1980

Eben Blomquist v. Marc C. Bingham Maurine Bingham And John Does 1-10 : Brief of Plaintiff-Appellant

Utah Supreme Court

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

-o-O-o-

EBEN BLOMQUIST, :

Plaintiff-Appellant : Supreme Court

vs. : Case No. 17268

MARC C. BINGHAM, MAURINE BINGHAM and JOHN DOES 1-10, :

Defendants-Respondents :

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BRIEF OF PLAINTIFF-APPELLANT

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APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH
HONORABLE J. ROBERT BULLOCK, JUDGE

-o-O-o-

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BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF NATURE OF CASE

In the Lower Court, Plaintiff-Appellant was granted a Decree of Specific Performance, mandating the sale of certain real property, pursuant to Contract. Plaintiff-Appellant appeals the terms of that Decree, but does not question the findings made by the Lower Court.

STATEMENT OF FACTS

Plaintiff-Appellant does not dispute the Findings of Fact as made and entered by the Court. The portions of those findings significant to this appeal are the following:

1. Plaintiff and Defendants are residents of Utah County, State of Utah. (Finding #1 R.2)

2. On or about August 3, 1979, Defendants were the owners of that certain tract of land and appurtenant water in Carbon County, Utah. (Finding #2 R.2)

3. On or about the 4th day of August, 1979, Plaintiff and Defendant entered into a Contract by the terms of which Plaintiff agreed to buy, and Defendants agreed to sell, the real estate above described, under the following conditions:

> . . .(d) The purchase price shall be paid as follows: TEN THOUSAND DOLLARS ($10,000.00) on or before December 31, 1979, then TWENTY-FOUR THOUSAND NINE HUNDRED DOLLARS ($24,900.00) on the 31st day of December, 1980, and each 31st day of December thereafter until the 31st day of December, 1985, at which time the entire principal balance, together with any unpaid interest, shall be due and payable. Each payment shall first be applied to interest, then to principal. Interest shall be calculated at Ten Percent (10%) per annum.
>
> . . .(g) Buyer and Seller recognize that to subdivide the property, that the off site improvements, such as water and sewer, will have to be brought to the property from some distance. Buyer is to obtain the loan to bring the water and sewer to the property, and the Seller will subordinate their interest in order to secure improvement loan.
>
> (h) At the present time, it is estimated that it will cost approximately FIVE THOUSAND DOLLARS ($5,000.00) per lot to improve the property as requested by Carbon County. Seller agrees to subordinate their interest to obtain loan to be a maximum of ONE HUNDRED FIFTY THOUSAND

DOLLARS ($50,000.00) on approximately Thirty Percent (30%) of the property at a time.

(i) Seller agrees to subordinate to the Buyer of each lot to builders determined by the Buyer to be credit worthy to the extent of their interest in the lot. No builder will be allowed to have more than six (6) lots under subordination at any one time. The subordination terms to be nine (9) months at Twelve Percent (12%) interest from date of subordination.

(Part of Findings #3, R. 3 & 4)

11. On approximately October 1, 1979, Blomquist advised Radford that he was ready, willing and able to close and asked when the closing would take place. (Findings #11, R. 6)

15. The failure of the transaction to close was the fault of the Defendants and their agents who did not cooperate in arranging a closing. (Findings #15, R. 6)

Council for the Plaintiff submitted a Proposed Decree, the significant portions of which are as follows:

1. Plaintiff is granted a Decree of Specific Performance implementing the Purchase Contract of August 4, 1979, between the parties by which Plaintiff contracts to purchase the following described real property (description omitted).

2. All payments required of Plaintiff and all interest and all payments to become due shall be extended in due date for a period equal to the delay in performance caused by this legal action. First performance shall be required third (30) days after

finality of this Decree, including appeal rights. (Plaintiff's Proposed Judgment and Decree)

The Court refused to grant the specific provisions of paragraph 2, and in their place and stead, entered the following:

2. It is further decreed that the implementation of the Purchase Contract on August 4, 1979, shall be as follows:

(a) The closing of the transaction shall occur not later than ten (10) days after final disposition of this lawsuit, including expiration of all appeal rights.

(b) Payment shall be made by Plaintiff to Defendants of TEN THOUSAND DOLLARS ($10,000.00) down payment referred to in the Earnest Money Receipt and in paragraph 3(d) of the Findings of Fact herein at the time of closing. There shall be no interest charged on the TEN THOUSAND DOLLARS ($10,000.00).

(c) One-half (1/2) of the interest on the principal, less the TEN THOUSAND DOLLARS ($10,000.00) referred to in 2(b) above of this Decree from the date of signing the Contract to the date of closing, as set forth in 2(b) above, should be waived and forgiven the Plaintiff.

(d) After the date of closing, as set forth in paragraph 2(b) above of this Decree, interest should be charged at the full rate of Ten Percent (10%) per annum, and all payments shall be made as provided in the Contract.

RELIEF SOUGHT ON APPEAL

Although the real property purchase delayed for a whole season during litigation and effective use of the purchased property has not yet come into the use and control of the Plaintiff, the District Court did not relieve the burden of interest on the principal nor the time of payment. Plaintiff-Appellent seeks equitable modification of the Contract to provide:

1. That interest be charged from the date of closing.

2. That the payment required to be made of TWENTY-FOUR THOUSAND NINE HUNDRED DOLLARS ($24,900.00) on December 31, 1980, be extended for a period equal to the delay occasioned by the refusal to close and the resultant litigation.

ARGUMENT

POINT I.

SPECIFIC PERFORMANCE IS AN EQUITABLE REMEDY.

> "Specific performance is an extraordinary and purely equitable remedy, action, or proceeding, and it is a substitute for the legal remedy of compensation whenever the legal remedy at law is impractical or inadequate." See 81 C.J.S. Specific Performance Sec. 2, pages 701-02.
>
> See also Note 1, Close vs. Blumenthal, 354 P.2d 856, 11 Utah 2d 51.

POINT II.

IN A SUIT FOR SPECIFIC PERFORMANCE, THE COURT SHOULD ADJUDICATE ALL RIGHTS AND CLAIMS OF THE PARTIES.

The Contract between the parties was to be performed on or about October 1, 1979. Because of Defendants' refusal to cooperate in a closing, to close on time had become an impossibility,

even as early as the filing date of Plaintiff's lawsuit. Timely performance was therefore impossible. The Findings show that the property was being purchased by Plaintiff for subdivision purposes. The original contract, without delay, provided for payment of TEN THOUSAND DOLLARS ($10,000.00) at closing (October 1, 1980) TWENTY-FOUR THOUSAND NINE HUNDRED DOLLARS ($24,900.00) or or before December 31, 1980, and TWENTY-FOUR THOUSAND NINE HUNDRED DOLLARS ($24,900.00) on or before each December 31st thereafter (Exhibit No. 1).

That the property was being purchased for subdivision development is apparent from the Contract (Exhibit 1), and from Findings of Fact # 3(g), 3(h) and 3(i), R. 3 & 4, page ____ of this Brief.

Equity demands therefore that the Plaintiff-Appellant have the economic benefit of one (1) full development season to accumulate an amount sufficient to pay the first full payment of TWENTY-FOUR THOUSAND NINE HUNDRED ($24,900.00).

The Court has the power to so provide and in the interest of full settlement, should make such provision.

> "Time for Performance of Decree. The Court may and usually should fix a time for the performance of the terms of the Decree." Vol 81A. C.J.S. Section 191.

POINT III.

WHEN THE PURCHASER HAS NOT RECEIVED COMPLETE AND BENEFICIAL POSSESSION OR WHERE VENDOR HAS WILLFULLY REFUSED TO PERFORM CONTRACT, THE COURT SHOULD POSTPONE PAYMENT OF INTEREST AND INSTALLMENTS.

In this case, although Plaintiff-Appeallant has had the right and the Court found "Constructive Possession" in the Findings of

Fact, this was a post lawsuit finding and Plaintiff-Appellant does not have possession upon which he can capitalize as far as development which would enhance Plaintiff-Appellant's ability to utilize the property being purchase.

The case of Amos vs. Bennion, 456 P.2d 172, 23 U.2d 40, is exactly in point.

In the above cited case the exact questions of interest and installment payments were raised. The assignments of error appealed from were:

> . . . (1) That the lower Court erred in ruling that Defendants are not entitled to interest for the period prior to November 15, 1966;
>
> (2) the Lower Court erred in ruling that the down payment and installment payments under the Contract should be deferred or postponed . . . (at page 173).

As in the case before us, the Plaintiff did not receive full use of the properties . . . and the Seller was responsible for the failure to close. The Court held:

> "At the time of entry of the Decree, August 12, 1968, it was no longer possible to perform the Contract in accordance with its terms, and it was the Court's duty to make equitable adjustments with respect to interest and installments.
>
> Plaintiff-Respondent's authorities hereinafter cited make it clear that where a purchaser's possession is not beneficial, or is incomplete, or where the vendor has wilfully refused to perform his Contract, a Court of Equity, in decreeing specific performance, should postpone the date for commencement of interest and the date upon which down payments and installment payments are to be made.
>
> Quoting Price vs. Gimmel, 48 Colo, 163, 109 P.941:

> " . . . the rule is applied that where a vendor refuses to comply with his Contract to convey, and the vendee obtains a decree requiring specific performance of such Contract, the purchase price draws interest only from the date the provisions of the Decree are to be complied with by the vendee, and not from the date when the Contract should have been performed, or from the date when, according to the Contract, the payments were to be made or secured. It would be obviously unjust to allow the vendor interest on the deferred payments of the purchase price when the failure to perform the Contract was caused by the fault of the vendor, and the vendee had never been in possession."

The Court upheld the Lower Court decision on deferrment of interest and purchase installments, and in so doing cited numerous cases sustaining said ruling. (Cases found in 456 P.2d, 175, including Johnson vs. Jones 109 U.92, 164 P.2d 893.

CONCLUSION

Since the purchase price agreed to in the Contract is THREE HUNDRED THOUSAND DOLLARS ($300,000.00), the time for interest to run at Ten Percent (10%) per year makes a significant economic difference. Since Plaintiff did not have use othe land, Equity would and should require that interest start to run from closing (after expiration of all appeal rights), and that installment payments be deferred by a like period.

Respectfully submitted,

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Certificate of Mailing

I CERTIFY that I mailed two copies of the foreing Brief to JOHN L. VALENTINE for HOWARD, LEWIS & PETERSON, attorneys for Defendants-Respondents, 120 East Third North, P. O. Box 778, Provo, Utah, postage prepaid, this 24th day of November, 1980.

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