

1981

# Rice, Melby Enterprises, Inc., a Utah Corporation v. Salt Lake County, A Body Corporate and Politic of the State of Utah : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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RICE, MELBY ENTERPRISES, INC., :  
a Utah corporation, :

Plaintiff-Appellant :

vs. :

Case No. 17525

SALT LAKE COUNTY, a body  
corporate and politic of  
the State of Utah :

Defendant-Respondent :

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APPELLANT'S BRIEF

Appeal from the Summary Judgment in favor of defendants in  
the District Court of the Third Judicial District in and for  
Salt Lake County, State of Utah.

Honorable Kenneth Rigtrup, Judge

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### STATEMENT OF KIND OF CASE

Plaintiff Appellant (Rice, Melby Enterprises, Inc.), brings action for rescission of a land sale contract which Defendant Respondent (Salt Lake County), induced by the promise of development and the threat of condemnation.

### DISPOSITION IN LOWER COURT

The District Court of the Third Judicial District granted Defendant's motion for summary judgment. From that judgment Plaintiff appeals.

### RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of order of the District Court granting summary judgment.

### STATEMENT OF FACTS

In 1970, Robert L. Rice, President of then Rice, Melby, Landsem Investments, Inc., was approached by representatives of Salt Lake County. These representatives informed Mr. Rice that the County intended to develop a public park west of real property which Rice, Melby, Landsem Investment, Inc., owned at 400 Highland Drive, Salt Lake City, Utah. The County indicated that in order to develop the park, it would be necessary to acquire real property located not only on the parcel of land owned by the corporation, but on a neighboring parcel owned by a third party.

as well. (Affidavit of Robert L. Rice p. 1) [hereinafter cited as Affidavit].

The real property owned by the Corporation has been used from that time to the present as a health spa facility. The corporation did not wish to part with this property because it would make any future expansion both difficult and costly. (Affidavit p. 2).

The County, however, prevailed upon the Corporation to sell the property at a bargain price. The County induced this sale by a threat coupled with a promise.

The threat was condemnation. The County indicated that in the event the Corporation chose not to sell the property, the County would exercise its power of eminent domain. The County also informed the Corporation that, it would exercise its power to condemn the neighboring parcel belonging to a third party as well. (Affidavit p. 1). The Corporation recognized the apparent futility of refusing to sell and subsequently sold the property to the County.

The promise was development. The development of the public park would have enhanced the real property on which the Corporation was located. It would further have saved the Corporation the expense of building additional facilities such as a jogging track. The benefits of the promised park development encouraged the Corporation to settle for the final bargain price of seventy four thousand nine hundred forty dollars and sixty two cents (\$74,940.62). This price would have been unavailable to a different third party. [Affidavit p. 1] (Contract for Sale of Real

Property p. 1).

The Corporation and the County entered into the written contract for sale on September 20, 1970. More than 10 years have passed since the sale and the County, far from developing the park, has failed to acquire the neighboring acreage which they represented was needed to make development feasible.

In the past ten (10) years demand on the health spa facilities, at the site owned by the corporation, have increased beyond expected. A jogging track, which would have been unnecessary if the park been developed as promised, is being built. This additional construction has eliminated some needed parking areas which would have been available had the Corporation been able to develop the use of the property sold. (Affidavit p.2).

Because the County has failed to develop the park as promised and apparently would not even have condemned the property if the Corporation had refused to sell; the Corporation filed an action in District Court seeking rescission of the contract or alternatively damages.

#### ARGUMENT

This Court held in Whitman v. W.T. Grant Co. 16 Utah 2d 395 P.2d 918 (1964) that when it hears an appeal from an order granting summary judgment it will view the facts in favor of the appealing party. Based on those facts and the following points of argument, this Court should reverse the District Court's order granting summary judgment.



point 1. STATUTORY PROVISIONS WAIVE GOVERNMENTAL IMMUNITY AND  
OBVIATE THE REQUIREMENTS OF NOTICE AND UNDERTAKING.

Section 63-30-5, Utah Code Anno., 1954, as amended, provides:

"Waiver of immunity as to obligation. - Immunity from suit of all governmental entities is waived as to any contractual obligation and actions arising out of contractual rights or obligations shall not be subject to the requirements of sections 63-30-12, 63-30-13 or 63-30-19 of this act."

The County, in its supplemental memorandum supporting summary judgment, asserts that the Corporation's causes of action do not arise out of contractual rights and obligations and, therefore, do not come within the purview of 63-30-5. The County attempts to limit contractual rights and obligations to those found on the four corners of the document. Such a narrow interpretation is not justified. This Court stated in Lamb v. Bangart 525 P.2d 602, 608 (Utah, 1974) "A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud." Implicit in this statement is the fact that any contract inherently carries with it the contractual right to seek a remedy for fraud, misrepresentation, or duress regardless of whether said remedy is expressly provided for in the contract. The Corporation's cause of action does, therefore, arise out of a contractual right; consequently 63-30-5 waives governmental immunity, the notice requirements under 63-30-12, 63-30-13, and the undertaking requirement of 63-30-19.

However, even if the Court found that the notice requirement was required prior to the institution of the instant case, the

Utah Supreme Court in El Rancho Enterprises v. Murray City Corporation, 565 P.2d 778 (Utah, 1977), upheld the premise that an equitable claim may be brought against a governmental body without the necessity of first presenting a claim for damages and that governmental immunity may not be used as a defense to equitable claims. The equitable claim in that case was based on contractual claims regarding real property.

Furthermore, there is a question of fact raised in the pleadings that the County was and has been acting in a proprietary manner rather than a governmental manner. Under the holding in Standiford v. Salt Lake, 605 P.2d 1230 (Utah, 1980), a municipality failing to act in a governmental function is not shielded by the Utah Governmental Immunity Act.

Furthermore, the County admits receipt of written communication seeking a reconveyance of the property which would fulfill the notice requirement if such is required. See: letter attached to Defendant's Supplemental Memorandum Supporting its Motion for Summary Judgment.

Therefore, by statute, equity, policy, and the facts, the County's motion for summary judgment based on governmental immunity should not have been granted. The County, by choosing to purchase the property by contract rather than condemn it, waived its immunity.

Point 2. BOTH DURESS AND MISREPRESENTATION EXIST IN THE CASE AT BAR.

The contract in the case at bar was induced by duress and misrepresentation.

Duress existed in that the parties to the contract were not negotiating from positions of equal strength. The County wielded the power of eminent domain and threatened condemnation if the corporation refused to sell. Acting under this duress, the Corporation sold the property. Nevertheless, the County failed to acquire, either by sale or condemnation the neighboring parcel. The County had represented that the neighboring parcel was necessary for development of the park and that they would condemn it. The County's failure to acquire the neighboring parcel evidences that the County threatened condemnation when it would not in fact have condemned the property.

Because the County threatened condemnation when it was not disposed to do so, the Corporation seeks to rescind the contract under the theory of duress.

The County in its memorandum supporting summary judgment quite appropriately points out that this Court in Fox v. Piercey, 227 P.2d 763 (Utah, 1951) held ". . . Under all authorities, ancient and modern, the act or threat constituting duress must be wrongful". The County takes the position that threatening condemnation is a legal right, therefore rightful, and consequently not duress. However, the County did not merely threaten condemnation, it threatened condemnation when it was not prepared to condemn, which is wrongful.

The misrepresentations in the present case are two-fold. First, as previously mentioned, the County threatened condemnation while being unprepared to condemn. Had the Corporation been aware of the County's true disposition, the property would not have been

sold. Second, the County represented that it was acquiring property with the intent to develop a park. More than ten years has passed since the promise of development was made and, is now obvious that the County was no more disposed to develop, promised, than it was to condemn, as threatened.

It is obvious that the County's power of eminent domain would give it a decided advantage over other purchasers in any negotiation for the sale of land. It is incumbent on the County to use that power responsibly. It is not responsible to use the power of eminent domain as a threat to acquire property while being unprepared to consummate the threatened action. Neither is it responsible to promise development while being undisposed to do so.

Point 3. PLAINTIFF JUSTIFIABLY RELIED ON DEFENDANT'S PROMISE TO DEVELOP A PARK AND IS ENTITLED TO DAMAGES ARISING FROM THAT RELIANCE.

The Corporation is entitled to rely upon the representation made by the County.

This court has not had occasion to rule on what may result from this reliance as has the Supreme Court of Alaska. In Alaska State 586 P.2d 1236, 1239 (Alaska, 1978) it stated, "In Grant State, 560 P.2d 36, 39 (Alaska 1977), we held that while the state is not bound to abide by its construction plans, parties to condemnation proceedings are entitled to rely on the state announced plans. Further, we held that when such plans are implemented, any further economic interference with the condemned property which results constitutes a second taking for which the state must pay just compensation."

Although the Corporation was not a party to condemnation proceedings, the sale was induced by the threat to condemn coupled with the promise to develop the land. The promise provided valuable consideration in that it made planned construction of additional health facilities unnecessary. The consideration paid for the property, therefore, was not only the cash price of seventy four thousand nine hundred two dollars and sixty two cents (\$74,902.62), but the promised development as well. Failure to carry out the promised development constituted a "second taking" for which the County must pay adequate consideration.

The Corporation is, therefore, entitled to damages incurred in detrimentally relying on the County's promised development, in that Plaintiff had to construct additional facilities, (as pointed out in Robert Rice's affidavit) which would have been unnecessary had Defendant complied with its promise.

Point 4. PLAINTIFFS CAUSES OF ACTION EXTEND THE STATUTE OF LIMITATIONS.

The Corporation has commenced suit within the statute of limitations and is not subject to laches. The County had cited a number of statute of limitations in seeking summary judgment; however, it has not addressed itself as to when the statute of limitations begins to run. See: Defendant's Memorandum Supporting its Motion for Summary Judgment.

25 Am Jur 2nd, Duress and Undue Influence, Section 28 (1966), states that it is held to be incumbent upon one from whom property

has been obtained by duress to avoid the contract when released from the duress.

51 Am Jur 2nd, Limitations of Action, section 126 (1977) states that a right of action upon a contract does not accrue until the statute of limitations does not begin to run until the contract is to be performed.

The contract in the case at bar was induced by duress and misrepresentation. In cases of duress or misrepresentation, the running of the statute of limitations may be delayed until discovery of the misrepresentation or release from the duress. The policy reason for extending the statute of limitation in these cases is that a plaintiff would not have the opportunity to pursue his action until he had either discovered the misrepresentation or been released from the duress. Neither occurrence of which could have been determined in the instant case until after the passage of a reasonable amount of time for the development of the parcel or the acquisition of the neighboring parcel.

The nature of the County's representation and duress, to condemn and develop a park within a reasonable time, extends the statute of limitations as to all of Plaintiff's causes of action. Even if we assume arguendo that there is no misrepresentation or duress in the case at bar the statute of limitations is extended for the Corporation's action for reliance damages; for the Corporation could not have discovered the failure of the promised considerations, (the park development) until a reasonable time had passed.

Point 5. PLAINTIFF'S CAUSES OF ACTION DO NOT VIOLATE THE PAROL EVIDENCE RULE.

The Corporation's causes of action under theories of duress and misrepresentations do not violate the parol evidence rule.

In Davis v. Payne and Day, Inc., 10 Utah 2d 56, 348 P.2d 340, (1960) the Court stated:

"The rule forbidding parol evidence to vary the terms of a written agreement applies only to evidence which is offered to prove the meaning of the original contract".

In the instant case, the Corporation's cause of action is not based on the interpretation of the written contract, but is based on matters of misrepresentation and duress - the proof of which will not violate the parol evidence rule and is not limited by the Statute of Frauds.

The Corporation's cause of action for reliance on the County's promise to develop the park, (which promise was part of the consideration for the transfer of the property) does not violate the parol evidence rule either.

Even though the promise to develop was not included in the written contract for sale it is well established that the parol evidence rule does not bar the introduction of parol evidence to reflect the true consideration of the parties. State v. Tucson Title Insurance Company 420 P.2d 286 (Ariz., 1966), Wentz v. Pacific States Savings & Loan Co., 5 Ariz. 508, 83 P.2d 1006 (1933); Cashion v. Bank of Arizona, 30 Ariz. 172, 245 P.360 (1926).

Point 6. PLAINTIFF'S CONSTITUTIONAL RIGHTS HAVE BEEN IMPAIRED.

The Utah and the U.S. Constitution both provide that there shall be no deprivation of private property by a government agency without just compensation. U.S. CONST. amend. V, U.S. CONST. art. 1 § 22.

The Corporation's constitutional rights have been violated because just compensation has not been tendered for the Corporation's property. The Corporation relied on the County's promise of development and in fact sold the property for a lower cash price than it would have had it not so relied. The County's failure to develop the park has caused the Corporation additional economic hardship, which constitutes a "second taking" for which the Corporation has not been compensated.

The legislature, in granting the power of eminent domain to the County, has specified the manner in which that power of eminent domain may be used by providing statutes to safeguard the rights of private citizens and ensuring "just compensation". Utah Code Ann. § 78-34-1--18.

It is inconceivable and perhaps unconstitutional for a governmental entity to misuse this power by threatening its use, thereby gaining a decided advantage in negotiations for a contractual sale. Indeed, the eminent domain statutes provide a means for determination of the fair market value of real property so as to provide just compensation to private citizens. By the County's choice to be sought to obtain the property through contractual means rather than the powers of eminent domain. By so doing, the County pl



itself in the same position as a private citizen with regard to the Corporation. Therefore, it was unconscionable and unconstitutional for the Defendant to threaten use of its governmental power when it was acting as a private citizen. Such misuse violates the constitutional safeguards. A county government has no inherent right of eminent domain but receives it only from the sovereign state. The state, in providing the powers of eminent domain to the county has provided specific means by which that power may be implemented. An abuse of that power by skirting the means by which it may be used is in violation of the rights and protections afforded private citizens and Plaintiff in this case.

#### CONCLUSION

The Corporation maintains that inasmuch as the County threatened condemnation when it was unprepared to condemn, and promised development when it was unprepared to develop; that said misrepresentations justify rescission of the land sale contract and evidence a possible unconstitutional exercise of the power of eminent domain. The Corporation further maintains that even in the absence of misrepresentation it was entitled to rely on the promised development as partial consideration and collect damages for the County's failure to develop as promised.

Because Plaintiff does state a claim for which relief can be granted, it respectfully submits that the order of the lower court granting summary judgment be reversed.

Respectfully Submitted.

  
Thomas J. Klc

MAILING CERTIFICATE

I delivered ten (10) copies of this Brief to the clerk of this court. I delivered two (2) copies to the County Attorney's Office this 1 day of March, 1981.

David H. Smith