

1988

Janet K. Jones v. Mark T. Johnson : Brief of Appellant

Utah Supreme Court

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Edward K. Brass; attorney for appellant.

Richard W. Perkins; Perkins, Schwobe and McLachlan; attorney for respondent.

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UTAH COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH
88-0251-CA

JANET K. JONES,)
)
Plaintiff-Appellant,)
)
vs.)
)
MARK T. JOHNSON,)
)
Defendant-Respondent.)

Case No. 860182

88-0251-CA

BRIEF OF APPELLANT

Appeal from a judgment of the Honorable Dean E. Conder,
District Judge of the Third Judicial District in and for Salt
Lake County, State of Utah, declaring a transaction between the
parties to not be unconscionable.

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JUL 28 1986

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JANET K. JONES,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 860182
)	
MARK T. JOHNSON,)	
)	
Defendant-Respondent.)	

BRIEF OF APPELLANT

ISSUE PRESENTED ON APPEAL

The sole issue on appeal is whether the transaction between the parties is unconscionable.

STATEMENT OF FACTS

On January 14, 1982, the appellant was the owner of a home in West Valley City, Utah, with a value of \$40,000.00 (R. 159). She was in default in payments on a trust deed in the sum of \$3,016.58 (R. 139). The respondent learned of the default by public records and sent an unsolicited letter to the appellant offering assistance in avoiding the foreclosure (R. 128). The appellant did not respond to the letter, but nevertheless, the respondent drove to her home to pursue the matter further (R. 173).

The meeting in the appellant's home produced an agreement on a form drafted by the respondent whereby she agreed to sell her home to the respondent for \$10.00 (R. 141). In return, the respondent would cure the \$3,016.58 default, assume

the \$13,816.00 loan balance and lease the home back to the appellant for \$179.00 per month, the amount of her mortgage payment (R. 120, 142).

The appellant had the option to repurchase the home for \$21,700.00 13 months later. However, if she missed one rental payment, the option would be void (R. 142). Jones immediately fell behind in rent (R. 122). Rent was then increased to \$280.00 per month (R. 148). She again fell behind and was evicted from the home (R. 123-124).

It is not disputed that at the time of the transaction Jones was an unemployed single mother dependent on child support, and the respondent was an experienced mortgage banker with a degree from Brigham Young University.

SUMMARY OF ARGUMENT

The disparity in the parties' bargaining positions and in the obligations imposed on them under the transaction is so great as to render the transaction unconscionable.

ARGUMENT

THE TRANSACTION IS UNCONSCIONABLE

On January 14, 1982, the appellant owned a home with an equity above the \$13,816.00 loan balance of \$26,184.00. She was unemployed and dependent on child support. The respondent purchased her home for \$10.00. He was also to make up the \$3,000.00 arrearage. The appellant then was to "rent" her home for the \$179.00 mortgage payment which she had been unable to make in the past. If she succeeded, she could repurchase the home for \$21,700.00. If she failed, she lost the home. At

worst, for this \$3,010.00 investment, the respondent was guaranteed a \$5,000.00 profit if Jones could somehow repurchase her home. At best, the first time she missed a monthly payment, the respondent would gain a house with an equity in excess of \$26,000.00. To support such a transaction would be unconscionable.

The appellant does not claim that the transaction was fraudulent. The documents are clear. Unconscionability is a different concept, as was explained in Resource Management Company v. Weston Ranch and Livestock Company, Inc., 706 P.2d 1028 (Utah, 1985). The Court observed, ". . .if a contract is unconscionable, in whole or in part, the Court may, on equitable grounds, refuse to enforce the unconscionable provisions, or it may construe the contract to avoid an unconscionable result," Id. at 1040. "The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by the parties," Id. at 1042.

Two distinct aspects of unconscionability were found, procedural and substantive, either of which would be sufficient to invalidate a contract, Id. at 1041. "Substantive unconscionability examines the relative fairness of the obligations assumed, Id. It is evidenced by ". . .terms so one-sided as to oppress or unfairly surprise an innocent party [citations omitted]. . .an overall imbalance in the obligations and rights imposed by the bargain [citations omitted]. . .or significant cost-price disparity [citations omitted]." Procedural unconscionability was defined as the ". . .absence of meaningful

choice," indices of which include ". . .use of printed form . . .drawn by the party in the strongest economic position . . .minimizing key contractual provisions by deceptive sales practices. . .lack of opportunity for meaningful negotiation . . .whether the aggrieved party was compelled to accept the terms. . .and exploitation of the underprivileged, unsophisticated, uneducated, and illiterate," Id. at 1041-1042.

Both aspects of unconscionability are present here. Substantively, there is a great "imbalance in the obligations and rights imposed," and a "significant cost-price disparity." Jones, who had already proven she could not make her mortgage payments, was expected to make those payments for 13 months. The respondent merely had to make one \$3,000.00 payment and then wait to see how Jones performed. If, by some miracle, she succeeded, the respondent was guaranteed a \$5,000.00 profit. If she failed, the more likely result, the respondent would receive the home and the equity. The value of the property the respondent received was grossly disproportionate to the cost.

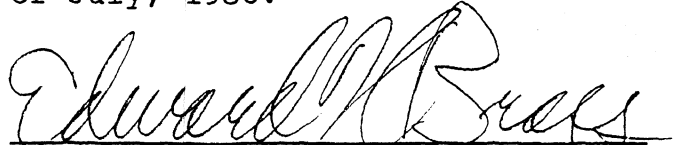
The elements of procedural unconscionability are readily apparent. "A printed form contract drawn by the party in the strongest economic position" was used by the respondent. There was no "opportunity for meaningful negotiation," the appellant was desperate and the respondent came to her home where she lived alone with her children and where legal counsel could not participate. Mrs. Jones believed she was "compelled to accept the terms" by her circumstances. Finally, to affirm this transaction would be to condone the "exploitation of the under-

privileged, unsophisticated and uneducated. . . ." It cannot be underemphasized that at the moment this transaction was completed, Janet Jones was a single, uneducated mother dependent on child support while the respondent was a college-educated mortgage banker who was making a living by preying on the fears of people about to lose their homes. He sought out Jones without her invitation, bought her home for \$10.00 and evicted her when she could not pay the rent. Equity cries out for this transaction to be nullified.

CONCLUSION

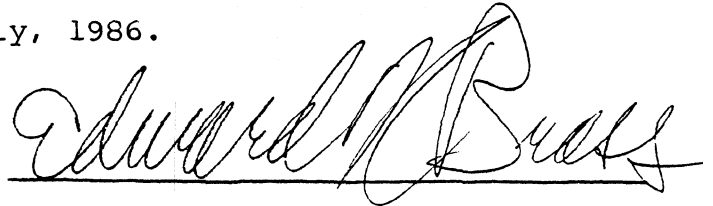
The facts of this case are not disputed. Therefore, the lower court's decision should be reversed with instructions to enter judgment for the appellant. That judgment would rescind the contract and require the appellant to restore to the respondent any moneys he spent on the home.

Dated this 28 day of July, 1986.


EDWARD K. BRASS
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Richard W. Perkins, 343 South 400 East, Salt Lake City, Utah 84111, on this 28 day of July, 1986.



APPENDIX A

Memorandum Decision
Findings of Fact
Judgment



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JANET K. JONES,	:	
	:	
Plaintiff,	:	MEMORANDUM DECISION
	:	
VS.	:	CIVIL NO. C-83-3249
	:	
MARK T. JOHNSON,	:	
	:	
Defendant.	:	
	:	

At a pre-trial settlement conference held January 6, 1986, both parties stipulated that the only issue to be determined by the court was whether or not the written documents constituted an "unconscionable" transaction against the plaintiff. Plaintiff dismissed all other issues relating to plaintiff's Amended Complaint. Briefs and memorandums have been submitted by each of the respective parties and reviewed by the court.

In substance plaintiff's home was in foreclosure. She had a Trust Deed on her property which was five months delinquent per the "Notice of Default" dated October 27, 1981. Defendant learned of the foreclosure action and sent her an unsolicited letter offering to assist her. In January, 1982, the parties executed the documents attached to the defendant's memorandum. It is these particular documents which are attacked by the plaintiff as constituting the "unconscionable transaction".

Both sides seek judgment in their favor and each seems to

rely heavily on two recent cases from the Utah Supreme Court, i.e., Resource Management Company v. Western Ranch and Livestock Company, Inc., 16 Utah Adv. Rep. 36 (August 23, 1985) and Bekins Bar V. Ranch v. Huth, Utah, 664 P2d 455 (1983).

This court has read the cases cited and the memorandums submitted and concludes that the transaction is not unconscionable under the circumstances of this particular case. Plaintiff was certainly in imminent danger of losing the home by foreclosure. This gave her an additional thirteen months to work out of the difficulty. Obviously, this may not have been the most prudent course for her to choose, i.e., she may have been able to sell the home and salvage some equity - but there is no evidence to support this either way.

Under the circumstances of this case the court finds in favor of the defendant and against the plaintiff.

Dated this 31 day of January, 1986.

DEAN E. CONDER
DISTRICT JUDGE

Copies mailed to each counsel.

ATTEST

HELSON MARCH 5

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Deputy Clerk

PERKINS, SCHWOBE & McLACHLAN
Richard W. Perkins (2567)
Attorney for Defendant
343 South 4th East
Salt Lake City, Utah 84111
Telephone: (801) 532-6808

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

* * * * *

JANET K. JONES,

:

Plaintiff,

:

FINDINGS OF FACT

&

vs.

:

CONCLUSIONS OF LAW

MARK T. JOHNSON,

:

Civil No. C-83-3249

Defendant.

:

(Judge Dean E. Conder)

* * * * *

The above-entitled case came on for Pre-Trial Settlement Conference on January 6, 1986, in the above-entitled Court, the Honorable Dean E. Conder, District Court Judge, presiding; the Plaintiff being present in person and represented by her Counsel Edward K. Brass, and the Defendant Mark T. Johnson being present in person and represented by his Counsel Richard W. Perkins, and both parties having stipulated that the only issue to be determined by the Court was whether or not the written documents constituted an "unconscionable" transaction against Plaintiff. Plaintiff dismissed all other issues relating to Plaintiff's Amended Complaint. Briefs and Memorandums having been submitted by each of the respective parties and reviewed by the Court, and the Court being fully advised in the premises, makes the followin

FINDINGS OF FACT

1. That in January, 1982, Plaintiff's home located at 3841 South 6440 West, West Valley City, County of Salt Lake, State of Utah, and more particularly described as: All of Lot 13, COPPER HILL HEIGHTS NO. 7, according to the official plat thereof was in foreclosure.

2. That Plaintiff had a Trust Deed on her property which pursuant to the Notice of Default dated October 27, 1981, was five months delinquent.

3. Plaintiff was in imminent danger of losing the home by foreclosure.

4. Defendant learned of the foreclosure action and sent Plaintiff an unsolicited letter offering to assist her.

5. In January, 1982, the parties executed the documents attached to the Defendant's Memorandum. It is these particular documents which are attacked by the Plaintiff as constituting the "unconscionable transaction."

6. The transaction entered into between the parties provided Plaintiff with an additional thirteen (13) months to work out her difficulty.

7. That in conjunction with the filing of Plaintiff's Amended Complaint, Plaintiff filed and caused to be reported a Lis Pendens with respect to this matter, which Lis Pendens was dated April 29, 1983, and recorded May 2, 1983, in Book 5455, page 2142, as Entry No. 3787681, in the Official Records of the Office of the Salt Lake County Recorder.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

1. That the transaction is not unconscionable under the circumstances of this particular case.

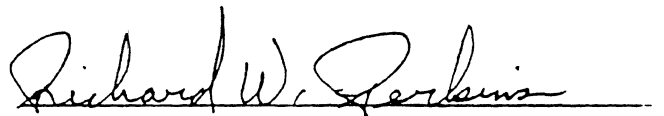
2. That Defendant is entitled to an award of Judgment against Plaintiff, said judgment to adjudge and decree that the Plaintiff's Amended Complaint be dismissed, with prejudice, no cause of action, and that the Lis Pendens referred to in the Findings of Fact be released.

DATED this _____ day of February, 1986.

BY THE COURT:

DEAN E. CONDER
DISTRICT COURT JUDGE

I hereby certify I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to Edward K. Brass, Attorney for Plaintiff, at 321 South 600 East, Salt Lake City, Utah 84102, postage prepaid, this 10th day of February, 1986.



Richard W. Perkins

PERKINS, SCHWOBE & McLACHLAN
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Attorney for Defendant
343 South 4th East
Salt Lake City, Utah 84111
Telephone: (801) 532-6808

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

* * * * *

JANET K. JONES,	:	
	:	JUDGMENT
Plaintiff,	:	
vs.	:	Civil No. C-83-3249
MARK T. JOHNSON,	:	(Judge Dean E. Conder)
Defendant.	:	

* * * * *

The above-entitled case came on for Pre-Trial Settlement Conference on January 6, 1986, in the above-entitled Court, the Honorable Dean E. Conder, District Court Judge, presiding; the Plaintiff being present in person and represented by her Counsel Edward K. Brass, and the Defendant Mark T. Johnson being present in person and represented by his Counsel Richard W. Perkins, and both parties having stipulated that the only issue to be determined by the Court was whether or not the written documents constituted an "unconscionable" transaction against Plaintiff. Plaintiff dismissed all other issues relating to Plaintiff's Amended Complaint. Briefs and Memorandums having been submitted by each of the respective parties and reviewed by the Court, and the Court being fully advised in the premises, and having

heretofore made and entered its Findings of Fact and Conclusions of Law herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant have and is hereby awarded Judgment against the Plaintiff as follows:

1. That Plaintiff's Amended Complaint be, and is hereby, dismissed with prejudice, no cause of action.

2. That the Lis Pendens filed and recorded by Plaintiff in the official records of the Salt Lake County Recorder's Office on May 2, 1983, in Book 5455, page 2142, as Entry No. 3787681, and pertaining to the hereinafter-described real property, is released: All of Lot 13, Copper Hill Heights No. 7, according to the official plat thereof.

DATED this _____ day of February, 1986.

BY THE COURT:

DEAN E. CONDER
DISTRICT COURT JUDGE

APPENDIX B

Letter to Appellant
Full Disclosure Form
Equity Purchase Form

EQUITY ASSURANCE - INVESTMENT

DEAR HOMEOWNER,

We see by public record that you are in Default on your Mortgage payments. As you are probably aware, this is the first step of a foreclosure procedure. We're sure that you do not want a foreclosure against your name or on your credit record.

We have several methods that can help protect you. But first of all you need to take action....YOU MUST CALL US TODAY AT 266-8543.....Then we can Explain various ways to help you solve your problem.

WE CAN:

CATCH-UP YOUR BACK PAYMENTS.

KEEP THE FORECLOSURE OFF YOUR NAME AND RECORD.

IF NECESSARY BUY YOUR HOUSE.

No gimmick...No tricks...No sales pitch... Just plain understandable business. We want to help get you out of financial difficulty and get people off your back. But you must take the first step by calling us TODAY and asking for DOUGLAS JOHNSON OR MARK JOHNSON AT 266-8543.....

In the meantime, the very best to you and your family.

Sincerely,


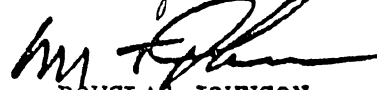


DOUGLAS JOHNSON
MARK JOHNSON

EXHIBIT "B"

CALL 266-8543 ANY DAY OR ANY TIME DAY OR NIGHT.

EQUITY ASSURANCE & INVESTMENT

FULL DISCLOSURE

7 We MARK JOHNSON, on this 14 day of JANUARY 1982, do fully understand, acknowledge and agree that by signing this full disclosure we have:

- 1) AGREED TO SELL OUR HOME.
- 2) AGREED THAT AS OF THIS DATE WE NO LONGER OWN SAID PROPERTY.
- 3) AGREED THAT WE HAVE BEEN GIVEN THE OPTION TO REPURCHASE THIS RESIDENCE.
- 4) AGREED AND REALIZE THAT WE ARE NOT BORROWING CAPITAL FROM MARK JOHNSON AND/OR ASSOCIATES.
- 5) AGREED THAT SHOULD THE ENCUMBRANCES AS OF 14 JANUARY, 1982 BE IN EXCESS OF THE AMOUNT NOTED ON THE EQUITY PURCHASE AGREEMENT, THAT THE BUYER HAS THE OPTION TO DEED SAID PROPERTY BACK TO THE SELLER WITH NO COST OR OBLIGATION TO THE BUYER AND/OR REVOKE ANY REPURCHASE AGREEMENTS.
- 6) Agreed to pay all attorney and legal costs incurred due to incidents that may arise from our occupancy and/or vacating of said property.
- 7) Been made aware and understand traditional foreclosure procedures, consequences and alternatives.
 - a) Ninety (90) day reinstatement
 - b) Twenty-one (21) day advertising period
 - c) Auction at the sale date
- 8) Agreed that during our conversation with MARK JOHNSON and/or ASSOCIATES we have been informed of outside financing such as friends, relatives, banks and/or finance companies in order to reinstate our loan.
- 9) Agreed to receive due us, if any, at the time that MARK JOHNSON and/or Associates receives recorded Warranty Deed from the County Recorder of proper county.

Seller MARK JOHNSON Date 14 JAN 82

Seller MARK JOHNSON Date 14 JAN 82

EXHIBIT "D"

EQUITY PURCHASE FORM

DATE 14 JANUARY 19 82

Address 3841 S. 67th W. WEST VALLEY CITY, UTAH

In consideration of the sum of \$ 1000 receipt of which is hereby acknowledged by SELLER. The SELLER agrees to sell and the BUYER agrees to purchase the the above described property for the sum of \$ 1000 NET to SELLER and to take title subject only to existing encumbrances not in excess of \$ 14,100 payable \$ 179 per month, including taxes and insurance. Impounds if any, are to be assigned without charge to BUYER, in an amount satisfactory to lending institutions. Any impound shortage will be deducted from funds due SELLER. SELLER agrees to execute a Warranty Deed in favor of the BUYER immediately and authorizes the BUYER to record said deed. Title and Loans are to be checked in the name of the BUYER and it is agreed that in the event that Title or Loans fail to be in the agreed condition, that at the BUYER'S option, the BUYER may record Warranty Deed in favor of the SELLER herein without liability, and/or rescind this agreement. BUYER is to pay all escrow and title charges. Premises are to be left clean and in good repair by the SELLER, and no real property is to be removed by SELLER. Balance of the funds due the SELLER herein are to be paid after checking title and when premises are vacated. SELLER agrees to give possession of the above described property to BUYER on or before 25 JANUARY 1982. Property to be available, to be shown by the BUYER any-time prior to possession date.

SELLERS: [Signature]
[Signature]

DATE 1-22-82
DATE 1-22-82

BUYER: [Signature]

DATE 1/1/82

EQUITY PURCHASE FORM CONTINUED

Buyer agrees to rent property to SELLER for amount of monthly Mortgage Payment including taxes and insurance. SELLER reserves the right to repurchase property for \$^(21,700)TWENTY ONE THOUSAND SEVEN HUNDRED on or before 28 FEBRUARY 1983 Rent is to begin as of the date of closing. Any rents delinquent more than 32 days voids all buy back agreements. SELLER understands that BUYER intends to assign all rights etc. to a third party for investment purposes and agrees that date of repurchase may be extended to a period of 13 months from that time. SELLER also understands and agrees that should no investor be secured by approximately 14 days before advertised date of Trustee Sale. Then property will be returned to SELLER along with all rents collected to that date. SELLER agrees that the return of all rents and the voiding of all closing papers nullifies any and all agreements whether in writing or implied. SELLER agrees that should the transaction be cancelled BUYER is to be held Harmless.

SELLER:

[Signature] DATE 1-22-83
[Signature] DATE _____
[Signature]

BUYER:

[Signature] DATE 1/14/83