

1981

Ron J. Villeneuve, et al v. Philip D. Schamanek, et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Villeneuve v. Schamanek*, No. 17343 (Utah Supreme Court, 1981).
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IN THE SUPREME COURT OF THE
STATE OF UTAH

RON J. VILLENEUVE, et al)
)
Plaintiffs-Respondents)

vs.) CASE NO. 17343

PHILIP D. SCHAMANEK, et al)
)
Defendant-Appellant)

APPEAL FROM A SUMMARY JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH
HONORABLE KENNETH RIGTRUP, JUDGE

BRIEF OF APPELLANT

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FILED

MAR 20 1981

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vs.) CASE NO. 17343

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Defendant-Appellant)

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Summary Judgment granted by the Honorable Kenneth Rigtrup, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, on the 5th day of September, 1980.

RELIEF SOUGHT ON APPEAL

Appellant Philip D. Schamanek seeks a reversal of the Summary Judgment and a remand of the above entitled matter to the Third Judicial District Court, in and for Salt Lake County,

State of Utah, for a full trial on the merits. The defendant Gail Schamanek did not appeal from the subject Summary Judgment.

STATEMENT OF FACTS

By their First Amended Complaint (R.20-23), respondents alleged that by a Uniform Real Estate Contract under date of March 30, 1978 (R.34), respondents, as sellers, sold certain real property located in Salt Lake County, Utah, to Thad H. Brown and Paula Brown. Respondents further alleged that the contract purchasers assigned all of their right, title and interest in and to the subject real property and Uniform Real Estate Contract to appellant pursuant to a Purchaser's Quitclaim Deed and Assignment of Contract under date of August 31, 1978 (R.36). These allegations were admitted by appellant (R.42).

The initial Uniform Real Estate Contract subsequently assigned to appellant provided for a principal and interest payment of \$487.70 due on the first day of successive months commencing on the first day of May, 1978 and for a payment period of thirty days (R.34).

By letter under date of December 18, 1979 (R.37), respondents attempted to invoke paragraph 16C of the original Uniform Real Estate Contract by declaring the entire unpaid balance immediately due and payable and treating the obligation

as a note and mortgage. Payment was demanded within ten (10) days in the amount of \$1,470.50 computed as follows:

November payment	-	\$ 487.70
December payment	-	487.70
Late charges	-	48.76
Balance of property tax due	-	360.34
Fire insurance	-	86.00
Total amount	-	\$1,470.50 (R.37-38)

A second letter from respondents' counsel under date of January 18, 1980 (R.39), set forth respondents' election to proceed pursuant to paragraph 16C of the original Uniform Real Estate Contract and enclosed a Warranty Deed in the name of appellant and Gail Schamanek, as grantees (R.23) in anticipation of foreclosure proceedings.

The letter under date of December 18, 1979 (R.37) was addressed, "Mr. Philip D. and Gail Schamanek" and the letter under date of January 18, 1980 (R.39) was addressed, "Mr. and Mrs. Philip D. Schamanek". Both letters were mailed to 7040 South Campus Drive, Salt Lake City, Utah 84121 (R.37, R.39).

By an Affidavit in Support of Motion (R.13,14), the defendant Gail Schamanek stated that appellant Philip D. Schamanek is affiant's brother but that appellant had been a resident of

Las Vegas, Nevada since November of 1979 and was not and had not lived with his sister at Gail Schamanek's residence at 7040 South Campus Drive, Salt Lake City, Utah.

By its Summary Judgment entered on the 5th day of September, 1980 (R.84,85), the lower court awarded respondents judgment against appellant in the amount of \$57,450.26 as the remaining principal balance due under the original Uniform Estate Contract together with interest at the rate of 9 $\frac{1}{2}$ % per annum from and after the first day of October, 1979; additionally respondents were awarded judgment against appellant in the amount of \$810.19 as property taxes, insurance and late charges. The Summary Judgment further awarded respondents a reasonable attorney's fee in the amount of \$1,675.00, costs in the amount of \$193.30 and ordered a sale of the subject real property. The sale was conducted on the 14th day of October, 1980, with respondents submitting the highest bid of \$66,126.00, which amount satisfied the full judgment together with the costs of sale (R.98).

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE DISPUTES AS TO MATERIAL ISSUES OF FACT

A. A GENUINE DISPUTE EXISTED BETWEEN THE PARTIES AS TO THE SUFFICIENCY OF THE NOTICE UTILIZED BY RESPONDENTS TO INVOKE THE ELECTED REMEDY.

It is elementary that, "Rule 56, U.R.C.P., should not be used where there are issues of fact in dispute". Hatch vs. Sugarhouse Finance Company, 20 Utah 2d 156, at 157, 434 P2d 758 (1967).

In Holbrook Company vs. Adams, 542 P2d 191, this Court stated at 542 P2d 193:

"It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted."

This announcement relating to the applicability of Rule 56 of the Utah Rules of Civil Procedure does not constitute a new announcement by this Court as to the rules governing disposition of proceedings filed pursuant to said rule, but merely constitutes a reiteration of the established guidelines. In re: Williamses Estate, 10 Utah 2d 83, 348 P2d 683. This Court has further stated that a Summary Judgment is appropriate

only where the favored party makes a showing which precludes as a matter of law, the awarding of any relief to the losing party. Tanner vs. Utah Poultry and Farmers Co-op, 11 Utah 2d 353, 359 P2d 18; and, Bullock vs. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P2d 559.

Additionally, on review, this Court is, "...obliged to consider the evidence in the light most favorable to the (losing parties)". Whitman vs. W. T. Grant Company, 16 Utah 2d 81, 388 P2d 918.

When viewed against the standard of appellate review, it becomes apparent that there is a genuine dispute between the parties as to a material issue of fact, to wit: The sufficiency of the notice employed by respondents invoke the elected remedy.

The original Uniform Real Estate Contract (R.34,35), permits a seller, at his option and upon written notice to a defaulting buyer, to declare the entire unpaid balance immediately due and payable and treat the contract as a note and mortgage and foreclose the same (R.35). The purported notice under date of December 18, 1979 (R.37) specifically itemized the alleged delinquencies and demanded payment in full within ten days. Appellant respectfully submits that this conditional election of respondents is ineffective because: (1) The notice was not

to appellant's residence; (2) the notice included a demand for the December monthly payment in the amount of \$487.70 although this payment was not delinquent; and, (3) the notice demanded payment of the amount of \$86.00 for fire insurance although fire insurance had been and was being maintained by appellant at the time of the notice.

It is clear from the record that respondents' election did not comply with the "written notice to the Buyer" provision of the original Uniform Real Estate Contract and for this reason alone must fail. However, additional problems within the notice itself negates respondents' election. The contract specifically provides that a payment is not delinquent if made within thirty days of its due date. By including and demanding payment of the monthly December amount of \$487.70, respondents were imposing a requirement on appellant neither provided for nor specified by the subject contract.

Finally, the incorporation within the notice of a demand for payment of a fire insurance premium also imposes an unwarranted requirement on appellant because fire insurance had been maintained on the subject premises.

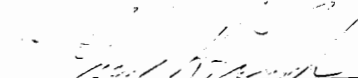
The question of the sufficiency of respondents' compliance with the written notice contractual requirement presented a

genuine dispute as to a material issue of fact and on the basis of the existing record, the lower court erred in awarding respondents' Summary Judgment.

CONCLUSION

For the reasons herein stated, appellant respectfully submits that the Summary Judgment of the lower court should be reversed and the matter remanded to the Third Judicial District Court in and for Salt Lake County, State of Utah, for a full trial on the merits.

Respectfully submitted this 27th day of March, 1981.



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