

1980

Nixon & Nixon, Inc. v. John New & Associates, Inc. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Richard Richards; Attorney for Defendant-Respondent;

L. Brent Hoggan; Attorneys for Plaintiff-Appellant;

Recommended Citation

Brief of Respondent, *Nixon & Nixon, Inc. v. John New & Associates*, No. 16989 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2252

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

NIXON & NIXON, INC., a)
Utah corporation,)
)
Plaintiff and Appellant,)
)
vs.)
)
JOHN NEW & ASSOCIATES, INC.,)
a Utah corporation,)
)
Defendant and Respondent.)

Civil No. 16989

RESPONDENT'S BRIEF

Appeal from a Judgment of the
District Court of Weber County,
the Honorable Calvin Gould, Judge

RICHARD RICHARDS, Esq.
2408 Van Buren Avenue
Ogden, Utah 84401
Attorney for Defendant
and Respondent

L. BRENT HOGGAN, Esq.
56 West Center
Logan, Utah 84321
Attorney for Plaintiff
and Appellant

FILED

OCT 30 1980

TABLE OF CONTENTS

STATEMENT OF NATURE OF CASE.	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I. THE COURT WAS CORRECT IN ITS DETER- MINATION THAT THE CONTRACT WAS TOO VAGUE FOR SPECIFIC ENFORCEMENT.	5
POINT II. THE COURT WAS CORRECT IN EXERCISING ITS EQUITABLE RIGHTS TO DENY SPECIFIC PERFORMANCE OF THE CONTRACT	11
CONCLUSION	13

CASES CITED

<u>Bunnell v. Bills</u> , 13 Utah 2d 83, 368 P.2d 597.	5
<u>Ferris v. Jennings</u> , 595 P.2d 857 (1959)	8, 11
<u>Otteson v. Malone</u> , 584 P.2d 878 (1978)	11

IN THE SUPREME COURT OF THE STATE OF UTAH

NIXON & NIXON, INC.,)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Case No. 16989
)	
JOHN NEW & ASSOCIATES, INC.,)	
)	
Defendant and)	
Respondent.)	

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF CASE

This is an action for specific performance of a written contract.

DISPOSITION IN THE LOWER COURT

The case was tried in the District Court of Weber County to the Honorable Calvin Gould sitting without a jury on the 14th day of February, 1980. The Court entered a judgment restoring the parties to their status before the Agreement, relieving the Respondent JOHN NEW & ASSOCIATES, INC., hereinafter referred to as New, from any duty to convey the property and awarded a money judgment to the Plaintiff/Appellant NIXON & NIXON, INC., hereinafter referred to as Nixon, in the amount of \$76,928.73, together with interest in the amount of \$20,562.83, and granted the

Plaintiff Nixon a lien on the property to insure payment of

the judgment and interest.

RELIEF SOUGHT ON APPEAL

The Respondent New requests that this Court affirm the judgment of Judge Gould.

STATEMENT OF FACTS

New was a general contractor, and the owner of a parcel of real property consisting of approximately 20 acres located in Weber County, Utah. New had previously mortgaged the property to Commercial Security Bank, had defaulted on the mortgage, and the property was sold at Sheriff's sale. The period of redemption expired on the 20th day of November, 1978. (T-128)

During the six-month redemption period, New sought money to pay off the bank, or purchasers who would purchase the property and thereby preserve for New his substantial equity in the property.

During this period of time, he, New, became acquainted with Jerry Olson, an employee of Nixon. New recited to Olson the nature of his problem concerning the property and solicited Olson's help in securing a buyer. Olson requested a formal listing on the property which New refused on the grounds that he had other offers, but did agree that in the event Olson secured a purchaser for the property, he would guarantee the payment of a commission. (T-127, 128) New ultimately signed a letter of agreement to pay the commission.

Sometime before the redemption period expired, Olson informed New that he had a buyer for the property. (T-130) However, two days prior to the expiration of the redemption period, Olson advised New that the sale had fallen through--that the buyer was no longer interested in the property. Mr. New testified,

" . . . he (Olson) said, Mr. Nixon would buy it from me. He said don't worry, I have got it taken care of. Mr. Nixon is going to take care of you." (T-130, 131)

Nixon and New met for the first time on November 20, 1978, the date the redemption period expired. Nixon agreed to purchase the property for \$130,000.00, of which approximately \$76,000.00 would be required to redeem the property from the Sheriff's sale and the balance of \$54,000.00 would be paid to New, ... "at a later date." (T-133)

They secured the services of attorney Donald C. Hughes, Jr. to draft the agreement. The parties met at the office of Attorney Hughes at approximately 4:00 o'clock in the afternoon. The contract was to be prepared and the property to be redeemed by 5:00 o'clock that same afternoon. The contract was marked Plaintiff's Exhibit C and admitted into evidence.

At the time the contract was drawn, New considered the value of the property to be \$202,000.00. (T-132) He advised Nixon that that was his value of the property and Nixon indicated that he was not going to pay that price,

but Nixon did agree to pay \$130,000.00 for the property.
(T-133)

The contract provided among other things that Nixon would pay the redemption price of \$76,928.73; New "would convey title to the property free and clear of all liens"; and that Nixon "would use best efforts to prepare a subdivision plat and proceed with engineering and development of the property at a commercially reasonable speed."

The contract further provided that six months from filing of the final plat, Nixon would pay to New the difference between the redemption price of \$76,928.73 and \$130,000.00.

After the payment of the redemption price by Nixon, there was no further contact between Nixon and New for an extended period of time. Nixon did not execute and deliver to New a Promissory Note as provided by the contract and New did not execute and deliver a deed to Nixon as provided by the contract. New made many and repeated attempts to contact Nixon. He wrote him a letter on January 9, 1979. (T-137) New said regarding attempts to contact Nixon,

"I contacted them by mail two times, and I must have called them twenty." (T-138, 139)

New went to see Nixon on the 23rd of January, 1979 and found that Mr. Nixon's father had just passed away and Mr. Nixon was unavailable. (T-139)

On February 8, New went to visit Nixon in Logan to no avail, and subsequently sent him a message on the 12th of February in an attempt to set up a meeting in Ogden.
Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
(T-139)

New went to Logan to visit with Nixon on the 7th of February, but Nixon was entertaining some people there and could not see him. New stayed in Logan overnight attempting to see him the following day and waiting for an hour or so, but Nixon didn't show up. Nixon's secretary told New he wasn't coming in until afternoon so New stayed until 2:00 o'clock, but Nixon did not show up and New returned to Salt Lake City.

On February 28, New met with John Reeves of Reeves Engineering in Ogden, and discussed the development of the land and ultimately hired him to perform engineering services in regard to development of the property. (T-141)

There was no further contact between Nixon and New until May of 1979 when Nixon discovered that New was proceeding to subdivide the property. Nixon filed an action against New and the matter proceeded to trial on February 14, 1980.

ARGUMENT

POINT I

THE COURT WAS CORRECT IN ITS DETERMINATION THAT THE CONTRACT WAS TOO VAGUE FOR SPECIFIC ENFORCEMENT.

It has long been the position of the Courts that contracts cannot and will not be enforced unless they are specifically definite so that the Courts can enforce them without re-writing the contract for the parties. Our high Court made it clear in Bunnell v. Bills 368 P.2d 597, 13

"Furthermore, a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed."

The contract now before the Court requires that the buyer, Nixon, pay to the seller the difference between the redemption price of \$76,928.73 and \$130,000.00, or approximately \$54,000.00 six months after the final plat has been filed. The contract makes no requirement as to when that plat will be filed and it obviously depends upon preliminary engineering, approval of the City Council, etc., and the contract does not require that the subdivision plat be prepared within a specific period of time. In fact, the contract says at paragraph 3,

"Buyer shall use best efforts to prepare a subdivision plat and proceed with engineering and development of the property at a commercially reasonable speed."

Nowhere in the contract is the phrase "commercially reasonable speed" defined. The evidence heard at trial indicates specifically that Mr. Nixon did little from the date the property was purchased, i.e. November 20, 1978, to develop the property. By his own testimony, the first action he took was in December and he simply contacted a land design company and had them take a look at it. He admitted,

"They didn't perform any services on it. They did look at it, went down and took a look. But they didn't actually bill me any work." (T-90)

Nixon then had another person, Jay Carlson, go down and look at the property, but

Nixon said that he then hired a Mr. Schwartz to do some surveying and engineering, but Schwartz did nothing until May, 1979, at which time he made some sketches and drilled some test holes on May 30, 1979. (T-92)

It is clear that Nixon did nothing further on the property until he heard that Mr. New was developing the property, at which time he filed his Notice of Lis Pendens and commenced this action.

This evidence alone may not justify the Court's ruling in this matter. However, taking the totality of the evidence heard at trial, it obviously became clear to the Court that not only was the phrase "commercially reasonable speed" vague and ambiguous, but the actions of Mr. Nixon indicated a desire on his part to do nothing for an extended period of time, if not to deliberately delay development. It is clear that New made many and repeated attempts to contact Nixon and discuss the development of the property; New sent two letters, and must have called them twenty times. (T-139) Nixon did not respond and his attitude is characterized by his testimony when asked the question at trial relating to the time that had elapsed from the November purchase of the property until the 30th of May,

Q. During all this period of time, by the time you got some test holes, did you ever have a conversation with Mr. John New?
to which he responded,

Q. Why not?

A. Why should I? (T-92, 93)

Nixon then went on to admit that he had seen some of the mail that had come from John New and that he had been advised that Mr. New wanted to meet with him and he simply said, ". . . what's John got to do with it?" (T-94)

By the very terms of the contract, New was to deliver to Nixon a deed to the property. Nixon was to deliver to Mr. New a Promissory Note for the approximate sum of \$54,000.00. It is simply not reasonable that Mr. Nixon would delay any contact between himself and Mr. New because he was simply too busy.

The above questions make a little more sense when we look at the provision in the contract at paragraph 12, which states,

"In the event, Buyer determines the development is untenable, Buyer may require Seller to rebuy the property for One Hundred Thousand Dollars (\$100,000.00)."

The contract also provided at paragraph 13,

"Time is of the essence to this agreement."

This Court in Ferris v. Jennings 595 P.2d 857 (1979) held in a case in which specific performance was requested, at page 859 where the Court said,

"We have no disagreement with the general proposition that a contract will not be specifically enforced unless the obligations of the parties are 'set forth with sufficient definiteness that it can be performed.' But to be considered therewith is the further

proposition that the parties to a contract are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent." (Emphasis added)

It is obvious that Nixon did not proceed in good faith to cooperate in performing the contract. His testimony at the trial also gives some indication as to his thinking and his motivation in causing the delay. At the time of trial he was asked,

Q. Why didn't you think it was important to talk to this man?

A. It wasn't a matter of being important. It was important -- it was a matter of I just wasn't available, was busy as I could be. (T-95)

Mr. Nixon's attitude was further clarified by his statement at the time of trial when I asked him,

Q. Mr. Nixon, how much are you willing to give by way of promissory note to Mr. New today in exchange for the deed?

A. Whatever I told you I would in that letter.

Q. \$9,000.00, right?

A. Whatever it was.

Q. \$9,052.00. (T-84)

Subsequently in the trial, I again asked the question of Mr. Nixon,

Q. When you gave me a figure of \$9,000.00 that you would accept today, and he gave you a deed, and you gave him

a promissory note for \$9,000.00, a lot of interest was

computed that reduced the \$54,000.00 down to nine, wasn't there?

A. Well, I pulled off the terms of the contract and it reduces it by twenty some odd thousand there. And then there is some liens that haven't been expunged yet that would have to be taken care of. And there is interest on the money that it has cost me in John holding me up from getting that thing done. (T-98)

The contract does not provide for interest which Mr. Nixon admitted. (T-97)

The Respondent New is certain that the Court looked at the totality of the arrangement between the parties, the vagueness of the terms of the contract and the ability of Mr. Nixon to refrain from taking action. The Court ultimately held that the rights of the defendant could not be ascertained or enforced except at the whim or caprice of the plaintiff and therefore found the contract unenforceable. The logic of the Court was sound. The capacity of Nixon to manipulate that contract to his benefit was obvious, and it was obvious that he did not care about the delay--the delay was simply inuring to his benefit and to the substantial economic loss of Mr. New. It was clear at the beginning of the contract that Mr. New would be entitled to approximately \$54,000.00 less what it would cost him to remove some liens, etc., but his interest was substantial and at the time of trial, Mr. Nixon had now determined that New's interest had been diminished to the figure of \$9.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ARGUMENT

POINT II

THE COURT WAS CORRECT IN EXERCISING ITS
EQUITABLE RIGHTS TO DENY SPECIFIC PERFORMANCE
OF THE CONTRACT.

We have heretofore discussed the Court's ruling in
Ferris v. Jennings in which the Court said at page 859,

"But to be considered therewith is the further
proposition that the parties to a contract are
obliged to proceed in good faith to cooperate
in performing the contract in accordance with
its expressed intent."

This Court in Otteson v. Malone 584 P.2d 878
(1978) said at page 879,

"In determining a grant of specific performance
a court should examine the contract and the
circumstances pertaining to its execution and
formation, and determine whether there exist
equitable grounds to grant or deny specific
performance. In this connection a court may
consider any evidence of concealment, over-
reaching, or misunderstanding on the part of
the contracting parties which might result in
a failure of meeting of the minds."

The Respondent does not claim fraud or misrep-
sentation in these matters, but it is clear by the evidence
that Mr. New had a very valuable interest in this property
and the only way he could realize his equitable interest in
this property is to have it developed within a reasonable
period of time. That was obviously his intent at the time
the contract was signed; he believed he would receive approxi-
mately \$54,000.00.

Based on the events that occurred subsequent to

the signing of the contract, it appears obvious that it was not Mr. Nixon's intent to move with dispatch in the development of the property and in accordance with his thinking, why should he? The interest of New diminished as time went on, and if and when Nixon reached a point where he thought the development of the property didn't make any economic sense to him, he had the right, under the terms of the contract, to require New to pay him \$100,000.00 and re-purchase the property. Based upon the testimony of New at the trial, the property was worth in excess of \$200,000.00. (T-131)

Nixon's counsel in his brief at page 18 argued that Nixon stood to lose more than New in the deal if the development of the property was delayed. We do not believe that is true.

Obviously, Nixon put up approximately \$77,000.00 to purchase the property, but the property was worth \$200,000 plus and all he ever had to pay to New was the difference between the \$77,000 he put up and \$130,000, or \$54,000, and New was obligated to pay off all the liens and encumbrances. Therefore, there was no way that Nixon could lose, and if he ultimately decided he no longer wanted to be bothered, and that was at his sole option, he could require New to re-purchase the property for \$100,000.

On the other hand, however, New's interest diminished as time went on and in the mind of Nixon by the time of trial, it had already been diminished by approximately

was obligated to pay over to New. Admittedly, there were some liens that had to be removed, but it was evident at the time of the negotiation between the parties that most of the liens had already been paid, they simply had not yet been removed from the title to the property. (T-117) Nixon believed that most of the liens and encumbrances that had shown on the title report of the property had either been paid, settled or forfeited, and that in some way they had been taken care of. (T-63)

Appellant claims that New is in violation of two fundamental maxims of equity, towit: "He who seeks equity, must do equity" and "He who comes into equity, must come with clean hands." He argues that New had taken matters into his own hands and had not sought judicial assistance when he took over the development of the property. It is clear, however, that New made many attempts to contact Nixon and Nixon would have nothing to do with him. He would not respond to his mail, he did not keep his appointments and he did not return calls. It was Nixon who prevented the diligent and expeditious development of the property for a benefit to himself and the detriment to New.

CONCLUSION

The contract did not provide a precise date at which time the money would be paid by Nixon to New; it did not provide a precise time in which the development would

commence or be completed. Nixon was able to delay development of the property and by so doing, was able to diminish the interest of New. Both parties agreed upon execution of the contract that New would receive approximately \$54,000, since the liens had all either been paid, released or should have been released, but by the interpretation of Mr. Nixon, he was able to diminish the proposed payment to New by approximately \$44,000.00.

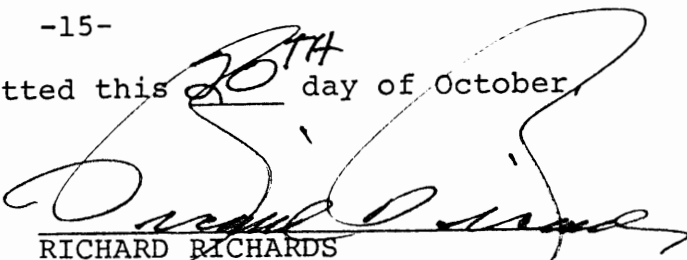
The Court obviously saw through Nixon's scheme and rightly concluded that Nixon could manipulate the contract to his benefit and to the substantial economic detriment of New because the time the development was to commence was solely at the discretion of Nixon and in the event Nixon determined that he did not want to proceed with development he could in turn require New to re-purchase the property for \$100,000.00.

The fact that times and dates were not firmly fixed by the parties, but within the sole discretion of Nixon and allowed him to manipulate these matters to his benefit and to the detriment of New was deemed unconscionable. Hence, the Court properly exercised its equity powers to prevent that injustice.

This Court, now having heard the testimony, should not now interfere with the lower Court's decision and Judge Gould's decision should be affirmed.

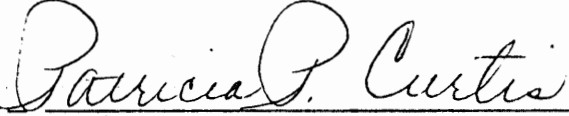
1980.

Respectfully submitted this 20TH day of October,



RICHARD RICHARDS
Attorney for Defendant and
Respondent
2408 Van Buren Avenue
Ogden, Utah 84401
Phone: 621-4430

I hereby certify that I mailed two copies of
the foregoing Brief to L. Brent Hoggan, Esq., Attorney for
Plaintiff/Appellant, 56 West Center Street, Logan; Utah 84321
this 20 day of October, 1980.



Secretary