1980

Dick Bastian and Phillip Taylor v. Cedar Hills Investment and Land Co., A Partnership, associated Industrial Developers, A California Corporation, and Near East Technological Services: Limited, A California Corporation : Respondents' Brief

Utah Supreme Court

JERIL B. WILSON; Attorneys for RespondentM. DAYLE JEFFS; Attorney for Appellants

SUPREME COURT
STATE OF UTAH

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DICK BASTIAN and PHILLIP TAYLOR,

Plaintiffs/Appellants,

-vs-

CEDAR HILLS INVESTMENT AND LAND CO., a partnership, ASSOCIATED INDUSTRIAL DEVELOPERS, a California Corporation, and NEAR EAST TECHNOLOGICAL SERVICES LIMITED, a California corporation,

Defendants/Respondents.

Case No. 16941

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RESPONDENTS' BRIEF

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TABLE OF CONTENTS

CASES CITED

Page

AUTHORITIES CITED

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--ooo0ooo--

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NATURE OF THE CASE

Plaintiffs commenced this action to compel defendants to sell approximately 142 acres of ground in North Utah County, or in the alternative for damages. Defendants counterclaimed for damages caused by plaintiffs clouding the title to the land and for their attorney's fees. After the trial had commenced, plaintiffs withdrew their cause of action for specific performance and proceeded only on their claim for damages.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury before the Honorable Don V. Tibbs, who entered judgment in favor of plaintiffs and against the defendants for the sum of $35,000 together with 8 percent interest

Defendants' counterclaim had been dismissed during the time of trial and prior to the time any evidence was put on concerning said counterclaim.

RELIEF SOUGHT ON APPEAL

Defendants seek to have the Supreme Court rule that plaintiffs had forfeited the $35,000 earnest money which they had paid; and to have the case remanded so that defendants may put on evidence concerning their damages.

STATEMENT OF FACTS

The plaintiffs in this matter are experienced land developers and had on November 15 and 16, 1979, entered into two earnest money agreements for the purchase of 105 acres and 37.75 acres respectively from Cedar Hills Development Company later known as Cedar Hills Investment and Land Company. Cedar Hills Investment and Land Company is a partnership consisting of Associated Industrial Developers, a California corporation, and Near East Technological Services, Limited, a California corporation.

The total sum of $35,000 was paid at the time of the execution of the two earnest money agreements, which amount was subsequently released by the real estate agent to the sellers in exchange for a letter of indemnification. On approximately February 6, 1978 some two and one-half months after the execution of the earnest money agreements, an amendment agreement was entered into between the parties which modified the earnest money agreements.

According to the terms of the earnest money agreements, the two sales were contingent upon annexation of the property into the

Town of Cedar Hills and obtaining approval of a preliminary plat. Both of these conditions had been accomplished by January 4, 1978.

The earnest money agreements further provided that a total payment of $215,000 would be made within 30 days of the date when preliminary plat approval was given and annexation had occurred, which according to the January 4 date, would make said payment due on February 3, 1978. This payment was never made or tendered by the purchasers.

The earnest money agreements had two provisions for forfeiture of the plaintiffs' rights in the event of non-payment. On line 39 and 40, the usual provision whereby the seller could retain all amounts paid as earnest money as liquidated damages, and also typed in after line 52 on the earnest money agreements was a provision that buyers would forfeit all of their interest if the $215,000 payment was not made within the 30-day period (by February 3, 1978).

By reason of the fact that the plaintiffs were in default as per the provisions of the earnest money agreements and subject to lose their rights to purchase the property as well as their earnest money, a meeting was scheduled at the office of William Malis in South Pasadena, California between the real estate agents and the sellers. At that meeting, which was held February 6, 1978, the amendment to the earnest money agreements was prepared and was signed by William Malis on behalf of Cedar Hills Development Company. The amendment agreement was then brought back to Utah where it was reviewed by the plaintiffs and after discussing the matter with the real estate agents, it was signed by both Mr.

Carson and Mr. Bastian.

The amendment agreement made several changes in the original earnest money agreements, most of which are insignificant as it relates to this lawsuit. However, of importance is the fact that paragraph 2(a) states as follows:

> "Buyer agrees as follows: All conditions mentioned in the earnest money receipts and offer to purchase mentioned above obligating buyers first payment therein, are hereby deemed satisfied as of January 4, 1978."

The amendment agreement further provided for the payment of the sum of $215,000 to be made at the time of the signing of the agreement. However, the parties agreed that this payment was to be made at a closing which was verbally agreed to and which was scheduled for February 17, 1978 at the office of Rocky Mountain Title Company in Orem, Utah.

George Drivas, agent for defendants came from California to attend the closing, however, the plaintiffs never tendered any funds at that time and the closing never was effected. There was much discussion at that time concerning the number of sewer hookups and culinary water connections that were available for the development of the property.

In anticipation of the closing, the title company had drawn the documents, including an escrow agreement (Exhibit 36) and the uniform real estate contract (Exhibit 35). Further, the closing statements themselves were penciled in, including the pro ration of taxes, etc. It is undisputed by the parties that the reason the closing failed was because of the question of the number of sewer hookups in the development of the property. There was no

discussion at the time of closing as to the condition of the title of the property nor the ability of the defendants to convey the property, if, in fact, the closing had taken place.

On March 3, 1978, defendants, through their attorney, gave written notice to plaintiffs' attorney that the sellers were electing the option in the earnest money agreement to retain the earnest money sums that had been paid. On March 27, 1978, plaintiffs filed the lawsuit. Paragraph 8 of the Complaint purported to be a tender on the part of the plaintiffs of the amounts due on the earnest money agreements. In response to that tender, defendants, through their attorney, made a formal request that a sum certain be tendered in the form of a cashier's check (Exhibit 23). No response was ever received from the plaintiffs or their attorney to that letter.

Thereafter, on May 3, 1978, Mr. Carson had arranged, subject to certain conditions, to obtain a loan that would allow him to proceed and close the transaction (Exhibit 34).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN HOLDING THAT THE PLAINTIFFS WERE NOT READY, WILLING AND ABLE TO COMPLETE THE TRANSACTION AS PROVIDED FOR IN THE AGREEMENTS.

Plaintiff claims error by reason of the trial court's finding that plaintiffs were not ready, willing and able to perform under the contracts, (Exhibit 9, 10, and 14). In the context of a contract to purchase real property, this amounts to a question of whether or not the parties performed, or tendered their performance

as required by the contract to purchase. It is plaintiffs' contention that performance or tendered performance, (specifically tender of payment) was not necessary as a result of the trial court's finding No. 6 where it was held that:

> "Defendant was not in a position to deliver the necessary titles to plaintiff." (R. 108).

Plaintiff offers this finding as justification or as a legal excuse for its failure to perform or tender its performance. While in particular cases such a legal excuse does exist, which relieves a purchaser of his duty to perform or tender performance, this court has been very clear in outlining the circumstances necessary for application of this exception to the general rules governing tender and performance.

The general rule is stated in 86 CJS, Tender, Section 3:

> "Where the existence of a right in one claiming it is dependent on the performance of duties on his part, as by the payment of money or its equivalent, tender of performance by him is necessary to enable him to sue to enforce the right."

This policy was echoed by this court in Marlowe Investment Corporation, vs. Radmall, 26 Utah 2d 124, 485 P.2d 1402 (1971):

> "Ordinarily, such a vendor does not necessarily have to have marketable title until the purchaser has made his payments." (1404).

In other words, the vendor's performance wasn't required, and as a result, there could be no vendor default until the purchaser had first performed or tendered performance.

Plaintiff suggests that this general rule is not applicable in the case at bar because the trial court held that defendant did not have the "necessary titles" ready for delivery to the plaintiff. This exception was applied by the court in

American Savings and Loan Association vs. Blomquist, 24 Utah 2d 35, 465 P.2d 383 (1970), where the court reviewed circumstances similar to those in the present controversy:

> "The position of Blomquist is that as vendors they were not required to have marketable title all during the pendancy of the contract, but only when the final payment was made or tendered; and that sellers could not claim breach of the contract until they had made or tendered all payments thereon. They argue that even though the property was under foreclosure, they had the possibility of making good title until the end of the redemption period, and that they therefore, were entitled to have the purchasers continue the payments. We do not disagree with the arguments nor with the cases cited in appropriate circumstances. But where it is shown that there is no possibility that the vendor will be ever able to convey good title, the purchaser of the property is not required to continue on the useless course of paying up in full and making demand for an obviously impossible performance. Whether this is the fact is something for the trial court to determine." (p. 37).

The court makes it very clear that the exception to the general rule that tender of performance or performance is required is to be applied when the vendor's performance obviously becomes impossible, and where there is no possibility of his ever being able to perform. In the case at bar, no evidence was produced from any source that defendants' performance under the contracts was impossible, or that there was no possibility of ever being able to perform. To the contrary, Mr. Church, the title company officer who prepared the title reports and closing documents, testified that the encumbrances on title could be resolved:

> "Q: (By Mr. Wilson) Is there any reason that you are aware of as to why this transaction could not continue to have been closed in a matter of a day or two?
>
> A: (By Mr. Church) I think any of them [title questions] could have been resolved or accomplished." (R. 521, lines 19 to 23.)

Mr. Church's testimony was corroborated by the testimony of Reed Nixon, an agent of the defendant as follows:

"Q: (By Mr. Wilson) Could the matter have been closed?

A: (By Mr. Nixon) Yes.

Q: Now, when you say yes, will you tell us the time frame of what it would have taken to have closed it?

A: Yes, what it would have taken was to have the money tendered by the buyers so that these obligations, which is the normal thing at closing, to the title company and escrowed and then the obligations are paid off and then the underlying contracts and then, of course, the documents that were to be signed at that time could all be properly recorded.

Q: And were you as the agent and person who made the conveyance, or at least, could have made the conveyance, were you capable of conveying the 16 acres that were to be released?

A: Yes."

There was no evidence presented at trial which would suggest that the defendants could not perform. The above referred to testimony presents a contrary conclusion, that it was definitely possible that the vendor could provide title to the 16 acres which was to be released. Plaintiffs have presented no evidence and the trial court did not hold that defendants could never perform or that such performance by defendants was impossible and as a result, the exception to the general rule that tender is required should not be applied in this case. The application of this legal excuse or justification for failure to perform or tender performance is very limited. According to the weight of authority:

"For encumbrances to serve as an excuse for failure of demand, tender or performance, there must be a natural inability on the part of the vendor to perform, and it is not

sufficient that at the time of performance there is an encumbrance on the property if the vendor is able to remove it. . ."(92 CJS Vendor and Purchaser, Section 580g).

This factual circumstance falls squarely within the above delineated rule, and defendant urges the court to reject plaintiffs' contention that it was excused from having to abide the technicality of tender (plaintiffs' brief, page 37).

Plaintiffs make a second argument for the proposition that it was not required to perform or tender performance, and bases that position on the decision of this court in Huck vs. Hayes, 560 P.2d 1124 (1977). It is important to make several key distinctions between the Huck factual background and that of the present case. First, the nature of the action itself. In Huck the plaintiff was suing for specific performance whereas the plaintiff in the instant case chose to withdraw his cause for specific performance and preceeded on damages alone. In the present case, there has never been a bona fide tender of performance; whereas in Huck, the plaintiff delivered to the realtor conducting the transaction, a cashier's check for the total amount of the defendants equity in the property. Finally, in Huck, the plaintiffs tender of payment was repeatedly rejected by the defendant, while in the present case, the defendants have not received a tender even though there has been a specific request for a tender to be made. (Exhibit 23).

Huck stands for the proposition that where the purchasers had tendered payment, failure to make a reciprocal performance by the vendor places him in default. This ruling is not inconsistent in the least with the finding of the trial court that plaintiff was not ready, willing, and able to perform, in deed, that plaintiff

did not perform nor ever tendered performance. Clearly, the factual circumstances which were deemed dispositive in the Huck case simply are not present in the case at bar, and the court is urged to uphold the trial court's finding that plaintiff failed to perform.

A final argument in support of this assignment of error is ventured by the plaintiff to the effect that if a tender is required, then the letter (Exhibit 42) to defendant dated February 23, 1978, qualifies under the statutory tender section, 78-27-1, UCA. The last paragraph of that letter reads:

> "If you are willing to discuss the affording of an easement for the additional lagoon systems as an alternative to the existing contracts requiring 42 hookups to your present lagoon system, subject to the approval of the State Health Department, we would appreciate hearing directly from you as we are prepared to close the matter within the next 10 days."

This paragraph fails under the statutory tender rule of UCA 78-27-1 on two separate grounds. First, there is no "offer in writing to pay a particular sum of money" as is expressly required in the Section. There is nothing more than a bare assertion that the plaintiffs were prepared to close within 10 days if certain conditions were met, primarily, relating to the granting of an easement for sewer lagoons. Such an "offer" is patently defective under the statutory tender rule, for that reason alone. Add to that the fact that the offer made by the plaintiffs was inherently defective for reasons other than simply not physically producing the money, (which the statutory tender rule was formulated to excuse).

In Hyams vs. Bamberger, 360 P. 202 (1894) the court ruled on

the proper application of the predecessor statutory tender section, UCA 78-27-1, (The statutes were identical), saying:

> "Where a man makes a tender in writing, the statute excuses him from actually producing the money at the time of making tender, but it excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute."

When the trial court ruled in finding No. 2 that the requirement to provide 42 sewer hookups was waived by plaintiff in the amendment agreement, (Exhibit 14) it undercut the legal support by which plaintiff could require either the provision of hookups, or as an alternative, the granting of an easement for the sewer lagoons, as a condition precedent to tender of payment. This court in Sieverts vs. White, 2 Utah 2d 351, 273 P.2d 974 (1954) acknowledged the general rule that:

> "A tender to be good must be free from any condition which the tenderer does not have a right to insist upon. . . the plaintiffs here had no right to insist upon delivery of a deed as a condition to their making a tender of purchase price . . ."

By analogy, in the present controversy, plaintiffs had no legal right to insist upon either performance, (provision of hookups or granting of an easement) from defendants, and the "offer" even though purported to fall under the protection of the statutory tender provision, fails for reason outside that which UCA 78-27-1 is intended to excuse. Once again, the court is urged to reject this attempt to excuse nonperformance and failure to tender payment on the part of plaintiffs and to uphold the trial court's findings in so far as they impose the consequences of the plaintiffs failure to pay or tender performance to defendant.

POINT II

THE TRIAL COURT DID NOT ERR IN NOT AWARDING PLAINTIFF EITHER DAMAGES OR ATTORNEY'S FEES.

Plaintiffs contend that the trial court committed error in determining that their claim for damages and attorney's fees was groundless. In responding to that argument, the conclusions of the analysis in the foregoing section on plaintiffs' failure to perform or tender performance will be referred to. The general rule governing breach of contract actions in which the purchaser is seeking damages is two pronged. First, it must be abundantly clear that the seller breached the contract and even more important, in the analysis at hand, it must be equally clear that the purchaser is not himself in default.

The focus of plaintiffs' assignment of error to the court is that the seller did not breach the contract and that plaintiffs are therefore, not entitled to maintain an action for damages arising out of a purported breach of the contract. The finding of the trial court was that plaintiffs were not ready, willing and able to perform at the appointed time, and that it made no attempt to perform or tender performance as required under the earnest money contracts as modified by the amendment agreement (Exhibits 9, 10, and 14). The conclusion which follows is that regardless of defendants' breach or performance under the agreements, the fact remains that plaintiffs had failed in their obligation under the documents, and consequently, should be precluded from maintaining an action for breach of contract with its attendant claim for damages.

POINT III

THE TRIAL COURT RULED CORRECTLY THAT THE REQUIREMENT FOR FURNISHING OF SEWER HOOKUPS WAS WAIVED.

Defendants argue that the trial court's finding No. 2, which stated that the amendment agreement, (Exhibit 14), was a full and complete waiver of any requirement that defendants provide sewer hookups was in error. Support for this assertion consists only of subsequent argument by plaintiff that the hookups were necessary and that it would have been foolish to waive this requirement. The amendment agreement, which was undated, but according to the testimony of witnesses, was drafted on or about February 6, 1978, (R. 663 lines 10-12) and signed by plaintiffs prior to February 17, 1978, is explicit and clear in its meaning:

> "Paragraph No. 2: Buyer agrees as follows: (a) all conditions mentioned in the earnest money receipts and offers to purchase mentioned above obligating buyers' first payment thereon are hereby deemed satisfied as of January 4, 1978."

It is significant to note that at the time the amendment was drafted, plaintiffs were already in default under the contract, having failed to make the prescribed first payment within 30 days or receiving preliminary plat approval and obtaining annexation, both of which occurred by January 4, 1978. In view of the default, but desiring to accommodate plaintiffs and keep the transaction alive, defendants agreed to extend the time for plaintiffs' performance to such time as the amendment was signed. Four conditions were included in the amendment to which plaintiffs agreed:

1. That all conditions precedent to buyers' obligation to

make its first payment of $175,000 and $40,000 respectively, would be deemed to be already satisfied as of January 4, 1978.

2. The initial total payment of $215,000 would be forth coming at the time the amendment was to be signed by the plaintiffs.

3. That the buyers' payment schedule be accelerated approximately one month in order to coincide with sellers underlying contractual obligations on the property.

4. That buyers would execute quit claim deeds to sellers in order to expedite clearing title should buyers fail to perform under the contract.

Given this exchange of consideration, all of which the parties to the amendment agreement bargained for, the terms and conditions of the amendment became binding on the parties and the contract became enforceable.

Finding No. 2 is merely a recognition of this fact and operates independent of the subsequent changes of heart of either party.

DATED this 29 day of July, 1980.

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MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to M. Dayle Jeffs, Attorney for Appellants, 90 North 100 East, Provo, Utah, 84601, postage prepaid this 29 day of July, 1980.