1981

Lorna M. Alder Soffe, aka Lorna M. Alder v. Donald Blaine Ridd and Nancy M. Ridd, His Wife : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

LORNA M. ALDER SOFFE, aka
LORNA M. ALDER,

Plaintiff and Appellant,

-vs-

Case No. 17342

DONALD BLAINE RIDD and
NANCY M. RIDD, his wife,

Defendants and Respondents.

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT OF SALT
HONORABLE DAVID B. DEE, JUDGE PRESIDING

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TABLE OF CONTENTS

Cases and Statutes Cited

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action by plaintiff-appellant (vendor) to retake a home and real property and to terminate a Uniform Real Estate Contract for the sale of said home and real property, and a Counterclaim by defendants-respondents for the return of monies paid by defendants-respondents to plaintiff-appellant on said Uniform Real Estate Contract.

DISPOSITION IN LOWER COURT

Plaintiff-appellant's Complaint was dismissed, no cause of action, and defendants-respondents were granted judgment on their Counterclaim in the sum of $15,897.19.

RELIEF SOUGHT ON APPEAL

Reversal of the judgment of the lower court, wherein defendants-

respondents were granted judgment against plaintiff-appellant on their Counterclaim and remanded with directions to the lower court to dismiss defendants-respondents Counterclaim, and that plaintiff-appellant be awarded attorney fees.

STATEMENT OF FACTS

On or about the 10th day of March, 1978, defendants-respondents, pursuant to a Uniform Real Estate Contract (plaintiff-appellant's Exhibit 1-P) agreed to purchase, and plaintiff-appellant agreed to sell a home and approximately .70 acre of real property at 1341 East Creek Road, Sandy, Utah, as described by said Uniform Real Estate Contract. The total purchase price of said home and real property was $57,500.00, payable $16,500.00 down, $325.00 per month, and $10,250.00 on the 10th day of March of each year thereafter on the principal, with interest at 9-1/2% per annum.

Defendants-respondents moved into the home and paid $325.00 per month through April, 1979. Defendants-respondents failed to pay the $10,250.00 payment due March 10, 1979, and failed to pay further monthly payments; and on the 18th day of April, 1979, plaintiff-appellant had served on defendants-respondents a Notice of Default (R. 8-10). On April 27, 1979, plaintiff-appellant had served upon defendants-respondents a notice terminating the contract (R. 10-11). This action was commenced to remove defendants-respondents from the home and to terminate the Uniform Real Estate Contract, and defendants-respondents on or about the 22nd day of June, 1979, moved from the home. Plaintiff-appellant thereafter entered upon the premises and did certain repair work as hereinafter set forth (Exhibits 4-P, 5-P, 6-P, and 7-P).

The home on the property was fairly old, and pursuant to defendants-respondents' counsel, Mr. Harrison's, testimony, the home was in some disrepair, had outbuildings, including chicken coops and garage, and an orchard, etc. (Tr. 180: 1-30).

Plaintiff-appellant testified and presented exhibits as to her cost factors by way of the sale to defendants-respondents and as to repairs, maintenance, utility bills, and anticipated costs of resale, which were as follows: Title insurance policy $259.00 (Exhibit 2-P Tr. 136: 23-28); taxes $537.15 (Exhibit 3-P Tr. 137: 5-9); list of expenses including checks written for linoleum repairs $150.00; carpet labor and materials $1,020.47; painting $1,165.00; draperies $296.31; carpentry work $330.57; electrical materials $48.65; plumbing expense $65.00; miscellaneous $9.11; sewer unpaid by defendants-respondents $5.28; replacement of shrubs $204.36; payment to a cleaner $100.00; mileage $79.00; labor by plaintiff-appellant and her husband $4,953.75; insurance $73.00 (Exhibit 4-P). In addition, time records of plaintiff-appellant and defendants-respondents were admitted (Exhibit 7-P).

In addition to the above, plaintiff-appellant testified that she had not sold the home (Tr. 147: 16-19), and in fact still has not been able to sell the home as of this date. Plaintiff-appellant testified that the sum of $400.00 to $450.00 would be a reasonable rental value, and based on $400.00 per month for twenty-five months, said time from the date of contract until the time of trial would total $10,000.00 (Tr. 175: 3-8); and defendants-respondents' expert witness, Mark B. Stevens, a brother in law of defendant-respondent Nancy M. Ridd, testified as an expert that $325.00 was a reasonable rental value (Tr. 214: 12-14). The court allowed $325.00 per

month for fifteen months. Both plaintiff-appellant and defendant-respondent Donald Blaine Ridd acknowledged that in their opinion the home was worth $50,000.00 in June, 1979, when defendants-respondents left the home, a loss of bargain of $7,500.00 (Tr. 199: 5-9). There was also testimony by plaintiff-appellant that a real estate commission to sell the home would be 6%, or $3,450.00, and that a new title policy would cost $259.00. Plaintiff-appellant's counsel testified as to his costs and attorney fees, including the trial, totalling $3,982.30 (Tr. 176: 6-13). The total amount of plaintiff-appellant's loss, without including any interest factor or without knowing when the home would be sold, totalled $34,487.95, pursuant to plaintiff-appellant's testimony.

ARGUMENT

THE COURT WAS IN ERROR IN AWARDING DEFENDANTS-RESPONDENTS JUDGMENT IN THE SUM OF $15,897.19 ON THEIR COUNTERCLAIM.

The court found that defendants-respondents had paid on the home the sum of $20,725.00 total, said sum being $16,500.00 downpayment and $325.00 per month for thirteen months, the $325.00 just covering the interest payment, and defendants-respondents were to pay the contract out in four years, with a minimum principal payment each year of $10,250.00. The court further found that there was a valid contract for the sale and purchase of a home and real property, and that the home, irrespective of the .70 acre, had a reasonable rental value of $325.00 per month, a total of $4,983.22, and that plaintiff-appellant's only loss was title insurance $259.00, sewer charge $5.28, cleaning $100.00, labor of plaintiff-appellant and her husband $375.00, insurance on the fence kept by defendants-respondents $100.00, and

fire insurance $73.00, for a total of $912.28, or a total of $5,895.50 which the court deducted from the total payments made by defendants-respondents, and awarded judgment to defendants-respondents on their Counter-claim of $14,829.50 plus 6% interest from the date defendants-respondents moved from the home on June 22, 1979, a total of $15,897.19. I am not sure why the court did not give the defaulting party a purple heart and a blue ribbon.

The court did not consider certain items which by the contract itself were applicable, to-wit: The defendants-respondents, pursuant to paragraph 12, had agreed to pay taxes, and the court did not even award plaintiff-appellant any portion of the taxes she paid for the year 1979 in the sum of $537.15. The contract also provides the defaulting party pay reasonable attorney fees pursuant to paragraph 21 of said Uniform Real Estate Contract, (and the court found the defendants-respondents defaulted on said contract), and testimony was given at trial by plaintiff-appellant's counsel as to $3,982.30 in attorney fees, and the court allowed no attorney fees. In addition thereto, the court ignored the loss of bargain which both plaintiff-appellant and defendants-respondents had testified was $7,500.00, as well as ignored the fact that said home had to be resold, and that real estate commissions would need to be paid, as well as new title insurance, and refused to consider the fact that the home had not sold and was still vacant on the 12th day of April, 1980, and by the way, said home has still not been sold. Also the court did not consider the repairs and expenditures in placing said home in condition for resale, including the time the plaintiff-

appellant spent, and the court ignored the forfeiture provision of the contract, decided to remake the contract itself, and declared the termination and forfeiture of the contract was unconscionable and created a totally unconscionable contract as to plaintiff-appellant.

In Perkins v. Spencer, 121 Utah 468, 478-9, 243 P.2d 446, 451-2 (1952), the Utah Supreme Court opened a can of worms, in that it has allowed trial courts to place their decision as to what is "unconscionable" and to ignore a contract as written, and to rewrite the contract as each trial court may determine as to what amount of money is a shock to its conscience. (See also Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294 (1954) and Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712 (1958).)

The trial courts and Utah Supreme Court have set forth in the above cases and others as well, as in Johnson v. Carman, 572 P.2d 371 Utah (1977), the following factors to be considered as to said forfeiture:

"1. Loss of an advantageous bargain;

"2. Any damage to or depreciation of the property;

"3. Any decline in value due to change in market value of the property not allowed in items 1 and 2;

"4. For the fair rental value during the period of occupancy."

In the case of Johnson v. Carman, the court also found that interest on the balance due on said contract, as well as attorney fees, were also applicable damages to be considered, as well as other factors.

The problem arises in regard to the court placing its decision as to what is or what is not unconscionable, in that as in this particular case before the court, the home was an older home with acreage, to-wit:

approximately .70 acre, outbuildings and orchard, etc., that the property had not been resold, that the property was worth now $50,000.00, the downpayment and monthly payments have been spent by seller, she has not received any undue enrichment, does not have her advantage of receiving $325.00 per month and $10,250.00 per year. Yet defendants-respondents have a judgment against plaintiff-appellant at this point in excess of $16,000.00, which I suppose they can now execute upon, have the property sold at sheriff's sale, and in the event plaintiff-appellant cannot pay said judgment, defendants-respondents would own the same property by reason of their execution on their judgment and would then have good title to the property without the payment of the balance due on the contract plus interest.

Each day in the state of Utah there are buyers and sellers of homes and other properties by the use of the Uniform Real Estate Contract. This is especially true with the present high interest rates. In that regard by way of argument, if a purchase is made of one hundred acres at $10,000.00 per acre, and of the $1,000,000.00 purchase price $200,000.00 is paid down and the balance is to be paid at $100,000.00 per year, with the idea and hope that the property can be sold in one year for $2,000,000.00, and said property having no buildings upon it and used only for grazing has a reasonable rental value of $400.00 per year. A buyer can then come back to the court, and if we use the rationale of the trial court in this specific case, the seller's only damage is $400.00 for reasonable rental value, and when a default occurs and the contract is breached, one can request that the court return $199,600.00 of the downpayment.

In no other arrangements for the sale of real property is this

true. In the event a trust deed is used on a home for $5,000.00, and the home is worth $100,000.00, and the owner of the trust deed bids in the home at $5,000.00, the court or no other governmental function protects the owner from the loss of $95,000.00, and the same is true of mortgages.

In the case referred to above, Johnson v. Carman, Chief Justice Ellett in dissenting in that case, which dissent was joined by Justice Crockett, Chief Justice Ellett states as follows:

> "This case is not in equity to foreclose the interests of the purchaser. This is a law action for money had and received. To permit this sort of a case to be considered is to encourage a purchaser to hold an interest in land and if the value thereof does not increase, to breach his agreement to pay, move out, and then sue for a return of his money. See the following cases which are in point: Glock v. Howard and Wilson Colony Co., 123 Cal. 1, 55 P. 713 (1898); Skookum v. Thomas, 162 Cal. 539, 123 P. 363 Cal. (1912); Jackson v. Peddycoart, 98 Okl, 198, 224 P. 689 (1924).
>
> "The law does not permit one to take advantage of his own wrong or default. It is well settled by this court and other courts of the highest standing that the vendee in an executory contract for the purchase of lands, who, after paying part of the consideration under such contract, makes default and refuses to carry out the further terms agreed upon, cannot maintain an action to recover any of the consideration advanced. Helm v. Rone, 43 Okl. 137, 141 P. 678; Snyder v. Johnson, 44 Okl. 388, 144 P. 1035; Hurley v. Anicker, 51 Okl. 97, 151 P. 593. From the authorities cited it is clear that the plaintiff is not entitled to recover the money paid, or to have affirmative relief as to the note and mortgage, unless the defendant's answer may be considered such a rescission on his part as would entitle the plaintiff to recover."

In Summary of Utah Real Property Law, Volume 1, Chapter 9, BYU Legal Studies (1978), there is an extended discussion about the forfeiture provision, commencing on page 303-306.

The basic problem of the court placing itself as the conscience

bearer of a defaulting party who created the wrong, is that a contracting party can never be sure as to whether or not if he sells on a Uniform Real Estate Contract, that he may end up being required to return the money of a defaulting party, even though the seller no longer has the money to return.

That also leads to the question of what is unconscionable. In Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963), the court determined that a buyer who had purchased a piece of property for $41,500.00, made payments of $19,000.00, and had spent $9,500.00 on repairs, was not unconscionable and allowed the forfeiture.

In the case before the court, a sale for $57,500.00 wherein $20,725.00 had been paid, was determined to be unconscionable, and the court ignored the fact that plaintiff-appellant had expended considerable sums by way of repairs, and the court did not allow plaintiff-appellant normal damages as allowed by this court in numerous cases, including taxes, interest on unpaid balance, loss of bargain, title insurance, future cost of sale, attorney fees, etc., and awarded the defaulting party $15,897.19 plus 8% interest from the total amount received of $20,725.00, after over fifteen months of occupying the property. The court would not have returned to seller any sums if the buyer had sold the property after fifteen months for $157,000.00, then why should the reverse be true?

CONCLUSION

It is respectfully submitted that the decision of the District Court should be reversed, and the action remanded with instructions to dismiss defendants-respondents Counterclaim, and grant plaintiff attorney fees.

Respectfully submitted,

NOLAN J. OLSEN