nature of an option requires that the parties incur no more expenses than are necessary, and that those expenses reflect only what is required to be done before the option can be exercised."

When you consider the many offers to purchase, assignments of interest, and all other negotiations that went on between Helm, Heyrend, Probe Construction, Probe Realty, Probe, Inc., and the plaintiff Gardner, it is difficult to know who was developing what, and exactly how the defendant's option was to be used. There is no way that the defendant could have reasonably anticipated or supposed that the claimed expenses would be made. Had she known of the juggling act that was being performed, she could well have wondered whether or not any real action would be taken with her property.

It is clear that at no time did the plaintiff expend any funds for the expenses of development proposals, nor did he have an assignment of such expenses. It is also clear that the only property subject to any valid claim on October 18, 1977, was the Christensen Property. In view of the fact that the plaintiff had received his interest in the option on the last day it could be exercised would indicate that he was only attempting to keep a "potential something" in hand. He suffered no special damages, and the court correctly so ruled.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DIS- CRETION IN REFUSING TO ALLOW ATTORNEY'S FEES.

It is recognized that a claim for attorney's fees must be based upon a statutory provision or a contractual agreement.

If based upon a written contract providing for payment of attorney's fees without specifying the amount, then the court is without authority to fix any such fees without proof as to what is a reasonable fee. This is as much a part of plaintiff's case as any other part, and must require the same attention. When plaintiff concludes its case and rests, the court is in a position to render judgment. At some point, the evidence must conclude and the matter be presented for ruling. Here, the plaintiff rested its case without evidence of the contract requirement to pay fees --- to which the defendant could have responded --- and without evidence as to amount.

In the case of FMA Financial Corp. v. Build Inv., ,
17 Ut 2 80, 404 P. 2d 670, the court, in addressing this subject, said:

"It is fundamental that the judgment must be based upon findings of fact, which in turn must

be based upon the evidence ... However, it was an issue of fact which was denied. Thus, it was a part of the plaintiff's case to which it had the burden of proving. Failing to offer proof of any character on this issue had the same effect as would the failure to offer proof as to any other controverted issue. There is nothing upon which to base a finding."

The fact that the court refused to allow plaintiff to reopen his case during final arguments was not an abuse of the court's discretion but was well within the discretion of the court.

CONCLUSION

It is apparent that the only interest that the plaintiff can claim is a last minute assignment to the Christensen option, and that any claimed damages must be based upon that interest only. Therefore, the court correctly determined that plaintiff's damage was the difference between the market value of the property on October 18, 1977, less the purchase price agreed. Since the market value and the purchase price were the same, the damages were properly assessed at the sum of \$2,000, the amount paid on the option to be credited against the purchase price.

As to the matter of plaintiff's claim to special damages, for engineering fees and other costs, the fact that those costs were expended by someone other than plaintiff, without assignment to plaintiff, and the fact that these were not costs anticipated by defendant, nor expenses reasonably contemplated at the time the option was given, clearly shows that plaintiff had no claim for those expenses and costs, and that the court correctly denied plaintiff's claim.

The court, having no evidence as to attorney's fees, properly did not make such award.

Respectfully submitted this 3rd day of June 1980.

WALTER R. ELLETT

Attorney for Defendant-Respondent

I hereby certify that on this 3rd day of June 1980, I mailed a true and correct copy of the foregoing Brief of Respondent to L. Benson Mabey, Attorney for Plaintiff-Appellant, 424 East 500 South, Suite 102, Salt Lake City, Utah 84111.

/s/ Walter R. Ellett