

1999

Michael Bowen and Kristen Hortin v. Teak D. Jones : Brief of Appellee

Utah Court of Appeals

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V

MICHAEL BOWEN & KRISTEN
HORTIN,
Plaintiffs and Appellees,

vs.

TEAK D. JONES,

Defendant and Appellant.

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BRIEF OF APPELLEE
MICHAEL BOWEN

Appellate Court No. 980908407

Trial Court No. 990640

ORAL ARGUMENT AT THE DISCRETION OF THE COURT OF APPEALS

WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH

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PRO SE APPELLEE

FILLED
Utah Court of Appeals

APR 18 2000

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

Rule 29 Priority No. 15

MICHAEL BOWEN & KRISTEN)	
HORTIN,)	BRIEF OF APPELLEE
Plaintiffs and Appellees,)	MICHAEL BOWEN
)	
)	
)	
vs.)	
)	
TEAK D. JONES,)	Appellate Court No. 980908407
)	
)	Trial Court No. 990640
Defendant and Appellant.)	

BRIEF OF APPELLEE MICHAEL BOWEN

ORAL ARGUMENT AT THE DISCRETION OF THE COURT OF APPEALS

APPEAL FROM THE JUDGMENT OF THE SECOND DISTRICT COURT OF

WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH

HONORABLE PAMELA G. HEFFERNAN, JUDGE

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LIST OF ALL PARTIES

The caption of the case on appeal contains the names of all individuals who were parties to the proceeding in the trial court. These individuals are:

Appellee Kristen Hortin, who was a co-plaintiff at the trial court.

Appellee Michael Bowen, who was a co-plaintiff at the trial court.

Appellant Teak D. Jones, who was the defendant at the trial court.

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<u>Triton Realty Co. v. Frieman</u> , 210 Md. 252, 123 A.2d 290 (1956)	5
<u>Usinger v. Campbell</u> , 280 Or. 751, 572 P.2d 1018 (1977)	5

CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code Annotated Section 25-5-3 (1998). Leases and Contracts for interest in lands.

JURISDICTIONAL STATEMENT

This is an appeal from a case decided on Motion for Summary Judgment. The Utah Supreme Court had original appellate jurisdiction. The Utah Supreme Court transferred this matter to the Court of Appeals.

STATEMENT OF FACTS

1. On the 5th day of May, 1998, Plaintiffs and defendant executed an agreement entitled LEASE AND OPTION TO PURCHASE.

2. The term of the lease was stated to be March 1, 1998 to August 31, 1998. Said lease further provided for lease payments of \$648.00 per month and specified that time was of the essence.

3. Page 3, paragraph 8 of said lease made it clear that both the lease and the option to purchase would expire at the end of the lease term unless the option was exercised prior to that time or unless all the parties agreed in writing that the lease and/or option would continue on a month to month basis. If there were no agreement, then the lease would terminate and would not even continue month to month. There was never an agreement in writing between all parties as specified. The agreement on page 5, paragraph 12 further specifies that there can be no change or waiver regarding any portion of the agreement unless agreed upon by all parties in writing.

4. The defendant failed to make all the lease payments due under the lease. The defendant did not exercise his option prior to the August 31, 1998 deadline. Paragraph 9,

page 4 of said Lease and Option to Purchase specifically provides that to exercise the option, the defendant must do so and actually close the sale on or before August 31, 1998.

5. On November 25, 1998, the defendant attempted to assign his expired interest in the lease and option to purchase to a Diana Marie Harrison. Said Assignment was notarized by Wendie Thomsen of Ogden, Utah.

6. Also on November 25, 1998, the plaintiffs mailed a 5 day notice to vacate to the Weber County Sheriff to be served on the defendant. This notice was served by the Weber County Sheriff by posting the same on the door of the residence on November 30th, 1998 and mailing a copy of the same by mailing to the defendant on December 1, 1998.

7. On December 16, 1998, the Defendant was served with the Complaint and Summons in the present matter and subsequently posted a counterbond.

8. In November of 1998, the defendant attempted to exercise his option by selling the property to a third party. As mentioned above, the defendant later assigned his interest in the lease and option to a 3rd party. As part of that transaction, the defendant proposed to pay past lease payments (thereby admitting that he had not paid all lease payments due under the agreement.) As mentioned above, the option had expired. No document reinstating the option document was ever drafted or signed.

9. Throughout all times relevant tot his case, Michael Bowen's name remained on the title to the real property as a joint tenant.

SUMMARY OF ARGUMENT

Appellee Michael Bowen and Appellee Kristen Hortin brought this action to evict Appellant from certain premises located in Weber County. Prior to the eviction action, appellant's Option To Purchase the property had expired and he was many months in arrears in lease payments.

Both Appellees were owners of the subject real property, owning the same as joint tenants even though they had previously been divorced. Appellant convinced appellee Hortin to execute certain documents relating to a sale of the property not to him, but to a Diana Harrison. Said sale was not completed and the present eviction action was brought. No action has been brought on the failed sale to Diana Harrison, nor has any action been filed to attempt enforcement of the earlier expired option to purchase.

There is no claim made that appellant relief to his detriment on any representation or either appellee made before the option to purchase expired, nor is there any evidence or claim that appellant was the person named in the sales documents executed by appellee Hortin.

This appeal is simply an attempt for the appellant to try to retain his lost option on the property and Summary Judgment was appropriately granted by the trial court.

ARGUMENT

RESPONSE TO ISSUES AS RAISED BY THE DEFENDANT

ISSUE: Did the trial court err in determining by summary judgment that Appellee Michael Bowen, following his divorce from Appellee Kristen Hortin, retained an ownership interest in the real property which would allow him to interfere with the purchase of the property by Appellant from Hortin.

There are two very simple responses to this issue. First, irrespective of the wording in the Divorce Decree (however a court may choose to interpret it), Mr. Bowen's name remained on the title to the real property following the divorce and to this day remains on the title to the property. So long as that title status continued, he was therefore required to agree to any sale or other transfer of the property before an effective transfer could be made. Second, no matter what the status of the title to property, the failure of sale that the appellant complains about was not to appellant, but to a third party. Even if the attempted sale had been to Appellant, his attempt to exercise the option would have been futile because the option had expired, not been renewed and anything that remained had been assigned to a 3rd party. The state of the law respecting the exercise or acceptance of an option is not in doubt. In 91 C.J.S. Vendor and Purchaser Section 10 (1955) as follows:

The acceptance of an option, to be effectual, must be unqualified, absolute,

unconditional, unequivocal, ambiguous, positive, without reservation, and according to the terms or conditions of the option. Substantial compliance with the terms of the option is held not sufficient to constitute an acceptance; to be effectual, the acceptance must be identical with the offer, or at least, there must be no substantial variation between them.

This rule of unqualified and absolute acceptance has been long adhered to by the Utah courts. See *Nance v. Schoonover*, 521 P.2d 896 (Utah, 1974) and *Lincoln Land and Development Co. v. Thompson*, 26 Utah 2d 324, 489 P.2d 426 (1971).

In the present case, the defendant did nothing to exercise his option during the option period. Later, he attempted to assign the expired option to a 3rd party and a third party attempted to purchase the property, but the sale was not completed.

The eviction action was brought months after the option had expired. Where a contract states that time is of the essence, cases hold that both parties are discharged from their contract obligations if neither makes tender by the agreed closing date. *Triton Realty Co. v. Frieman*, 210 Md. 252, 123 A.2d 290 (1956); *Usinger v. Campbell*, 280 Or. 751, 572 P.2d 1018 (1977); *Guillory Corp. v. Dussin Investment Co.*, 272 Or. 267, 536 P.2d 501 (1975); 6 Corbin on Contracts s 1258 (1962).

ISSUE: Did the trial court err in determining by summary judgment that the option agreement between Jones and Hortin was not extended through Hortin and Bowen's acquiescence and Hortin's subsequent signing of closing documents which included provision for payment of accrued rent.

As noted by the cases cited by Appellee Bowen above, for the option to purchase the real property at issue to be extended, it would have to be done prior to the July 1,

1998 deadline. The later acts by appellee Hortin to execute documents selling to a 3rd party (without even mentioning the option) are insufficient to somehow extend the expired option. See *Nance v. Schoonover*, 521 P.2d 896 (Utah, 1974) and *Lincoln Land and Development Co. v. Thompson*, 26 Utah 2d 324, 489 P.2d 426 (1971).

While appellant claims acquiescence by appellees, he fails to note any facts in support of that contention except the proposed sale to a 3rd party. Neither appellee did anything with appellant to extend the option to purchase.

Appellant further goes on to claim that he had “clean hands” and should be granted equitable relief. The trial court correctly noted that the appellant was behind in his rent payments thousands of dollars and that this action precluded him presenting himself as a claimant with “clean hands.” Appellant also claims that the rent payments were to be paid under the contract with appellee Hortin, but fails to note that the appellant was not a party to that agreement and no document is presented which indicates that appellant was the one who was going to pay those back payments. Further, an offer to correct a default does not erase the fact that a default had occurred and render the person suddenly an appropriate party for equitable relief.

ISSUE: Assuming that Appellee Bowen’s approval for the sale of the property to Appellant was not (sic) required and even if there was no extension of the option to purchase, did the trial court err by failing to find that Appellee Hortin created a new and binding contract for the sale of property by signing closing documents including a warranty deed, or, in the alternative, does the merger doctrine apply to Appellee Hortin’s actions.

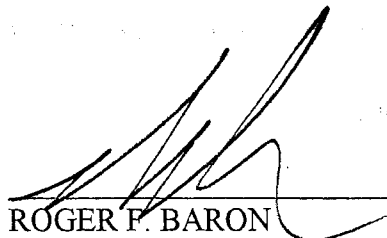
As shown by Addendum E to appellant's brief, all closing documents and agreements were between Kristen Hortin and Diana Harrison. Diana Harrison was not a party to the lawsuit. The court therefore had no reason to look at whether a new and binding contract of sale was created by appellee Hortin. Should Diana Harrison wish to attempt to enforce a contract of sale, that would be her option, but does not involve the eviction action in this case. Further, no matter who the buyer was, it is clear that inasmuch as both appellees names were on the property, both would have to agree to the sale.

In connection with the above issue, appellant claims that the Warranty Deed signed by appellee Hortin somehow merged the earlier documents between Hortin, Bowen and Jones. Appellant once again fails to mention that the Warranty Deed was not with Jones, but was with Harrison. He also fails to note that for the Deed to be effective, it would have had to have been signed by both owners of the property and proper delivery made of the deed. It is undisputed that the sale never closed and the deed never delivered or recorded. Without a closing and delivery of the deed, it is merely a piece of paper expressing an intent to sell to Diana Harrison.

CONCLUSION

The essential facts in this case are undisputed. The parties executed a lease with an option to purchase. The option expired, the lease payments fell into default. One of the Appellees executed some sales documents to a 3rd party (Diana Harrison), but the sale was never closed. The present eviction action was brought by Appellees and Summary Judgment Granted. There are no facts or inferences from these facts which would entitled appellant to a trial in this matter.

Dated this 18th day of April, 2000.



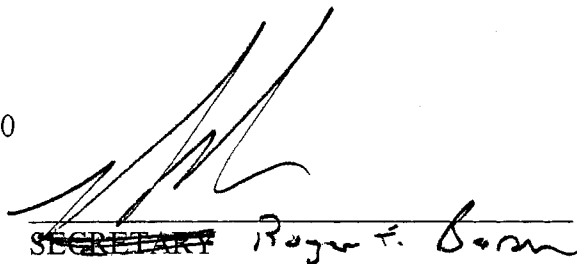
ROGER F. BARON
ATTORNEY FOR APPELLEE BOWEN

CERTIFICATE OF MAILING

I, Roger F. Baron, hereby certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLEE MICHAEL BOWEN this 18th day of April, 2000, postage prepaid to the following:

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~~SECRETARY~~ Roger F. Baron