

1989

Leon Sprouse v. Arjen W. Jager, Nada H. Jager, Artie
Edmunds, Lloyd Walters, and John Does 1
thought V : Reply Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Sprouse v. Jager*, No. 890642 (Utah Court of Appeals, 1989).
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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

LEON SPROUSE,	:	
Plaintiff,	:	Case No. 890642-CA
	:	
vs.	:	Oral Argument
	:	Priority No. 16
ARJEN W. JAGER, NADA H.	:	
JAGER, ARTIE EDMUNDS,	:	
LLOYD WALTERS, and JOHN	:	
DOES 1 through V,	:	
Defendants.	:	

ROY N. LARSEN, ARTIE	:	
EDMUNDS, and INTERWEST	:	
COMMERCIAL PROPERTIES,	:	
Third Party	:	
Plaintiffs-Appellees,	:	
vs.	:	
LEON SPROUSE,	:	
Third Party	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY,
UTAH, THE HON. J. PHILIP EVES, PRESIDING

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FILED

JUN 7 1990

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Statutes and Rules Cited:

Utah R. App. P. 24(c).	1
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SUMMARY OF ARGUMENT

Edmunds asserts in his brief that independent grounds for affirming the judgment exist in the assignment provisions of the Note/Agreement/Assignment ("NAA") and that Edmunds was entitled to share in the proceeds of the sheriff's sale. Edmunds may not thus claim selected benefits from the NAA while ignoring the concomitant burdens. The assignment provisions of the NAA could only have secured payment of the note provisions of the NAA. The note provisions exclude personal liability. The assignment provisions cannot negate that exclusion.

Even if the assignment were enforceable, there were no proceeds from the sale to which the assignment could attach. Edmunds' claim that Sprouse should have paid the amount of his sheriff's sale bid into court is barred by Edmunds' failure to challenge the manner in which the sale was conducted.

Sprouse properly marshalled the evidence on the issue of whether Edmunds and his principal broker accepted the NAA. Even Edmunds' evidence showed that he and his broker acted at all times as though Sprouse's obligation to them was embodied in the NAA. Their actions establish, as a matter of law, that they consented to and accepted the NAA.

Finally, Sprouse's failure to object at trial to Edmunds' proffer of evidence regarding attorney fees does not preclude Sprouse from challenging the award of attorney fees. Sprouse does not challenge the accuracy of the proffer, but only that the evidence proffered was insufficient to present a prima facie case.

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INTRODUCTION

Appellant disagrees with much of the arguments set forth in the Brief of Respondents. Pursuant to the provisions of Rule 24(c) of the Utah Rules of Appellate Procedure, however, this reply brief will be generally limited to answering new arguments raised in the Brief of Respondents. Any failure of Appellant to

respond to any argument raised in the Brief of Respondents should not be viewed as an admission that the argument is well-taken.

ARGUMENT

POINT I

THE ASSIGNMENT PROVISIONS OF THE NAA DO NOT INCREASE SPROUSE'S PERSONAL LIABILITY.

Edmunds argues in Point I of his brief that he is entitled to recover against Sprouse pursuant to the "assignment" portion of the Note/Agreement/Assignment ("NAA"). Edmunds asserts that the real estate commission was included in the judgment Sprouse obtained against Jager (the judgment debtor), and that Edmunds owned an assignment of the underlying Uniform Real Estate Contract, and that Edmunds was accordingly entitled to a share of the "proceeds" of the foreclosure sale.

The primary difficulty with this argument is that the assignment only secured payment of the note, and other portions of the NAA clearly excluded any personal liability on the note. In addition, there were no "proceeds" of the foreclosure sale.

Edmunds supports his argument with four subpoints. These points will be addressed in the order presented in Edmunds' brief.

A. Sprouse's Judgment Against Jager Did Not Necessarily Include The Commission.

Edmunds recites that the selling price of the motel was set at \$475,000.00 because Sprouse wanted at least \$450,000.00, so the \$25,000.00 commission was included in the sale price. Edmunds

further recites that Sprouse received certain properties in lieu of a down payment, and deduces from these facts that the commission must have been included in the unpaid balance of a contract due from Jager. Edmunds then argues that this reasoning process somehow supports his claim that Sprouse is personally liable for payment of the commission notwithstanding the provision of the NAA to the contrary.

One cannot look at the sales price and state that the commission is included in any particular portion, or included at all. Even if that were possible, the facts and logic set forth by Edmunds just as readily support Sprouse's position. If Sprouse is personally liable for payment of the real estate commission, it is irrelevant whether the amount of that commission was "included" in the sale price or "included" in the judgment ultimately obtained against Jager. By arguing that the commission was included in the sale price and judgment, Edmunds in reality admits that the commission was to come only from Jager. If the commission is "included" anywhere and if Sprouse were personally liable, one would assume that the commission was "included" in the money or assets Sprouse has already received, i.e., the down-payment. The portion identified by Edmunds as "including" the commission is that portion of the sales price which has not been paid. This bolsters Sprouse's contention that the commission was not to be paid unless Jager paid.

Sprouse has obtained a judgment against Jager and acknowledges that if that judgment were collected from Jager, Edmunds would be entitled to recover his commission from the proceeds collected from Jager. The judgment is, however, uncollectible. The academic question of whether the commission is somehow "included" in the judgment is otherwise irrelevant.

B. Edmunds Is Entitled To The Proceeds Of The Sheriff's Sale Because There Were No Such Proceeds.

Point I.B. of Edmunds' brief argues that the assignment provisions of the NAA give Edmunds a right to share in the proceeds of the sheriff's sale. There were, however, no such proceeds. The only bid at the foreclosure sale was that tendered by Sprouse, and consisted only of a credit for the benefit of Jager against the judgment in favor of Sprouse. The sheriff conducting the sale accepted the bid and conveyed title to the property to Sprouse. Edmunds has not brought any action to set aside the sale or otherwise challenge the actions of the sheriff in accepting the bid, nor has Edmunds otherwise challenged the validity of the sale.

In the event that any proceeds are realized from the judgment against Jager, however, Edmunds would be entitled to only a pro-rata portion of those proceeds, pursuant to the authorities set forth in Edmunds' brief.

C. The Assignment Secures Only Payment of The Note.

Sprouse did not make an absolute assignment to Edmunds of all of Sprouse's interest in the Uniform Real Estate Contract, but only assigned that interest to secure his obligations under the NAA. The terms of the NAA clearly limit that obligation as applying only to payments "received by Heritage [Thrift and Loan] under the Unifrom [sic] Real Estate Contract referred to above."

Edmunds argues, in Point I.C. of his brief, that his assigned rights are entitled to priority over the rights of Sprouse. The arguments might have merit if Sprouse had any remaining obligation to Edmunds which was secured by the assignment and if Sprouse had received any proceeds in the foreclosure. Neither of these factors are present. Because Sprouse's debt to Edmunds was contingent upon Jager making payments, the assignment is likewise contingent.

D. Sprouse Did Not Receive Any Proceeds from the Sheriff's Sale.

Point II.D. of Edmunds' brief again asserts that Edmunds is entitled to share in the "proceeds" from the sheriff's sale. As explained above, however, there were no such proceeds. If Edmunds had an objection to the Sheriff accepting a credit bid from Sprouse, Edmunds should have objected to the sale and filed appropriate pleadings to set it aside. Having failed to object to the manner in which the sale was conducted, Edmunds cannot now claim an entitlement to "proceeds" which do not exist.

POINT II

THE ASSIGNMENT PROVISIONS OF THE NAA DO NOT CONFLICT WITH THE PROVISIONS RELIEVING SPOUSE OF PERSONAL LIABILITY.

Edmunds argues in Point II of his brief (at p. 28), that there was no point in making an assignment of a portion of the Uniform Real Estate Contract if Jager has no personal liability. The exclusion of personal liability could be construed to limit the effect of the assignment. It does not follow, however, that the provisions are inherently conflicting and that the exclusion of personal liability must be totally eliminated in order to give greater effect to the assignment. The rule of construction is clearly to the contrary. All of the parts of a contract should be given effect insofar as is possible. Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163 (Utah 1980) (citations omitted).

The assignment provision of the NAA does have a purpose, even with the exclusion of personal liability. As proffered by Mrs. Sprouse, the purpose was to permit Edmunds to protect his commission by stepping into the shoes of Mr. Sprouse and foreclosing against Jager if necessary. (Tr. 255.) In fact, if Sprouse has been personally liable for the commission, there would have been little need for the assignment. Had Sprouse been personally liable, Edmunds could have enforced that liability by action directly against Sprouse. If he had been successful in obtaining a judgment against Sprouse, he could have executed on Sprouse's

interest in the Uniform Real Estate Contract. The granting of an assignment and the concomitant right of stepping into Mr. Sprouse's shoes to foreclose against Jager was necessary only because Sprouse was not personally liable.

POINT III

EDMUNDS AND HIS BROKER MUST BE DEEMED, AS A MATTER OF LAW, TO HAVE ACCEPTED THE NAA.

Edmunds asserts on page 39 of his brief that Sprouse has failed to marshall all the evidence both for and against the trial court's findings relating to the NAA. Although Sprouse has not restated the entire transcript, Sprouse did set forth the primary testimony both for and against the NAA. (Brief of Appellant, pp. 21-22.) Sprouse has thus fulfilled his duty to marshall the evidence.

The primary thrust of Sprouse's argument, however, was not that there was no conflicting evidence, that rather that even Edmunds' evidence established, as a matter of law, that Edmunds and his broker had accepted the NAA. Edmunds' broker assigned the NAA to Edmunds shortly after closing. Edmunds subsequently assigned the NAA to a bank. Although not initially named as a party to this action, Edmunds filed an affidavit in the action to assert rights under the NAA. Edmunds' initial pleadings in this action assert rights under the NAA.

Edmunds argues that his actions in purchasing an assignment of the NAA for full cash value is inconsistent with the limitation

of personal liability, and that only a fool would have made such a transaction if the limitation of personal liability were enforceable. It is not the province of the courts, however, to inquire into the wisdom of a transaction. Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983). It is possible that Edmunds purchased the assignment for full cash value because he believed that Jager would pay. (Sprouse presented evidence that Edmunds had made glowing representations concerning Jager's ability to pay. E.g., Tr. 168-69.) There may have been other factors. The reasons why he made the assignment are not particularly important, because there is no dispute that the assignment was made, and that Edmunds and his broker consistently acted as though Sprouse's obligation to them was embodied in the NAA. The great weight of the evidence established, as a matter of law, that Edmunds and his broker had accepted the NAA, and are bound by all of its terms.

POINT IV

SPROUSE'S ACCEPTANCE OF THE PROFFER REGARDING ATTORNEY FEES DOES NOT PREVENT HIM FROM CONTESTING THEM ON APPEAL.

In Point IV of his initial brief, Sprouse challenged that award of attorney fees on two grounds: First, that Edmunds failed to present a prima facie case that the fees were reasonable, and second, that only a third of the fees were related to the points on which Edmunds prevailed. Edmunds has responded by asserting that Sprouse did not object to the evidence at trial and is

therefore precluded from challenging the sufficiency of the evidence, and that the claim is raised for the first time on appeal. These argument will be addressed in order.

Edmunds argues that he proffered evidence at trial concerning his attorney fees, and that Sprouse is somehow bound by that proffer. (Brief of Respondents, page 44.) On page 46 of his brief, Edmunds refers to the proffer as a "stipulation and proffer." No stipulation was made. The transcript (a copy of which is attached as Appendix "H" to Appellant's Brief) demonstrates that Sprouse's counsel initially queried whether the parties could reach a stipulation concerning reasonableness, but Edmunds counsel instead made of proffer of what the testimony would be. (Tr. 162.) The only response of Sprouse's counsel to the proffer was an acknowledgement that it correctly reflected what the testimony would be. (Tr. 163-64.) No stipulation or other agreement was made concerning the reasonableness of the fees.

Sprouse still does not challenge the validity of the proffer. Sprouse further does not dispute that the hours were spent as testified. Sprouse only asserts that the evidence proffered was not sufficient to make a prima facie entitlement to an award of attorney fees.

Edmunds asserts that had Sprouse challenged the evidence, he could have presented additional evidence at the trial. The defendant does not, however, have the burden to explaining to the

plaintiff, prior to the plaintiff resting his case, in what areas the plaintiff's proof is deficient. It is the burden of plaintiff to present a prima facie case. If he fails to do so, the defendant may move for a dismissal without ever having made any objection to the evidence. See Utah R. Civ. P. 41(b).

Sprouse is not, therefore, trying to avoid any stipulation he made. Sprouse simply asserts that Edmunds failed to present a prima facie case, and further, even if a prima facie case was presented, two-thirds of the fees are not recoverable in any event because they were not related to the points on which Edmunds prevailed. Mountain States Broadcasting Co. v. Neale, 776 P.2d 643 (Utah Ct. App. 1989).

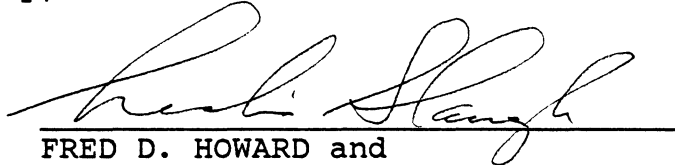
Edmunds also asserts that this issue is raised for the first time on appeal. The issue was raised at least as early as the hearing on Sprouse's "Motion for New Trial," which was made prior to the entry of the judgment. (Minute Entry, March 14, 1989.)

CONCLUSION

The great weight of the evidence admits of no other conclusion but that Edmunds and his principal broker accepted all the benefits of the NAA, and viewed Sprouse's obligations for the payment of a real estate commission to be embodied in the NAA. Edmunds continues, on appeal, to assert that he is entitled to benefits from the NAA. Any benefits from the NAA must come together with the burdens. The limitation of personal liability

in the NAA is enforceable according to its terms. The judgment against Sprouse must be reversed.

DATED this 29th day of May, 1990.

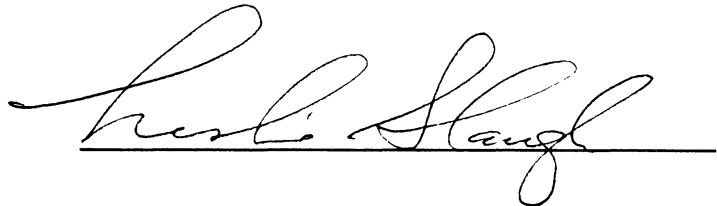
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FRED D. HOWARD and
LESLIE W. SLAUGH, for:
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Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 29th day of May, 1990.

John L. Miles, Esq.
60 North 300 East
St. George, Utah 84770

A handwritten signature in cursive script, appearing to read "Leslie Slauch", written over a horizontal line.