1981

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

EBEN BLOMQUIST,

Plaintiff-Appellant,

vs.

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

Defendants-Respondents

Supreme Court
Case No. 17268

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from the Judgment of the Fourth Judicial District Court fo- Utah County, State of Utah
Honorable J. Robert Bullock, Judge

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STATEMENT OF NATURE OF CASE

This case was initiated by the Plaintiff-Appellant seeking to enforce and validate as a contract for the sale of land a certain Earnest Money Agreement and Offer to Purchase. A Judgment and Decree of Specific Performance was entered by the Fourth Judicial District, the Honorable J. Robert Bullock presiding, on July 25, 1980. On appeal, the Plaintiff-Appellant does not, apparently, contest the correctness of any finding of fact of the Court below, but does challenge the propriety of the conclusions of law drawn therefrom and the propriety of the Decree of Specific Performance.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks affirmation by this Honorable Court of the Decree and Judgment of the Court below, the Honorable J. Robert Bullock presiding.

STATEMENT OF FACTS

As there is no dispute in this appeal that the findings of fact of the Court below were supported by the evidence and Plaintiff-Appellant's Brief on Appeal cites extensively from those findings, Defendant-Respondent shall limit this statement to those findings critical to the ultimate conclusions and Decree of the Court below, including findings not referred to by Plaintiff-Appellant and to the records where opposite to the issues on appeal.

The Court below in granting to Plaintiff-Appeallant specific performance of the contract, found that Defendant-Respondents had waived the date of closing as stated in the Earnest Money Receipt and Offer to Purchase. The Court found that Plaintiff-Appellant notified Defendants-Respondents' real estate agent on or about Oct. 1, 1979, that he was ready to close. (See Findings of Fact and Conclusions of Law, Findings No.'s 7 and 11.) The Court further found that the facts supported the following Conclusions of Law:

> 3. The contract had the effect of giving constructive possession of the real property to the Plaintiff.
>
> 4. The Defendants performed no affirmative acts which would terminate the constructive possession of Plaintiff.

While the Court below did find that the failure of this transaction, which included the exchange of real property, was the "fault" of the Defendants-Respondents, no finding of fact or conclusion of law was entered that the breach was willful

The court below decreed the following in support of and in enforcement of the Judgment and Decree of Specific Performance of the contract of the parties to this action entered on or about the 4th day of August, 1979:

It is further decreed that the implementation of the Purchase Contract of 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 paument 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.

The following colloquy between Plaintiff-Appellant and his attorney occurred at trial:

> Q Mr. Blomquist, are you still ready, willing and able to close this transaction --
>
> A Yes.
>
> Q -- in the event it should be ordered by the Court?
>
> A Yes.
>
> (T.R. at 80, 81)

The uncontroverted facts at the trial were that Plaintiff-Appellant had not paid any taxes owed by the Defendant-Appellant, nor had any payments under the contract, other than the $100.00 earnest money, been received or paid, including payments under the contract due to Defendants-Respondents' seller by Plaintiff-Appellant. (T.R. 90 and 92). The Plaintiff-Appellant paid none of the taxes on the subject property to be transferred under the contract to Plaintiff-Appellant on September 15, 1979, (T.R. 90 and 92). In regard to the payment of interest under the contract, the following colloquy occurred between the Plaintiff-Appellant and the Court:

> THE WITNESS: Interest from September 15 through June 15. I'm assuming it will take a few days to put everything back into order.
>
> THE COURT: At what rate?
>
> THE WITNESS: It's at 10 percent, I believe.
>
> THE COURT: At the contract rate?

THE WITNESS: Yes. And I'd be liable for that interest now if we went ahead with the contract the way it was set up. (T.R. at 89)

ARGUMENT

POINT I.

ENTRY OF A DECREE OF SPECIFIC PERFORMANCE AND THE BALANCING OF THE EQUITIES BETWEEN THE PARTIES IN PROVIDING THE TERMS OF SAID DECREE, ARE DISCRETIONARY WITH THE TRIAL COURT, AND SHOULD NOT BE REVERSED ON APPEAL WHERE NOT CONTRARY TO THE LAW.

While the Utah Constitution, Art. VIII, Sec. 9, does provide that in appeals "in equity cases the appeal may on questions of law and facts" this court has made clear that it will review evidence in the light believed by the trial court and not from the perspective of the appealing party. Kier v. Condrack, 478, P.2d 327 (Utah 1970). While in the present case appellant does not challenge the findings of fact of the Court below, it is submitted that the appellant herein, in its brief on appeal, is interpreting the facts as found by the court in the light most favorable to that party, which is not necessarily what the court found to justify its ultimate conclusions of law.

Furthermore, this court has expressed on issues identical to those challenged on appeal in this case, i.e. the trial court's authority to allow or refuse to allow interest to a vendor found in breach in a contract to sell land, that the trial court must balance the equities, which necessarily entails some discretion on the part of the lower court. Eliason v. Watts, 615 P.2d 427, (Utah 1980). As stated in Eliason:

When specific performance is granted, it is the obligation of the courts to evaluate the equities of the parties and to formulate a remedy that seeks to place the parties in a position as similar as possible to that which they would have been in had the conveyance been according to the terms of the contract.

POINT II.

THE DECREE OF THE COURT BELOW, WHICH ADJUSTED THE EQUITIES BETWEEN THE PARTIES AND PLACED THEM IN THE POSSESSION THEY WOULD HAVE BEEN IN HAD THE CONVEYANCE BEEN TIMELY PERFORMED UNDER THE CONTRACT, SHOULD BE AFFIRMED.

It should be noted at the outset that the record does not support the contention of the Appellant that the contract between the parties in the present litigation was to be closed and the option exercised on or about October 1, 1979. (Brief of Appellant at page 5).

The date under the Earnest Money Receipt and Offer to Purchase is a closing date of September 15, 1979, which the court below found waived by the Respondents herein. (See Findings of Fact and Conclusions of Law, Conclusion of Law No. 2). It is submitted that this distinction is of particular importance to the understanding of the actual Decree of the court below, and in the balance of the equities.

In this case the Plaintiff-Appellant sought to affirm the contract, rather than to rescind for breach by Defendants-Respondents; therefore he is bound by the terms of that contract and cannot specifically enforce only those provisions to his benefit. Farnsworth v. Jensen, 217 P.2d 576 (Utah 1950).

Appellant relies upon the holding of this Court in

Amoss v. Bennion, 456 P.2d 172 (Utah 1969), in asserting that the trial court in entering of a decree of specific performance in favor of the purchaser may deny interest on the purchase price until the date of the entry of the Decree and postpone the date upon which down payments and installment payments are to be made. It is submitted that Amoss v. Bennion, supra, is not on point to the present facts. This Court's decision in Eliason v. Watts, 615 P.2d 427 (Utah 1980) should be decisive of the issues. While Eliason dealt specifically only with the issue of interest upon the purchase price and not with granting the purchaser entirely new periods of time for payments under the contract, as stated by this Court in Amoss v. Bennion, 456 P.2d at 174, "The two points are governed by similar principles of law."

In Eliason v. Watts, supra, the vendor rejected a tender of payment by the plaintiff pursuant to an earnest money and offer to purchase. The plaintiff successfully obtained a Decree of Specific Performance. This Court, in Eliason laid down the following principles concerning the purchaser's duty to pay interest on the purchase price from the date of performance under the contract:

> The standard for determining the proper compensation to the parties was stated in Ellis v. Mihelis, 32 Cal. Rptr. 415, 60 Cal. 2d 206, 384 P.2d 7 (1963), as follows:
>
> > The guiding principle with respect to the calculation of the damages incident to the decree of specific performance . . . is to relate the performance back to the date set in the contract.

> Timely performance of the contract would result in the purchaser receiving the rents and profits of the land but being denied the use of the purchase money, and a purchaser who seeks to recover rents and profits must permit an offset for his use of the purchase funds during the period that performance was delayed. In an early case this court held that a defendant in a situation like the one before us should be permitted to offset against the profits interest on the entire purchase price. (Heinlen v. Martin (1879) 53 Cal. 321, 343). This holding is the overwhelming weight of authority. (Citations omitted.) See also In re Bond & Mortgage Guarantee Co., 271 A.D. 44, 62 N.Y.S.2d 685 (1946), app. denied 296 N.Y. 824, 72 N.E. 2d 15; Bostwick v. Beach, 103 N.Y. 414, 9 N.E. 41 (1886). (Id at 430).
>
> (8) In the present case, defendant's refusal to convey the property was found to be "wrongful in that it was in contravention of the contract but it was not willful or malicious so as to entitle plaintiffs to punitive damages." The usual rule of credit for purchase money interest against rental value should therefore be followed in adjusting the equities between the parties based upon their position had there been a timely conveyance. (Id at 431).

This Court further noted in Eliason that only when the vendor's breach is wrongful or willful in the sense of being more than a mere breach of the contract terms, should the vendor be denied any excess of interest over rents and profits. Nonetheless, in the present case, it is clear that not only did Plaintiff-Appellant have complete control over all money required to be paid under the terms of the contract to Defendant-Respondent during the pendancy of this litigation and prior thereto, but also had constructive possession of the premises to be purchased by the Plaintiff-Appellant under the contract. (See Conclusion of Law No. 3). This right to possession was not terminated by

any affirmative action of the Defendants-Respondents (Conclusion of Law No. 4). There can be no question in this case the Plaintiff-Appellant has had the use and enjoyment of the money otherwise due under the contract and did not appropriate it or otherwise set it aside. See 71 Am.Jur. 2d, Specific Performance, Sec. 219. Furthermore, as shown in the statement of facts, the Plaintiff-Appellant failed to pay any part of the taxes or to Defendants-Respondents' seller, as required by the contract, which is the subject matter of this litigation.

The Plaintiff-Appellant has not appealed, claiming error in that the trial court should have awarded him rents and profits from the period of the date of performance to the entry of the decree. The court below found that the Defendants-Respondents were at fault, but there is no finding that this means other than merely breaching the contract, nor is there any finding that the Plaintiff-Appellant did not have the beneficial use of the property to be conveyed to him under the contract or that the Plaintiff-Appellant did not receive rents and profits from the 120 acres. The Plaintiff-Appellant is required under the contract to convey to the Defendant-Respondents. In cases in equity, as well as in law, this Court will indulge considerable deference to the Trial Court's findings and where the evidence is in dispute, will assume the trial judge believed that which is favorable to his findings. Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980).

The court below of course granted to Defendants-Respondents only one-half of the interest due under the contract until the date of closing, minus the $10,000.00 due at the time of closing as defined in the Decree and which otherwise would have been due on Dec. 31, 1979. As stated in the Statement of Facts herein, the Plaintiff-Appellant testified under oath that he was ready, willing and able to perform under the contract immediately upon entry of the Decree of Specific Performance. (See T.R. at 80 and 81.) The Court certainly should have been allowed to rely upon Plaintiff-Appellant's own statement in balancing the equities and determining that performance should occur as stated in the contract. Indeed, where the purchaser, prior to bringing suit for specific performance, sets his own date for performing under the contract, and on that date fails to perform, he will be denied any relief in law or in equity. Nuttall v. Holman, 173 P.2d 1015 (Utah 1946). The Plaintiff-Appellant has affirmed the contract. He should not be heard to complain to the terms thereof.

POINT III.

THE TERMS OF THE CONTRACT GOVERN WHERE THE BREACH BY THE VENDOR IS NOT WILLFUL

As noted above, the trial court did not find that the breach by the Defendants-Respondents was willful or wrongful or that they were otherwise than in the mere sense of having breached the contract. It is submitted that the Court below could not have found the breach willful as the record shows that the Plaintiff-Appellant did not personally contact the Defendants-

Respondents or communicate to them on or about Oct. 1, 1979, that he was ready, willing and able to close, but only notified their real estate agent. (Finding of Fact No. 11)

In Farnsworth v. Jensen, 217 P.2d 571 (Utah 1950) this Court held that the purchasers who obtained specific performance of a real estate contract remained liable for the full amount of interest as stated in the contract, and that the terms of the contract applied. This Court drew the critical distinction between paid interest required as damages and interest ordered to be paid by a court by reason of the terms of the contract between the parties. This Court quoted from 30 Am. Jur., Sec. page 6, in regard to interest required under the contract, which states that interest "is as much an integral part of the debt as the principal itself; and while it forms an element in computing the amount of recovery, it does so in a way that a provision of the contract limiting liability, or any other contractual provision as to the amount involved in the contract does."

In Farnsworth, Supra, this Court did require the purchaser obtaining specific performance to pay interest from the date performance was due or interest began to accrue under the contract. As this Court stated in Farnsworth v. Jensen, 217 P.2d at 575-576:

> The provisions of the contract expressly provide for the payment of six percent interest per annum on the unpaid balance from the date of the contract until paid. The respondents have consistently denied that they have repudiated the contract or their obligations thereunder and have repeatedly insisted that the

contract was in full force and effect over the entire period. If such is the case, then respondents must carry out the terms imposed on them, whether they are beneficial or detrimental. They admit the retention and use of the money after the due dates of payments and yet seek to avoid the payment of interest on the amount retained because appellant was dilatory in clearing title.

Conceding that appellant was not permitted to forfeit the contract for failure of respondents to perform because she was in default, we are of the opinion that her default did not alter or change the obligations placed on respondent to pay interest on the unpaid balance. The interest contracted for is payable to appellant for respondents' use of the money. It must be paid at the agreed times unless there is some action on the part of appellant which legally excused respondents from performing in accordance with the provisions of the agreement. We are unable to discover evidence in the record which would permit a court to release the respondents from the terms of the contract made by them.

While this court did distinguish Farnsworth in Amoss v. Bennion, 456 P.2d 174, on the grounds that in Farnsworth, Supra the breach was not willful and the purchaser had possession of the property, it is submitted that Farnsworth v. Jensen is apposite in the instant case on the very grounds that the court below found Plaintiff-Appellant had constructive possession and the breach was not willful. There is simply nothing in the record to release the Plaintiff-Appellant from the terms of the contract made by him.

Indeed at least one court has held that where there are contract terms specifically providing for interest, and presumably for the time payment of interest and principal, these terms apply, and the rules in equity have no application. As stated by the Minnesota Supreme Court in Lund v. Larson, 24 N.W.

2d 827 (Minn. 1946):

> (4,5) Because interest is the creature of contract, it would seem to follow logically and the well settled rule is that, where a contract for the sale and purchase of real estate contains express provisions relating to the purchaser's liability for interest, those provisions determine not only whether interest shall be payable on the unpaid purchase price, but also all matters relevant thereto, such as the rate of interest, whether installment payments shall bear interest, and when interest shall accrue and cease, even though the purchaser enters into possession of the purchased land under the contract.
>
> (6) Since there cannot be two conflicting rules operating at one and the same time to determine the rights of the parties under a contract with respect to the same subject matter, the rule is that where there is an express provision in a contract for the sale and purchase of real estate relating to the purchaser's liability for interest the provisions of the contract govern with respect to the matter, and the rule in equity under which an equitable obligation to pay interest is imposed upon the purchaser in order to adjust the rights and obligations of the parties has no application. The rule in equity will not override express contractual provisions relating to the same matter. Security S. & T. Co. v. Latta, 118 Or. 559, 247 P.777; Barnett v. Cloyd's Executors, supra.

While Lund v. Larson, Supra, did not concern the situa of a defaulting vendor, it is submitted this rule does apply whe the vendor's breach is not willful. Eliason v. Watts, Supra.

The terms of the contract in the present case should be specifically enforced in the manner provided in the Decree an Judgment of Specific Performance of the court below.

CONCLUSION

There is nothing in the record to show that the breac of the Defendants-Respondents was willful or wrongful. Therefo

the usual rules apply to allow the Defendants-Respondents interest on the purchase price which the Plaintiff-Appellant has had full use and enjoyment thereof.

Furthermore, in light of the findings of the court below and Plaintiff-Appellant's own testimony as to being immediately ready, willing and able to close upon entry of the Decree, and in the balance of the equities, the Decree of the Court requiring payments of installments under the terms of the contract and requiring the Plaintiff-Appellant to pay one-half of the interest due under the contract to the date of closing is proper and should be upheld.

DATED this 13th day of August, 1981.

Respectfully submitted,

LAW OFFICES OF LOWELL V. SUMMERHAYS, P.C.

By Lowell V. Summerhays by VMP
Lowell V. Summerhays

Victor M. Perri
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Plaintiff-Appellant was hand delivered this 13th day of August, 1981, to:

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