

1980

Melville L. Morris v. Dwane J. Sykes and Patricia Sykes : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MELVILLE L. MORRIS,

Plaintiff and
Respondent,

vs.

DWANE J. SYKES and PATRICIA
SYKES,

Defendants and
Appellants.

Case No. ~~47424~~ 16838

BRIEF OF APPELLANTS

Appeal From Judgment of the Fourth
Judicial District Court of Utah
County, Honorable J. Robert
Bullock, Judge

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MELVILLE L. MORRIS,)	
)	
Plaintiff and)	
Respondent,)	
)	
vs.)	Case No. 16838
)	
DWANE J. SYKES and)	
PATRICIA SYKES,)	
)	
Defendants and)	
Appellants.)	

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is an action brought by respondent asking the trial court for a mandatory injunction ordering the appellants to accept the unpaid balance due under a land purchase contract and to execute and deliver a warranty deed to the property to the respondent, or in the alternative, to relieve the respondent from the harshness of the retaking of the property by the seller without compensation to the buyer pursuant to the contract and asking the Court to order the appellants to return to respondent the money paid by respondent on the contract or such part as the Court might deem equitable.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury on June 14, 15 and 18, 1979, before the Honorable J. Robert Bullock sitting in

equity without a jury. The Court found in favor of the appellants and against the respondent on the demand for a mandatory injunction requiring delivery of title to the property. The Court found for the respondent and against the appellants holding that the retaking of the property by the appellants was an wholly unreasonable penalty and denying literal enforcement of the contract terms. The Court entered judgment requiring a reimbursement to the respondent buyer of \$14,121.54. Appellants filed a Motion to Amend Findings of Fact and Conclusions of Law and Judgment or in the Alternative for a New Trial, which Motion was denied by the Court on December 24, 1979. The appellants appealed that decision of the Court and its denial of the Motion to Amend Findings or in the Alternative for a New Trial.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the Court reverse the trial court, to apply the Alaska law to the case and to declare that the retaking of the property under all of the circumstances then existing was a reasonable application of the contract terms. Appellants seek to have this Court rule that the appellants did not receive anything more than that which they were entitled to under the contract and that respondent is not entitled to any recovery in this proceeding.

STATEMENT OF FACTS

On October 3, 1974, the respondent, as buyer, entered into a real estate contract with the appellants, as sellers, (Ex. 1) for a tract of land of approximately 27 acres known as Tract "B" of the Musk Ox Subdivision located near Fairbanks, Alaska. The contract provided for a \$2,000.00 down payment and monthly payments of a minimum of \$350.00 commencing December 1, 1974. In addition to the monthly payments, the buyer was obligated by the contract to pay \$1,000.00 on November 1, 1974, \$5,000.00 on February 1, 1975, \$5,000.00 on August 1, 1975, and \$3,000.00 each succeeding February 1 and August 1 until November 1, 1978, when the entire unpaid balance would be due.

On the same day as the signing of the contract, the parties executed an escrow agreement, (Ex. 23) and on that day buyer and seller went to the office of attorney Gene Belland. At the office, appellant, Dwane Sykes, read the escrow instructions and documents prepared to be executed as Exhibit 23 to the respondent. (Testimony of Dwane Sykes, Record, 256: 5-10). The contract and the escrow instructions required that the payments under the contract would be paid to the First National Bank of Fairbanks, Alaska. Mr. Sykes informed the plaintiff that there was an existing mortgage on the property at the time of purchase and the agreements instructed the bank to apply any funds received to the payment of such mortgage upon the property. (Ex. 23, Escrow Instructions, paragraph 3, subparagraph

b; Record 256: 13-18). After the execution of the agreements, the appellant, Dwane Sykes, moved to the State of Utah. The respondent variously lived in Florida, California, and Brussels, Belgium. Payments were to be made to the escrow department of the First National Bank of Fairbanks pursuant to paragraph 2 of the real estate contract, (Ex. 1) and the escrow instructions (Ex. 23).

On November 16, 1975, appellant, Sykes, sent a letter to respondent enclosing a proposed contract of sale on two additional parcels upon which they had been negotiating. The respondent counteroffered to purchase Lot 13 only setting forth the terms. (Reply, Ex. 18).

On December 3, 1975, appellant, Sykes, responded (Ex. 2) accepting the counteroffer and enclosing a purchase contract for Lot 13 exactly as the counteroffer of respondent. Respondent never made the payments on Lot 13 as offered in writing (Ex. 18) and accepted by the appellant (Ex. 3). This failure to complete later became a problem in the parties' dealings. In that letter, (Ex. 2) appellant, Sykes, gave notice to the plaintiff by the second postscript that "Fairbanks bank indicates they have not received payments on the Musk Ox escrow 10557 (Ex. 23) and informed respondent that he was several months behind. Responding to the December 3, 1975 letter by a letter of December 17, 1975, (Ex. 19) respondent said, "Re: the February payment, will get it into bank as

early as I can. Also, I've written to the bank on being in arrears - my records indicate up to date currently, so upon their reply we can check out the discrepancy." [Emphasis supplied] The testimony of respondent shows that the payments recorded by the bank were the only payments paid. (Record 205: 14-23; Record 215: 6-12). It further shows that respondent made all the payments personally and not by any other person. (Record 220:6-12). Respondent knew he was delinquent at all times, (Record 220: 19-22; Record 211: 5-16) and that his letter claiming that his records showed him to be current, was a misrepresentation given to the appellant regarding his payments to the bank (Ex. 19).

On the 29th of December, 1975, Steve Arnold, appellant's accountant, wrote to the respondent (Ex. 3) regarding the delinquency in the escrow which informed respondent that at that time he was four month's delinquent and that by the time of the receipt of the letter, would be five month's delinquent at \$350.00 per month or \$1,750.00. That letter further informed him that appellant, Sykes, was depending upon the payments on the contract by respondent to meet Sykes commitments on the mortgage to First National Bank of Fairbanks and that it was subject to immediate termination of both his interests and Mr. Sykes if payments were not brought current. Exhibit 3(a) attached to that letter shows the calculations of payments received, compared to the payments due up through December of 1975.

On the same date, December 29, 1975, appellant wrote to the First National Bank Escrow Department, (Ex. 22 and Ex. 27) with a copy to respondent requesting and authorizing the escrow department to automatically make payments from the escrow to the note owed to First National Bank to keep the note current. He further informed respondent of the dependency of Mr. Sykes upon his monthly payments to meet the payments to the bank.

Respondent did not correct the \$1,750.00 delinquency as requested and on February 11, 1976, respondent, by letter to appellant, Sykes (Ex. 14) again misrepresented that the bank records were inaccurate and claiming that a \$700.00 and two \$350.00 checks were not reflected and that he had sent to the bank a tracer on these matters.

Because of the repeated claims by Mr. Morris that he had made payments that were not shown by the bank, Walt Hick, an accountant for Mr. Sykes, sent a communication to the bank with a copy to respondent attempting to verify if there was any differences in payments received and what the bank records showed (Ex. 21).

On September 2, 1976, the plaintiff requested a "good discount" for prepayment on the Musk Ox property and conditioned his purchase of Lots 13 and 14 at a lesser price upon obtaining a discount, if a discount acceptable to him could be allowed (Ex. 20).

On September 30 or October 2, 1976, respondent, in a telephone conversation with Dwane Sykes, conditioned payoff at the Musk Ox property upon obtaining a discount. Mr. Sykes denied that request (Record 80: 12-23; Record 166: 4-9). In that same telephone conversation, appellant Sykes informed respondent that it was very important that he keep the payments at the bank current because if he was delinquent, he would be terminated under the contract. Mr. Sykes informed respondent that Mr. Sykes' payments to the bank were 100 percent dependent upon respondent's payments to the escrow account under the purchase agreement. Respondent informed Mr. Sykes that he would personally go into the bank and verify his escrow account status and bring it current (Record 165-167; Record 80: 2-16).

On October 14, 1976, the respondent telephoned appellant Sykes at Orem, Utah and Dennis Sykes, appellant's brother, got on the extension telephone and overheard and described the conversation in his deposition (Record 82). Respondent again asked for a \$1,000.00 discount as a condition of prepayment on the Musk Ox contract. Dwane Sykes declined to give the discount. Dwane Sykes again told respondent that the accountant's records in Utah showed respondent delinquent and that the bank had not provided any information to verify or refute that (Record 83: 6-8). Respondent misrepresented

that he had been into the bank and had already brought his payments completely current, "having just within the past few days paid a major amount covering some months, receipts of which perhaps had not reached Utah through the mails" (Record 83: 9-13). The record of payments paid show that no payments were paid by respondent after August 2, 1976 (Ex. 5). Respondent again misrepresented to Mr. Sykes payments ostensibly made in Alaska (Record 82: 8-12). In that conversation, Dwane Sykes informed the respondent that he would not permit any delinquency on his Musk Ox sale to respondent (Record 83: 21-23).

In early November, Mr. Sykes learned that respondent was seriously delinquent on the payments on the Musk Ox property and that respondent had not made payments in October as he had represented. Respondent had not kept the contract current nor had he brought any payments current over the entire period of the contract. Appellant further learned that respondent's representations had all been false representations of payments which respondent knew had not been paid (Record 83: 26-32; Record 84: 1-4).

On November 11, 1976, appellant's accountant, Walt Hick, served the notice of termination under the contract on the bank with copies to respondent, both in Mango, Florida and Brussels, Belgium (Ex. 4).

After the termination, appellant, Sykes, offered reinstatement of the Musk Ox contract by a telephone conversation between Sykes and Morris on November 18, 1976. That offer of reinstatement was confirmed by a reply message (Ex. 29) of November 19, 1976. The respondent declined to reinstate.

By a letter dated November 24, 1976 (Ex. 28) the bank demanded payment of a delinquency of \$1,573.87 plus \$339.39 interest by December 8, 1976.

On December 27, 1976 appellant's attorney wrote to the respondent (Ex. 19) offering reinstatement and setting forth the requirements for bringing the account current, and set January 25, 1977 as the expiration of the offer of reinstatement.

On the 18th of January, 1977, the respondent declined the reinstatement and said he found the terms unacceptable (Ex. 11). No tender of any payment to bring the contract current or to make any payments under the contract were ever made by the respondent (Record 224: 24-30). On the same date, January 18, 1977, appellant's attorney sent a further letter to respondent (Ex. 25) reiterating the privilege of reinstatement and the expiration date of reinstatement offer for January 25, 1977.

On January 28, 1977, appellant's attorney again wrote to the respondent reminding him of the reinstatement offers made on the 18th of November, 1976 in a telephone

call with Mr. Sykes, the reiteration of that offer in the November 19 Memo from Mr. Sykes to respondent (Ex. 29); the reinstatement offer of December 27, 1976; and informed him that if he did not wish to reinstate, that was up to him but, since he had passed the January 25, 1977 expiration date of the reinstatement offer, the presumption of the appellants was that he did not wish to reinstate. Respondent never communicated an answer to appellant's attorney.

On February 9, 1977, the bank informed Mr. Sykes that unless the \$3,318.68 delinquency was paid within thirty (30) days, that the bank would declare the entire unpaid balance on the mortgage due and accelerate the note and foreclose the deed of trust immediately (Ex. 30).

The Sykes were thus faced with an imminent foreclosure of their Musk Ox property by the bank under its trust deed. They were located in Utah and the property was in Fairbanks, Alaska. It was mid-winter and the property was totally inaccessible. Mr. Sykes attempted to refinance the mortgage payment to pay the bank out (Record 299: 1; Record 300: 20-30). Appellants, after several attempts to sell the property, obtained a sale of the property to the only market available, a buyer who had previously purchased property from appellants and would rely upon their statement as to the property without an examination of it. They sold the property under such distress circumstances to John Iverson, their

brother-in-law, for the unpaid balance owed by the respondent upon the purchase contract. No windfall profits were obtained by the appellants as a result of the sale. They only received what they would have received had the respondent completed the payments under his contract.

POINT I

THE TRIAL COURT MISAPPLIED THE ALASKA LAW ON FORFEITURE AND DAMAGES.

In this matter the trial court indicated that the law of Alaska was the applicable law, but indicated that the Court did not believe that the Alaska law was significantly different than Utah law. Thereafter, the trial court dealt with the case on the basis of applying established principles of law under Utah decisions more familiar to the Court. The Utah Court in applying Utah law has never applied a strict forfeiture in a real estate contract. It has applied various formulas requiring the Court to take into account the reasonable rental value for the period of time the purchaser has been in possession of the property, interest which could have been earned had the payments been met, damages to the property and loss of bargain. This Court, applying Utah law, has generally allowed a refund to the defaulting purchaser for the excess over the reasonable damages of the vendor calculated under a variety of formulas which is considered to be a windfall to the vendor and reimbursable to the vendee.

Alaskan law is considerably different than Utah law. The Alaska Court does recognize the right of a vendor to enforce the provisions of a forfeiture in the event of default by the vendee. In 1967 the Alaska Court, speaking in Lonas v. Metropolitan Mortgage and Securities Co., 432 P.2d 603 (1967) construed a real estate contract containing a provision almost identical to the contract provision on forfeiture contained in the contract which is the subject matter of this action (Ex. 1). The provision in the Lonas case reads at page 605:

Time is of the essence of this contract, and in case of failure of the said purchasers to make either of the payments or perform any of the covenants on their part, this contract shall be forfeited and determined at the election of the said vendor; and the said purchasers shall forfeit all payments made by them on this contract and all rights acquired hereunder, and such payments shall be retained by the said vendor as liquidated damages, and they shall have the right to re-enter and take possession of said land and premises and every part thereof.

In the case now before the Court, the contract provision read:

Time is of the essence of this contract, and in the event of failure of buyer to make any payment falling due hereunder within thirty days after due date thereof, or to abide any other obligation herein-undertaken, the seller may, at any time while such failure continues, terminate this contract and all purchase rights herein afforded to buyer, and pursuant thereto may re-enter and retake possession of said real estate, and all payments made theretofore shall be retained by the seller as liquidated damages for failure of performance hereunder by the buyer.

The Alaska Court stated in the Lonas case at page

605:

The forfeiture provision is not made exclusive. In such a case, the seller is entitled to pursue, in addition to the remedy specifically mentioned in the contract, any other remedy which the law affords. The seller in this case was not limited to the remedy of forfeiture of the contract, but could seek judgment for monies past due and for specific performance. [Emphasis supplied]

The Alaska law thus makes it clear that the seller is entitled to the remedy provided in the contract, of forfeiture of the contract, if he so elects.

In Alaska Placer Company v. Richard E. Lee, Alaska, 455 P.2d 218 (1969) the Alaska Supreme Court distinguished the earlier cases of Land Development, Inc. v. Padgett, 369 P.2d 888 (Alaska 1962) and Jameson v. Wurtz, 396 P.2d 68 (Alaska 1964) which the court said stood for the proposition that under some circumstances it may be inequitable to enforce a forfeiture because the loss to the buyers would be all out of proportion to the injury to the seller, and held in that case at page 229:

This is not a case where appellant sat idly by, registered no objections, and then attempted to forfeit appellees' interest under the contract at a time when it was too late for appellees to remedy their failure to perform.

and further said:

We find that there was not a waiver by appellant of its right of forfeiture under the contract. Nor did the notice of forfeiture come too late to be effective.

Thus, the Alaska Court recognizes the right of the vendor to forfeit out the interest of the vendee when the losses of the vendor are not disproportionate to those of the vendee.

In the case now before the Court, the forfeiture and subsequent sale of the property by the vendor, appellant Sykes, produced less than the amount of funds that would have been produced had the vendee made his payments as required by the contract and the determination by the trial court to refund monies paid by the vendee imposed all of the losses in the matter upon the vendor and none upon the vendee, who was the defaulting party in the matter.

In the 1972 case of McCormick v. Grove, Alaska 495 P.2d 1268, the Alaska Supreme Court held that the trial court properly had the discretion to refuse to enforce the forfeiture because, "the sellers never 'hinted' that they would terminate because of the late payments." In the case now before the Court, not only had the sellers sent two notices citing the delinquencies and informing buyers they were subject to termination (Exs. 2 and 3) but had several telephone communications repeatedly making demands to keep the accounts current, indicating the failure to do so would cause termination of the contract. (Record 80: 12-23; Record 166:4-9; Record 82: 8-12; Record 83: 6-23)

The case cited in the Lonas case of Land Development, Inc. v. Padgett, supra., was decided in 1962 and in that case

the buyers had paid \$9,500.00, leaving a balance due of only \$2,400.00. The Court refused to enforce literally the forfeiture provision of the contract and this was upheld by the Supreme Court. The Court noting that the vendor's rights "...were fully protected; for if the buyers failed to pay the balance owing by the time specified in the judgment, then their interest in the property would then be entirely forfeited and the seller would regain possession." Id. 889 [Emphasis added] In the circumstance before the Court, the bank had served upon the seller-appellant notice of intended forfeiture and foreclosure of the trust deed owed by seller to First National Bank of Fairbanks. In the event of such foreclosure by the bank upon the seller as a result of buyers defaults, seller would have lost all interest in the property. Vendors' rights were not fully protected as in Land Development v. Padgett, supra. In this matter, seller-appellant did not obtain by the sale to Iverson more than what he would have obtained had the respondent-buyer met his payments. In the Land Development, Inc. v. Padgett case, supra., the Court said that the reason the trial court has been justified in refusing to enforce the forfeiture provision was because there was no anticipated losses to seller and the losses to buyer were out of proportion. In this case, the effect of the trial court's ruling was to impose all loss on the appellant-sellers with no loss to the respondent-buyer.

The other case cited by the Alaska court in support of the proposition that the Court under certain circumstances,

has the discretion to ignore the contract provision, was Jamison v. Wurtz, supra., where the Court held that where the vendor had received 88.3% of the total purchase price and where the purchaser had tendered the balance of the purchase price into the Court at the time of institution of the suit, that it would have been inequitable for the Court to have enforced the literal provisions of the forfeiture under the contract. That is not the circumstances in the case now before the Court.

The Supreme Court of Alaska has further ruled that the ultimate aim of the Court rendering a decision where a vendee has defaulted in payments upon a land purchase contract in an equity proceeding challenging whether or not a forfeiture is to be allowed is exemplified in Ward v. Union Bond and Trust Co., 243 F.2d 476 (1957) wherein the court said at page 480:

The ultimate aim in these proceedings in equity must be to save the respective parties harmless from loss or damage and, if just and equitable, place them in the status quo of their contract so as to permit them as vendor and vendee to each have the benefit of their respective bargains voluntarily entered into, . . . not to be measured in the light or economics of subsequent events, but as of the day of the contract.

The Court thus illustrated that the examination in equity should determine whether the results gave the parties the benefit of the bargain they would have had if the contract had been fully performed. The decision of the trial court in this matter took from the sellers the benefit of their bargain

to the benefit of the vendee when viewed through the entire proceeding and the course of events leading up to the termination. Such result was inequitable because vendee was the only defaulting party and vendors had committed no defaults.

Another circumstance where the Alaska Court has refused to enforce literally the forfeiture provisions of a real estate contract is Williams v. DeLay, Alaska, 395 P.2d 839 (1964) wherein the Court pointed out that in that circumstance, (a) there was a remaining unpaid balance of the purchase price of only \$575.95, (b) this balance was tendered into Court by the buyers almost immediately after it had been ascertained by the special master during the case, (c) the buyers had made valuable improvements upon the property and, (d) the property had appreciated considerably in value after execution of the contract. The Court held in conformity with the decision in Land Development v. Padgett, supra., that this would cause a loss to the buyers out of proportion to any injury that might be sustained by the sellers.

In the case now before the Court, the trial Court did not weigh the losses to the seller as opposed to the losses of the buyer and did not apply the Alaska law as it had been cited herein in Lonas v. Metropolitan Mortgage and Securities Co., supra., and Alaska Placer Company v. Richard E. Lee, supra.

Other decisions where the Alaska Court has indicated that in the event of a breach of contract that the responsibility

of the Court is to put the injured party, that is the non-defaulting party, in the same position he would have been had the contract been fully performed are: Green v. Koslosky, Alaska, 384 P.2d 951 (1963); City of Whittier v. Whittier Fuel and Marine Corporation, Alaska, 577 P.2d 216 (1978) and McBain v. Pratt, Alaska, 514 P.2d 823 (1973).

It is appellants' contention that the trial court ignored Alaska law and imposed upon the nondefaulting party the major losses in this case.

There was no showing that the appellant-seller obtained any windfall profits as a result of the retaking. There was no showing that the losses on buyer were out of proportion to the losses to the seller. The result of the decision was to impose all losses on the non-defaulting seller.

POINT II

NOTWITHSTANDING THE PLAINTIFF'S REPEATED DEFAULTS AND MISREPRESENTATIONS, THE TRIAL COURT, ERRONEOUSLY REFUSED TO ENFORCE THE CONTRACT TERMS FOR TERMINATION OF CONTRACT RIGHTS.

At time of trial, respondent testified that the bank records accurately reflected the record of all payments made by him under the contract. (Record 205: 14-23; Record 215: 1-2) That record of payment was introduced as Exhibit 5 in the proceeding. Attached to this brief as Appendix "A" is a chart showing the payments as required to be paid under the contract and payments as made by respondent, together with a

summary showing the delinquency status of the contract at selected dates. The record of payments shows that respondent made the semiannual lump sum payments not as required by the contract, but within 30 to 45 days thereafter. The contract, however, required that each month respondent was to pay a monthly payment of \$350.00. These payments were paid to the escrow agent, the bank in Fairbanks, and applied to the payment of appellant's mortgage to the First National Bank of Fairbanks upon the same property. Respondent, himself, had made every payment that was made, personally, not by his wife, accountant, agent or by any other person. (Record 220: 6-12) Morris further recognized that he was obligated under the contract to pay a monthly payment every month of \$350.00 plus the two lump sum payments the 1st of February and the 1st of August each year. (Record 220: 19-22) Such knowledge and understanding was made abundantly clear in the testimony of respondent (Record 222: 9-17):

Mr. Jeffs: What I'm suggesting to you, Mr. Morris, is that when you were making these payments, whether you were in California, Montana, Fairbanks, Alaska or Brussels, Belgium you knew that you were to pay a payment of \$350.00 every month?

Mr. Morris: Yes sir.

Mr. Jeffs: And you were the only one that handled the payment?

Mr. Morris: Yes sir.

On December 3, 1975, appellant sent a letter (Ex. 2) to the respondent regarding additional property upon which the respondent was negotiating to purchase. As a postscript appellant said, "Fairbanks bank indicates that they have not received payments on the Musk Ox escrow 10557; in fact, that it is several month's behind". On the date of that communication, respondent was six installments of \$350.00 each delinquent. (Appendix "A")

On December 8, 1975, respondent made two monthly payments of \$350.00. On December 17, respondent wrote to Mr. Sykes (Ex. 19) and said:

"I have written the bank on being in arrears - my records indicate up to date currently. So upon their reply, we can check out the discrepancy."

This was at a time when Mr. Morris knew that he was delinquent on the contract and misrepresented his records to show himself to be current.

On December 29, 1975 a letter was sent under the signature of Steve Arnold, the accountant for appellant herein, (Ex. 3) enclosing an accounting (Ex. 3(a)) of the \$350.00 monthly payments which were due. The letter pointed out that the December 8 payment covered the months of July and August but it was still four month's delinquent with another payment becoming due on January 1, 1976, making a total by the time the letter was received of \$1,750.00 in arrears, or five monthly installments. Respondent acknowledged his understanding of such delinquency (Record 211: 17-24). By Exhibit 3, the

accountant informed Mr. ~~Sykes~~^{Morris}:

"I would appreciate your bringing these monthly payments current (which are required over and above the additional payments) immediately, because both yours and Mr. Sykes' separate notes are subject to immediate termination, which the bank could initiate at any moment."
[Emphasis added]

Respondent acknowledged his receipt of such notice and demand.

(Record 212: 1-8; Record 212: 30; Record 213: 1-2)

In the letter (Ex. 3) Mr. Arnold had acknowledged the payment on December 8, 1975 of \$700.00 covering July and August payments. After receipt of that letter, the respondent sent a letter to the appellant Sykes dated February 11, 1976 (Ex. 14) in which he represented:

"Got the schedule of payment and there is a \$700.00 check (Dec.) and two \$350.00 checks not reflected. Have written to the bank for them to trace out for me."

The record of payments, Appendix "A", shows that only payment of \$700.00 paid during the entire payment period was the one on December 8 which had been acknowledged in Exhibit 3 and was shown on Exhibit 3(a). Respondent falsely and consciously misrepresented by Exhibit 14, four payments which he knew had not been paid since he had made all payments himself, and since his own testimony verifies that the payments made are as reflected by the bank's records. Nevertheless, he falsely and intentionally misrepresented his payments to the appellant Sykes with knowledge that since they were being paid to the bank in Alaska as escrow agent, Sykes would not have direct knowledge about the payments.

Respondent acknowledged that he never attempted to correct that delinquency. (Record 223: 4-7):

Mr. Jeffs: But your letter, you acknowledge the letter of December 29, you were four months behind. When did you ever attempt to correct those payments?

Mr. Morris: I never really corrected them, that's true . . .

Respondent failed to correct the delinquencies despite the fact that he was handling all of the payments. (Record 223: 21-28)

Mr. Jeffs: But you had within your control all of the payments that you had paid and the dates on which they were paid by the checks.

Mr. Morris: Yes.

Mr. Jeffs: And you had a copy of the contract and the escrow that told you the dates on when you were supposed to pay the payments?

Mr. Morris: Yes.

During this same period of time, respondent was making representations to appellant Sykes that he had additional money and wanted to buy more land. (Record 240: 22-30; Record 231: 1-8)

Exhibit 14 shows that respondent was extending overtures to purchase additional tracts of land during the period of delinquency. Exhibit 16 shows Sykes' response to a request for land. Exhibit 17, shows respondent's request for discount on tracts of land and respondent said he had cash on hand to purchase more land but did nothing to correct the delinquency

and in fact thereafter, increased his delinquency. Exhibit 15 shows respondent requesting Tract No. 13. Appendix "A" shows that as of July 8, 1976 respondent was five installments delinquent and never paid any monthly installments after July 8. He did pay the August 1, 1976 lump sum payment of \$3,000.00, but failed to pay any additional payments. The testimony of respondent shows he knew he was delinquent on the payments for August, (Record 218: 22-28) September, (Record 218: 29-30) and that he never paid any monthly payments after July of 1976 (Record 225: 8-14).

As reconfirmed at trial, respondent's testimony on deposition referring to the communication from Mr. Hick, the accountant for Mr. Sykes, on August 13, 1976 (Record 224:16-23).

"When you received a communication from Mr. Hick that you were some six or seven payments delinquent . . ." "Uh-huh" . . .
"were you not aware that you had missed that many payments?" Answer: "Yes".
Question: "You were aware?" . . .
Answer: "I was aware that I was behind a certain amount of payments, six, four, five or seven; I knew I was behind. Isn't that what your answer was given?"
Answer: "Yes sir."

After the last payment, August 2, 1976, respondent had communication from Mr. Hick in behalf of Mr. Sykes (Ex. 21). Thereafter, Mr. Sykes had telephone communication directly with respondent. The testimony of Mr. Sykes (Record 165: 6-30; Record 166: 1-30) shows that respondent was specifically asked about the delinquent status of the

payments to the escrow agent in Fairbanks. (Record 166:

17) Mr. Sykes testified:

"I asked him what the problem was that we couldn't get the bank to show us that the payments that he claimed had been made and I asked him, too, what the status on it was". He said, "the payments are paid and current".

Again on October 14, 1976 respondent again called Mr. Sykes requesting a discount on the Musk Ox property. After Mr. Sykes had declined to grant the discount, the conversation turned to the delinquent status of the contract. Mr. Sykes directly confronted respondent on the delinquency. (Record 169: 4)

"On that occasion, I pinned Mr. Morris down about what was going on on our accounting. He said he had been into the bank, his account was current, and he had made recent payments into the bank within the past few days".

Again, the record of payments shows no such payments were ever made in October and it was a fraudulent misrepresentation of payments made to mislead the appellant Sykes. These misrepresentations by respondent were corroborated in the deposition of Dennis L. Sykes on written questions, which was admitted into evidence in lieu of his testimony. Dennis had overheard the conversation on the extension phone on October 2, 1976 and again on October 14, 1976. (Record 80: 31-32; Record 83: 8-12) wherein Dennis Sykes' deposition says:

"Mr. Morris replied that he had been into the bank and had already brought his payments completely current, having just within the past few days paid a major amount

covering some months, receipts of which perhaps had not reached Utah through the mails". [Emphasis supplied]

The bank's records submitted by respondent as Exhibit 5 show that the statement was a fraudulent misrepresentation of the status of his accounts, no payments having been made after August 2, 1976.

These ongoing defaults, no efforts to correct the known delinquency and oral and written misrepresentations that he had brought the contract current, clouded by the letters claiming to have extra cash on hand to buy other parcels, preclude respondent's right to ask the Court to grant him equitable relief. He has not done equity and cannot ask the Court to grant equity and impose the loss on appellant.

The trial court should have denied him relief and should have enforced the contract right of the appellant-seller to retake possession of the property without reimbursement to respondent.

POINT III

THE COURT ERRED IN RULING THAT DEFENDANT'S RETAKING WAS AN UNREASONABLE FORFEITURE.

Under Alaska law the reasonableness of a forfeiture of the payments paid under a land purchase contract are determined by all of the circumstances leading up to the termination of contract and the circumstances pertaining at the time of the termination and thereafter.

At the time of the execution of the purchase contract and the execution of the escrow documents, these papers were read orally, each individually, in detail by appellant Sykes to respondent in the preparing attorney's office (Record 256:5-20). At that time Mr. Sykes informed respondent that he only had a thirty-day grace period and that was all. (Record 258:6-18) The escrow papers provide that the bank is to apply the proceeds of the monies received to the debt upon the property owed by appellant Sykes. (Record 243:1-13) On December 3, 1975 appellant Sykes sent the first notice of delinquency (Ex. 2) to Mr. Morris. (Record 243:12-23) Morris received that notice and was aware of the request to correct the delinquency. (Record 211:21-24) Sykes sent the second notice of delinquency and demand for payment of the five delinquent installments on December 29, 1975 (Ex. 2; Record 271:24-30; 272:1-5). Mr. Morris received that letter informing him of a potential termination (Record 211:25-27). He was aware that Exhibit 3 notified him that he was \$1,750.00 delinquent, or five installments at that time. (Record 212:1-6) He was further aware of the demand to correct the delinquency. (Record 212:7-8 and 23-30; 213:1-2)

Instead of responding by correcting the delinquency, Mr. Morris sent a letter to Mr. Sykes (Ex. 14) in which he misrepresented that he had sent payments to the bank, which did not show on the bank's record. (Record 213:17-22, 27-30) From that point forward he never made any attempt to correct the

five delinquent installments. (Record 223:4-7) In the summer of 1976 Morris knew he had not paid the July and August payments to the bank. (Record 228:9-17) During this period of delinquency, Mr. Morris continued to make overtures for purchase of lots 13 and 14. Morris made further representation that he had extra money on hand if he could get a discount on Musk Ox. (Record 230:17-30; Record 231:1-8; Ex. 17)

In telephone conversation by respondent to Mr. Sykes on October 2, respondent told Sykes that he would personally go to the bank and clarify the question of the delinquency because he said he was current and there was no problem on his account record. (Record 278:9-30) In the later October 14 telephone call respondent reiterated that he had been to the bank and was current. (Record 280:26-30) Sykes gave Morris a deadline to bring the account current immediately. (Record 276:21-24) and made oral demand for him to keep the account current or the contract would be terminated and the property would be repossessed. (Record 281:13-17 and 25-30)

During these communications between the parties, at no time did Sykes ever lead respondent to believe that it was not necessary for him to keep the monthly payments on the contract current. (Record 226:14-26) Respondent never gave notice to Sykes that he was not going to continue making the monthly payments and consistently misrepresented that he had brought the account current. (Record 226:26-30; Record

227:1-7) Respondent never informed Sykes that he was holding back on the payments. (Record 227:30; Record 228:1-2) All of this occurred during a time when respondent was mailing all the payments under the contract (Record 220:6-12), had a personal knowledge that monthly payments were required under the contract and under the escrow (Record 220:19-22), had personal knowledge and had been informed that Mr. Sykes depended upon Mr. Morris to make the payments to the bank escrow because of his necessities in meeting the obligations on the mortgage on the same property. (Ex. 3) In as many as 15 telephone conversations between the parties, Morris never told Sykes that he was not meeting the monthly payments to the bank and consistently misrepresented that he had been to the bank, had checked his own account and had brought the account current. (Record 227:12-16) In view of the fact of the repeated delinquencies and defaults of respondent, his lack of good faith in performing under the contract, and the demands of the bank to bring the amount current (Exs. 28 and 30) respondent was given oral notice of impending termination in the October 2 and 14 telephone calls (Record 169:16-20). On November 11 the bank closed the escrow and forwarded the escrow papers in accordance with the escrow agreement to appellant Sykes. Sykes thereupon recorded the Quit Claim Deed from Morris to Sykes in accordance with the escrow agreement and the contract and in performance of the contract terms.

In view of the difficulties imposed upon the ^{appellant} the respondent:

(a) the fact that the property was subject to foreclosure by the bank;

(b) the seasonal sale of real estate in Alaska (Record 300:11-19);

(c) the difficulty of sale of real estate in Alaska, particularly the Fairbanks area in midwinter (Record 300:38-30);

(d) Sykes' inability to bring the account current (Record 300:20-26);

(e) the efforts of Sykes to sell the property in the winter (Record 301:1-30; 302:1-30);

(f) the fact that Sykes only recovered the amount of the unpaid balance without any windfall gain (Record 303:17-30; 304:1);

(g) and in fact received less than he would have received under the completion of the contract by Morris had Morris kept the contract current (Record 304:5-10).

this forfeiture of payments was reasonable. The multitude of facts and the recognition by the Alaska Courts of the rights of a contract seller to forfeit payments on the failure of the buyer to make payments, coupled with the fact that Morris' own defaults and misrepresentations had created all of the problems, compels a conclusion that the retaking of the property by the Sykes in conformity with the contract terms was not an unreasonable forfeiture and the Court's ruling that it was an unreasonable forfeiture was in error.

POINT IV

THE COURT ERRED IN RULING THAT THE PLAINTIFF WAS ENTITLED TO NOTICE OF THE INTENDED SALE AND REASONABLE OPPORTUNITY TO MAKE DEFENDANT WHOLE BEFORE THE SALE WAS MADE.

To evaluate whether respondent was entitled to additional notice before the sale of the property by appellant, the Court must review what had transpired.

There was a long history of delinquency, not entirely known to appellant because it had been clouded by a pattern of misrepresentation by the respondent:

(a) claiming payment not credited, which in fact were false (Ex. 14, Appendix A);

(b) claiming additional funds on hand for more land when still five months delinquent (Ex. 17)

(c) claims that he would go to the bank and verify delinquency was cleared up (Record 81:13-16);

(d) False claims that he had been to the bank and in past few days had paid major amounts and brought the account completely current (Record 83:8-13).

This preamble leading up to the termination of the contract and escrow on November 11, 1976 was followed by another history of failures on the part of respondent. On November 18 in telephone conversations between Sykes and respondent, Mr. Morris was informed that he had been terminated; that he had been misrepresenting the payments and was greatly delinquent (Record 288:6-30). In that conversation Mr. Sykes reviewed with respondent the notices that he had been sent and the misrepresentations of having brought the payments current. Respondent's response was: "So what if the account was delinquent and the bank records are correct, so what difference does it make". (Record 288:9-23) In that same conversation on November 18,

1976 Mr. Sykes informed respondent that if he wished to reinstate he could do so and set forth what the reinstatement terms would be (Record 289:1-7). On November 19, 1976 appellant followed that up with a reinstatement offer (Ex. 29; Record 289:9-19).

At no time after the termination did Morris ever tender cash or a cashier's check to anyone to correct the delinquencies and so testified. (Record 224:24-30). The attorney for Mr. Sykes sent a reinstatement letter to respondent (Ex. 10). Respondent responded to Mr. Hibbert's reinstatement letter and informed him that he did not wish to reinstate (Record 249:9-16, Ex. 11). Respondent rejected the reinstatement offers (Record 249 and 250). Respondent was given several offers to reinstate (Record 178:10-30; Record 179:15-29). Those reinstatement offers were before the trial court at the trial (Record 291:1-25). After numerous communications following termination and the lapse of the period of time from November 11, 1976 to February 9, 1977 and in face of the bank's notice of acceleration and forfeiture (Ex. 30) it was error for the trial court to rule that Sykes was required to give a notice of intent to sell and additional opportunity for respondent to purchase the property prior to the sale.

CONCLUSION

While it is true that in reviewing an equity decision this Court can examine both the law and the facts, in the

final analysis, this Court must decide not whether rules of law were followed, but whether justice and equity were fairly given to the parties.

The result of the decision of the trial court must be viewed in that light.

In this matter, appellant performed exactly as the contract required, never being in default.

Appellant, in the face of repeated reports from the bank that respondent was grossly delinquent, continued to give the benefit of the doubt to respondent because respondent was transmitting oral and written false claims that he had made payments for which he had not been given credit or had brought the account current. When he was eventually made aware of the defaults and misrepresentations he followed the parties agreements and terminated the escrow and recorded the Quit Claim Deed.

Respondent had full control of the matters. He paid every payment personally, knew he was required to pay \$350.00 each month. Nevertheless, he falsely represented payments never paid, claimed records, he said, showed him to be current, claimed he had brought the account current and claimed he had corrected all delinquency. He further knew he had paid no monthly payments after July 8, 1976. He never tendered funds to bring current or to pay off the balance. He rejected reinstatement offers and failed to respond to the attorney's final letters on reinstatement.

When weighing the propriety of the trial court's decision, this Court should conclude that it put the burden of loss on the nondefaulting party and imposed practically no losses upon the party with unclean hands, the party who caused the forfeiture and forced sale of the property.

In this case of unclean hands the Court should not allow the facilities of the Courts to be used to aid the wrongdoer.

It is respectfully requested that this Court reverse with instructions to enter judgment of no cause for the respondent.

Dated this 18th day of April, 1980.


M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief were mailed to A. H. Boyce, Attorney for Respondent, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah 84111 by placing a copy of same in the United States mails, postage prepaid, this 18th day of April, 1980.


M. Dayle Jeffs

APPENDIX "A"

Payments Required By Contract	Payments Paid By Plaintiff-Respondent	Delinquency Status Of Contract On Selected Dates
11/1/74 - \$1,000.00	\$1,000.00 - 11/ /74 (Exhibit 13)	
12/1/74 - 350.00		
1/1/75 - 350.00	350.00 - 1/8/75	
2/1/75 - 350.00		
2/1/75 - 5,000.00	\$5,699.00 - 2/4/75	Current
3/1/75 - 350.00		
4/1/75 - 350.00		
5/1/75 - 350.00	597.46 - 5/7/75	\$100.00 delinquent
6/1/75 - 350.00	449.95 - 6/ /75	Current
7/1/75 - 350.00		
8/1/75 - 350.00		
8/1/75 - 5,000.00		
9/1/75 - 350.00	\$5,323.25 - 9/9/75	3 Installments delinquent \$1,050.00
10/1/75 - 350.00		
11/1/75 - 350.00		
12/1/75 - 350.00		
		12/3/75 - 6 Install- ments \$2,100 delinquent (Exhibit 2)
	700.00 - 12/8/75	
		12/29/75 - Exhibit 3 Demand for \$1,750.00 5 Installments 1/1/76 - 5 Install- ments \$1,750 delinquent
1/1/76 - 350.00		

<u>Payments Required By Contract</u>	<u>Payments Paid By Plaintiff-Respondent</u>	<u>Delinquency Status Of Contract On Selected Dates</u>
	350.00 - 1/27/76	
2/1/76 - 350.00		
2/1/76 - \$3,000.00		
	350.00 - 2/4/76	2/11/76 - Plaintiff misrepresents payments (Exhibit 14)
	\$3,316.50 - 2/20/76	
3/1/76 - 350.00	350.00 - 3/12/76	
	350.00 - 3/31/76	
4/1/76 - 350.00		4/1/76 - 5 Install- ments \$1,750 delinquent
5/1/76 - 350.00		
6/1/76 - 350.00		
7/1/76 - 350.00	\$1,044.00 - 7/8/76	5 Installments \$1,750.00 delinquent
8/1/76 - 350.00		
8/1/76 - \$3,000.00	\$2,985.00 - 8/2/76	
9/1/76 - 350.00		
10/1/76 - 350.00		
11/1/76 - 350.00		11/1/76 - 9 Install- ments Delinquent
<hr/> 24 Monthly Installments Required	15 Monthly Installments Paid	