

1989

W. Kent Brown, David B. Garnder, Glade Southam
and Nolan H. Olsen v. Melvin Keith Burningham,
et al. : Respondent's Petition for Rehearing

Utah Court of Appeals

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CKET NO. 89-501 CA IN THE UTAH COURT OF APPEALS

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W. KENT BROWN, DAVID B. GARDNER,)
GLADE SOUTHAM and NOLAN H. OLSEN,)
Plaintiffs,)
-v-)
MELVIN KEITH BURNINGHAM, et al.)
Defendants.)

RESPONDENT'S PETITION FOR
REHEARING

COMMERCE FINANCIAL, a Utah)
corporation,)
Cross-Claimant and)
Appellant,)
-v-)
MARKWEST CORPORATION,)
Cross-Claim Defendants)
and Respondent.)

890501-CA
Case No. ~~890108~~
Priority 14(b)

COMMERCE FINANCIAL, a Utah)
corporation,)
Third-Party Plaintiff)
and Appellant,)
-v-)
HOWARD H. HUCKS AND DANIEL B.)
HUCKS,)
Third-Party Defendants)
and Respondents.)

APPEAL FROM A FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE RAYMOND S. UNO

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Court
U. T. Macdon

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and Respondents.

STATEMENT OF ADDITIONAL FACTS

The Court of Appeals in its decision has perhaps overlooked a number of critical facts, attributable in part to the complex nature of this case. It is an exceedingly complicated matter. Specifically , the Court of Appeals has more failed to recognize the fact that the principal on the primary construction Note was not paid out in full and in fact never disbursed. In deed that

breach is the source of the ultimate failure of the construction project. The current language of the Opinion, for example, states: "We hold that C.F. is entitled to recover principal loan and interest accrued thereon, as provided in each of the three Notes, from the respective Note Makers." See Page 6 of the Opinion. The Court of Appeals has understandably overlooked the fact that the principal on the construction loan was never lent out or disbursed in full. It certainly does not make any sense to hold the Defendants liable for money they never received. Indeed, it is the understanding from counsel of the Appellant that the Respondents are liable for all money on the Note whether received or not received. This clearly cannot be the holding of the Court of Appeals.

Second, the Opinion on page 6 also states that "1. Appellees were not entitled to recover damages for the breach of C.F." In fact, the Court had found that C.F. had breached the terms of the Contract, but the price of a fully developed lot would be too speculative. It is clear from the evidence in the Memorandum Decisions of Judge Raymond S. Uno that there should be damages, but that the damages would be difficult to ascertain. An appropriate manner of dealing with this case would be to remand and allow for additional testimony regarding some form of damages. It is clear that Markwest and Howard Hucks had been damaged and that an offset should occur. The Trial Court merely found that that was a speculative amount. It would turn justice on its head if the quid

pro quo envisioned by the Court in order to deal with the speculative nature of the damages should be overturned so as to ignore one person's damages when they clearly exist, and reward the other side because of the other side's misfortune in this regard. Consequently, this matter should be remanded to the trial court for further findings regarding the damages that the Hucks sustained.

In addition, the Opinion does not address the facts cited by the Memorandum Decision of Judge Uno that Howard Hucks no longer had the ability to legitimately seek alternate financing. Consequently, the holding in Utah Farm Production Credit Association vs. Cox; 627 P.2d 62 (Utah 1981) can be and should be distinguished upon the grounds that it would be impossible for Howard Hucks to have mitigated his damages by finding alternate financing. The Court of Appeals should therefore consider the effect of someone in the position of Howard Hucks and Markwest, who no longer having the ability to seek alternate financing, would therefore be denied an offset for damages caused by a lender's breach of an agreement.

Finally, the Opinion does not address the nature of the overall financing scheme. The notes were restricted by various contingencies and conditions that were not met. There were additional agreements and conditions regarding these Notes which have not been dealt with either in the Opinion or the Briefs, but were dealt with by Judge Raymond S. Uno. The Notes should be

viewed only in the context of these later agreements which modified and made contingent their demand.

SUMMARY OF ARGUMENT

The Respondent respectfully suggests to the Court of Appeals that it may have overlooked the fact that its holding requires Howard Hucks and Markwest to pay for all monies received on the Notes and not merely the amounts that were disbursed. The Court of Appeals should certainly modify its holding to require only the repayment of funds that were actually disbursed. To do otherwise would be a severe injustice.

Second, the Respondent would emphasize the fact that it was found to have been damaged by C.F.'s breach of the Contract, but that the Court did not feel obliged to deal with the uncertainties and difficulties of ascertaining how much would have been recovered on a sale of the property. Certainly some fund would have, in addition to what was received, at forecloser been produced from the completion of the project. The matter should be remanded to the Court in order to determine what kind of damages should be provided to offset whatever damages Commercial Finance may have.

Thirdly, Utah Farm Production Credit Association vs. Cox should be distinguished on one essential element: The Respondents Howard Hucks and Markwest were unable and it was impossible for

them to seek alternate financing under the circumstances. The Respondents should not be so severely penalized for not seeking alternative financing when it is obvious under the circumstances that that would be an utter and complete waste of time.

Fourth and finally, the Court of Appeals should re-evaluate this extremely complex set of facts in the context of the various contingencies and conditions established by the parties regarding these Notes and duties of each of the parties. These facts have not been dealt with at any extent by the Opinion. An adequate regard for them may in fact change the Court's Opinion regarding this matter.

ARGUMENT

I

THE APPELLANT COMMERCIAL FINANCE DID NOT
DISBURSE OR GIVE TO RESPONDENTS THE ENTIRE AMOUNT
OF THE NOTE AND THE RESPONDENTS CANNOT THEREFORE BE LIABLE
FOR MONIES THEY HAVE NEVER RECEIVED BECAUSE OF A
BREACH OF THE APPELLANT

This Argument is simply to emphasize the fact that the Opinion, as it now stands, requires the Respondents to pay the Appellants the full amount of the three (3) construction Notes, a staggering sum, in spite of the fact that the Appellants never paid the full amount of the Note. Appellant, infact, breached the Agreement by their failure to pay beyond a certain amount. Communications from counsel for the Appellant have in fact conveyed

this fact but as Judge Uno pointed out on page 17 of his Memorandum Decision "but in view of the foregoing facts, they cannot sue for money that they never paid out." It is indeed an inappropriate and injustate of facts if Commercial Finance is permitted to sue for money that it never paid out and that it was breaching the terms of a Contract and Agreement by not paying out. They would doubly have benefited from their wrongdoing.

Therefore, the Court of Appeals should require a remand to determine what amounts were actually paid or to simply incorporate what evidence was proffered as to what amounts were paid.

II

THE COURT OF APPEALS SHOULD REMAND THIS MATTER TO DISCOVER WHAT HOWARD HUCKS' AND MARKWEST'S DAMAGES ACTUALLY WERE

The nature of Judge Uno's Judgment, after he had reviewed all the facts and a three-day trial, amounted to finding that Commercial Finance had breached the Agreement and that Howard Hucks and Markwest had been damaged. They lost an entire development, all chance for profits and any opportunity to pay off on these Notes. However, Judge Uno opted for a more equitable resolution of the matter by finding that the amounts that may have been due on the Notes were offset by the Appellant's breach. A simple solution to a complex problem. However, it is clear that Howard Hucks and Markwest were damaged by their inability to finish the

project. They would have had a greatly enhanced development project available for sale if it could have been completed. It was clear that it was in large part, Commercial Finance's fault for the failure of it to be completed. That has damaged Howard Hucks and Markwest. The current Opinion makes no accommodation for that fact. It would be just and appropriate that some account be given to Markwest and Howard Hucks for the damages that they did receive. The Trial Court was beset with an extremely difficult problem of finding damages. Testimony and evidence was presented by the Respondents regarding prices and damages, but the Trial Court chose to take another alternative. The Respondents should not be penalized because of the Trial Court's choice in remedies.

Finally, Commercial Finance would be able to benefit from their improper behavior, and Howard Hucks and Markwest would be victimized by Commercial Finance's unilateral decision to stop giving funds to construction project, used to develop the property. It is certainly undeniable that the value of the property would have been enhanced if construction would have continued, even if profits may not have been found. It is not speculative that the value of the property would have been enhanced by continued work. Therefore, justice requires that this matter be remanded to find what the damages of Markwest and Howard Hucks would have been. Otherwise, Commercial Finance would be rewarded for their wrongful actions and Howard Hucks and Markwest will be stuck in a Catch-22.

III

THE FAILURE TO FIND ALTERNATE FINANCING IS EXCUSABLE WHEN IT IS IMPOSSIBLE TO GET ALTERNATE FINANCING

The rule in Utah Farm Production Credit Association vs. Cox was basically that failure to seek alternate financing sources preclude special damages, including loss profits, by the damaged individual. The Respondents would point out that the evidence and Memorandum Decision in that trial indicated that seeking alternate financing would have amounted to tilting at windmills. It is a basic principal of contract law that a person should not be required to carry out or attempt things that are impossible. It would be elevating form over substance to require Howard Hucks and Markwest to seek alternate financing under these circumstances and then arbitrarily impose a penalty on them for recognizing the impossibility of seeking alternate financing. Quite simply, the Court should imply a requirement of reasonableness into seeking alternate financing. Evidence should be permitted upon remand to find out whether a reasonable person would have pursued alternate financing considering their dire financial circumstances.

IV

THE DAMAGES IN THE COX CASE WERE SPECIAL DAMAGES,
THE DAMAGES IN THIS CASE INCLUDE DAMAGES NOT REQUIRING
SPECIAL DAMAGES

The Court of Appeals' Opinion includes in its decision the position that, under Cox, a failure to pursue alternate financing preclude special damages, including loss profits. However, the holding of the Appeals Court is overbroad in that it fails to recognize that the damages of Markwest and Howard Hucks includes damages that do not include profits. This means that Howard Hucks and Markwest should be allowed to produce what the reasonable market value of the property would have been if they were allowed to complete it. This would not include such amounts for damages which may have been found by discovering very favorable buyers. However, damages should include the reasonable increase in value caused by the completion of the project. That is clearly the holding in Utah Farm Production Credit Association vs. Cox.

V

THE COURT OF APPEALS' OPINION DOES NOT CONSIDER
THE CONDITIONS AND CONTINGENCIES ESTABLISHED
BY THE PARTY REGARDING THE NOTES AND DISBURSEMENTS

The Court of Appeals' Opinion fails to take into count the various conditions and contingencies agreed to by the parties over the term of the construction and Note. Without this information, it is unable to analyze the entire matter completely. The Trial

Court did in fact make a number of findings regarding this matter.

However, the Opinion simply deals with the blank aspects of the Notes and the breach by Commercial Finance. A proper disposition of this matter should be a remand that incorporates what these conditions and contingencies were. As it stands, the Opinion by the Court of Appeals does not deal with these issues whatsoever.

VI

CONCLUSION

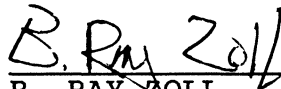
The Respondents respectfully request that the Court of Appeals set this matter for resubmittal and hearing upon the issues above mentioned. In the alternative, the Respondents request that that the Opinion and holding modified to provide for a remand based upon the points made by the Respondents above. Specifically, the Respondents request that the Court of Appeals remand to find what amounts were actually disbursed, what the damages of Howard Hucks and Markwest were. Finally, the Respondent would request an affirmation of the Judgment based upon the fact that it was impossible for Markwest and Howard Hucks to find alternative financing or that their damages, not including loss profits, would exceed the value disbursed by Commercial Finance.

CERTIFICATION OF COUNSEL FOR THE PETITIONER

Counsel for the Petitioner hereby certifies that this Petition is presented in good faith and not for delay.

Respectfully submitted this 1st day of October, 1990.

ZOLL & BRANCH



B. RAY ZOLL
Attorney for Respondents
Howard Hucks and Markwest

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, on this 1st day of May, 1990, to:

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