

1979

C & J Industries, Inc., A Utah Corporation, A.
Robert Collins and Glade N. James v. Edward O.
Bailey and Ruth C. Bailey, His Wife : Appellant's
Brief

Utah Supreme Court

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IN THE SUPREME COURT
STATE OF UTAH

C & J INDUSTRIES, INC., :
a Utah corporation, :
A. ROBERT COLLINS and :
GLADE N. JAMES, :
: :
Plaintiffs-Respondents, :
: :
vs. :
: :
EDWARD O. BAILEY and :
RUTH C. BAILEY, his wife, :
: :
Defendants-Appellants. :

Case ... 16648

APPELLANT'S BRIEF

APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE CHRISTINE M. DURHAM, JUDGE

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67 Am Jur 2d, Sales, §8

MISCELLANEOUS

Black's Law Dictionary

Williston on Contracts. Vol. V, Revised Edition p. 3476
§1422

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vs. :

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RUTH C. BAILEY, his wife, :

Defendants-Appellants. :

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiffs-respondents, hereinafter referred to as "plaintiffs", for judgment as follows:

- "1. That an order to show cause issue immediately requiring the defendants to appear and show cause, if any they have, why they should not be restrained from forfeiting the rights under said contract until the court has had a full hearing in this matter and entered its judgment declaring the rights of the parties.
- "2. For a declaratory judgment declaring that the terms and conditions of the real estate contract which is Exhibit "A" attached to the complaint have not been violated and that payments thereunder may continue pursuant to the terms thereof." (Prayer of Complaint, P.3)

Edward O. Bailey and Ruth C. Bailey, his wife, hereinafter referred to as "Baileys" contend that plaintiffs have breached the provisions of said contract and pray for judgment against

plaintiffs:

- a. No cause of action against plaintiffs and for costs and a reasonable attorney fee. (p.24)

DISPOSITION IN LOWER COURT

Each of the parties submitted the matter pursuant to motions for summary judgments by the respective parties and a motion for attorney's fees by Baileys for enforcement of the contract under paragraph 21 of said contract which reads:

"21. The Buyer and Seller each agree that should the default in any of the covenants or agreements contain herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this Agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the Statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise." (underscore added)

The court granted plaintiffs-respondents motion for summary judgment and denied defendants-appellants motions.

RELIEF SOUGHT ON APPEAL

Reversal of the granted motion for summary judgment and the granting of the motion for summary judgment of defendant and motion for costs and attorney's fees for enforcing said contract provision.

STATEMENT OF FACTS

Baileys and C & J Industries Incorporated, a corporat

designated as Buyer, made and entered a contract entitled Uniform Real Estate Contract, designated as Exhibit "A" (p.6) on the 13th day of April, 1978, for the purchase of the following described lands in Salt Lake County, State of Utah, to-wit:

All of Lots 17, 18, 19, 27, 28, 30, 31, 32, 33 and 34, Block 6, Longview Park Addition, as recorded in the office of the County Recorder of Salt Lake County, State of Utah, subject to existing rights of way. (Exhibit M-D-1) (p. 6 and 53)

Three of said lots face on State Street and have a business building thereon, and eight of said lots are in the rear across the alley and had a storage building and were used for parking. (p.53)

To definitely fix the persons responsible, Baileys required a Guaranty (p.25) by and between said Baileys and A. Robert Collins and Glade N. James, "principal officers" of said corporation, wherein it was covenanted and agreed:

"Buyer, and A. Robert Collins and Glade N. James are each jointly and individually bound to satisfy the obligations of said C & J Industries, Incorporated, under the terms of said Uniform Real Estate Contract, and to perform each of the covenants and agreements therein.

"Each and all of the parties to said Uniform Real Estate Contract are each severally and jointly bound to perform the obligations, covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James individually and jointly." (Exhibit D-1 attached to Answer) (p.25)

That paragraph 3(a) of said Uniform Real Estate Contract, Exhibit A, provides in part:

"In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises, then and in the event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction (underscore added) (p.6)

On or about March 9, 1979, plaintiffs, Collins and James, not the Buyers under said contract, but the Guarantors, sold a portion of the subject real property and said office building located thereon to one Jay L. Burgie pursuant to a Uniform Real Estate Contract dated March 9, 1979, a copy of which contract is attached to the Complaint herein and marked as Exhibit B, (p.10) and said contract contemplated the transfer of three lots containing the building and all State Street-facing property (p.10), Lots 17, 18 and 19 of Block 6, Ten-Acre Plat "A", Big Field Survey of Longview Park Addition. (p.53)

Under date of March 19, 1979, counsel for Baileys mailed a letter (p.54) to each of plaintiffs advising of the breach and asking it to be corrected. (p.54)

Baileys thereafter had prepared and served upon C & J Industries Incorporated, on April 4, 1979, upon A. Robert Collins on April 5, 1979, and upon Glade N. James on April 9, 1979, a "NOTICE TO REINSTATE THE TERMS OF THE CONTRACT TO PURCHASE BY PAYMENT OF ALL DELINQUENT AMOUNTS DUE AND OWING BY VIRTUE OF THE SALE OF THE PROPERTY SUBJECT TO SAID CONTRACT OR FORFEIT ALL RIGHTS UNDER SAID CONTRACT". (p.13) Exhibit C. Said Notices set forth said subparagraph (a) of Paragraph 3 of said Uniform Real Estate Contract and stated:

"That said Jay L. Burgie, dba Ogden Beauty Supply Company has reputedly purchased a portion of said real property in contravention of said agreement in that said 'the full and outstanding balance due on this contract prior to said transaction' has not been paid.

"In contravention of said specific provision of said contract rights of said Buyer and interests of said Buyer in said described properties have been sold, or assigned or transferred or conveyed without the 'outstanding balance due on said contract' having been paid to Buyer 'prior to said transaction.'

"NOTICE IS HEREBY GIVEN THAT WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE UPON YOU, SAID CONTRACT MUST BE REINSTATED BY THE PAYMENT OF SELLER 'IN FULL THE OUTSTANDING BALANCE DUE ON THIS CONTRACT'.

"NOTICE IS HEREBY GIVEN THAT IF YOU CLAIM ANY RIGHTS UNDER SAID CONTRACT, IF THE PAYMENT IN FULL IS NOT PAID WITHIN A REASONABLE TIME, NAMELY 30 DAYS, YOU AND EACH OF YOU ARE HEREBY NOTIFIED THAT SAID CONTRACT OF SALE IS TO BE TERMINATED AND CANCELLED BY REASON OF SAID BREACH OF SAID CONTRACT AND REFUSAL TO PAY THE FULL AMOUNT DUE AND OWING AND BY REASON OF SAID REJECTION OF THE OFFER TO REINSTATE SAID CONTRACT." (Exhibit C) (p.13)

On April 26, 1979, plaintiffs filed the subject action asking for an Order to Show Cause why a restraining order should not issue restraining defendants from declaring a forfeiture under the terms of said contract and for a declaratory judgment, and hearing was set for may 10, 1979, before the above entitled court with the Honorable Christine M. Durham, Judge presiding.

Paragraph 5 of said contract provides:

"5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the Seller."

Paragraph 21 of said Uniform Real Estate Contract provides:

"21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise."

Attached to the Memorandum in Support of Motion for Summary Judgment was the record of payments sheet showing the payment number of each and every payment made under said contract with the first payment due June 1, 1978, and the written acknowledgment of payments made which are underlined and how payments made through May, 1979, were applied and the balance due and owing on May 1, 1979, which is \$213,034.41. (Exhibit M-D-3). (p.55)

Hearing was had on said May 10, 1979, on said Order to Show Cause. The court ruled that a restraining order at that time did not seem proper.

In order to facilitate the disposition of the matter, the court said that each of the parties might file a Motion for Summary Judgment and that the parties might "get together on the facts". Motions were filed. (p.19, p. 28) Hearing on said Motions was set for May 25, 1979, at 3:00 p.m. before the court. Counsel were invited to file written memorandum, if they chose. Written Memorandum were filed. (p.30,43) An affidavit

in support of motion for attorney's fees to enforce terms of contract was filed. (p.84)

ARGUMENT

POINT I

The Uniform Real Estate Contract, the subject of this action, was signed and agreed to by all parties to this action. Each, individually signed the same, each of the Baileys, C & J Industries Incorporated, by its officers, A. Robert Collins and Glade N. James, individually. (p. 9)

It should be noted that the Buyer under the contract was C & J Industries Incorporated, a corporation, (p.6) and the Seller under the purported contract of sale was Glade N. James and A. Robert Collins. (Exhibit B) (p.10) How the parties are switching the ownership around is not clear. How the property was sold, transferred or assigned or how much is not known. There had to be some. The Buyer under the Uniform Real Estate Contract, (Exhibit A) (p.6) is not the Seller of the premises in the Uniform Real Estate Contract between Glade N. James and A. Robert Collins and Jay L. Burgie. (Exhibit B) (p.10)

The Guaranty, (p.15) signed by the parties was to make each of the parties personally and jointly responsible for the performance of said contract. (Exhibit D-1)(p.25) Unknown persons who were responsible for the corporation were made definite by the Guaranty.

Paragraph 3 of said contract (p.6) reads:

"3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Two

Hundred Twenty Thousand Dollars (\$220,000.00) payable at the office of the Seller, his assigns, or order in Salt Lake City, Utah, strictly within the following times, to-wit: Two Hundred and Ninety-seven Dollars and 31/100 (\$2,297.31) per month commencing June 1, 1978.

(a) In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction . . ." (underscore added) (p.6)

In Black's Law Dictionary, we read:

"With respect to ownership of external objects of property, rights may be classed as absolute and qualified. An absolute right gives to the person in whom it inheres the uncontrolled dominion over the object at all times and for all purposes. A qualified right gives the possessor a right to the object for certain purposes or under certain circumstances only."
(Black's Law Dictionary, p. 1559—under Classification)

The Buyer took the subject property subject to the terms of the contract which imposed conditions. C & J Industries Inc. purchased the property subject to the conditions of paragraph 3(a). Based on the facts and documents before the court, Glade N. James and A. Robert Collins have no rights or interests in these premises or in the contract. The court must assume a sale, assignment, or conveyance of C & J Industries, Inc. rights or interests to Glade N. James and A. Robert Collins in order for them to enter the contract executed by them on March 9, 1979. (Exhibit B) (p. 8). If there were a sale, assignment or conveyance by C & J Industries Inc. to Glade N. James and A. Robert Collins, then it was a breach of paragraph 3(a). That paragraph requires that "prior to said transaction" the "Buyer must pay in full the outstanding balance"

Section 22 of said contract provides:

"22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto."

Section 19, of said contract provides, in part:

"19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances . . ."

C & J Industries Inc. had the right to assign its "rights" and "interests". The contrary is not contended. However, prior to said "sale, assignment, transfer or conveyance" the "buyer must pay in full the outstanding balance due on this contract." If "buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction." What could be more clear? All parties signed this contract with this limitation. The sale to Burgie was all of the business building and property facing on State Street, the main thoroughfare. The retained portion is rear property consisting of parking space and warehouse space.

The key to this business property is the front store. The contract does not provide that a portion of the property may be sold, assigned or transferred or conveyed. The contract specifically provides that if "the Buyer's interest in the premises

is sold, assigned or transferred or conveyed the Buyer must pay in full the outstanding balance."

The Seller is not trying to restrict the rights of the Buyer. This was agreed to in writing. Jay L. Burgie, is not the one Seller is looking to "not to commit or suffer to be committed to any waste, spoil, or destruction in or upon said premises." (p. 10) Buyer can assign or sell to whom Buyer pleases but when Buyer does, Seller is to receive "pay in full of the outstanding balance."

In the instant case, "Buyer's interest in said premises was sold. It was no one else's interest. It was "buyer's interest" even though buyer was retaining some additional interest, but buyer was selling "Buyer's interest."

What havoc the courts would wrought if parties were permitted to sell, assign or transfer part of the properties sold when parties had agreed not to sell, assign or transfer the properties purchased. If one contracts not to sell the property, can a court of law permit one to sell part of it, and part of it again, and part of it again until for all practical purposes it is all sold. When one contracts not to sell a piece of property and courts cannot authorize the sale of part of the property. Pandora's box would certainly be opened.

POINT II

THE PHRASE "RIGHTS OR INTERESTS" DOES NOT MEAN ALL RIGHTS OR ALL INTERESTS, BUT INCLUDES A PART OR PORTION

The contract executed between the parties was designed

in part, to protect defendants against third parties obtaining rights in the property over which defendants had no control. To avoid that undesirable position, defendants required plaintiffs to pay the balance of the contract price in the event plaintiffs sold, transferred or assigned their interest in the property. This was the only protection defendants had from outside parties with whom they had no privity of contract.

Plaintiffs have argued that "rights" and "Interests" refer to "all of their rights" or "all of their interests" and not just a portion of them. The contract does not so provide. Each part is contained within the whole and when a condition applies to the whole it applies to each part. Plaintiffs contend that it would be ridiculous under defendants' interpretation of the contract to completely pay the balance of the contract if they sold or assigned one square foot of property. The choice is with the plaintiffs, plaintiffs need not sell. Plaintiffs reasoned that they could sell all but one square foot of property without paying off the contract since they would still own an interest in the property.

In attempting to determine the definition of "right" or "interest", counsel was unable to find a Utah case in point. However, the Minnesota Supreme Court defined "interest in land" in "In Re Rood's Estate, 38 N.W. 2d 70, 229 Minn. 73 (1949) as follows:

"In the instant case, the prayer for relief presented to the court the broad issue of declaring

or ascertaining the title or interest of the applicant in the land. Obviously, the applicant's interest in the land could not be determined without giving consideration to the validity and extent of all encumbrances. 'Interest in land' is a broad term which may refer to any one of a variety of estates or fractional shares in realty. It may refer to the net equity or fractional property value possessed by the owner over and above the sum total unpaid on outstanding encumbrances." (emphasis added)

ACCELERATION CLAUSES

To argue that Acceleration Clauses are against public policy or illegal would be specious. All of the parties agreed the acceleration clause in writing.

Baileys sold to C & J Industries Inc. without any down payment. The monthly payments were a small fraction over one percent of the purchase price. When interest rates were six percent per annum rent was usually figured at one percent per month of the purchase price or fair market value. That was the way a fair computation of the rental value was figured. With interest rates soaring to fifteen and three-quarters percent prime rate, the one percent per annum would not be feasible. No bank would make such a loan as there is no profit margin or inflation considered. This loan was made under the most favorable of conditions to the buyer. The contract protected the seller against having anything to do with any other buyer, assignee, transferee or purchaser. That is a fair, legal and legitimate condition to a contract. The only party capable of accelerating payment was C & J Industries Inc. The contract was written for that express purpose. That was the purpose of subsection 3(a).

There is no question of fraud, or the lack of knowledge

the terms of the contract. There is a desire to abrogate the terms of the contract.

The court went on to state in Peck v. Judd, 326 P.2d 712, 7 Utah 2d 420:

"It is not our prerogative to step in and renegotiate the contract of the parties. It may be conceded that with an advantaged background we may be able to improve on their work and considering the changed times and conditions say what now appears to us to be fair under such conditions. Possibly at least one of the parties would agree. There is no reason why we should consider the vendee privileged and entitled to our intervention unless the conditions sought to be imposed on the vendee are unconscionable . . .

"Further than to determine if enforcement of the contract results in gross inequity, and unless and until the enforcement would be highly unconscionable, we should recognize and honor the right of persons to contract freely and to make real and genuine mistakes when the dealings are at arm's length."

The provisions of Section 3(a) (b) and (c) are not provisions of the standard Uniform Real Estate Contract. This contract was typed to specifically include paragraph 3(a). There is no question of fraud, unconscionable advantage taken, or deceit. This contract provided simply that the Seller would deal only with the buyer. In the event buyer wanted to unload the contract or take advantage of a sale that the seller must be paid out in full. The Buyer could sell to anyone buyer chose upon such terms as buyer might desire. The buyer's interest in the contract and the premises was so tied that if the buyer wanted out, the seller wanted out first. There is nothing fraudulent or unconscionable about that situation.

SALE OR EXECUTORY CONTRACT

In the Supplemental Memorandum counsel for plaintiffs quoted in part from 67 Am Jur 2d, "Sales", Section 8, in an attempt to differentiate between a sale and an executory sale. However, the final paragraph of Section 8 which plaintiffs omitted, clarifies the artificial distinction between a sale and a contract for sale. It states as follows:

" . . . Although the Uniform Commercial Code defines 'contract for sale' separately from 'present sale,' no distinction is made between the rights of the parties according to whether the transaction is a present sale or a contract to sell, unless a provision of Article II expressly so provides. In short, pre-Code distinctions between a sale and contract to sell will continue under the Uniform Commercial Code; but the distinction is theoretical for most purposes, since the passing of title is of relatively little importance under the Code."

This section specifically states that no distinction is made between the rights of the parties under either contract form unless provided for by a provision of Article II. However, Article II of the Utah Commercial Code applies only to goods and not the sale of real property. Since the present case involves the transfer of real property, it is immaterial whether the transfer of property was a sale or a contract for sale because the rights of the parties remain the same under both.

Plaintiffs further allege that transfer of title is the key issue. Section 8 states that the passing of title is relatively unimportant. We agree. In most real estate transactions the buyer rarely acquires title to the property he is purchasing unless he pays cash. Real estate contracts are used extensively

throughout Utah with the seller retaining title until the purchase price has been paid. That does not mean that the buyer does not have rights or interest in the property. Obviously, in the instant case the buyer acquired some right or interest in the property because they transferred a portion of it for value to a third party. Whether the contract between plaintiffs and defendants is considered a sale or a contract for sale becomes meaningless, since plaintiffs' rights under either are the same.

FORFEITURE

Defendants filed an Affidavit in Answer to Verified Complaint on Order to Show Cause setting forth that defendants' action "is not to forfeit the Uniform Real Estate Contract, but to require plaintiffs to abide by the terms of said contract and particularly paragraph 3(a); that a restraining order should not issue to restrain or enjoin defendants from enforcing the contract; and that defendants are entitled to take such steps as may be necessary to enforce a legally binding contract."(p.20) The answer to the complaint simply asks that judgment be entered against plaintiffs of no cause of action, plus costs and a reasonable attorney's fee. (p.24)

One must not lose sight of the fact that defendants are trying to retain the right to enforce a contract. Plaintiffs' action is an attempt to stop the enforcement of the contract. There is no element in the pleadings any place of a proceeding toward forfeiture.

The trial court asked that two questions be briefed subject action:

1. Must the defendants pay the plaintiffs for the improvements made on the property by the plaintiffs during the time that the plaintiffs are in possession under contract in the event there is a default and the defendants institute an action to declare a forfeiture under the contract?

2. Did the entering of the contract to sell three of the eleven lots for over seventy-five percent of the original sellers sale price constitute a sale of the property under the terms of the Uniform Real Estate Contract. (see page 14)

This doctrine found its origin in Utah law in the case of Christy v. Guild, 101 Utah 313, 121 P.2d 401. At that time I was the law clerk to the Chief Justice. Christy sold the premises to Guild under contract in 1935. Guilds were to pay \$3,200.00 for the property in monthly installments of \$30.00 including both principal and interest. Guild agreed to make improvements on home and pay taxes. Default was declared because of failure to make payments, failure to make improvements and payment of taxes. Compliance with the notice to correct defaults was ignored. Suit was filed for the breach and forfeiture sought.

Guild was required by the contract to make improvements on the property and did, in the approximate amount of \$2,000.00

The court noted that a credit for the improvements made were more than absorbed in the monthly income from the property. No award for improvements was made. It was only considered.

The landmark case in Utah law on this subject is Perkins vs. Spencer, 121 Utah 468, 243 P.2d 446, wherein Perkins contracted to pay \$10,500.00 for the home, \$2,500.00 down and the balance at \$75.00 per month until Perkins sold their home in Bountiful, Utah. Perkins then were to pay off the balance. The sale was on a standard Uniform Real Estate Contract. Perkins sold their home, but were unable to pay off the balance. Perkins v. Spencer is a claim for forfeiture case. THE CASE BEFORE THE COURT IS NOT FOR FORFEITURE. This is a case to enforce the contract as written and as agreed in writing between the parties.

The court was concerned as to what would happen if the case went to forfeiture. Sellers DO NOT want forfeiture because the rule laid down in Perkins v. Spencer, supra, as to how to apply a forfeiture is as follows:

"(9) The vendors are entitled to any loss occasioned by them by any of these factors:

- (1) Loss of an advantageous bargain;
- (2) Any damage to or depreciation of the property;
- (3) Any decline in value due to change in market value of the property not allowed for in items 1 and 2; and
- (4) For the fair rental value of the property during the period of occupancy.

The total of such sums should be deducted from the total amount paid in, PLUS ANY IMPROVEMENTS FOR WHICH IT WOULD BE FAIR TO ALLOW RECOVERY, and any remaining difference awarded to the plaintiffs."

In the case before the court, the monthly payments are \$2,297.31 on a purchase price of \$220,000.00 with no down payment. One percent of the value of commercial property is usually considered the fair rental value. In other words, Baileys are getting the fair rental value in the monthly payments. Buyer claims a \$45,000.00 improvement on the property. Where are the Baileys, retiring out of their business, going to come up with the \$45,000.00 for the improvements? Seller wants out, not the property. There is no way Seller can declare a forfeiture and come up with the \$45,000.00.

Perkins v. Spencer, supra, is a forfeiture case and has been cited in twenty-six Utah cases on review and two federal cases as well as in the Utah Law Review. The citations are in:

Scoville v. Kellogg Sales Co., 1 Utah 2d 18, 261 P.2d 442
Pearce v. Shurtz, 2 Utah 2d 130, 270 P.2d 442
Jacobson v. Swann, 3 Utah 2d 65, 278 P.2d 294
Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623
Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882
Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989
Andreasen v. Hansen, 8 Utah 2d 370, 335 P.2d 404
Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396
Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468
Nagle v. Fontainbleu, 17 Utah 2d 125, 405 P.2d 346
U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867
Jensen v. Nielsen, 26 Utah 2d 96, 485 P.2d 673
Corporation Nine, Inc. v. Taylor, 30 Utah 2d 53, 513 P.2d 1145
Williamson v. Wanlass, 545 P.2d 1145
Russell v. Park City Utah Corporation, 548 P.2d 889
Kay v. Wood, 549 P.2d 709
Young Electric Sign Company v. Vegas, 564 P.2d 758
Johnson v. Carman, 572 P.2d 371
Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712
Biesinger v. Behunin, 584 P.2d 801
Chumney v. Stott, 14 Utah 2d 202, 381 P.2d 84
9 ULR 919
227 F 2d 637
147 FS 247

Counsel has taken two cases under Uniform Real Estate Contracts to the Supreme Court, bearing on forfeiture and improvements namely: Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712, and Biesinger v. Behunin, 584 P.2d 801. The question of the Buyer being given credit for improvements was raised in each case. In each instance it was shown that the loss of the Seller exceeded the improvements made. In the instant case, not permitting the seller to require buyer to abide by the contract may require sellers, who have retired, to pay buyer \$45,000.00 for improvements, which they do not have. One must give credence to paragraph 3(a) as it is a special condition written into the contract to protect Baileys and all parties agreed to it.

At Christmas I found myself trying to put toys together for the children and was getting nowhere. In the yard, I find myself trying to put a new implement or tool together and get confused. Usually, my wife sees my plight and will come over gently and pick up the instructions and read them to me with the admonition, "when all else fails, read the instructions." Let's read the paragraph; it states:

"3. . . .

(a) In the event Buyer desires to sell or assign transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on said contract prior to said transaction."

What does the instruction state? (1) "In the event buyer desires to sell or assign", does not mean after he has sold, after he has

assigned, but when the idea has been concluded to sell or assign
(2) "buyer's interest in said premises", not to sell or assign
someone else's interest but "buyer's interest in said premises",
(3) "Buyer must pay in full" the "outstanding balance" due;
(4) when must this be done? "Prior to said transaction". When
the buyer has the "desire" buyer "must pay in full" "prior to the
transaction".

Counsel was the author of said paragraph. The intent
is expressed in the buyer's "desire" to "sell or assign". Buyer
certainly had the desire but "prior to the transaction", prior to
doing anything about it, Buyer "must pay" the seller "in full the
outstanding balance" on the contract. Reason would dictate that
when the money starts passing from all parties Baileys get their
first. It does not provide Baileys can be ignored.

After two trips to the Supreme Court, one learns. The
clause avoids the "forfeitures". This avoids the "improvements".
This avoids "damage to" or "depreciation". This avoids lawsuits.
This avoids attorney's fees. This avoids "rights of subsequent
buyers". This avoids "assignees".

Chief Justice McDonough stated in Cole v. Parker, supra,
and as Judge Worthen restated in Peck v. Judd, supra, and Judge
Henriod reiterated in Carlson v. Hamilton, supra:

" . . . It is not our prerogative to step in and
renegotiate the contract of the parties . . . There
is no reason why we should consider the vendee
privileged . . . unless the conditions . . . are
unconscionable . . . and we should recognize and
honor the right of persons to contract freely and to
make real and genuine mistakes when the dealings are
at arms length . . ."

Courts of equity should not interfere except when sharp practice or a most unconscionable result is to be prevented.

No fraud is claimed. No failure of the meeting of the minds. No failure to disclose, no sharp practice. No unconscionable results. This is the simple case of enforcing the contract. Why should it not be enforced? The parties so contracted. No illegal provisions, no provision against public policy, what basis is there for a court to step in and change the provisions? There is no claim that plaintiffs could not read. No claim that they did not read. No claim that they did not understand. According to value only a little over seventy-five percent of the property was sold. "No cause" has been shown why the provision of 3(a) should be ignored and set aside.

SUMMATION

In the case of Mortgage Investment Co., Inc. v. Toone, 17 Utah 2d 152, 406 P.2d 30, in considering a Uniform Real Estate Contract it is stated: "This is a contract duly executed by the parties containing mutual obligations which are consideration for each other." So is the instant case. Covenants are "binding unless they are illegal, fraudulent, contrary to public policy, or inequitable," Jensen v. Nielsen, supra.

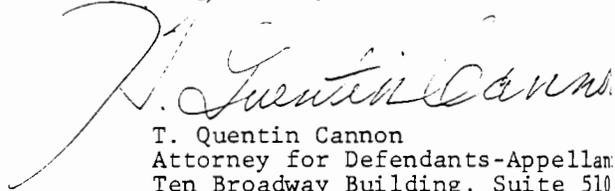
Pecuniary inability of the defendant will not preclude a decree for payment of the price where such a decree is appropriate. Williston on Contracts. Vol. V, Revised Edition, p. 3476, §1422. There has been no claim that plaintiffs cannot pay.

CONCLUSION

Baileys are praying:

- a. That the contract will be enforced as it is written
and
- b. That Baileys will be awarded their attorney fees
and costs as provided in said contract for enforcement.

Respectfully submitted,

A large, elegant handwritten signature in cursive script, reading "T. Quentin Cannon". The signature is written in dark ink and is positioned to the left of the typed name and address.

T. Quentin Cannon
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Salt Lake City, Utah 84101

I hereby certify that I mailed a copy of the foregoing to Kay M. Lewis, Attorney for Plaintiffs-Respondents, 320 South 300 East, Suite 1, Salt Lake City, Utah 84111, postage prepaid, this ____ day of November, 1979.
