

1981

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

RON J. VILLENEUVE and
BEVERLY VILLENEUVE,

Plaintiffs-Respondents,

vs.

PHILIP D. SCHAMANEK,

Defendant-Appellant.

CASE NO. 17343

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

BRIEF OF RESPONDENTS

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MAY 11 1981

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vs.

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Defendant-Appellant.

CASE NO. 17343

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a Summary Judgment entered by the Honorable Kenneth Rigtrup, Judge of the Third Judicial District Court, for Salt Lake County, State of Utah, on the 5th day of September 1980, which Judgment foreclosed Respondents' mortgage on the real property which is the subject of this action.

RELIEF SOUGHT ON APPEAL

Respondents request this Court to either dismiss the appeal for mootness or affirm the Summary Judgment and to award Respondents their attorneys' fees and costs incurred on this appeal.

STATEMENT OF FACTS

A. Objections to Appellant's Factual Statements.

Initially, Respondents do not believe the following factual statements made by Appellant are accurate:

1. Appellant states (P.2) that by letter dated December 18, 1979, Respondents declared the entire unpaid balance under the contract immediately due and payable. This statement is incorrect. The December 18, 1979 letter gave notice that unless the amounts in default were paid within ten days, Respondents would declare the entire amount due.

2. Appellant states (P.7) that as of December, 1979, Appellant was maintaining fire insurance on the premises. There is absolutely no evidence to support this assertion and Appellant does not cite any such evidence in the record.

B. Respondents' Statement of Facts.

On or about March 30, 1978, pursuant to a Uniform Real Estate Contract, Respondents sold the real property which is the subject of this action, which is improved with a duplex and is located in Salt Lake County, Utah, to Thad H. Brown and Paula Brown (R.34). On or about August 31, 1979, all of the purchasers' interest under the Uniform Real Estate Contract was assigned to Appellant (R.36). Appellant did not notify Respondents of this Assignment or of any address at which he could be contacted (R.33&79). The Assignment recited that Appellant's address was 7040 So. Campus Drive, Salt Lake City.

In late September or October, 1979, Respondent Beverly Villeneuve was informed by a third party that Appellant and Gail Schamanek had received an assignment of the purchasers' interest in the Uniform Real Estate Contract. In the middle of October 1979, when Respondents had not received the first monthly payment of \$487.70 due from Appellant, she telephoned Defendant Gail Schamanek to inquire about the payment. Mrs. Schamanek told Mrs. Villeneuve at that time that she was glad she had called because Mrs. Schamanek did not know where to send the payment and that Mrs. Schamanek would send the payment out immediately. A few days later Respondents did receive the first and only payment ever made on the Uniform Real Estate Contract by Appellant. The check for the payment was signed by Gail Schamanek and the address on the check was 7040 So. Campus Drive, Salt Lake City, Utah, the same address listed for Appellant on the Assignment (R.79). Thereafter, Appellant defaulted by failing to pay the November and December monthly payments, and taxes and insurance due on the Uniform Real Estate Contract, even though Appellant was receiving approximately \$600.00 a month in rents from the property and Respondents were required to keep paying a monthly payment of approximately \$370.00 on an underlying Trust Deed to prevent the beneficiaries from foreclosing on the property (R.32-38).

By letter dated December 18, 1979 (R.37), Respondents gave notice to Appellant that unless the sums needed to bring the contract current were paid within ten days, that Respondents would elect pursuant to paragraph 16C of the Uniform Real Estate Contract to treat the contract as a note and mortgage, pass title subject thereto and declare the entire unpaid balance immediately due and payable. This letter was addressed to Appellant Philip Schamanek and Gail Schamanek, 7040 So. Campus Drive, Salt Lake City, Utah 84121, because that was the address which was listed on the check for the October payment, Gail Schamanek had held herself out to Respondents as an owner of the property, and Respondents believed that she was Philip Schamanek's wife (R.33&79). When Appellant still had failed to make any payments after 30 days to bring the contract current, a second letter was sent by Respondents dated January 18, 1980 (R.39), giving notice that Respondents had elected to treat the Uniform Real Estate Contract as a note and mortgage, pass title subject thereto and declare the entire unpaid balance immediately due and payable. Respondents also enclosed a Warranty Deed in the name of Appellant and Gail Schamanek as grantees (R.23). This letter was also sent to the Campus Drive address. Gail Schamanek admittedly received both notices and called Respondents' attorney during the latter part of January and first part of February to talk about the contract (R.15&16).

Defendant Gail Schamanek at all relevant times held herself out to Respondents as an owner of the property (R.33).

She was the only person with whom Respondents communicated concerning the property (R.33) and she made the only payment that was made by Appellant on the Property (R.79). The fire insurance policy which was obtained by the Schamaneks on the subject property some time in 1980 (a copy of which was mailed to Respondents), listed Gail Schamanek, not Appellant, as the insured under the policy (R.82&83). At no time have Respondents been informed of the address for Appellant, so the only way they had to contact him was at the Campus Drive address (R.79).

On or about January 25, 1980, Respondents commenced this action to foreclose their mortgage on the subject property. A copy of the Summons and Complaint was served at the Campus Drive address on February 16, 1980 (R.5). No responsive pleading was filed and on or about March 19, 1980, a Default Judgment was entered ordering that the subject property be sold at Sheriff's Sale (R.9). The Defendants subsequently moved to set aside the default on the basis that the Summons and Complaint had not been properly served (R.11). Based upon the stipulation of the parties, the Court granted such motion (R.18). This was the first time that Respondents were informed that Defendant Gail Schamanek had not received any interest in the subject real property and that Appellant Philip Schamanek was the sole assignee of the purchasers' interest.

Thereafter, and on or about April 28, 1980, Respondents filed an Amended Complaint seeking to foreclose their mortgage on the subject real property as against Appellant only. The Amended Complaint also sought reformation of the Warranty Deed previously given by Respondents to Appellant and Gail Schamanek to delete Gail Schamanek as a grantee (R.20).

On or about May 15, 1980, Respondents filed a motion in District Court to have a receiver appointed for the subject property pursuant to the terms of the contract between the parties (R.40). At the hearing on this motion, Appellant's counsel offered to tender into Court all sums required to bring the contract current and to thereafter pay all monthly payments into Court during the pendency of the action if the Court would deny the motion to appoint a receiver. Based upon the stipulation of the parties at the hearing, the Court entered an Order giving Appellant 20 days in which to make the payments into Court and providing that in the event these payments were not paid into Court, a Receiver would be appointed to manage the property during the pendency of the action (R.47). Appellant still failed to make any payments into Court and, in fact, even as of then had never tendered any amount whatsoever to Respondents (R.80). Respondents subsequently moved for Summary Judgment foreclosing their mortgage on the subject property as against Defendant Philip Schamanek.

and reforming the Warranty Deed which they had given to delete Gail Schamanek as a grantee. After three continuances were granted at the request of Appellant's counsel, this motion was granted by the Court and Judgment was entered on September 5, 1980 (R.84). Appellant appeals from that portion of the Judgment foreclosing Respondents' mortgage. Defendant Gail Schamanek did not appeal from that portion of the Judgment reforming the Warranty Deed.

Appellant did not seek to stay enforcement of the Summary Judgment and on or about October 14, 1980, the subject real property was sold at foreclosure sale for the full amount of Appellant's indebtedness (R.98). The period within which Appellant could redeem the property expired April 14, 1981, and the Sheriff's Sale is now final (Rule 69, Utah Rules of Civil Procedure).

ARGUMENT

I. BECAUSE THE SUBJECT REAL PROPERTY HAS BEEN SOLD AT SHERIFF'S SALE, WHICH SALE HAS BECOME FINAL, THE SUBJECT MATTER OF THIS APPEAL IS MOOT.

As previously stated, Appellant did not seek to stay enforcement of the Trial Court's Judgment and on October 14, 1980, the property was sold at Sheriff's Sale. Pursuant to Rule 69, Utah Rules of Civil Procedure, Appellant had six months within which to redeem the subject property from the Sheriff's Sale. He did not do so. Consequently, the Sheriff's

Sale has become final and Appellant has no further right, title or interest in the subject property. Thus, this appeal by which Appellant seeks to challenge the foreclosing of the mortgage on the subject property has been rendered moot as the foreclosure has been completed and title passed pursuant to Sheriff's Deed.

II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE SUFFICIENCY OF THE NOTICE UTILIZED BY RESPONDENTS OF THEIR INTENT TO FORECLOSE THE CONTRACT AS A MORTGAGE.

Appellant does not dispute that he defaulted under the contract and that in fact the only payment he ever made under the contract was the October 1979 payment of \$487.70. Rather, Appellant seeks to find some technical deficiency in the notices given to him in order to avoid the consequences of his almost total failure to comply with his obligations under the contract. Specifically, Appellant claims that the Summary Judgment should be reversed because there is a genuine issue of fact as to the sufficiency of the December 18, 1979 notice given by Respondents of their election to accelerate the balance due under the contract and foreclose the contract as a mortgage because:

1. The notices were not mailed to Appellant's residence in Las Vegas, Nevada;
2. The December 18 notice included a demand for the December monthly payment in the amount of \$487.70, when this payment was allegedly not delinquent; and

3. The December 18 notice demanded payment of the amount of \$86.00 for fire insurance when the fire insurance was allegedly being maintained by Appellant under a separate policy.

For the reasons set forth below, Respondents respectfully submit that these contentions lack merit and that the notices given were in fact sufficient as a matter of law to entitle Respondents to accelerate the remaining balance due under the contract and foreclose the contract as a mortgage.

A. Respondents Were Not Required to Give Appellant Any Notice Prior to Commencing a Lawsuit to Foreclose the Contract as a Mortgage.

In the absence of a contractual provision requiring notice, no notice need be given by a mortgagee prior to accelerating the payments due under a mortgage by virtue of the default of the mortgagor. Hallstrom v. Beuhler, 378 P.2d 355 (Ut. 1963); Thomas v. Foulger, 264 P. 975 (Ut. 1928); II SUMMARY OF UTAH REAL PROPERTY LAW, pp. 382-383. Thus, the only notice requirement in the present case is that contained in paragraph 16 of the Uniform Real Estate Contract which provides that:

"In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the Seller, at his option shall have the following alternative remedies:

"C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once

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due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah. . . ." (R.35) (Emphasis added)

Under this provision, 30 days after Appellant defaulted under the contract by failing to make the various payments required thereunder Respondents were entitled to immediately accelerate the balance owing by simply notifying Appellant that they had elected to do so and without any prior warning. See, e.g., Rothey v. Stereo-Rama, Inc., 506 P.2d 63 (Ut. 1973); American Savings & Loan Association v. Blomquist, 445 P.2d 1 (Ut. 1969). It seems this minimal notice requirement was satisfied when Appellant was served both with the Complaint and Amended Complaint in this action.

Moreover, under Utah law it is doubtful that Appellant, as an assignee of the Buyer's interest under the Uniform Real Estate Contract, was entitled to any notice whatsoever even if the original Buyer under the contract was entitled to notice. Thus, in Wiscombe v. Lockhart Co., 608 P.2d 236 (Ut. 1980), this Court held that the assignee of the Buyer's interest under a Uniform Real Estate Contract was not entitled to any notice of the Seller's election to forfeit the Buyer's interest, whether or not the Seller had actual or constructive notice of the Assignment.

Notwithstanding the foregoing, Respondents sent a letter on December 18, 1979 (48 days after the initial default occurred), giving notice that unless the defaults under the

contract were cured within ten days, Respondents would accelerate the entire unpaid balance and foreclose the contract as a mortgage. When Appellant had still not made any payments 30 days after the initial notice was given, Respondents sent a further letter dated January 18, 1980, giving notice that Respondents were accelerating the balance due under the contract and had elected to foreclose the contract as a mortgage. Certainly, if Appellant was not entitled to any notice of Respondents' election to foreclose, he cannot complain about the alleged technical deficiencies in the notices that were given to him.

B. The Fact That the Notices Were Not Mailed to Appellant's Residence Did Not Render the Notices Ineffective.

Even if Respondents were required to give Appellant notice of their election to foreclose the contract as a mortgage prior to commencing suit, the fact that both the December 18, 1979 and January 18, 1980 notices were not sent to Appellant's unknown residence in Las Vegas, Nevada, does not render those notices ineffective.

In the first place, although Appellant complains about the sufficiency of the notices given because they were sent to Appellant and Gail Schamanek at Gail's address on Campus Drive in Salt Lake City, it is very significant that Appellant has never claimed that he did not receive these notices or that he was prejudiced in any way by the fact that the notices were sent to the Salt Lake City address. Furthermore, Gail Schamanek admitted receiving the notices and never once claimed

in this action that she did not inform Appellant of the notices.

The notices were sent to Philip and Gail Schamanek at the Campus Drive address in Salt Lake City because the only notice that Respondents received of the Assignment was from a third party to the effect that Philip and Gail Schamanek had received an Assignment of Contract and that was the address on the check for the October payment. In fact, the "Purchaser Quit Claim Deed and Assignment of Contract" by which Appellant received his interest in the property on August 31, 1979, recited that Appellant's address was 7040 So. Campus Drive Salt Lake City, Utah 84121. This fact alone justifies Respondents' sending of the notices to that address. Neither Appellant nor anyone else ever informed Respondents of Appellant's residence address in Las Vegas, where he allegedly moved in November 1979, after he had defaulted under the contract. Thus, it would have been impossible for Respondents to send notices to Appellant's Las Vegas address. Certainly, if Appellant expected to receive notices in connection with the contract at that address, it was his burden to supply Respondents with the necessary information.

Moreover, it is undisputed from the evidence that at the very least Gail Schamanek was acting as Appellant's agent with respect to the Uniform Real Estate Contract and the property covered thereby such that the mailing of the notices to her address was certainly sufficient notice under the contract.

Gail Schamanek at all times held herself out to Respondents as an owner of the property and all the communications which Respondents had concerning the contract were with Gail Schamanek, not Appellant. In fact, after the notices were sent out, it was Gail Schamanek who contacted Respondents' attorneys respecting the notices. It is also extremely significant that it was Gail Schamanek who made the only payment made by Appellant to Respondents under the contract and the address listed on the check by which payment was made was the Campus Drive address in Salt Lake City, to which address the notices in relation to the contract were sent by Respondents. Furthermore, the fire insurance policy which was obtained by Appellant some time in 1980, also listed Gail Schamanek at the Campus Drive address as the insured owner. Under these circumstances, it seems somewhat disingenuous for Appellant to complain about the fact that the notices in relation to the contract were sent to the Campus Drive address.

Finally, even if Appellant had not received the notices prior to the filing of this lawsuit, he certainly received notice both when the Complaint and Amended Complaint were served. Yet, Appellant still did not tender any money to cure the defaults even though he was receiving substantial rents from the property. Perhaps, the most compelling evidence that Appellant's claim of insufficient notice is and always has been a "smoke screen", designed simply to attempt to buy

more time while he tried to come up with the money necessary to cure the defaults, is the fact that in June 1980, six months after the first notice was sent, at a hearing in the District Court on Respondents' Motion for Appointment of a Receiver, Appellant's counsel offered to pay into Court all amounts necessary to bring the contract current if the Court would refuse to appoint a Receiver. Based upon that offer and upon the stipulation of Respondents, the Court entered an Order allowing Appellant to pay such funds into Court within 20 days. Appellant wholly failed to comply with that Order and did not tender one cent into Court.

C. The Fact That the First Notice Demanded Payment of the December Monthly Payment Does Not Render the Notice Insufficient.

Appellant's argument that the December 18, 1979 notice of default was defective because it included a demand for the December monthly payment in the amount of \$487.70 when that payment was allegedly not yet delinquent is similarly unavailing.

In the first place, the December payment was due and payable on December 1, 1979, and was in fact delinquent when the first notice of default was sent on December 18, 1979. The fact that paragraph 16 of the contract required Respondent to wait for 30 days after a default occurred before accelerating the balance due under the contract does not mean that a payment is not delinquent until it is more than 30 days late. This fact is clear from paragraph 3 of the contract which specifies

provided that a delinquency charge would be made for any payment made more than 15 days after the due date. More importantly, whether or not the December 1, 1979 payment was delinquent at the time the notice was sent is totally irrelevant because it is undisputed that at the time the notice was sent Appellant was in default because he had not made the November payment or paid the taxes due and Appellant did not tender to Respondents any of the amounts in default. Furthermore, Respondents did not actually exercise their election to foreclose until their notice of January 18, 1980, at which time even the December payment was undisputedly more than 30 days delinquent. Finally, Appellant never objected to the fact that the December 18, 1979 notice included a demand for the December payment either when the notice was sent or in the Court below and raises this argument for the first time on appeal. Appellant does not claim and cannot show that he was prejudiced in any way by the inclusion of a demand for the December payment.

D. The Fact That the First Notice Included a Demand for the Fire Insurance Premiums Does Not Render the Notice Insufficient.

The final basis upon which Appellant seeks to invalidate the notices sent to him by Respondents, is that the first notice of December 18, 1979 included a demand that he reimburse Respondents for a fire insurance premium of \$86.00, which they had been required to pay. Appellant, again, makes this claim for the first time on appeal on the basis that he was

allegedly already paying fire insurance in December of 1979 under a different policy.

Pursuant to paragraph 13 of the Uniform Real Estate Contract, Appellant was required to maintain insurance on the property, to assign the insurance policy to Respondents to the extent of their interest in the property, and to deliver a copy of the insurance policy to Respondents. There is absolutely no evidence in the record to substantiate Appellant's contention, made for the first time before this Court, that he already had fire insurance on the property in December of 1979 under a different policy for which he had already paid the premium. Furthermore, Appellant does not even contend, and there is certainly no evidence in the record to show, that Appellant had assigned that insurance policy to Respondents to the extent of their interest or delivered a copy of the policy to them. More importantly, Appellant never objected to the fact that a demand for fire insurance was included in the notice and such demand certainly didn't prejudice Appellant because he didn't tender any of the amounts in default.

Thus, Respondents respectfully submit that the notices given Appellant were more than sufficient to entitle them to avail themselves of the remedy provided by paragraph 16C of the contract to accelerate the entire balance under the contract and foreclose the contract as a mortgage. As Appellant admittedly was in default under the contract, no genuine issue of material fact existed and the District Court proper-

granted Summary Judgment. FMA Financial Corp. v. Build, Inc., 404 P.2d 670 (Ut. 1965); Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538 (Ut. 1973).

III. RESPONDENTS ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES INCURRED ON THIS APPEAL.

Under paragraph 21 of the Uniform Real Estate Contract (R.35), Respondents are entitled to recover all attorneys' fees incurred in pursuing any remedy provided for by the contract. Consequently, Respondents respectfully submit that they are entitled to an award of attorneys' fees incurred on appeal.

CONCLUSION

Appellant made one payment of \$487.70 in October 1979 and then admittedly defaulted under the contract between the parties by not making any further payments notwithstanding the fact that Appellant was receiving substantial rents from the property and Respondents were required to continue making monthly payments of \$370.00 on an underlying Trust Deed encumbering the property. Even though Respondents were probably not required to give any notice to Appellant prior to instituting a foreclosure action, Respondents did in fact give Appellant two separate notices and gave him substantially more time than

required by law to cure the defaults prior to electing to foreclose the mortgage. These notices were sent to the address listed by Appellant on the Assignment he received. Appellant does not deny that he received these notices or contend that he suffered any prejudice whatsoever because of the address to which the notices were sent or the form of the notices. The Trial Court, recognizing these facts, refused to be a party to Appellant's efforts to further delay this matter and entered Summary Judgment. Pursuant to that Judgment, the subject property was sold at Sheriff's Sale and Appellant failed to redeem the property within the six months allowed by law.

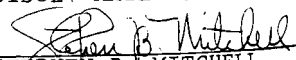
It is respectfully submitted that the Trial Court's determination was correct that no genuine issue of material fact exists with respect to this action and that the Judgment should either be affirmed or the appeal dismissed because the subject of the appeal has been rendered moot.

DATED this 7th day of May, 1981.

Respectfully submitted,

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