

1989

Valley Bank and Trust Company v. Wesley Sine : Reply Brief

Utah Court of Appeals

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OF APPEALS
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DOCUMENT

890-592-CA

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,
Plaintiff/Appellee,
v.
WESLEY SINE,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT
Docket No. 890592-CA
District No. C88-0907962CV
Priority Classification 14b

* * * *

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON PRESIDING
POURED OVER FROM UTAH SUPREME COURT (#890343)

* * * *

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ED

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SUMMARY OF ARGUMENT

Valley has skirted many of the arguments in Sine's opening brief. Its philosophy appears to be one of ignoring the lower court's errors, since it feels entitled to win and did. To argue that "all's well that ends well" does not work in this case. Valley cannot, under law or equity, agree to bid the full debt, extract a promise that Sine would not attend the sale, arbitrarily bid in a lower amount and then be awarded judgment for the \$340,000 difference.

Valley had the right to pursue Sine directly. But by electing to dispose of the collateral by sheriff sale, Valley subjected itself to the statutory requirements for seeking a deficiency.

ARGUMENT

1. A trial is needed to determine the facts. Valley's listing of facts is revealing. Br. pp. 6-7. Paragraphs 15 through 18 decry a need for evidence on various issues. Paragraph 19 sets forth the following facts relating to the Se Rancho Motel which are admittedly "not in the record":

- a. that redemptive rights were granted to Sines,
- b. that those rights were not exercised,

- c. that Valley has attempted to sell the motel,
- d. that those sales efforts have not succeeded,
- e. that Valley is leasing the motel to Sines.

Valley must feel these are material to the appeal or they would not have been set forth in its brief. If there are facts not in the record which the moving party feels are material, one must question whether that party should have been awarded summary judgment.

Paragraph 20 of the response brief begrudgingly concedes that Valley has admitted that it "agreed to do certain things." Br. p. 7. Of course those "things" are to bid in the amount of the debt, costs and attorney fees. Without skipping a beat, Valley then "disagrees with the statements" in the affidavits of Sine and Cundick. Appendix IV to opening brief. Valley then, without specifics, accuses Sine of mischaracterizing its own affidavits. Even though Valley says for purposes of the appeal that it "agreed" to stay away from the sale, Br. p. 7., Sine is punished repeatedly by Valley for precisely the same terminology. Br. pp. 7, 8, 15, 17, 18 and 23.

Clearly the record lacks necessary richness. Trial is necessary to determine the various issues. This problem is underlined by the fact Valley failed to respond to Sine's point # 4, "Trial is needed to determine the nature of the new oral agreement." So in addition to legal error, factual issues prevent summary judgment.

Valley has rightly invited the Court to "determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." Br. p. 10.

2. Valley essentially admits lower court error. For example, it states, "Though the language of the Summary Decision is somewhat ambiguous, the district court did not make a specific finding that Valley's statement constituted an agreement." Posing this problem points again to the need for trial and fact-finding. Valley calls the Summary Decision "ambiguous", and feels the need to torture its wording to support its victory. The decision is Appendix II of Sine's opening brief and Addendum A to Valley's response. Valley drafted no further written decision for the court to consider--only a judgment.

Then comes the following charge: "Valley argues that to the extent the district court implied the existence of an oral agreement as the basis for its ruling, such implication is unfounded and erroneous." Br. p. 11. If both parties find error, reversal is warranted. And a trial is needed if Valley itself is unsure whether the lower court based its decision on existence of an agreement. Finally, Valley failed to cross appeal and raise its point of error.

3. A deficiency is barred by the plain language of § 57-1-32, Utah Code. Despite lack of authority to support its position, Valley states that the statute does not apply to enforcement of a guarantee. Br. pp. 13-15.

Valley's nonresponsiveness to Sine's arguments is especially noticeable on the subject of its failure to comply with this statute. The following points are included in Sine's brief (pp. 7-12), but remain unrebutted for the most part:

10. The judgment is invalid for failure to comply with § 57-1-32.

11. The plain language of § 57-1-32 is broad and without exception.

12. It would be unfair and contrary to § 57-1-32 to allow a deficiency judgment under these circumstances.

Valley fails to directly refute these points, but seems to ask the Court to look past the plain language of the statute. § 57-1-32 provides as follows:

At any time within three months after any sale of property under a trust deed, as hereinafter provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering the judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. . . .

§ 57-1-32, Utah Code (1986) (emphasis altered from original). The highlighted portions are those which were not complied with by Valley and the lower court. The complaint was brought too soon, it lacked the required allegations and the court did not make the required findings.

"[T]he plain language of the statute [is that] . . . if the beneficiary of a trust deed elects to foreclose non-judicially, is owed a deficiency following application of the sale proceeds, and wishes to obtain a deficiency judgment," the statutory procedure must be followed "or any claim to a deficiency is waived." G. Adams Ltd. Partnership v. Durbano, 121 Utah Adv. Rep. 20 (Ct. App. Nov. 8, 1989). Valley waived its deficiency, since more than three months have passed since the sale and a proper deficiency action has not been brought.

The statute does not in any way limit its effect to a deficiency lawsuit against the principal debtor. It applies to **"any sale of property under a trust deed"** as provided in the statutes on trust deed foreclosure. § 57-1-32, Utah Code (1986). Valley's nonjudicial sheriff sale must have been by authority of those provisions, or it was without any authority at all.

If such a sale occurs, a deficiency is allowed only as provided in § 57-1-32, Utah Code. Valley is not required to comply with that statute. It must comply, though, if it chooses to foreclose independently and deny the debtors the protection

of the courts. "[S]ection 57-1-32 provides the exclusive procedure for securing a deficiency judgment following a trustee's sale of the real property under a trust deed." Cox v. Green, 696 P.2d 1207, 1208 (Utah 1985).

The statute does not differentiate between principal debtors and guarantors. Valley reads the difference into it, despite the clear wording. Valley's observation that Sine was not the maker of the note or the giver of security is of no significance under the wording of the statute.

Statutory terms are used advisedly, and should be given an interpretation and application which is in accord with their usually accepted meaning. Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030 (Utah 1983). Literal wording controls the interpretation. Cox Rock Products v. Walker Pipeline Constr., 754 P.2d 672 Utah App. 1988; Gleave v. Denver & Rio Grande Western R. Co., 749 P.2d 660, Cert. denied, 765 P.2d 1278 (Utah App. 1988). "Plain meaning" will not be ignored in favor of some effort to divine legislative intent. Allisen v. American Legion Post No. 245, 763 P.2d 806 (Utah 1988).

4. Valley dodged the point on this issue. Its short treatment of § 57-1-32 depends entirely on the case of Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982). But that case is not on point. It merely makes the

obvious point that an unconditional guarantee of payment allows the creditor to proceed against the guarantor without exhausting its remedies against the principal. 646 P.2d at 743-744. But this is not the issue.

The issue is whether, having elected to exhaust its self help remedies within the trust deed statute, Valley can ignore the applicable limitations and sue for a deficiency. Since a deficiency is only possible within the statute, the issue must be resolved in the negative. This issue is not treated even remotely by Strevell-Paterson.

But that case does provide a helpful analogy, citing to FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah 1979), cited by Strevell-Paterson, 646 P.2d at 743. FMA construed § 70A-9-504(3), the Uniform Commercial Code provision requiring creditors to give notice to the "debtor" in order to accomplish a commercially reasonable nonjudicial sale of collateral. "Debtor" was held to include a mere guarantor, and no deficiency was possible unless the guarantor was given reasonable notice of the sale. 590 P.2d at 807. Like the trust deed statute at issue here, the UCC provision litigated in FMA does not even mention guarantors. But they are included nevertheless.

The purpose of the notice requirement is for the protection of the debtor [which includes the guarantor], by permitting him to bid at the sale, or arrange for interested parties to bid, and to otherwise assure that the sale is conducted in a commercially reasonable manner. The danger resulting from not notifying the debtor of the sale of secured property is that the property may be

sold for an amount unreasonably below its market value, burdening the debtor with liability for the deficiency.

FMA, 590 P.2d at 807 (bracketed portion added). The same "plain meaning" statutory construction applies. The same public policy--avoiding an absolute bidding power by the creditor, which would in turn produce an arbitrary deficiency judgment--applies to both statutes. In FMA the guarantor was not properly notified of the sale, so no judgment against him was possible.

5. The affidavits establish an agreement for Valley to bid the full debt. Valley's point III contends to the contrary. Br. p. 15-16. But it really amounts to an argument for a trial to determine whether an agreement was formed. And as indicated above, Valley has admitted in connection with this promise that it "agreed to do certain things." Br. p. 7.

According to Sine's affidavit, Valley's representative stated: "I need not worry that Valley Bank would bid on the property at the amount owed on the note plus interest, costs and attorney fees." Opening Br., Appendix IV ¶ 3, R. 057. He continues, "I was asked if I planned to attend the sale. Relying upon this assurance from Mr. Doctorman and Mr. Zollinger I told them I probably would not and did not. . . ." Id ¶ 4, R. 058.

Mr. Cundick's affidavit states, "in response to concerns raised by Mr. Sine, Mr. Doctorman represented that at the

sheriff's sale . . . Valley Bank would bid on the property at the amount owed, plus interest, plus attorney fees." Id. at ¶ 5, R. 059.

Valley merely argues semantics when it calls the assurance something other than an "agreement." A question on this issue, if relevant, would be for the fact finder to determine. A conflict as to the terms the parties intended to include in an agreement presents a factual question for the jury. Hays v. Underwood, 411 P.2d 717, 720-721, 196 Kan. 265 (1966).

Valley's suggestion that this Court should view Valley's statement "in context" (Br. p. 16) is another invitation for a trial to determine the proper context. Valley may not ask this court, and should not have asked the trial court on summary judgment, to weigh the facts.

Valley also asks this Court to delve into whether there was an offer, acceptance and consideration. Br. pp. 16-17. This is still another factual inquiry that should have been made at trial. The affidavits indicate Valley offered to Sine that Valley would bid in the whole debt (thereby extinguishing it). Sine both stated his acceptance, and refrained from attendance or efforts to find bidders.

Valley argues that there is a lack of is proper consideration, despite the holding of the trial court that "there is consideration for the oral agreement in the form of

defendant's purported failure to attend or encourage others to attend the trustee's sale. . . ." Summary Decision, Opening Br. Appendix II, Response Br. Addendum A, p. 3, R. 090. The effort to make a controversy on this issue shows that a trial is needed to examine consideration and/or the lower court decision was ambiguous. Again, Valley failed to preserve its disagreement with the finding of consideration by cross-appealing.

So consideration for the promise lies in the detriment to Valley of losing a deficiency right on the one hand, and a detriment to Sine in absenting himself from a sale he had the right to attend on the other. In response, Valley asserts that Sine could not have bid or found a bidder. Evidence in support of such an argument was not presented by affidavit and no trial was had to receive it.

6. The agreement is not covered by the statute of frauds. Valley also fails to properly respond to Sine's arguments on this issue. Compare Opening Br. pp. 2, 7 with Response Br. pp. 19-20. Sine incorporates his arguments on this point by reference, as it is inappropriate to rehash them in a reply brief. Points 2, 3 and 9.

Once again, for this point Valley relies exclusively on Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982). That case does not apply here either. It states that a release of a guarantee is covered by the statute of frauds. 646 P.2d at 742.

But here the unconditional, open-ended guarantee was not released. It is true that the agreement to bid in the full debt extinguished the guaranteed debt, making judgment in this case impossible. But it does not change the nature of the guarantee. If Valley were to lend additional funds to Sine's parents, his guarantee would likely still be in effect. No one has argued that the guarantee itself was released. Valley has emphasized repeatedly that it is continuing in nature. But obviously Sine would be Valley's debtor only to the extent there remains a debt owing which may be guaranteed.

Of course even if this agreement were otherwise covered by the statute of frauds, part performance, waiver and estoppel take it outside the statute.

7. Part performance may be considered. One of the first arguments Valley makes is that the lower court made an error--that it was right to hold for Valley but may have done so on an incorrect basis. Br. p. 11. Valley urges that this Court may affirm the decision on a ground raised for the first time on appeal. Id. Yet later Valley asserts that the doctrine of part performance was not raised by Sine below and so may not be considered on appeal. Br. p. 20-22.

This is an unusual case for Valley to complain that part performance was not raised in answer to its complaint for the following reasons, among others:

a. The action was filed December 13, and a return of

service was filed December 29, 1989. R. 006. This is the same day Sine's performance (not attending the sheriff sale) occurred. Is it surprising part performance was not set forth in the answer as specifically as Valley would like?

b. The complaint did not allege a statute of frauds issue, making it impossible to raise part performance as a defense in the answer.

c. The answer does raise "settlement" and "accord and satisfaction" in its Third Defense. R. 009. This is sufficient notice pleading to raise the fact the parties agreed to extinguish the debt.

Valley argues (Br. p. 24) that part performance may not be discussed here; that Valley's action is "at law" and part performance is "purely equitable in nature." Yet it is Valley who relies upon the statute of frauds to escape a promise it must have later regretted. Is Valley asserting that the statute of frauds can be raised in this case, but avoidance of it cannot? The statute of frauds itself states: "Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." § 25-5-8, Utah Code.

The part performance exception is well recognized. Coleman v. Dillman, 624 P.2d 713, 715 (Utah 1981). In Baldwin v. Vantage Corp., 676 P.2d 413 (Utah 1984), both parties had admitted the existence of the oral contract, as they do in this

appeal. Some partial payments for the real estate involved. "This part performance was sufficient to remove the contract from the statute of frauds under these circumstances where the existence of the contract was admitted." 676 P.2d at 417.

8. **Part performance was timely raised.** Valley states that Sine did not claim part performance in his response to Valley's summary judgment motion. Actually, the agreement to bid in the full debt was described. Defendant's Response to Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, R. 052. "In reliance upon that agreement defendant did not attend the trustee[']s sale, did not bid at that sale [or] make efforts to have others bid at that sale." Id. See also Sine and Cundick affidavits, attached to the Response. R. 057-060. Sine's performance, then, was fully described shortly after the performance occurred. Apparently Valley quibbles with failure to identify the doctrine by name. Not only is this unnecessary, but it would be absurd to expect it, since the statute of frauds defense was not even raised by Valley until later.

The statute of frauds first became part of this case until Valley's reply memorandum. So Sine had no pleading in which to restate its part performance theory before summary judgment was issued. It was, however, specifically argued in Sine's Objection to Order, Motion for a New Trial or to Correct Decision and Memorandum of Authorities. R. 92-94. This motion

was filed within the ten days permitted by Rule 59(b), URCP. The motion was based in part on Rule 59(a)(7) (new trial permitted for error in law). Even the portion of Sine's document which objected to the order attacked its substance, not its form. So the five day limitation of Rule 4-504(2), Code of Judicial Administration does not apply.

The important fact is that Sine described the part performance in his first memorandum and affidavit, then specifically labeled it as such in his next pleading: the motion for a new trial or to reconsider. The trial court had ample opportunity to consider the doctrine's applicability to the facts. The court had much more notice and opportunity to consider the facts and theory of part performance than was true in Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1045 (Utah 1983). A matter is sufficiently raised to preserve it for appeal if it has been submitted to the trial court, which has had an opportunity to consider it and rule upon it. See, James v. Preston, 746 P.2d 799 (Utah App. 1987).

Defendants also contend that the plaintiffs raise in their brief in this court for the first time matters which were not presented to the district court, and hence should not be considered here. The principle is correct. But its application here is not. Upon examination we find that, though the pleadings and submissions speak in generality, the critical matters recited above pertaining to the plaintiffs' claim of fraud were sufficiently set forth in the pleadings, affidavits and depositions.

Rich v. McGovern, 551 P.2d 1266, 1268 (Utah 1976).

9. Promissory estoppel was timely raised. Valley's argument to the contrary (point 8 above) misses the mark for the same reasons as its argument that part performance was not timely raised. Sine's arguments in response to that argument are incorporated herein.

Valley admits estoppel was raised in Sine's answer, as its Second Defense. R. 009. In paragraph 3 of Defendant's Response to Plaintiff's Motion for Summary Judgment Sine sets forth Valley's assurance about bidding at the trustee's sale, and that Sine stayed away and refrained from seeking bidders "[i]n reliance upon that agreement." R. 052. The affidavits attached gave more detail on the promise and reliance.

The Supplemental Affidavit of Wesley Sine (filed a month before the decision was rendered in this case) stated in part:

As indicated in his prior affidavit herein, Affiant change[d] his position in a material and substantial way by not attending the trustee's sale and not attempting to obtain higher bidders at that sale in reliance upon plaintiff's assurances that plaintiff would be the full amount owed to plaintiff and that there would be no claim of a deficiency. Affiant believes that plaintiff is therefor estopped to assert the Statute of Frauds, lack of consideration, or other defenses to the enforceability of said oral agreement.

R. 074, ¶ 2. A copy of the Supplemental Affidavit is attached hereto as Appendix I.

The Summary Decision of the court even acknowledges that one of the grounds for Sine's opposition to summary judgment was that "plaintiff orally waived a claim for deficiency judgment and is thus estopped from proceeding against defendant." R. 088, Appendix II, Opening Brief, Addendum A, Valley's Response Brief. The court went on to override the estoppel theory and invalidate the agreement under the statute of frauds, without explaining why estoppel did not apply.

Finally, estoppel was argued again in the post judgment motion discussed above. R. 093, ¶ 3. How can Valley argue with a straight face that Sine "failed to raise the defense of promissory estoppel"? Br. p. 26-27.

Valley argues that promissory estoppel cannot prevail because it is not convinced the promise to bid the full debt in fact caused Sine's reliance, and is not convinced Sine could have bid or found a bidder. Br. pp. 28-29. These are merely factual doubts, and are not arguments in support of dismissal on summary judgment.

CONCLUSION

Valley is stuck with the plain meaning of the statute on deficiency judgments. Having made no effort to comply when it arbitrarily credit bid about \$840,000, Valley will have to be satisfied with ownership of the motel.

Valley agreed or represented its bid would vitiate a deficiency judgment, lulling Sine into complacency. The agreement was to wipe out the debt, not release the guarantee itself. So the statute of frauds does not apply. Even if it did, Valley cannot avoid its promise with impunity, since estoppel, waiver and part performance take it out of the statute of frauds. The decision should be reversed and/or remanded for trial.

Respectfully so requested March 19, 1990.

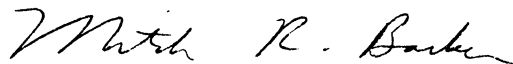


Ronald C. Barker
Mitchell R. Barker
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 1990 I caused to be hand delivered or mailed, postage prepaid, the original and seven copies of the foregoing to the office of the Clerk of the Utah Court of Appeals, and that I caused four true and correct copies of the foregoing to also be served by postage prepaid mail or hand delivery to the following at the address indicated:

Gary Doctorman, Esq.
50 West Broadway
Fourth Floor
Salt Lake City, Utah 84101



Mitchell R. Barker

APPENDIX I

Supplemental Affidavit of Wesley Sine

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Debbie Youngling

THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH

---ooOoo---

VALLEY BANK & TRUST COMPANY,)
 Plaintiff,)
 SUPPLEMENTAL AFFIDAVIT OF
vs. WESLEY SINE
WESLEY SINE, Case No. C88-0907962CV
 Defendant.) Judge Michael Murphy

---ooOoo---

A F F I D A V I T

STATE OF UTAH)
 : ss.
County of Salt Lake)

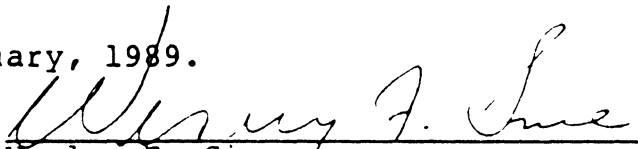
WESLEY SINE, being first duly sworn, on his oath deposes and says that he is the defendant in the above entitled action; that he has personal knowledge concerning each of the following statements and is competent to testify with respect thereto except as otherwise noted:

1. That Jerry Sine Investments is a general partnership whose partners are Jerry Sine and Dora Sine. Said partnership has existed for many years and has regularly filed partnership tax returns with the State of Utah and with the Internal Revenue Service. Plaintiff and its counsel are well aware of that partnership since the same counsel for plaintiff herein also appeared as

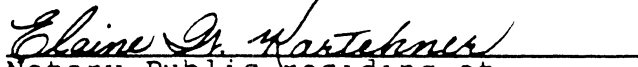
counsel for Valley Bank & Trust Company in a Chapter 11 Bankruptcy proceeding involving said partnership.

2. As indicated in his prior affidavit herein, Affiant changes his position in a material and substantial way by not attending the trustee's sale and not attempting to obtain higher bidders at that sale in reliance upon plaintiff's assurances that plaintiff would bid the full amount owed to plaintiff and that there would be no claim of a deficiency. Affiant believes that plaintiff is therefore estopped to assert Statute of Frauds, lack of consideration, or other defenses to the enforceability of said oral agreement.

Dated the 22nd day of February, 1989.


Wesley F. Sine

Subscribed and sworn to before me the 22nd day of February, 1989.

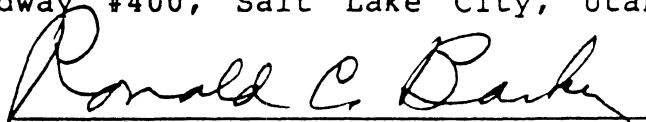

Notary Public residing at
Salt Lake City, Utah

My commission expires: August 15, 1991.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, the 22nd day of February, 1989, to each of the following persons at the addresses indicated:

Gary Doctorman, Esq. and Elizabeth S. Whitney, Esq., BIELE, HASLAM & HATCH, 50 West Broadway #400, Salt Lake City, Utah 84101.


Ronald C. Barker