

1980

Thomas T. Thompson, and Lula Thompson, His Wife v. Q. Keith Smith, and Rosslyn Smith, His Wife : Brief of Respondents

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THOMAS T. THOMPSON, and
LULA THOMPSON, his wife,

Plaintiffs and Respondents,

-vs-

Q. KEITH SMITH, and
ROSSLYN SMITH, his wife,

Defendants and Appellants.

Case No. 16562

BRIEF OF RESPONDENTS

Appeal from judgment of Hon. J. Harlan Burns, Judge
of the District Court of the Fifth Judicial District, In
and for the County of Washington, State of Utah.

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FILE

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Clk, Supreme Court

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IN THE
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THOMAS T. THOMPSON, and
LULA THOMPSON, his wife,

Plaintiffs and Respondents,

-vs-

Q. KEITH SMITH and
ROSSLYN SMITH, his wife,

Defendants and Appellants.

Case No. 16662

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action requesting reformation of a written contract.

DISPOSITION IN LOWER COURT

The Fifth Judicial District Court ordered a contract entered into by and between the parties reformed to properly set forth the agreement between the parties.

RELIEF SOUGHT ON APPEAL

The Respondents request the Utah Supreme Court to affirm the action of the Trial Court.

STATEMENT OF FACTS

During the month of December of 1976 the parties entered into a certain agreement wherein the Respondent as Sellers agreed to sale to the Appellants as Buyers the following described real property located in Virgin, Washington County, State of Utah to-wit:

BEGINNING at a point 1353.0 feet North and 704.55 feet East from the South Quarter (Sl/4) Corner of Section 22, Township 41 South, Range 12 West, SLB&M & running thence East 140.25 feet; thence North 209.5 feet; thence West 140.25 feet; thence South 209.5 feet; to the point of beginning.

TOGETHER with all improvements & appurtenances thereunto belonging but being SUBJECT to Easements Rights-of-Ways & RESTRICTIONS of record & those enforceable in law and equity. (R. 105-106)

The agreement between the parties provided for a description of the property, the terms of sale, including the total purchase price and provided that interest on the outstanding balance of the purchase price would be charged at the rate of 8% per annum simple interest (R.106). Subsequent to the execution of the written agreement, it was found by the parties that the Appellants were having trouble coming up with the down payment as called for by the original contract and negotiations were entered into by and between the parties with the intent and purpose in mind of modifying certain terms of the provisions of said contract to enable and allow the Defendants to make

a reduced down payment (R.106). During all of the times that the various negotiations took place between the parties the Respondents were elderly persons 65 years of age or older, and appeared somewhat physically infirm and emotionally unstable, and had a difficult time in negotiating the terms and conditions of their transaction with the Appellant Q. Keith Smith who appeared to be a more articulate, emotionally and physically stronger person of an aggressive nature (R.106). Prior to the month of March 1977 the parties appeared at the office of one Allan Carter of Southern Utah Title Company at St. George, Utah and requested Mr. Carter to prepare a new contract embodying new terms, as the same pertained to the down payment, however the total purchase price of the property in question and the interest rate as called for were not modified or changed (R.107). The said Allan Carter of Southern Utah Title Company of St. George, Utah was not an attorney licensed to practice law in the State of Utah but was involved in the operation of a title company known under the name and style of Southern Utah Title Company in St. George, Washington County, State of Utah (R.107).

Subsequent to the meeting of the parties in the office of said Allan Carter of Southern Utah Title Company the Defendant Q. Keith Smith contacted said Allan Carter alone and without the Respondents being present, and requested that the terms of the contract be modified to carry interest at the rate of 8% per annum for one year only and verbally advised said Allan Carter that the Respondent Thomas Thompson had agreed to such change. Thereafter said Allan Carter did redraft a new contract between the parties which contract called for payment of principal and interest as follows:

3. Said Buyer hereby agrees to enter into and pay for said described premises the sum of Fifty-one Thousand and no/100th Dollars (\$51,000.00) payable at the office of Seller, his assigns or order of Zions First Nat'l Bank as Escrow Agent strictly within the following times, to-wit: Six Thousand Five Hundred Dollars-----(\$6,500.00) cash, the receipt of which is hereby acknowledged, and the balance of \$44,500.00 shall be paid as follows:

The sum of \$16,175.81 is hereby acknowledged through the Buyers assumption of the contract now in full force and effect with Odessa Severson, leaving a remaining equity balance of \$28,324.19 due to Thompson which shall be paid as follows: One Hundred Fifty-two (152) Payments of \$200.00 each, with the last (153rd) payment being \$190.13, which shall entirely discharge said Thompson equity obligation, including the interest built in to said payments aforementioned at 8% as computed for one year only on the \$28,324.19 due to Thompson, which leaves an annual percentage

rate of interest being charged at 0.62745% per annum should this contract go its full 12 3/4 years. If Prepayment is made it WILL NOT reduce the total of \$28,324.19 plus \$2,265.94 interest which is due in this contract FIRST PAYMENT DUE MAY 15, 1977 to Buyer on the 29th day of March, 1977.

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal (R.107-108).

On March 29, 1977 the contract as prepared by said Allan Carter was delivered to the office of one Nick Nachos at Zions First National Bank in Hurricane, Utah, and after some argument and discussion between the parties regarding the amount of the down payment, the said contract was executed by and between the parties with the Respondents as Sellers and the Appellants as Buyers (R.108). Neither party to the contract contacted an attorney to reduce their contract to writing nor did any attorney engage in negotiations between the parties representing any of them regarding the execution of their original contract or the subsequent modification of the same on March 29, 1977 (R.108). At the March 29, 1977 meeting with Nachos the contract was read to the parties and some discussion was held regarding the payment provisions for interest as called for thereby as the same was difficult if not impossible for the Plaintiffs to understand or for the bank officer to understand (R.108-109). In this regard the trial Court made

a specific finding that the portion of the contract dealing with the payment of principal and interest was not clear on its face and was ambiguous and did not conform to the parties' agreement (See paragraph 10, R.108). At the Nachos Meeting on March 29 the parties attempted to contact Allan Carter, the preparer of said agreement, to ask him to explain the terms and conditions of said contract as it pertained to interest, however it was found impossible to contact Allan Carter, and therefore the provisions of said contract regarding the payment of interest was not explained by the preparer of the agreement (R.109).

Approximately 2 days subsequent to March 29, 1977 the Respondent decided that there was some question as to whether or not the contract called for interest as they had agreed and therefore asked said Allan Carter to draft a new contract carrying interest at the rate of 8% per annum and requested the Appellants to execute the same (R.109). The Appellants failed and refused to execute said new agreement setting forth interest at the rate of 8% per annum simple as requested by the Respondents (R.109).

The Trial Court made a specific finding that the agreement executed by the parties on March 29, 1977 did not contain the agreement between the parties as it pertained to the payment of interest and as the

parties had previously had a meeting of the minds.

See paragraph 17. Evidence of Fact and Conclusions of Law 9.114. The Trial Court further found that there was no meeting of the minds between the parties regarding the payment of interest as set forth in the March 29, 1977 agreement (R.109).

The Trial Court further found that the actual meeting of the minds between the parties was that interest would be paid at the rate of 8% per annum simple interest on the outstanding balance of the contract until principal and interest had been paid in full with each payment to be applied first to the payment of accrued interest and second to the reduction of principal (See paragraph 19 R. 111). The Trial Court further found that the Respondents had manifested their willingness and desire to stand ready, willing and able to execute a proper contractual agreement between the parties properly and fully setting forth their agreement, including but not being limited to the payment of interest as the parties had agreed (R.110).

The Trial Court further found that unfair advantage had been gained by the Appellants Smith through the execution of the agreement between the parties as of March 29, 1977 and said agreement did

not embody the actual agreement between the parties with respect to interest payments which should reflect 8% per interest per annum on the unpaid balance during the life of the agreement rather than 8% for one year only as the March 29 agreement was written (R.110). Thereafter the Court made the conclusion of law that the contractual agreement between the parties should be reformed to properly set forth the payment of interest as agreed by and between the parties (R.111) and thereafter entered its Judgment and order ordering the contract to be reformed providing for the payment of interest at the rate of 8% per annum simple interest on the unpaid balance contract until both principal and interest have been paid in full (R. 112-113).

ARGUMENT

POINT I: THE DECISION OF THE LOWER COURT SHOULD BE AFFIRMED.

Points I and II of the Appellants' Brief argue and cite authorities to the effect that two things must exist prior to a Court being able to reform a contract in Utah. As Respondents understand the arguments in Appellants' Brief they are arguing that the following items must be present before reformation can be ordered: (1) mutual mistake of

the parties and/or (2) ignorance or mistake of the complaining party coupled with or induced by the fraud or inequitable conduct of the other or remaining parties. It is the contention of the Respondents that such is not the law in Utah.

In the Utah Case of McMahon vs. Tanner (1952) 122 U. 333, 249 P.2nd 502, the Utah Supreme Court quoted the Connecticut Case of Spirt vs. Albert, 109 Conn. 292, 146 A. 717, 720 as follows:

Where, unknown to one of the parties, an instrument contains a mistake rendering it at variance with the prior understanding and agreement of the parties, and the other party learns of this mistake at the time of the execution of the instrument and later seeks to take advantage of it, equity will reform the instrument so as to make it conform to the prior understanding.

In regards to the McMahon Case, it appears that the mistake contained in the instrument involved was a scrivener's mistake. That case, however, allowed the reformation of a written instrument, in that case it being a deed, without necessarily requiring a showing of mutual mistake or fraud on the part of the opposing party.

In this case it is uncontroverted that the parties, in December of 1976 entered into a written agreement for the purchase and sale of certain real property

in Washington County, Utah which agreement provided for a sum certain as to the amount of purchase price, a sum certain as to a down payment, for periodic payments, and which contract carried interest at the rate of 8% per annum simple interest with each payment being applied first to the payment of interest and second to the reduction of principal. It is further uncontroverted that after the execution of the original agreement the parties renegotiated their agreement, due to the fact, that the Appellants, could not meet the down payment. An examination of the Exhibits and the record clearly indicates that the parties intended only to renegotiate the amount of the down payment and did not intend to renegotiate the interest payments. The record is further clear that the parties thereupon met in the office of Allan Carter, a real estate and title person but not an attorney, and asked him to reduce the agreement to writing with the provision that interest be carried on the agreement at the rate of 8% per annum simple interest. Subsequent thereto the record clearly indicates that the Appellant Smith unilaterally and on his own requested Carter to modify the contract terms to carry interest at the rate of 8% per annum for one year only. The record is clear that this change

in the agreement was made at the request of Appellant Smith without the knowledge or permission of the Respondent Thompson.

If a party executes a written instrument knowing the intention of the other party as to terms to be embodied therein and knowing that writing does not accurately express the intention of the other party the other party may have the writing reform to express that intention. Holiday Inns of America vs. Peck, Ala. (1974) 500 P. 2nd 87.

The province of reformation is to make a writing express the bargain which the parties desire to put in writing. Where the parties have come to a complete mutual understanding of all essential terms of their bargain but by reason of mutual mistake are its equivalent the written agreement is not in conformity with such understanding in a material manner reformation of the writing is justified upon proof of such facts. Durkee vs. Busk (1960) Ala 355 P. 2nd 588.

The Trial Court clearly found that the Respondents Thompson did not know what they were signing and did not understand the terms of their agreement as it pertained to the payment of interest, and further found that the eventual writing that was executed by the parties did not conform to the parties' agreement. It also found that the Appellants Smith took unfair advantage of the Respondents in unilaterally asking the scrivener to modify the terms and conditions of the agreement. The Court's

attention is called to the fact that a clear finding was made by the trial Court that the Respondents Thompson were in excess of 65 years old and appeared to be somewhat physically infirm and emotionally unstable and had difficulty negotiating the terms and conditions of their transaction with the Appellant Smith who appeared to be a more articulate emotionally and physically stronger person of an aggressive nature. The evidence further showed that the Appellants were not represented by an attorney through the transaction and did not seek the advice of an attorney, and the actual scrivener of the instrument and the person who closed the transaction were both layman. An examination of the transcript further indicates that there was some question about the payment of interest at the time the closing occurred and a telephone call was made to the scrivener to ask him to explain the transaction, however he was unavailable at that time.

A further examination of the exhibit setting forth the written instrument and the terms and conditions pertaining to interest will show that the terms are somewhat ambiguous, unclear and difficult to understand.

Point III of the Appellants' Brief claims that the Respondents Thompson were guilty of inexcusable negligence. In that regard, the Utah case Peterson et al vs. Gldredge (1952) 122 U. 96 246 P.2nd 886, provides that a written contract will be reformed to express the agreement of parties where proof of mistake is clear, definite and convincing and he who seeks relief is not guilty of inexcusable negligence in executing an instrument and makes timely application for the relief sought. Also See Sine vs. Harper, U., 222 P2nd 571.

It is respectfully submitted to the Court that under the circumstances as set forth in the transcript and evidence in the above entitled matter, that the Respondents were not guilty of inexcusable neglect. They attempted to request clarification of the interest provision of the contract at the time the same was executed, and were unable to contact the scrivener to obtain a clarification. In addition, and shortly after the discovery of the apparent true meaning of the contract, the Respondents immediately had a new contract prepared and requested the Appellants to execute the same. Upon refusal of the Appellants

to execute the new contract the Respondents immediately contacted an attorney and filed action in Fifth District Court to reform the contract.

CONCLUSION

It is respectfully submitted that the Judgment of the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED.

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