1980

David S. Grow v. Marwick Development, Inc., A Corporation; Daniel R. Southwick; Sterling Martell; Et Al. And Boardwalk Development Corporation : Reply Brief of Appellant David S. Grow

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID S. GROW,

Plaintiff-Appellant,

vs.

MARWICK DEVELOPMENT, INC., et al.,

Defendants-Respondents,

and

BOARDWALK DEVELOPMENT CORPORATION,

Intervenor-Respondent.

Case No. 16675

REPLY BRIEF OF APPELLANT DAVID S. GROW

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IN THE SUPREME COURT OF THE STATE OF UTAH

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A statement of the nature of this case, its disposition in the district court, the relief Appellant seeks on appeal and a statement of facts, are all set forth in Appellant's Brief on file herein. This Reply Brief is submitted for the purpose of answering the matters raised in Respondents' Brief and reiterating the arguments which compel a reversal of the Summary Judgment. The short-forms used herein have the meaings set forth in Appellant's Brief.

POINT I

APPENDIX "A" OF RESPONDENTS' BRIEF IS NOT PART OF THE RECORD ON APPEAL AND CANNOT BE CONSIDERED BY THE COURT.

Pursuant to Rule 75(a), Utah Rules of Civil Procedure, Appellant designated the entire record made in the lower court

to be included in the record on appeal herein. (R. 285-86.) Respondents have at no time objected to the completeness of the record. Nor did they complain in the lower court about the adequacy or accuracy of the record.

Rule 75(h), Utah Rules of Civil Procedure, provides that:

> If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the Supreme Court, or the Supreme Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

Although Respondents have made no attempt to follow the required procedures set forth in Rule 75(h), they seek now to supplement the record on appeal with a preliminary title report which was neither included nor even referred to in the record proper and which has not been certified as part of the record on appeal. The document is not authenticated, is inadmissablible hearsay, and is presented in a way that affords no opportunity to test its accuracy or completeness.

It is clear that Respondents' submission to the Court of documents not contained in the record on appeal is improper, notwithstanding their attempt to cloak such impropriety with the label "Appendix" and the disclaimer: "Boardwalk does not wish to supplement the record on appeal." (Respondents' Brief, p.8.) In Tucker Realty, Inc. v. Nunley, 16 U.2d 97, 396 P.2d 410 (1964), a party sought to supplement the record on appeal with a transcript

of testimony received after the appeal had been taken. The transcript was simply brought and left with the clerk of the Supreme Court. In ruling that the transcript could not be considered by the Court in resolving the matter on appeal, the Supreme Court referred to Rule 75(h) and explained as follows:

> No order has been made authorizing this transcript to be made part of the record on appeal. Nor could it properly have been. The appeal is from and is limited to the proceedings in the district court upon which the judgment is based. The rule referred to contemplates that any addition to the record be part of that proceeding, and does not authorize bringing in anything other than that record. It requires but a moment's reflection to realize what a chaotic situation would exist if after a judgment is entered and an appeal taken, the parties could keep on having supplemental proceedings, adducing new evidence, and forwarding the transcripts to the Supreme Court. The illogic and irregularity of attempting to do so is so obvious that further comment as to its impropriety is unnecessary.

Id. at 413-14 (footnotes omitted).

In Nelson v. State Tax Commission, 506 P.2d 473 (Utah 1973), the Supreme Court again had occasion to rule upon the propriety of submitting new documentary evidence on appeal. The appellant in that case had obtained a stipulation from respondent that certain documentary evidence could be included in the record on appeal, even though it had not been introduced or made part of the record in the lower court proceedings. The Supreme Court cited Tucker Realty in holding that:

> [T]here is no indication whatsoever that [the document] is or was part of the record. We therefore cannot properly so regard it any more than we could any other extraneous document which someone may bring in and lodge with this court.

Id. at 440.

The irregularity and impropriety of Respondents' back-handed attempt to circumvent both Rule 75(h) and the holdings of Tucker Realty and Nelson is so obvious that further comment as to its impropriety is unnecessary. Consequently, Appendix "A" to Respondents' Brief and all references in Respondents' Brief to said Appendix "A" are beyond the record on appeal and hence beyond consideration or entertainment by the Court.

POINT II

THE DEFAULT WAS NOT TIMELY CURED AND FORFEITURE IS THE BARGAINED-FOR REMEDY.

Respondents contend that Buyers tendered to Appellant all delinquent sums under the Contract within fifteen (15) days after receiving the August 9, 1978 Notice of Default. Nevertheless Respondents have admitted that, if Paragraph 11B applied to "all amounts unpaid" under the Contract (whether or not currently due), there has never been a sufficient tender of payment to cure the existing defaults. (R. 82, 83.) Thus, the question of whether the default was cured depends upon resolution of questions concerning the interpretation of Paragraph 11B. To argue that the admitted defaults were timely cured is merely to beg the question. And if the default was not timely cured, forfeiture certainly is one of the bargained-for remedies set forth in the Contract.

POINT III

THE REMEDY OF BARGAINED-FOR FORFEITURE IS REASONABLE AND PROPER.

Respondents' Brief and the trial court's Summary Judgment entirely misapprehend the law with respect to enforcement of the

forfeiture remedy in Uniform Real Estate Contracts. Utah courts have consistently held that forfeitures of land based upon this or similar provisions of the Uniform Real Estate Contract are generally enforceable. It is critical, however, to distinguish between those "forfeiture" provisions governing the release of the vendor from all obligations to convey the subject property and those "forfeiture" provisions resulting in a loss of all payments made or liquidated damages. The Utah courts have developed various principles and policies to ameliorate the sometimes harsh effects of enforcing liquidated damages provisions. But the same courts have, except in very limited circumstances, consistently enforced the vendor's right to be released from any obligation to convey the subject property to the defaulting vendee.

Cases illustrating this distinction are collected under Point III of Appellant's Brief on file herein. These cases demonstrate that the customary and most equitable course of action is to release the vendor from any obligation to convey the subject property but to award the vendee some measure of restitution where necessary to avoid a "penalty."

Respondents' Brief and the trial court's Summary Judgment both fail to acknowledge these two very different facets of the forfeiture provision. Consequently, Respondents' assertion of "windfall to Grow in excess of $200,000.00" (Respondents' Brief, p. 16) is grossly overstated. The record is entirely silent as to the market value of the property. Respondents' effort to argue its case based upon unsupported and extravagant claims of market value and "windfall" are improper and illustrate vividly the

the defect in the judgment below. The Summary Judgment must be reversed and the case remanded to the trial court for a determination first of Appellant's right to be released from any obligation to convey the property and second of Respondents' right, if any, to restitution.

As to the favor with which forfeiture provisions generally are held in the law, it must be remembered that we are dealing here with transactions in non-residential property among sophisticated businessmen, not novices or uninformed consumer victims. Thus, the express remedial provisions of the parties' bargained-for agreement should not be lightly ignored or compromi

In Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712, 717 (1958), the Utah Supreme Court correctly explained the nature and scope of its function in resolving disputes arising under uniform real estate contracts:

> 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. Equity should not indulge in refinements and exact valuations at a time subsequent to breach of recission. Further than to determine if enforcement of the contract results in grown inequity, and unless and until 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 dealing at arms' length. (Emphasis Added.)

POINT IV

THE TRIAL COURT'S INTERPRETATION OF PARAGRAPH 11B IS ERRONEOUS AND IMPROPER.

It is true that "[a]ll parties submitted to the Court that the language of the Contract [i.e., Paragraph 11B] was clear and unequivocal." (Respondents' Brief, p.16.) What Respondents failed to disclose, however, is that each party considered the Paragraph 11B language to have a clear and unequivocal meaning directly conflicting with the clear and unequivocal meaning attached to such language by the opposing party.

The parties have from the outset of litigation argued explicitly about the interpretation of Paragraph 11B. Buyers' Answer to Appellant's Complaint states that "11(b) is ambiguous and is subject to varying interpretations." (R. 34.) In the hearing on Respondents' Motion for Summary Judgment, counsel for Boardwalk and Phoenix asserted that Paragraph 11B is "very clear in its meaning," and then explained:

> We think it is clear that the words "on all amounts unpaid" relate directly back to the words "delinquent or in default" and that has to be the clear intent of that provision and the clear meaning of that language.

(R. 326-327.) Counsel for Appellant argued contrariwise that:

> It is clear that the 18 percent interest applied to all unpaid amounts. It does not say "all amounts presently due and owing." It does not say "any delinquent amounts." It says "all unpaid amounts under the contract." If I may draw [an] analogy, that is common language in a promissory note that interest is payable on all unpaid amounts. That language is not construed to mean the amount that is due that particular month, but all unpaid amounts on the promissory note. It is clear that the 18 percent interest applied to all amounts both principal and interest anytime after default or delinquency.

(R. 330.) The foregoing references evidence the very diverse meanings of Paragraph 11B advanced by counsel for the parties during litigation.

In making his Ruling and Judgment in the trial court, Judge Sam did not state that the meaning of Paragraph 11B is clear and unequivocal on its face. Indeed, the language of the Ruling seems to indicate the contrary, i.e., that Paragraph 11B was ambiguous, thus requiring "interpretation." Appellant submits that the language of Paragraph 11B means what all of the evidence in the record says it means, or that it is at least ambiguous, creating a material issue of fact which cannot be disposed of by summary judgment. (See Appellant's Brief, P.10-18.)

The evidence in the record, when viewed in the light most favorable to Appellant, supports Appellant's construction of Paragraph 11B. The testimony of David Grow and Stephen Thomas shows that Appellant's interpretation was the one agreed upon between Appellant and Buyers at the time the Contract was entered into. Again, Respondents' argument that these affidavits are not admissible in evidence simply begs the question. Extrinsic or parol evidence is certainly admissible to resolve ambiguous contract language.

Ambiguity exists because reasonable minds may differ as to the meaning of Paragraph 11B. Camp v. Deseret Mutual Benefit Association, 589 P.2d 780 (Utah 1979). Since ambiguity is a question of law, an appellate court is in the same position as a trial court to determine the existence of an ambiguity. See, e.g., Craig v. Hamilton, 213 Kan. 665, 518 P.2d 539 (1974); Beedle v. General Investment Co., 2 Wash.App. 594, 469 P.2d 233 (1970). Insofar as the trial court determined there was no ambiguity, Appellant urges the Supreme Court to hold as a matter

of law that Paragraph 11B is ambiguous and that the existence of factual issues regarding its interpretation precluded summary judgment.

CONCLUSION

The trial court erred in granting the Summary Judgment. Respondents have failed to revute Appellant's argument that, if the material facts concerning the interpretation of Paragraph 11B are resolved in favor of Appellant, Respondents did not timely cure their admitted default and delinquency. Forfeiture of the subject property is the remedy bargained for between the parties and is reasonable and proper under the circumstances. The Court should not rewrite the Contract or void its express provisions. At worst, Paragraph 11B is ambiguous as a matter of law, and the existence of factual issues surrounding such ambiguity preclude the Summary Judgment.

Summary Judgment should therefore be reversed and the case remanded to the trial court for a trial on the factual issues as to the parties' intended meaning of Paragraph 11B and other remaining issues.

Respectfully submitted this 5th day of September 1980.

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CERTIFICATE OF MAILING

I hereby certify that copies of the foregoing Reply Brief of Appellant David S. Grow were served this 5th day of September 1980, upon the Defendants-Respondents and Intervenor-Respondent by mailing the same, postage prepaid to the following:

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