

1980

Reuel S. Kohler and Dolores M. Kohler v. Town of Garden City, Utah, A Municipal Corporation and Birdie Properties, a Partnership v. Town of Garden City Utah A Municipal Corpotation, Mack J. Madsen, and Leola S. Madsen : Brief of Appellant

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsHILLYARD, LOW & ANDERSON; Attorneys for DefendantDavid Lloyd; Attorney for Plaintiff/ Respondent and Cross-APellant Birdie PropertiesEdwin C. Barnes, Bryce E. Roe; Attorneys for PlaintiffsJames c. Jenkins; Attorney for Defendants/Respondents Madsen

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IN THE SUPREME COURT
OF THE STATE OF UTAH

REUEL S. KOHLER and
DOLORES M. KOHLER,
Plaintiffs/Respondents,

vs.

TOWN OF GARDEN CITY, UTAH,
a municipal corporation,
Defendant/Appellant

BIRDIE PROPERTIES, a
partnership,
Plaintiff/Respondent/
Cross-Appellant,

vs.

BRIEF OF CROSS
RESPONDENTS, MACK J.
MADSEN, and LEOLA S.
MADSEN

Case No. 17346

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a municipal corporation,
MACK J. MADSEN, and
LEOLA S. MADSEN,
Defendants/Appellant/
Respondents/Cross-
Respondents.

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NATURE OF CASE

The representation of the nature of this case and the disposition in the lower Court, as set forth in the Brief of Birdie Properties (Cross-Appellant) is essentially correct.

RELIEF SOUGHT

Defendants/Cross-Respondents Madsens respectfully submit that the judgment of the Lower Court is correct and should be upheld.

STATEMENT OF FACTS

Madsens respectfully submit that the relevant facts of this case pertaining to their involvement and the claims of Birdie Properties, are as follows:

1. Cross-Respondents, Madsens are record title holders of the subject property of this action. (Exhibit 38)

2. The Cross-Appellant, Birdie Properties, a Wyoming partnership, and John A. Scott and Gerald W. Davis are purchasers under that certain executor's contract with Madsen dated August 14, 1978, a copy of which has been entered herein as Exhibit 38 and also attached to the Complaint of Birdie Properties.

3. Madsens sold the subject said property "subject to the rights of Garden City in and to the street on the north part of said property." (See paragraph 1, of Exhibit 38; TR 159)

4. Birdie Properties agreed by said contract (see paragraph 4 of Exhibit 38), and by their own testimony, that they as purchasers inspected the subject property and were aware of the existance of the road, which is the subject of this case. TR 134-142; 149; 154; 155; 159; 160; 161; 162; 163; 164

5. Birdie Properties' witness, Mr. Hill, testified that he discussed the claims of Garden City in and to said roadway with the purchasers on July 4 of 1978 at the time the earnest money agreement was signed. TR 119, 128, 129

6. Birdie Properties admit knowing that Mr. Cherington and Mr. Brown, who are neighbors to the North of the subject property, had a right-of-way over the subject road on the subject property. Dr. Davis testified that he learned of Mr. Cherington's claim of right-of-way on July 5, 1978 after talking with Mr. Cherington about the road. TR 141, 164. Dr. Davis further testified that he thought Garden City had a 20 foot right-of-way but not more. TR 142, 154, 155, 164. This evidences Birdie Properties' prior knowledge of the existence of a claim of Garden City.

7. Birdie Properties further agreed by way of the contract (Exhibit 38) as follows:

"The Buyers agree that they have inspected the said premises and the same are purchased as a result of such inspection and not in reliance upon representation by the Sellers or their agents, and that Sellers shall not be liable hereunder for any representation not made in writing in this agreement... Buyers and Sellers agree this writing constitutes the entire agreement between the parties and no modification of this agreement shall be binding unless such modification shall be in writing and signed by the parties hereto." TR 159, 160

8. No material representations were made by Madsens to Birdie Properties except as stated in the subject contract:

a. Paragraph 4 of the subject contract evidences this fact. (Exhibit 38)

b. Purchasers and Sellers never met until after the final contract had been executed. TR 143, 164

c. Mr. Hill was not an agent of Madsen but was an independant contractor. By Mr. Hill's own testimony no listing agreement or agency agreement existed between him and the Madsens. He was merely to receive 6% of the sales

price if he was able to sell the property and as such was acting solely on his own behalf and not as a representative or agent of either the Buyers or the Sellers. TR 116, 117, 131, 132

d. Defendants Madsen never showed the property to Birdie Properties prior to the execution of the contract. TR 148

e. Mr. Hill made no representations to Purchasers as to the exact locations of the boundaries of the subject property. On the contrary, his testimony was the he showed Purchasers "approximately" the corner points of the property and showed them where he "thought" the boundaries were. Furthermore, the contract made no representations as to specific boundary lines or points except as stated in the legal description of paragraph 1 thereof. TR 135, 136, 138; Exhibit 38

f. The contract is not subject to or conditioned upon the results of any survey. Exhibit 38

9. Birdie Properties presented no evidence of the measure of damages if any existed. The only testimony on values of property was that of Mr. Hill, who was not established as an expert on appraisals, and who, in fact, admitted not being a property appraiser or being qualified to appraise the subject property. TR 121-124

10. No evidence exists to substantiate Birdie Properties' claim that the subject roadway on the North side of the subject property is a defect in the clear title of the property and as contracted for by Birdie Properties.

ARGUMENT

1. The parties are bound by the terms of the written contract.

"Generally speaking, neither of the parties, nor the Court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced in accordance with the intention as manifested by the language used by the parties to the Contract." Jones v. Acme Bldg. Products Inc. 22 Utah 2d 202, 450 P2d 743 (1969)

Parole evidence may not be given to change the terms of a written agreement, which are clear, definite and unambiguous to permit that would be to cast doubt on the integrity of all contracts and to leave a party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who in the subsequent light of events discovers that he made a bad bargain. Strout West Realty Ag. Inc. v. Broderick, 522 P2d 144 (Utah 1974)

The Contract does constitute the entire agreement as between the parties and is the guide and final word in resolving the issues which are presented in this action.

2. Madsens made no misrepresentation and committed no fraud.

Although Plaintiffs failed to specifically plead misrepresentation or fraud, they did by way of their trial memorandum attempt to suggest that Madsens misrepresented the property boundaries and the existence of the Garden City's claims to the subject roadway. No credible evidence exists to support these implied allegations, and even if some of the evidence could be construed as supporting such a proposition, it is insufficient to meet the required burden of proof by clear and convincing evidence.

"The elements of actionable fraud to be proved are a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon upon which Plaintiff reasonably relies to his detriment.

The burden is upon the party charging fraud to prove fraud by clear and convincing evidence." Schwartz v. Tanner, ____ Utah ____, 575 P2d 873 (1978)

Cross Appellants (Birdie Properties) have cited the Court to the case of Pace v. Parrish 122 Utah 141, 247 P2d 273 (1952). That same case was relied upon in the more recent case of Cheever v. Schramm, ____ Utah ____, 577 P2d 951 (1978) at page 954:

"We have in the past stated that one claiming fraud must establish by clear and convincing evidence all of the following: 1) that a representation was made; 2) concerning a presently existing material fact; 3) which was false; 4) which the one making the misrepresentation either a) knew to be false, or b) made recklessly knowing he had insufficient knowledge upon which to base such representation; 5) for the purpose of inducing the other party to act upon it; 6) that the other party acting reasonably and in ignorance of its falsity; 7) did in fact rely upon it; 8) and was thereby induced to act; 9) to his injury and damage. We agree with the trial court; defendants have not met their burden of establishing these elements by clear and convincing evidence, which clearly preponderates against the findings of the trial court.

Using this analysis the trial court properly dismissed the claims against Madsens as no cause of action. Madsens never represented any more than the fact that GardenCity had some claim to the subject road; which was a truthful representation of fact. Because the contract was explicitly subject to any claims the city had to the road, the exact nature of such claim was and is immaterial. And, while Madsens may have known that the city claimed up to 66 feet of roadway, they had no reason to believe such a claim was valid. In fact,

In view of the Cross-appellant's burden of proving all of the aforereferenced elements by clear and convincing evicence, the allegations against Madsens are without actionabl merit.

Birdie Properties cannot ignore the express conditions stipulated in paragraph 1 of the written contract which stated that Madsens sold the subject property "subject to the Rights of Garden City (if any) in and to the street on the North part of this property."

Birdie Properties cannot ignore the provisions of paragraph 4 of said contract which provided in part that "the Buyers agree that they have inspected the said premises and same are purchased as a result of said premises and same are purchased as a result of said inspection and not in reliance upon representation by the Sellers or their agents and that Sellers shall not be liable hereunder for any representation not made in writing in this agreement...Buyers and Sellers agree this writing constitutes the entire agreement between the parties and no modification of this agreement shall be binding unless such modification shall be in writing and signed by the parties hereto."

One who complains of being injured by a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interest as would be exercised by an ordinary, reasonable and prudent person under the circumstances. and if he fails to do so he is precluded from holding someone else to account for the consequences of his own neglect. Jardine v. Brunswick Corp. 18 Utah 2nd 378, 423 P2d 659 (1967)

The Madsens nor Mr. Hill made no specific references to the exact nature of Garden City's claim to the roadway or

the precise boundaries of the property. Birdie Properties had a duty to exercise reasonable care to protect their own interests, and to investigate prior to final contract the extent of Garden City's claim, if they felt that such a claim were material to the transaction. No evidence exists that Birdie Properties made any inquiry or attempted to determine the exact nature of Garden City's claim to the roadway, prior to the execution of the contract, nor was any effort made by them to determine the exact boundary location of the property until sometime after the execution of the contract. The determination of these items was not made a condition subsequent of the contract. The evidence clearly suggests that Garden City's claim was not a material fact of the purchase transaction.

3. Terms of the contract cannot be changed or modified by parole evidence.

Paragraph 4 of the contract, as recited above, specifies that the contract may not be modified except in writing, signed by the parties; and further, that nothing except as stated within the contract constituted the agreement between the parties.

Birdie Properties specifically agreed by way of the contract (see paragraph 4 thereof) that no representations were made or were relied upon except as specified in the contract.

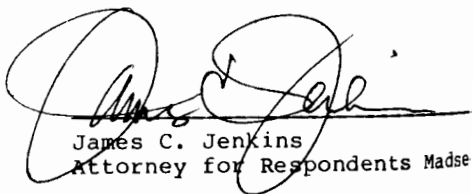
The contract is clear, definite, and unambiguous and expressly informed the Purchasers of Garden City's possible claims. It expressly bound the Purchasers to rely upon

their own investigations and inspection of the property. It expressly limited the contract to those specified in writing. Since Cross-appellants have failed to show the presence of fraud, the written contract is conclusively presumed to contain the entire agreement. Parole conversations, representations or statements will not be allowed to vary or add to the terms of the written agreement. See also State Bank of Lehi _____ Utah 2d _____, 563 P2d 413 (1977).

CONCLUSIONS

Cross-appellants failed to prove their case against Defendants Madsen. The written contract between the parties is binding upon both parties and constitutes the full agreement between them. No misrepresentations were made by Madsen. No evidence of fraud exists. Madsens have not breached the contract between the parties.

RESPECTFULLY SUBMITTED this 28th day of February, 1981.



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CERTIFICATE OF SERVICE

I certify I mailed two copies of the within brief to the following counsel of record, postage prepaid this 28th day of February, 1981.

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