1979

Price Construction Co. v. Hal Foutz, Et Ux : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PRICE CONSTRUCTION CO., INC.,

Plaintiff-Respondent,

vs.

HAL FOUTZ, et ux.,

Defendant-Appellants.

BRIEF OF A[illegible]

Appeal from the Judgment of
District Court of Utah Co[illegible]
Honorable David [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

PRICE CONSTRUCTION CO., INC., Plaintiff-Respondent, vs. HAL FOUTZ, et ux., Defendant-Appellants.	Case No. 16,688

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth Judicial District Court of Utah County, State of Utah
Honorable David Sam, presiding

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought suit in unlawful retainer against defendants for possession of home and treble damages; together with an action for the court determining ownership and immediate possession of the residence together with a reasonable attorney's fee and costs. Defendant counterclaimed for specific performance of contract or in the alternative to specific performance, damages, both compensatory and punitive together with a reasonable attorney's fee and costs.

DISPOSITION IN LOWER COURT

The Honorable David Sam of the Fourth Judicial District Court of Utah County, without a jury, ruled that the Earnest Money Receipt was a clear, unambigious and final contract; that plaintiff was entitled to immediate possession of the house and

ordered defendants to vacate the residence; that defendants were entitled to have returned the $10,000.00 down payment less $350.00 per month as rent for the premises during defendants' occupancy. The court ruled that the Earnest Money Receipt was a final contract and that the defendants were in default. The court further ruled that defendants were guilty of unlawful detainer, that plaintiff was entitled to treble damages but offset the treble damages by reason of the increased value of the house since the parties entered into the contract of sale. The court allowed an offset of plaintiff's damages against the $10,000.00 down payment which defendants made on the house. The court gave defendants credit for $300.00 improvement on the yard, improvements in the house not to exceed $1,000.00 and awarded plaintiff $1,550.00 in attorney's fee together with costs. The court ruled that 61-2-2 UCA, 1953, was not applicable. The court further ruled that the plaintiff had made full disclosure to defendants and had not misrepresented the house.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the decision of the lower court; to have this court determine that the Earnest Money Receipt was not a final contract and that the parties should make and enter into the final contract, with all of the terms, as provided for in the Earnest Money Receipt. Or in the alternative, to determine

that under the facts plaintiff did misrepresent the house to defendants, that said misrepresentations were material. Appellants request this court to rule that the decision of the lower court amounts to a wrongful unjust enrichment to plaintiffs of approximately $15,000.00. Appellants request this court to rule that Title 61, UCA 1953 applies to the facts of this case and that defendants are entitled, as a matter of law, to damages.

STATEMENT OF FACTS

The parties signed a Earnest Money Receipt and Offer to Purchase, the printed form used by realtors, on November 29, 1977, at which time plaintiff sold to defendant a residence in Orem, Utah, for the purchase price of $52,000.00, $600.00 which was paid down as earnest money. The Earnest Money Agreement provided for rent at the rate of $350.00 a month to be paid to Seller, plaintiff, until the final closing of the sale and the final agreement between the parties. Defendants paid the rent and was having difficulty in selling their residence in Las Vegas, Nevada, which was stated in said Earnest Money Receipt. The earnest money payment of $600.00 was paid to the president of plaintiff corporation, who was also a principal officer and stockholder in the real estate broker involved. The $600.00 earnest money was not placed into a trust account of either the broker or the plaintiff.

On May 25, 1978, the parties signed a second Earnest Money Receipt and Offer to Purchase, the pre-printed form, at which time appellants paid to respondents $10,000.00. The second

Earnest Money Receipt expressly stated that it superseded the first Earnest Money Receipt. Again, the $10,000.00 was delivered to Mr. Larry Price, president of plaintiff and a principal officer and stockholder in the real estate company involved. (Ex. 1, ; TR 7, Line 10; TR 15, Line 3) The Earnest Money Receipt, Exhibit 1, was prepared by plaintiff's employee and realtor agent. (TR 18) The $10,000.00 payment made by appellant to respondent went as a part payment on the lot of the house in question and sold to appellants. (TR 38, Line 13) Mr. Lund, the real estate agent and employee of Larry Price, President of respondent, informed appellants that Seller would not pay the FHA or VA points on the house. He specifically told appellants that "they could probably finance the home FHA if they were willing to make an offer at a higher price than $52,000.00 list price." (TR 42, Lines 8-12) Mr. Lund, realtor, agent and employee of the president of plaintiff corporation, told Mr. Foutz that the residence in question would probably qualify for an FHA or VA loan. (TR 51, Line 14-17)

Appellants could not get conventional financing on the house by reason of them opening a new self-employed business in the State of Utah. Appellants applied to approximately ten places for a conventional loan, as recommended and assisted by Mr. Lund, realtor, agent and employee of Larry Price, president of plaintiff. (TR 75, Line 5-10; 76, Line 18-21)

Appellants did not know that the house in question would not qualify for VA or FHA loan on May 25, 1978, the signing

of the Earnest Money Receipt, Exhibit 1, and would not have purchased the house had appellants realized the house would not qualify for VA or FHA loan. Appellants pursued conventional financing at the suggestion of Mr. Lund, plaintiff's realtor and agent and relied upon Mr. Lund for the conventional financing. (TR 97, Line 10-13) The conventional loans did not materialize because the conventional loan money at that time dried up. (TR 98, Line 1,2) Prior to and during the time of the trial herein, appellants had applied for a VA or FHA loan and the matter was being processed (TR 97, Line 14-26). Appellants are willing to pay any and all necessary discount points under the law to qualify for VA or FHA by reason of increase in purchase price or otherwise. (TR 99, Line 4-7) Appellants could have borrowed money by reason of the value of the house in question to pay any necessary additional costs of the VA or FHA discount points. (TR 104, Line 24-30; TR 105, Line 1)

The appraised valuation of the house in question on August of 1978 was $58,000.00. (TR 105, Line 25) Appellants discovered the house would not qualify for FHA because it was in a planned unit development and specific items must be done to qualify said house for FHA financing. (TR 76, Line 19-21; TR 81, Line 25-30) The value of the house at the time of the trial was between $65,000.00 and $75,000.00. (TR 49, Line 28-29)

Mr. Brian Crandall, one of the employees of plaintiff and a witness of respondents, testified that prior to the signing

of the Earnest Money Receipt, it was not disclosed to appellants that the house would not qualify for VA or FHA. (TR 122, Line 25-)

Appellants tendered and offered to enter into a final real estate contract, spelling out all of the terms and agreements between the parties, but respondents failed and refused to do so.

All during the negotiations, the sale, and the attempts for financing, the realtor-agent, Mr. Lund, was an employee and agent of Mr. Larry Price, president of plaintiff corporation; Mr. Price having an interest in the real estate company involved and being one of the owners of said real estate company. (TR 36, Line 7-21)

The earnest money payments, both the $600.00 and the $10,000.00 were not placed into a trust fund of the realtor and there was no formal closing of the contract or the final contract entered into.

Exhibit 1 attached to defendants' memorandum of facts and authorities on the above matter and entitled "Statement of Cost and Mortgage Loan Required by Regulation Z" is the standard application form for FHA loans as used by First Security Bank which is typical. On said Exhibit 1, there is a specific provision that states for a disclosure of the loan discount fee to be paid by the buyer or the loan discount fee to be paid by the seller. This is specific evidence on the standards and practice of the financing trade and the FHA regulations. Attached as Exhibit 2 to the same defendants' memorandum, is a copy of the rules and

regulations of the State of Utah Real Estate License Law and as having been adopted in Utah County as well as other counties in the State of Utah. Said regulations provide in part as follows:

1. On Page 5, Paragraph 14C it provides for the broker to prepare closing statements. This was not done in the case now before the court.

2. Paragraph 15 provides for the placing of 100% of all funds belonging to others into a trust account by brokers involved. This was not done in the case pending before the court.

3. Paragraph 25 provides that when the seller fails or is unable to consummate the contract, the broker has no right to any portion of the money deposited by the buyer and relates specifically to earnest money. This has not been done in the case now pending before the court.

The Earnest Money Receipt (Exhibit 1) calls for rent of $350.00 per month. On August 15, 1978, plaintiff sent a notice to defendants unilaterally attempting to raise the rent to $600.00 per month. The purpose being to try to force defendant out of the house. (TR 49, Line 4-11)

A R G U M E N T

POINT I

LOWER COURT ERRED IN RULING PLANTIFF'S AGENTS NOT "A REAL ESTATE BROKER" AND IN A FIDUCIARY CAPACITY AS DEFINED IN 61-2-2 UCA, 1953

Exhibit 1, the Earnest Money Receipt in question, is a pre-printed form in this case prepared by and furnished by the seller and his agents. The Earnest Money Agreement specifially provides on Line 33 that there will be either a contract of sale or an instrument of conveyance; Line 39 that it constitutes "the entire preliminary contract" and then goes on further and stated "as further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase." It is clear from the language of the Earnest Money Receipt and the intention of the parties that the Earnest Money Receipt is merely a preliminary agreement. Prior to and during the course of the trial, appellants offered to enter into a final agreement between the parties and incorporating the provisions and Earnest Money Receipt, the oral discussions and particularly the question of discount points for FHA or VA financing. Appellants specifically requested specific performance to order the parties to enter into a final contract. There are many items in the final contract that will have to be specifically described that are not in the Earnest Money Receipt. The financing of the property is still being worked on and appellants are not in default of the

Earnest Money Receipt. They have been paying rent, parties agreed that rent could be deducted from the $10,000.00 payment by appellants to respondent. Specific performance is an equitable relief and under the facts of this case appellants are entitled to equitable relief to conclude the purchase between the parties.

The purchase price has been defined, the fact that respondent is getting rent until the installment payments or lump sum payments are made protects the respondent from any loss. The failure of respondent to inform appellants that the house would not qualify for FHA or VA and the fact that respondent's agents steered appellants to conventional financing is the reason for the delay in the final contract and payments to which respondent is entitled.

In Bunnell vs. Bills, 13 Utah 2d 83, 368 P2d 597, this court ruled that an Earnest Money Receipt was a binding contract that can be specifically enforced, under the facts of that case. Appellants seek to enforce the Earnest Money Receipt provisions together with the other provisions not mentioned in said Earnest Money Receipt. This fact situation before the court graphically illustrates the necessity for final contracts as provided for and which may be enforced under these Earnest Money Receipts. Failure to specifically enforce the contract of appellants constitutes unjust enrichment to the respondent in the sum of approximately $15,000.00. Appellants have performed and are continuing their performance under the agreement between the parties. The delays in the closing is a result of the failure to disclose and mis-information furnished appellants by respondent and its agents.

POINT II

LOWER COURT ERRED IN RULING PLAINTIFF AND HIS AGENTS DID NOT BREACH A FIDUCIARY DUTY IN FAILING TO PLACE PAYMENTS INTO TRUST ACCOUNT AS PROVIDED FOR IN 61-2-11 UCA, 1953; AND ERRED FAILING TO AWARD PENALTY PROVISION AGAINST PLAINTIFF AS PROVIDED IN 61-2-17 UCA, 1953.

61-2-2 UCA, 1953, defines"real estate broker" and states in part as follows: " . . . the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate. . ." This section makes an exception to some isolated sales and where you are your own owner and selling your own property. The evidence before this court clearly discloses that Mr. Price does not have an interest in the licensed real estate broker involved, Courtesy Real Estate; that Mr. Price was the contractor that built the house and his representative, Mr. Lund, was the individual working with appellants for the financing.

The evidence discloses that the original $600.00 on the first Earnest Money Receipt was not placed into a trust account nor was the $10,000.00 payment made by appellants to respondents.

61-2-11 UCA 1953, has provision for the requirement of depositing earnest money and down payments in trust account of the real estate broker. It describes that failure to do so is grounds for revocation or suspension of the license of the

broker.

The section further discusses that there must be adequate records of these transactions, how the trust funds are held and whether used by the builder, the amounts of the commissions and to whom the proceeds were disbursed. There is no evidence before the court that this has been done. See Reese vs. Harper, 8 Utah 2d 119, 329 P2d 410, as distinguished in 10 Utah 2d 930, 297; 353 P2d 989; and 29 Utah 2d 280, 508 P2d 542, which hold as follows:

> "A broker has the responsibility of honestly and fairly representing those who engage his services and because of this specialized service the broker offers as an agent for his client, there arises a fiduciary agreement between them."

The State of Utah Real Estate License Law Rules and Regulations specifically provide under 61-2-5(b) that there shall be closing statements, that the broker shall be held responsible for correctness of all closing statements; it further provides for a trust account to be used for all down payment, earnest monies, costs, rents, payments on contracts, mortgages, etc. "The said trust account shall at all times contain 100% of all funds belonging to others." (See Paragraph 15 of the printed brochure, which is attached to appellants' memorandum on file.) Paragraph 25 of said regulation and laws specifically provides in part: "When for any reason seller fails or is unable to consummate a contract, the broker has no right to any portion of the money deposited with him by the buyer."

It is clear as to the importance of these rules and regulations, which have not been followed and have been refused

by respondents, their agents and the realtors involved. There has been a total of $10,600.00 in down payments made upon the property as well as rent paid by appellants at the rate of approximately $350.00 a month since November, 1977, to and including the present time by reason of cash payments and credits agreed upon toward the $10,000.00 payment made to respondent; all as agreed upon between the parties. None of these funds have been trust funded as required by law. The importance of this regulation is pointed out in this case before the court to require the parties to enter into a final contract. The final contract in this case would avoid the problems of failure to disclose the financibility of the house in question and avoid many problems for all parties. Respondent refuses to enter into the final contract for the reason that they are getting rent on the property, and are receiving the equivalent of a forfeiture of $15,000.00 in increased value to the house in question.

61-2-11, UCA 1953, specifically requires rent, earnest monies, down payments, payments on contracts, all to be placed into a trust account until the final contract between the parties is entered into. This has not been done in the case before the court. All of the parties would be strongly motivated to enter into thefinal contract if these funds had been deposited on trust, the final contract entered into and the closing are required by law performed. See 61-2-2, UCA 1953; 61-2-11, UCA 1953; 61-2-17, UCA 1953; 61-2-5(b), UCA 1953.

POINT III

LOWER COURT ERRED FAILING TO FIND MISREPRESENTATION AS TO FINANCIBILITY OF HOUSE AND DEFENDANTS' RIGHT TO DAMAGES AS A RESULT THEREOF. IN THE ALTERNATIVE, LOWER COURT ERRED TO GRANT SPECIFIC PERFORMANCE IN THE FORM OF A FINAL CONTRACT OF SALE BETWEEN THE PARTIES AND THEREFORE CAUSED UNJUST ENRICHMENT TO DEFENDANTS.

Mr. Lund, Agent of Respondent, specifically testified that prior to the signing of the Earnest Money Agreement in question, that he nor none of the agents or representatives of respondent informed the appellants that the house would not then qualify for FHA or VA; and that it probably would qualify. Appellants testified that they relied upon their understanding that the house would qualify for FHA or VA loans; that they preferred FHA or VA loans but that respondent's agents kept encouraging them and steering them towards conventional laons at a time when the conventional loan money had dried up. Appellants specifically testified that they would not have purchased the house had they known that the house would not qualify for FHA or VA loans. This is a specific example of failure to disclose the fact that the house did not qualify but they were informed that it probably would qualify. As a direct result of reliance upon this misrepresentation, the proper financing and loans were not closed or obtained. The evidence is clear that these applications are still pending before FHA and VA. The elements of misrepresentation, to wit, false statements, material fact, reliance upon, and damage, are all present in the case now before this court.

As a direct result of this material fact and misrepresentation, appellants have been damaged by the amount of the money that they have paid in the form of rent, payments of $10,600.00, and a loss of increase in the value of the home in approximately $15,000.00.

Appellants are clearly entitled to damages as provided for in Title 61 for failure to trust fund the payments, together with all other damages, which were tendered in the form of evidence at the time of the trial of this matter in the lower court. The lower court erroneous ruled that the unlawful detainer, Title 78, Chapter 36, UCA 1953, applied; in that this was not a landlord-tenant situation but was a seller and buyer relationship in which the buyer agreed to pay rent during the term of the preliminary contract. The damages requested were in the alternative to specific performance of the final contract of sale between the parties.

Under the evidence, appellants, the buyer, could and would have paid any and all discount points for FHA. This is another item that needed to be placed in the final contract between the parties and which was some of the many discussions on the subject matter.

POINT IV

LOWER COURT ERRED IN AWARDING ATTORNEY FEES TO PLAINTIFF

The contract between the parties was enforceable and

still in force and effect without default on the part of appellants. Rent had been paid in the form of cash and, as agreed between the parties, credits of $350.00 per month upon the $10,000.00 payment by appellant to respondent. The matter was not "closed" for the reason that the final contract had not been entered into or proposed. Appellants proferred a final contract prior to commencement of suit. The VA and FHA loan applications are still pending and were at the time of the commencement of suit. Title 78, Chapter 36, UCA, unlawful detainer, does not apply to a buy and sell agreement; this not being a landlord-tenant situation even though rent was being paid until the contract was finalized and closed. The parties had, by their conduct, waived the strict time for closing the contract particularly where respondent refused to enter into a final contract, which was required.

There being no default on the part of appellants, the court erred in awarding attorney's fees and costs. To the contrary, respondents refused to enter into a final contract, misled appellants on the financing and created the problems complained of. Their conduct clearly amounts to an unjust enrichment which equity forbids.

CONCLUSION

The lower court erred in ruling that the unlawful detainer statute applied where in fact there has been and was an enforceable sale between the parties. The lower court erred in construing the Earnest Money Receipt as the final contract between the parties when it expressly, under its terms, provides for a final contract to be entered into between the parties including the financing arrangements or installment payments to be made under the final contract. The facts of this case clearly demonstrate appellants are entitled to specific performance of the Earnest Money Receipt and the entering into a final contract. Respondent wrongfully refused to enter into a final contract.

The conduct of the parties waived any specific time element particularly where agents for respondents misrepresented and misled appellants in trying to obtain financing.

Title 61 UCA, 1953, applies in the case now before this court. Respondent and its agents clearly failed to trust fund the payments made by appellants and disbursed the funds unlawfully. This has specifically damaged appellants herein. Appellants have suffered damages, if specific performance is notgranted, in the sum of $10,600.00 in installment payments together with loss in value of the house in the sum of approximately $15,000.00, together with attorney's fee and costs and provided for in the Earnest Money Receipt. The lower court has committed reversible error. Appellants are entitled to specific performance

of the Earnest Money Receipt or in the alternative the damages herein described.

Respectfully submitted this 12th day of December, 1979.

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CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief of Appellants were mailed to Richard S. Dalebout, Attorney for Respondent, 60 East 100 South, Provo, Utah 84601, postage prepaid, this 13th day of December, 1979.

THOMAS S. TAYLOR, Attorney