1980

P. James Coleman v. R. Earl Dillman : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

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P. JAMES COLEMAN, :

Appellant, :

vs. : Case Nos. 16666 & 16926

R. EARL DILLMAN, :

Appellee. :

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BRIEF OF APPELLANT

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Appeal from two Judgments of the Third Judicial District Court, in and for Salt Lake County, the Honorable Jay E. Banks, Judge, and the Honorable David E. Winder, Judge

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RICHARD J. LEEDY
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellant
P. James Coleman

M. DAVID ECKERSLEY
10 West Broadway, Suite 500
Salt Lake City, Utah 84101

Attorney for Appellee

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610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellant
P. James Coleman

M. DAVID ECKERSLEY
10 West Broadway, Suite 500
Salt Lake City, Utah 84101

Attorney for Appellee

TABLE OF CONTENTS

CASES CITED

Cases Cited

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF APPELLANT

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DISPOSITION OF THE LOWER COURT

This is an appeal from the decision of the District Court of Salt Lake County, State of Utah, wherein the District Court denied the appellant Coleman specific performance of an oral contract for the purchase of land and granted the Appellee restitution of the premises.

STATEMENT OF FACTS

On January 28 or 29 of 1975, the appellant moved into a home owned by the appellee located at 2670 Creek Road, Salt Lake County, Utah. The appellant testified that he moved into the house pursuant to an oral agreement for the purchase of the home for the sum of $36,000. He testified that the appellee had previously sold the home and the sale had fallen through and that appellant was merely to take over the position of the

previous buyer and to keep the payments current of $303.29 per month (Tr. 6-7). The appellee testified that the appellar was occupying the home pursuant to an oral rental agreement (Tr. 110), wherein the rent to be paid was $303.29 per month.

After moving into the home the appellant made several improvements on the home, such as installing four windows; planting a lawn; replacing a yard which had been eroded by a flash flood (R. 87). Additionally, the appellant made improvements on the home such as repairs on the heater, placed a new motor on the furnace, and also had to have the sewer cleaned out eight or nine times (Tr. 88-89). At no time did the appellant ever request reimbursement from the appellee for the improvements or the repairs (Tr. 88, 89).

After moving into the home the appellant made several payments to the appellee, although the same were sporatic and not the precise amount of the agreed consideration.

The appellant and appellee engaged in several joint ventur wherein the appellant was working for the appellee (Tr. 86, 1 121). Some of the compensation that the appellant would rece for such work, according to his testimony, went to apply on t payment for the home. Additionally, and it is undisputed, tha the appellant made several payments to the appellee, some of which contained the words "house payment" thereon (Tr. 79-80, Ex. P. 1-2).

Although there is a dispute as to whether the appellant wa occupying the premises pursuant to a purchase or rental contr the following facts are undisputed:

Immediately prior to the appellants occupying the premises the appellee had the premises listed for sale (Tr. 180-181).

Appellant made payments upon the premises and some of those payments reflected the words "house payment" (Tr. 79-80, Ex. P. 1-2).

A commitment for title insurance was obtained (Tr. 96-97, Ex. P. 13).

The appellant applied for a loan to pay the full purchase price to the appellant (Tr. 93, 97, 164-169).

The appellant offered to pay off the appellee as soon as the judgments and liens were cleared up so that he could obtain the loan.

The appellant instituted a lawsuit for specific performance to require the appellee to convey the property to himself (R. 2-3).

The appellee then instituted an action for wrongful detainer seeking eviction of the appellant (R. 1-2, 4 Sup. Ct. #16666).

Appellee then moved to consolidate (R. 9-10). Thereafter, the parties stipulated that two actions "involved common questions of law and fact and should be consolidated for the purpose of trial" (R. 12, Sup. Ct. #16666) and the District Court ordered the actions consolidated for the trial (R. 13, Sup. Ct. #16666).

Appellant requested a jury trial and the jury fee was paid (Tr. 11). The appellee objected to the jury demand (Tr. 44).

At the time of trial without motion on the part of either party, the court separated the two cases and proceeded to try only the case for specific performance without a jury and left

the other case and issues to be tried at a later date with a jury.

The court found, without a jury "the facts do not warrant finding that there was part performance and which would take t alleged oral contract out of the effect of the statute of frau (Tr. 59-60). The court further found that the attempt to obta financing and to pay off the balance of the purchase price, as suming an oral contract for sale was no justification for the appellant's failure to make the monthly payments thereafter (T 60).

POINT I

THE TENDER OF THE FULL PURCHASE PRICE TO THE APPELLEE RELIEVES THE APPELLANT FROM MAKING THE FURTHER MONTHLY PAYMENTS.

As pointed out in the Statement of Facts, there was a disp as to whether the appellant was occupying the premises in ques pursuant to an oral purchase agreement or an oral rental contr That question was never answered by the court. It should be noted that the District Court found there was not sufficient p performance to take an oral contract out of the statute of fra and, further, that the failure to make the monthly payments ev after a tender of the full purchase price did not relieve the appellant from a breach, there was never a finding as to wheth or not there was a contract in existence. This is, presumably because the District Court knew that such a question would pro perly be left for a jury and, therefore, did not decide the qu tion for fear of denying the appellant his right to a jury tri This point will be more thoroughly discussed in later portion

this brief. However, if there was such a contract, it is the appellant's position that the attempt to obtain a loan to pay off the full purchase price and the frustration thereof by the appellee would excuse his remaining performance for the monthly payments.

As noted previously, the appellant testified that he was occupying the premises pursuant to an oral purchase contract for $36,000 with monthly payments of $303.29. It is further undisputed that many of the payments were made, although some were not, and the sum of the payments contained the words "house payment" thereon. It is further undisputed that improvements were made on the house and that repairs were made and that no reimbursement was requested from the appellee. Then, and it is further undisputed, that the appellant attempted to obtain a loan to pay off the balance of the purchase price. It is further undisputed that the loan could not be obtained because the appellee had so many liens and judgments against the property that the lending institution would not make the loan. The appellant testified:

> "I told Mr. Dillman I was going to go ahead and get the loan and pay the house off. So I proceeded to First Security State Bank.
>
> Question: During that conversation with Mr. Dillman, did he give you anything to help you in getting the loan?
>
> Answer: At that time, he did not give me anything. But he had given me Commonwealth Title Report prior to that, so that I could go at my convenience and get the loan. (Tr. 24-25)
>
> Question: Mr. Coleman, after obtaining Exhibit P-13, you indicated you, some time later, applied for a loan.
>
> Answer: Yes.

Question: I believe that your testimony was that you applied with First Security State Bank.

Answer: Yes.

Question: With whom did you apply for First Security State Bank, any particular officer?

Answer: With a loan officer, Gloria Oldham. (Tr. 20-26)

Question: Then after, did you have further dealings with First Security State Bank.

Answer: Only that I called up and said that the title was clouded and we would have to wait. Mr. Dillman was going to clear title the property for me.

Gloria Oldham from First Security State Bank testified:

Question: In connection with your employment (First Security State Bank) there, have you had occassion to meet Mr. Jim Coleman?

Answer: Yes, I have.

Question: What occassion did you have to meet him?

Answer: He applied for a loan.

Question: What type of loan was it?

Answer: The conventional home loan.

Question: Was the property mentioned?

Answer: Yes.

Question: What was the property?

Answer: 2670 Creek Road. (Tr. 93-94)

After the loan had been declined because the title was clouded, appellant made no further monthly payments to the appellee. The District Court found that such constituted a brea of the agreement between the parties and that the appellant wa not excused from the monthly payments merely because he was un

able to obtain a loan because the title of the property was clouded.

There is no question that in a purchase of real estate, the seller has the obligation to deliver clear title. If his failure so to do prevents the purchaser from obtaining the necessary loan to pay off the balance due and owing on the purchase price, it is the appellant's contention that such breach excuses the purchaser from further performance. Such a proposition is Hornbook law. As stated in Am. Jur. on contracts (17 Am. Jur. 2d 899 Sec. 442):

> "It is a necessary implication that every contract with promises or covenants binding each party that neither will interfere to prevent performance by the other, and a contracting party whose performance of his promises is prevented by the adverse party is not obligated to perform . . . .If the non-existence, either of something which is a substantial subject matter of the contract or of some condition or particular state of things which is of the substance of the contract, it is attributal to some breach of contract or of duty on the part of one party and prevents the other party from performing his contract, such other party has a right of action on the contract notwithstanding such non-performance."

Therefore, the failure to deliver clear title, which would allow the appellant to obtain a loan to pay off the appellee constitutes a breach on the part of the appellee which prevented the appellant from performing, and appellant's non-performance does not prevent him from maintaining the action for strict performance as prayed for in the complaint.

POINT II

THE LOWER COURT ERRED IN DENYING THE APPELLANT A JURY TRIAL.

This case involves a consolidation of two actions. The first action was commenced by the appellant to compel specifi performance of an oral contract for the purchase of land. Ap pellee filed a civil action seeking to evict the appellant an for unlawful detainer. As stated in the Statement of Facts, two actions were consolidated upon motion of the appellee and stipulation of the appellant and a jury trial was requested (12-13, Sup. Ct. #16666). The jury fee was paid and then the appellee objected to the jury trial (Tr. 44). The court stat

> "We have had a discussion in chambers not on the record. Mr. Leedy has made a motion that there be a jury trial. He also, in Civil No. 78-3718, a long time ago and timely, made a demand for jury trial. Mr. Eckersley made a demand to strike the jury, claiming Mr. Coleman does not have his right on the claim, that it is a contract and it is taken out from under the statute of frauds by the doctrine of part performance and that that is an equitable matter and therefore, he is not entitled to a jury trial. Counsel discussed the matter with me in chambers and it is my opinion that on those issues, it is an equitable matter and am denying the jury trial and the matter will proceed to court. . . . .
>
> In effect, these cases won't be consolidated. We're going to try Mr. Coleman's case first, but that will be non-jury." (Tr. 3-4)

It is the appellant's position that once the cases were consolidated and the jury demand made, that the court erred i separating the two cases and trying some of the issues witho a jury although no request for separation was made. C.F. Will M. Milne Inv. Co. v. Cox, 580 P. 2d 607 (Utah 1978).

It is unique in this case that there has never been a fin that there was not an oral contract for the purchase or sale the land in question. Obviously, such a finding would be a f tual issues for the jury.

POINT III

THE COURT ERRED IN FINDING THAT THERE WAS NOT PART PERFORMANCE.

There is no question that specific performance is a proper remedy for a breach of an oral contract for the purchase of land. Rich v. McGovern, 551 P. 2d 1266 (Utah 1976); Sandberg v. Klein, 576 P. 2d 1291 (Utah 1978); Summary of Utah Real Property Law, Ch. VIII, p. 259; Christensen v. Christensen, 9 UT 2d 102, 105, 339 P. 2d 101, 103 (1959); Brinton v. Vancott, 8 Utah 480, 33 Pac. 218 (1893); In re Roth's Estate, 2 Utah 2d 40, 269 P. 2d 278 (1954); Lynch v. Coriglio, 17 Utah 106, 53 Pac. 983 (1898); In re Madsen's Estate, 123 Utah 327, 259 P. 2d 595 (1953); Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P. 2d 480 (1956); Utah Mercur Gold Min. Co. v. Herschel Gold Min. Co., 103 Utah 249, 134 P. 2d 1094 (1943); Adams v. Taylor, 391 P. 2d 837 (Utah 1964); 9 Utah Law Rev. 91, 100-101; Brady v. Fausett, 546 P. 2d 246 (Utah 1976); Utah Code Ann., 25-5-8, 1953. Section 25-5-8, Utah Code Ann. provides:

> "Nothing in this chapter contained should be construed to abridge the powers of the courts to compel the specific performance of agreements in case of part performance thereof."

There is no question that the appellant moved into possession of the premises; that he made payments thereon; that he made repairs thereon, and improvement thereon. If there was a contract for the purchase of land, these facts would certainly show part performance. The issue is not whether there was substantial performance but whether or not a contract for the purchase of the

property in question existed the court erred in finding that the above facts do not constitute part performance.

Respectfully submitted,

Richard J. Leedy
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that on this ____ day of July, 1980, I mailed two copies of the foregoing Brief of Appellant to M. David Eckersley, 500 Ten West Broadway Building, Salt Lake City, Utah 84101.