

1980

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

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. 16838

BRIEF OF RESPONDENT

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

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Respondent brought an action asking the trial court for an order requiring 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 respondent from the harshness of the forfeiture and retaking of the property by appellants, as sellers, without compensation to respondent, as buyer, and asking the Court to order appellants to return to respondent the money paid on the contract by respondent, or such part as the Court found to be equitable.

DISPOSITION IN THE LOWER COURT

The case was tried on June 14, 15 and 18, 1979, before the Honorable J. Robert Bullock sitting in equity without a jury. The Court found in favor the the appellants and against the respondent on the issue of requiring the appellants to accept the unpaid contract balance and deed the property to respondent. The Court found for respondent and against the appellants holding that the forfeiture and retaking of the property and retaining the money paid on the contract was a wholly unreasonable penalty and its enforcement under all the circumstances to be inequitable. The Court entered judgment requiring a reimbursement to the respondent buyer of \$14,121.54 of the \$23,216.72 paid on the contract. Appellants Motion to Amend Findings of Fact and Conclusions of Law and Judgment, or in the Alternative for a New Trial was denied by the Court on December 24, 1979. Appellants ' appealed this decision of the Court and its denial of the Motion to Amend the Findings or in the Alternative for a New Trial.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the Court sustain the trial court and find that under Alaska law and the facts of the case the enforcement of a strict forfeiture would be a violation of the basic principals of equity, good conscience, and fair dealing.

STATEMENT OF FACTS

On October 3, 1974, the respondent, as buyer, entered into a real estate contract with appellants, as sellers, of a vacant 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 \$350.00 commencing December 1, 1974. In addition, the buyer was to pay \$1,000.00 November 1, 1974, \$5,000.00 on February 1, 1974 \$5,000.00, August 1, 1975, and \$3,000.00 each succeeding February 1 and August 1 until November 1, 1979, when the contract balance was to be paid in full. The total purchase price was \$40,000.00 (Exh. 1).

The parties agreed First National Bank of Fairbanks, Alaska, would be the escrow agent for the transaction to hold certain papers and receive the contract payments. Respondent, as buyer, was informed there was a trust deed lien on the property held by the same bank and that respondent's contract payments would be used by the bank to make the payments on the trust deed obligation.

After the execution of the agreement appellant, Dwane Skyes, moved to Utah. The respondent's residence was divided between Florida, California and Brussels, Belgium. All payments made by respondent, except one payment of \$1,000.00, were made by respondent to the escrow bank (Exh. 5).

The monthly payments and periodic lump sum payments were often made late or at different times than called for by the contract, and many payments were made in amounts different than called for. The contract was in default almost from its inception and was seriously in default at the time of the termination, November 11, 1976. (Exh. 5)

Because of the way the payments were made, the fact that respondent was in and between Brussels, Florida and California, and appellants were in Utah, considerable confusion and misunderstanding developed regarding the status of the payments. Appellants in their statement of facts go into considerable detail to show that respondent was deliberately misrepresenting to the appellants the payments he had made and the status of the contract, but a careful reading of the entire transcript indicates the so called misrepresentations were more likely an outgrowth of confusion on the subject and lack of communication between the parties.

Appellants sent written communications to respondent on December 3, 1975, advising that payments were several months behind and on December 29, 1975, advising that the last monthly payments made were for July and August of 1975, and that appellants' loan at the bank was delinquent because of respondent's delinquency and subject to termination which the bank could initiate at any moment. No subsequent written notice

was given to respondent regarding the contract delinquency, and appellants continued to accept late payments.

Between October 3, 1974 and August 2, 1976, respondent made some fourteen payments totaling \$23,216.72 of which \$3,507.38 was in payment of interest and \$19,709.34 was applied to principal. The unpaid contract balance after the August 2, 1976 payment was \$20,290.66.

Respondent testified that in August 1976, he decided to try to refinance the contract, went to the escrow bank in early September and received tentative approval for a loan to pay off the contract; and on October 5, 1976 signed a note, and trust deed for the loan and furnished the bank with an updated title report, a current appraisal and a financial statement. (Exhs. 6, 7) There is a conflict in the testimony as to when the request was made, but respondent called appellant, Dwane Sykes, and advised him of the pending refinancing of the contract and that the bank wanted a written authorization from appellant to use funds paid by the respondent on contract to pay off appellants' trust deed to the bank (R173:4-8; R308:21-29; R309:21-23). Appellant, Dwane Sykes, agreed to give such authorization (although he contended the bank did not need it) after respondent signed a contract for the purchase of two other lots, designated as Lots 13 and 14 (R173:20-26). Appellant agreed to send the contract for the two lots to respondent. There followed a series of phone calls over a period of weeks

from respondent to appellant asking if the contract had been sent, to which calls appellant apologized for the delay and promised to send the contract.

On November 15, 1976, the contract for lots 13 and 14 at a purchase price of \$20,000.00 was received in the mail by respondent who was then in California. Respondent signed the contract on November 16, 1976, and mailed it back that day with his check for \$3,000.00 down payment (R195:6-30) (Exh. 9). Appellant subsequently rejected the offer made by respondent in the contract (R199:17-23) (Exh. 10).

On November 11, 1976, appellants caused a Notice of Termination of the contract on the Musk Ox property (Exh. 4) to be issued and sent to the respondent who received it on November 17, 1976. Appellants closed the escrow at the bank, withdrew the documents and latter recorded the quit claim deed from respondent to appellants which had been part of the escrow documents.

On November 17, 1976, respondent called appellant concerning the Notice of Termination; appellant professed no knowledge of it but later confirmed it had been given because of respondent's delinquency.

Up until the receipt of the Notice of Termination, respondent was telephoning appellant repeatedly attempting to get the authorization requested by the bank to complete the refinancing and pay off the contract. Appellant never gave the requested authorization (R175:9-15; 176:6-20).

The property at the time of the termination was worth as much as it had been sold for to respondent, i.e., \$40,000.00 (R177:23-25).

On February 9, 1977, the bank sent a letter to the appellants advising them that their loan was delinquent and demanding payment of the delinquent amounts within thirty (30) days or the bank would accelerate the obligation and foreclose its trust deed (Exh. 30).

On February 15, 1977, appellants entered into an Earnest Money Agreement for the sale of the Musk Ox property to Johnny Iverson and by a deed dated February 15, 1977 and delivered to Iverson in early April 1977, conveyed the property to Iverson. The purchase price was \$20,663.38 (approximately one-half the value of the property) payable \$8,000.00 cash and assumption of the trust deed obligation at the bank in the amount of \$12,663.38. Johnny Iverson was the brother-in-law of appellants (R302:21-24; R303:17-25).

During the period between the receipt of the Notice of Termination and the agreement to sell the property to Iverson, negotiations were taking place between appellant and respondent to permit respondent to reinstate the delinquent contract. A condition of reinstatement in each instance required respondent to purchase the two other lots, 13 and 14, for \$25,000.00. These are the same lots appellants sent the contract to respondent on for \$20,000.00. Respondent declined to reinstate on those conditions (Exh. 10 and R178:10-30; R179:1-26).

By Notice of Default and Election to Sell dated July 18, 1977, the trustee in the trust deed given to the bank by appellants gave notice that the property would be sold on October 19, 1977 (Exh. 31).

The Musk Ox property was vacant and in its unimproved state would produce no income. According to appellants' testimony the use of the property was worth approximately \$500 to \$600 a year.

POINT I

THE TRIAL COURT PROPERLY APPLIED THE ALASKA LAW ON FORFEITURE AND DAMAGES

Respondent believes that Points II and III of appellants' brief are included in the subject matter of Point I; so, respondent's brief will treat Points I, II and III together.

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 from Utah law.

The trial court was correct in its application of Alaska law and was also correct in concluding Alaska law was not significantly different from Utah law so far as refusing to enforce a forfeiture which would be inequitable.

Utah Courts have adopted some guidelines regarding forfeiture in land purchase contracts which appear to be absent from case law in Alaska, but neither Court has allowed a strict

forfeiture which violated fundamental principles of equity and fair dealing.

In the case of Land Development, Inc. vs. Padgett, 369 P.2d 888 (Alaska 1962) the Court refused to enforce literally the forfeiture provision of the contract and adopted a rule which remains the law in Alaska that where the equities so indicate, the Court is justified in refusing to enforce a forfeiture provision of a contract. In that case, the buyers had paid principal and interest in the amount of \$9,500.00, leaving a balance due on principal of \$2,435.00.

In Jameson vs. Wurtz, 396 P.2d 68 (Alaska 1964) in reversing the lower court which had denied the purchaser specific performance of a long term real estate contract the Court stated at page 74:

"Moreover in Land Development, Inc. vs. Padgett, this Court has established by case rule in Alaska the further principle that where the contract involves land the buyer will be relieved from strict forfeiture if enforcement of the forfeiture would cause a loss to him all out of proportion to any injury that might be sustained by the seller.

In the Jameson case, the Court also stated at Page 74:

"Also to be considered is the principal that equity abhors a forfeiture and will seize upon slight circumstances to relieve a party therefrom. Speaking on this principle the Supreme Court of the United States has said:

'Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made . . . '".

The Court also recognized the legal principle approved by the Supreme Court of Oklahoma in Shull vs. Welch, (387 P.2d 606) that:

"In an equitable action, the presumption is in favor of the correctness of the finding of the trial court, and it will not be set aside unless against the clear weight of the evidence".

In the matter before this Court, the trial court awarded to the appellants compensation of \$3500.00, and interest on the contract balance from the date of the last payment, August 2, 1976 to August 15, 1977, although the contract was terminated November 11, 1976 (R109: 6 a, b, c). This in the opinion of the trial court constituted adequate compensation to the appellant.

In Williams vs. DeLay, 395 P.2d 839 (Alaska 1964), the Court after dealing with points of law and a line of cases from other jurisdictions stated at page 846:

"The foregoing may be acceptable principles of law in their place, but in Alaska we are committed to the rule announced in our decision in the case of Land Development, Inc. vs. Padgett that the trial court may refuse to enforce literally the forfeiture provisions of a real estate contract, for this is a matter of discretion which is directly related to the equities of the situation."

In Moran vs. Holman, 501 P.2d, 769, although (Alaska 1972) the buyer had made only six monthly payments in the course of 16 months and had defaulted in other provisions of the contract, the trial court refused to enforce the forfeiture provisions of the contract. At page 771 the Court states:

"While the Court has so far refused to enforce the forfeiture provisions of an installment land contract only in cases involving more sizeable investments by the vendee prior to the vendor's invocation of the forfeiture, we did not intend in Padgett, DeLay, Jameson, or McCormick to promulgate a purely quantitative rule. Rather, we adopted the position espoused by the United States Supreme Court in Knickerbocker Life Insurance Company vs. Norton, 96 US 234, that

'where adequate compensation can be made - - equity - - discharges the forfeiture, upon such compensation being made'.

"The primary consideration for a Court faced with a choice between specific performance and enforcement of a forfeiture clause was stated well in Ward vs. Union Bond and Trust Company, 243 Federal 2d. 476:

"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 one Alaska case which permits a strict forfeiture is Alaska Placer Company vs. Lee, 455 P.2d 218 (Alaska 1969) and is a case in which the purchase price was \$400,000.00; the buyer had paid only \$2,500.00 and had defaulted in other provisions of the contract. In that case the Court stated at Page 227:

"Considering the very small percentage of the total purchase price paid by Lee, the fact that in prior years Lee had failed to put the mining claims in production, and the fact that appellant was counting

on Lee to produce in 1965, which he did not do, we do not consider it inequitable to enforce the forfeiture clause of the contract according to its terms."

Appellants cite the case of Lonas vs. Metropolitan Mortgage and Securities Company, 432 P.2d 603 (Alaska 1967) as authority for the proposition that the Alaska law allows enforcement of a forfeiture if that remedy is provided in the contract. The case does not go into the matters of the equities involved or the loss sustained by each of the parties in the event of forfeiture. This case really stands for the proposition that a forfeiture provision in a contract, unless made the exclusive remedy by the contract itself, does not exclude the pursuit of any other remedy which the law affords. In that case the Court states 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."

In the instant case, the trial court found that over a period of 22 months respondent made some 14 payments totaling \$23,216.72, leaving an unpaid contract balance of \$20,290.66. The Court then applied the Alaska law and in its discretion denied the enforcement of forfeiture provision of the contract as being inequitable under the circumstances, but in keeping with the Moran and Knickerbocker cases (supra) awarded to the appellants

which the Court considered to be adequate compensation in the matter.

Appellants in point II of their brief contend that notwithstanding the plaintiff's repeated defaults and misrepresentations, the trial court erroneously refused to enforce the contract terms for termination of contract rights.

The trial court did not refuse to enforce the contract terms for termination of contract rights; the trial court allowed the termination to stand but refused to allow appellants to retain all the payments made by respondent as liquidated damages because the Court found that to do so would be an inequitable forfeiture.

Appellants go to considerable detail to show that respondent had not done equity and could not ask the Court to grant equity to him, but appellants in their brief fail to state that up until the termination of the contract, negotiations were taking place between the parties for paying off the contract through respondent's making a loan from the bank.

Respondent notified appellants he had been to the bank to get a loan to pay off the contract and asked respondent to give the bank written authorization, requested by the bank, to use proceeds from the payoff of the contract to pay appellants' obligation to the bank.

The appellants never did furnish the requested authorization. Instead, appellants agreed to send such authorization

after respondent had signed a contract to purchase two other lots. Before the contract on the two lots was received by respondent for signature, the Notice of Termination had already been issued.

One who frustrates the performance of a contract by his own conduct - the setting of conditions he has no legal right to assert - cannot in equity ask the Court to find he comes into Court with clean hands and grant him relief at the expense of the other party.

The trial court had all this before it together with evidence of respondent's defaults and so-called misrepresentations, and based on all the facts concluded that to enforce the forfeiture provision and permit the appellants to take back the property worth as much as it was worth when it was sold to the respondent and to retain the entire \$23,216.72 paid by respondent would be inequitable.

It is respondent's position that when appellants terminated the contract and took the property back they made an election; they knew what they were getting; they knew the trust deed they had given on the property to the bank was delinquent. They then had the property worth at least as much as it had been sold for to respondent; they had some \$23,000.00 of respondent's money. To allow them to retain both would be inequitable.

Appellants argue that to require them to return part of the money paid by respondent would be to reward the defaulting party at the expense of the party not in default.

In arriving at this position, appellants further argue that they were forced to sell the property at half its value or what was owed by respondent on the contract.

Respondent at the trial unsuccessfully objected to evidence of the so-called distress sale, maintaining that the rights and equities of the parties were fixed when the contract was terminated.

But even in the light of such evidence, there are defects in appellants' argument:

1. Appellants did not have to sell the property, at the time they did under the adverse circumstances of wintertime. The Notice of Default and Election to Sell given on behalf of the bank which held appellants' trust deed was not given until July 18, 1977 and the sale, as set in the notice, was not to take place until October 19, 1977. Appellants would have had the time from November 11, 1976, when they terminated the contract, until October 19, 1977 in which to sell the property at a fair price.

2. The purchaser at what the appellants contend to be a distress sale by them for one-half the value of the property was to appellants' brother-in-law. This cannot, in an equity matter be considered as an arms length, fair transaction.

This entire approach is contrary to the principle set forth in the Ward case (supra) that the aim of "proceedings in equity must be to save the parties harmless from loss or damage,

and if just and equitable, place them in the status quo of their contract to permit them to 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 contract". (Emphasis added)

POINT II

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

The Court had before it evidence that respondent in August 1976 decided to try to refinance the contract and went to the escrow bank in early September 1976 and received tentative approval for a loan to pay off the contract and on October 5, 1976, signed a note and trust deed and furnished other requested information and documents to the bank. Respondent called appellant Dwane Sykes and advised him of the pending loan and the payoff of the contract and further advised appellant that the bank wanted written authorization from him to use funds paid by respondent on the contract to pay off the trust deed loan to the bank. Appellant agreed to give such authorization after respondent signed a contract for the purchase of two other tracts of land, lots 13 and 14, for \$20,000.00. Appellant agreed to send the contract for the two lots to respondent. There followed a series of phone calls from respondent to appellant attempting to get appellant to send the contracts to him so he could then get the requested authorization and close his loan at the bank.

On November 15, 1976, the contract for the two lots (Exh. 9) was received in the mail by respondent who was then in California and who signed the contract November 16th and mailed it back with his check for the \$3,000.00 down payment. On November 17, 1976, respondent received the Notice of Termination (Exhibit 4) dated November 11, 1976. Later, respondent's offer to purchase lots 13 and 14, as evidenced by the contract, was rejected by appellants.

Based on this, it was apparent to the trial court, that appellants had in fact frustrated respondent's making a loan to pay off the contract and that appellants terminated the contract while negotiations were going on between the parties relating to the loan and the payment of the contract.

Appellants further contend that after the termination respondent never did tender cash or a cashiers check to anyone to pay the delinquency and reinstate the contract. Respondent refused to reinstate because a condition of reinstatement made by appellants in each instance required respondent to purchase lots 13 and 14 for \$25,000.00; these are the same lots for which the appellant sent the contract to respondent at a purchase price of \$20,000.00. Respondent declined to be forced to purchase the lots at this higher price as a condition of reinstating his contract on the Musk Ox property.

This is but one other facet of the case which the Court had before it in making its decision.

CONCLUSION

The trial court had before it all the facts necessary to make its decision. Based on those facts, it found that under Alaska Law a forfeiture would be inequitable. In arriving at its decision and applying principles of equity it granted to appellants what it considered to be reasonable compensation.

In reviewing the findings and decision of the trial court, the presumption is in favor of the correctness of the finding of the trial court and it will not be set aside unless against the clear weight of the evidence. In this case, there is no clear weight of evidence against the findings made by the Court.

It is respectfully requested that this Court affirm the trial court.

Dated this 15th day of May, 1980.

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief were mailed to M. Dayle Jeffs, JEFFS & JEFFS, 90 North 100 East, P.O. Box 683, Provo, Utah 84601, attorney for appellants, on this 16th day of May, 1980, by placing the same in the United States mail, postage prepaid.

Art Boyer