

1981

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

Utah Supreme Court

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Quentin L.R. Alston; Attorney for Respondent
Thomas J. Kic; Attorney for Appellant

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RICE, MELBY ENTERPRISES, INC.,	:	
a Utah corporation,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	Supreme Court No. 17525
	:	
SALT LAKE COUNTY, a body	:	
corporate and politic of	:	
the State of Utah,	:	
	:	
Defendant-Respondent.	:	

RESPONDENT'S BRIEF

Appeal From The Summary Judgment In Favor Of Defendant
In The District Court Of The Third Judicial District
In And For Salt Lake County, State Of Utah

Honorable Kenneth Rigtrup, Judge

Thomas J. Klc
4625 South 2300 East
Salt Lake City, Utah 84117
Attorney for Appellant

Quentin L. R. Alston
Deputy County Attorney
151 East 2100 South
Salt Lake City, Utah 84115
Attorney for Respondent

FILED

JUN - 5 1981

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corporate and politic of	:	
the State of Utah,	:	
	:	
Defendant-Respondent.	:	

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This case involves an action brought by plaintiff-appellant (Rice, Melby Enterprises, Inc.) against defendant-respondent (Salt Lake County) to rescind a contract for the sale and purchase of land entered into more than ten (10) years ago because of purported duress and misrepresentation.

DISPOSITION IN LOWER COURT

The District Court for Salt Lake County granted defendant's Motion for Summary Judgment, and, on December 29, 1980, entered a Summary Judgment of non-liability dismissing plaintiff's complaint with prejudice and on the merits. (R. 47-49) Plaintiff appealed.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of dismissal of appellant's complaint made by the District Court.

STATEMENT OF FACTS

While appellant's statement of facts portrays a general scenario of what took place, it is slanted heavily in appellant's favor and reeks of a seller's belated remorse in having sold its property. Respondent accordingly elects to make its own statement of facts.

The land sale contract which is the subject matter of this appeal was entered into more than ten (10) years ago on September 20, 1970. (R. 15-20) The land sold by appellant and purchased by respondent pursuant to that contract was acquired by Salt Lake County for the expansion of the Big Cottonwood Park. The agreed upon consideration set forth in the contract was timely paid, and, on February 27, 1973, the property was conveyed to the County by Warranty Deed duly recorded in the Office of the County Recorder.

The thrust of appellant's claim to vitiate the more than ten year old contract is purported duress and misrepresentation. The purported duress is the assertion that at the time the contract was entered into, respondent's agent told appellant that unless appellant voluntarily sold respondent the property which respondent was endeavoring to acquire for the expansion of the park, respondent would institute condemnation proceedings to acquire it. The misrepresentation claimed by appellant is that respondent

agent purportedly told appellant at the time the contract was entered into that the property would be developed into a public park.

The Big Cottonwood Park for which the property was acquired has not been fully developed. The primary reason being the defeat of the County Recreation Bond Election on August 13, 1974. Had that bond election been successful, the County would not only have been able to complete the development of the Big Cottonwood Park, which was one of the specific items set forth in the bond election issue, but, the County also would have been able to acquire and develop many other recreational sites and facilities.

The above are the basic facts giving rise to appellant's claim for rescission of the land sale contract for purported fraud and misrepresentation. Where additional facts are deemed necessary, they will be set forth in the brief to support the points argued by respondent. Respondent's argument will follow chronologically the points and argument made by appellant.

ARGUMENT

POINT I

THE TORT CLAIM OF DURESS AND/OR MISREPRESENTATION WHICH APPELLANT ASSERTED AGAINST RESPONDENT MUST FAIL UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY. HOWEVER, EVEN IF RESPONDENT'S GOVERNMENTAL IMMUNITY BE DEEMED WAIVED, APPELLANT STILL CANNOT PREVAIL BECAUSE IT FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS OF THE GOVERNMENTAL IMMUNITY ACT.

In Point I appellant endeavors to overcome its admitted failure to comply with the mandatory provisions of the Utah Governmental Act which respondent interposed as one of several

defenses to appellant's tort claim against respondent (R. 8-9) by stating on page 4 of its brief:

"...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...." (Emphasis supplied)

Appellant cites the case of Lamb v. Bangart, 525 P.2d 602 in support of the above quoted assertion; and, on page 4 of its brief then says:

"...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."

Neither Lamb v. Bangart nor any other case respondent knows of says or implies that because fraud, misrepresentation or duress, under certain circumstances, may possibly vitiate a contract, that therefore fraud, misrepresentation or duress is a contractual right upon which a suit against a governmental entity may be based, since, as to contracts, governmental immunity has been waived. Horn book law teaches that fraud, misrepresentation and duress sound in tort--not in contract. How respondent can reach such a twisted, tortured interpretation of the language in the Lamb v. Bangart decision is beyond respondent.

The analyses as to the governmental immunity defenses which were asserted by respondent, and which were considered by the lower court are set forth in respondent's memoranda which are part of this record on appeal so they will not be repeated. (See R. 25-27 and R. 41-43)

The concluding statement made by appellant on page 5 of its brief in support of its Point I that: -- "The County, by choosing to purchase the property by contract rather than condemn it, waived its immunity" -- simply doesn't follow. Appellant by suing respondent for purported duress and misrepresentation was suing in tort and not on the contract. It necessarily follows then that even if governmental immunity was waived, appellant would still have had to comply with the other mandatory provisions of the Utah Governmental Immunity Act which appellant did not do.

POINT II

A SO-CALLED THREAT OF CONDEMNATION IS NOT SUCH LEGAL DURESS AS TO INVALIDATE AN OTHERWISE VALID LAND ACQUISITION CONTRACT ENTERED INTO BY A GOVERNMENTAL ENTITY.

Appellant, in its endeavor to invalidate the land contract it entered into with respondent, and, in support of Point II of its brief says on page 5 of its brief:

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

The only duress referred to was the purported threat of condemnation made by respondent. Then on page 6 of its brief appellant says:

"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."

Appellant cites no authority for the above assertion. Furthermore, respondent questions that any such authority can be found. With reference to what does in fact constitute actionable

duress, the Utah Supreme Court in Fox v. Piercey, 227 P.2d 763, at page 766 said:

"...under all the authorities, ancient and modern, the act or threat constituting duress must be wrongful."

Assuming that condemnation was threatened if respondent was unable to acquire the property voluntarily, is there anything wrongful with that? It is submitted that it is the usual and customary practice for all public entities who need private property for a public purpose to first try to acquire the property voluntarily, and, if this cannot be done, then inform the owner that condemnation proceedings will be instituted to acquire it. Since in this case the property was in fact acquired voluntarily without condemnation, why would condemnation be resorted to so as to subject appellant to the considerable additional expenditure of time and money necessarily incurred in any condemnation proceeding? The mere statement of such a useless action demonstrates its nonsense. Furthermore, such a novel doctrine would be dangerous and leave land titles in considerable doubt. It would mean that whenever a public entity acquired property for a public purpose, it would have to condemn because, if it did not condemn, any voluntary acquisition without condemnation would be voidable since it could always thereafter be said that threats of condemnation were made. Such a doctrine would upset more than seventy-five per cent (75%) of the property acquisitions made by the various public entities in the United States. The mere threat of condemnation simply does not

constitute duress sufficient to invalidate an otherwise valid contract.

Finally, even if the claimed threat of condemnation should be construed as duress legally sufficient to invalidate an otherwise valid contract, appellant still could not prevail. This for the reason it would have to have occurred before or at the time the contract was signed. In this case, that was more than ten years ago. Accordingly, appellant's claimed duress would long ago have been barred by the statute of limitations.

POINT III

APPELLANT'S CLAIMED PROMISSORY MISREPRESENTATION IS NOT THE KIND OF MISREPRESENTATION WHICH IS ACTIONABLE UNDER PREVAILING UTAH LAW.

Appellant's claim of misrepresentation by respondent is not that respondent made a statement of a material fact which was false and known to be false, and, which was relied upon by appellant to appellant's damage. The claimed misrepresentation is simply that respondent promised appellant it would develop the property it acquired from appellant as a park within a reasonable time.

Even though it is conceded that the property in question has not yet been fully developed as part of the Big Cottonwood Park, attention is invited to the fact that appellant does not allege in its complaint that when the claimed promissory representation as aforesaid was made, respondent did not intend to carry out that representation. It is this deficiency in pleadings, among other deficiencies, which makes appellant's complaint fatally defective.

The case of Nielson v. Leamington Mines & Exploration Corporation, 48 P.2d 438, involved a situation similar to the one in the above case. It was an action to set aside a deed to certain mining claims purportedly induced by false and fraudulent representations. The lower court found for plaintiff and set aside the deed. However, that ruling was reversed on appeal. In its decision the Utah Supreme Court set forth the following principles as those governing cases involving fraudulent representations. At page 441 of the opinion the court said:

"In the case of Campbell v. Zion's Co-op Home, etc., Co., 46 Utah 1, 148 P. 401, 406, this court announced the principles governing cases involving fraudulent representations by quoting and approving the following language from Southern Development Co. v. Silva, 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678: 'In order to establish a charge of this character the complainant must show by clear and decisive proof: First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in the expression of opinion or judgment, honestly entertained;...."

While Nielson v. Leamington Mines & Exploration Corporation, supra, typifies the usual fraud case, Utah does, however, recognize that an action for fraud may also be predicated on a promise accompanied by a present intention not to perform. In setting aside the dismissal of a fraud action based on a promise to do

something in the future, this court in Hull v. Flinders, 27 P.2d 36 said at page 57-58 of the opinion:

"The complaint, however, states a cause of action in deceit. The complaint is bottomed, not on breach of contract, but on misrepresentation and the substitution of the corporation instead of the defendant as the one obligated to perform the promise made of payment of installments as they became due on the mortgage. Plaintiff relies on the rule that an action for fraud may be predicated on a promise accompanied by the present intention not to perform it, made for the purpose of deceiving the promisee, thereby inducing him to act where otherwise he would not have done so, and by virtue of which he parted with his money. 12 R.C.L. 261; 27 C.J. 35, see annotations 51 A.L.R. 46; Snyder v. City Bond & Finance Co., 106 Cal. App. 745, 289 P. 859. This rule is supported very generally and is said to be the majority rule. The theory on which it is based is well stated in 12 R.C.L. 262, as follows:

'The rule is based on the theory that one who promises another to do something in the future as a consideration or inducement to him to do anything, impliedly asserts a present intent to carry out his promise; that the intention to deceive is a condition of mind, which, when it exists, is as much a fact as is a condition of the body, notwithstanding that it is more difficult to prove; and that, therefore a misstatement of a man's mind is a misstatement of fact. The gist of the fraud, in such cases, is not the breach of a promise, but the fraudulent intent of the promisor or obligor at the time he makes the promise or executed the contract, not to perform the same, and to deceive the obligee by his false promise. Hence to render nonperformance fraudulent the intention not to perform must exist when the promise is made, and if the promise is made in good faith when the contract is entered into there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform.'

"Some courts, a numerical minority, hold that fraud cannot be predicated on a mere promise, even though accompanied by a present intention not to perform, on the ground that even under such circumstances the promise is not the misrepresentation of an existing fact. Where the minority rule is followed, it is held that the remedy in such case, if any, is to sue upon the promise. 12 R.C.L. 262. We are inclined to follow the majority rule and hold the complaint states a cause of action for misrepresentation of a fact, in that the allegation is that defendant made the promise to pay the mortgage and to post as security \$3,500 of bonds of the General Finance Company, and at the time he had no present intention of keeping his promise, because he at once drew a contract in writing, which plaintiff says he did not and could not read and did not agree to, wherein the obligations defendant had promised to assume were shifted to the corporation of which he was an officer, and, instead of bonds, mere stock of the company was posted as security."

Appellant's complaint does not allege that when the claimed misrepresentation was made by respondent that it would develop the property it was acquiring from appellant as a park, it was respondent's intention at that time not to perform and not to develop the property as a park. It always was and still is respondent's intention to develop the property as a park. The property will be fully developed as part of the Big Cottonwood Park as soon as funds are available. The so-called promissory misrepresentation alleged by appellant in its complaint simply doesn't meet the criteria for an actionable misrepresentation established by Hull v. Flinders, supra, which has never been repealed.

POINT IV

APPELLANT'S CLAIM FOR DAMAGES BECAUSE THE PROPERTY RESPONDENT ACQUIRED FROM APPELLANT HAS NOT BEEN FULLY DEVELOPED AS A PARK IS WITHOUT MERIT.

In support of its Point 3 about being entitled to damages, appellant reiterates and reaffirms the only claim it makes against respondent, i.e., a so-called promissory misrepresentation by stating in the concluding paragraph for that point on page 8 of its brief:

"The Corporation is, therefore, entitled to damages incurred in detrimentally relying on the County's promised development...."
(Emphasis supplied)

At no time has appellant ever alleged that at the time the promise was made it was the intention of respondent not to perform. As this court said in Hull v. Flinders, supra, on page 55:

"...To render nonperformance fraudulent the intention not to perform must exist when the promise is made, and if the promise is made in good faith when the contract is entered into there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform."

See also 37 Am. Jur. 2d, Sec. 85, at page 130:

"No charge of fraud will lie where the intended use of the property is stated in good faith, but the purchaser afterward changes his mind...."

Respondent has not changed its mind. The property will in fact be developed as soon as funds are available.

In the case of Olsen v. Bd. of Ed. of Granite Sch. Dist., 571 P.2d 1336, condemnation proceedings were initiated in 1964 to

acquire certain property for the construction of school buildings. A judgment of condemnation was entered in 1966. However, the property was never put to its intended use. In 1966 it was declared surplus and sold. Although an effort was made to have the condemnation declared void or voidable because the acquired property was never put to its intended use, the condemnation by which the school district originally acquired the property was nevertheless upheld.

Finally, appellant, to support Point III in its brief that it is entitled to damages because it justifiably relied on respondent's promised performance to develop the acquired property as a park, asserts on page 5:

"...Failure to carry out the promised development constituted a 'second taking' for which the County must pay adequate consideration."

Appellant then cites the Alaska cases of Alsop v. State, 586 P.2d 1236, and Grant v. State, 560 P.2d 36 in support thereof. Neither of those cases is in point.

The Alsop case was an attempted class action case for declaratory relief. Alsop's property had been condemned in a prior condemnation proceeding as part of the proposed New Seward Highway. He had expressly conditioned the settlement of his condemnation case on the continuation of unrestricted access to that highway at the 76th Avenue intersection. A subsequent plan for upgrading the highway, among other things, called for closure of the 76th Avenue intersection.

While the Alaska Supreme Court held that a class action was not proper, it did say in part in its opinion at page 1240:

"We hold that in order to recover damages, each of the appellants must demonstrate that he or a predecessor in interest had a portion of his property taken for the original construction project, that he or his predecessor relied on construction of an inter-section at 76th Avenue or the two-way frontage road, or both, in settling or receiving an award for their condemnation claims, and that his remaining property has decreased in value as a result of the highway modification."

The Grant case, like the Alsop case, concerned a deprivation of access because of a change in highway construction plans. In November of 1972, Grant's prior owner of the property, Mathis, along with eight others, sued the State of Alaska in inverse condemnation for purported deprivation of access to adjacent property. A month thereafter Mathis sold the property to Grant, reserving its inverse condemnation claim against the State. In 1972, at the time of the conveyance from Mathis to Grant, the State's highway construction plans called for an underpass culvert which would permit ingress and egress of small craft to the Mathis property. During construction of the expressway in 1974, however, the culvert collapsed and the State decided it would not be replaced. In March of 1975 Mathis settled its inverse condemnation with the State in which settlement she acknowledged receipt of payment of compensation for the taking of the water access and damages arising out of or resulting from the taking. After the Mathis settlement, the Grants, in October of 1975, sued the State of Alaska in inverse condemnation asserting that when they purchased the property from Mathis in 1972, they relied on the State's plan in existence at that time to provide an underpass culvert directly in front of the property which

would provide access to the property. In that suit the lower court granted the State's motion for summary judgment on the State's theory that Grant's predecessor in interest had already been paid for this very claim. In reversing the summary judgment and remanding for a new trial, the Supreme Court of Alaska said in part in its opinion at page 39:

"...There was a second economic interference when the state decided not to replace the collapsed culvert...."

The court said further at page 40:

"In light of our reversal of the superior court's grant of summary judgment to the state, on remand the superior court should grant the state's motion for leave to file a third-party complaint or to require the joinder of Ms. Mathis. We believe that if Ms. Mathis is made party to the suit, the state's seemingly reasonable claim that they compensated her for all damages to the subject property's littoral access can be properly adjudicated."

Unlike the situation in the Alsop and Grant cases, *supra*, wherein a change in plans actually deprived the property owners of access to their property, the subject case involves a promissory representation of some future intended action which has not yet been fully consummated. Under the decision in Hull v. Flinch such a promissory representation is not actionable.

POINT V

THE CAUSES OF ACTION WHICH APPELLANT ASSERTS AGAINST RESPONDENT HAVE NOT AND DO NOT EXTEND THE STATUTE OF LIMITATIONS.

In Point IV of its brief appellant argues that the causes of action it asserts against respondent extend the statute of limitations. Appellant states in this connection on page 4:

"The contract in the case at bar was induced by duress and misrepresentation. In cases of duress and misrepresentation, the running of the statute of limitations may be delayed until discovery of the misrepresentation or release from the duress...."

Appellant fails to recognize that it did not sue respondent on the contract. There is no language whatsoever in the contract between the parties which obligates respondent to develop the property respondent acquired from appellant into a park.

(R. 15-20) Appellant's claim against respondent is a tort claim based on duress and misrepresentation. The purported duress is that respondent threatened condemnation unless appellant would voluntarily sell respondent the property.

To support its contention that its claim of duress extends the statute of limitations, appellant cites 25 Am. Jur. 2d, Duress and Undue Influence, Section 28 (1966), stating that it is incumbent upon one from whom property has been obtained by duress to avoid the contract when released from the duress. Even if the threat of condemnation constituted duress, which it does not, how could appellant still be under that so-called duress after the contract which was purportedly induced by that duress has been signed? Upon the signing of the contract there would no longer be any such duress because there would be no necessity to continue to threaten condemnation because the object of the threatened condemnation would have already been achieved. In this case, the contract was signed more than ten years ago so appellant at that time was released of any so-called duress by virtue of any threatened condemnation. The statute of limitations

for duress accordingly began to run at that time. Appellant's claim of duress at this late date is necessarily barred by the statute of limitations and the running of that statute has not been extended.

To support its contention that its cause of action for misrepresentation has been extended, appellant cites 51 Am. Jur. 2d, Limitations of Action, Section 126 (1970), stating that a right of action on a contract does not accrue, and, the statute of limitations does not begin to run until the contract is to be performed. The performance set forth in the contract between the parties is not the development of a park but the conveyance of property upon the payment of the agreed upon consideration. In this case, both parties fully performed precisely as their contract obligated them to do. Respondent paid and appellant conveyed.

Appellant's cause of action for a purported promissory misrepresentation is a tort claim and not a contract claim. The kind of so-called promissory misrepresentation which appellant sets forth as its cause of action against respondent is not an actionable misrepresentation under the circumstances of this case. This has been fully treated in respondent's Point III so the argument thereon will not be repeated here.

Appellant simply does not have a cause of action against respondent for misrepresentation so its claimed cause of action for misrepresentation does not extend the statute of limitations.

POINT VI

RESPONDENT CONCEDES THAT CAUSES OF ACTION
BASED ON DURESS AND MISREPRESENTATION DO NOT
VIOLATE THE PAROL EVIDENCE RULE.

Appellant's Point V is that its causes of action do not
violate the parol evidence rule. In support of this assertion
appellant states on page 10 of its brief that:

"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 above statement seems inconsistent with appellant's prior
statement supporting its Point I when on page 4 of its brief it
said:

"The Corporation's cause of action does,
therefore, arise out of a contractual
right...."

In spite of the apparent inconsistency in appellant's
assertions, since there is no question but that the causes of
action against respondent are based on duress and misrepresen-
tation, it is not necessary for respondent to respond to
appellant's Point V. Respondent concedes that causes of action
based on duress and misrepresentation do not violate the parol
evidence rule.

POINT VII

APPELLANT'S CONSTITUTIONAL RIGHTS HAVE NOT
BEEN IMPAIRED. APPELLANT WAS PAID JUST
COMPENSATION FOR ITS PROPERTY WHICH WAS
ACQUIRED BY RESPONDENT.

In support of its Point VI appellant makes the statement on
page 11 of its brief that:

"The Corporation's constitutional rights have been violated because just compensation has not been tendered for the Corporation's property...."

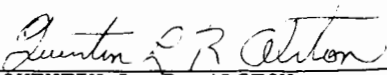
Both Amendment V to the Constitution of the United States and Article I, Section 22 of the Constitution of the State of Utah mandate that private property shall not be taken for public use without the payment of just compensation. Appellant was paid just compensation. The contract for the sale and purchase of the property was voluntarily entered into by the parties. The consideration provided for therein was timely paid and accepted. Thereafter, a deed of conveyance was duly executed, delivered and recorded. There is no merit to appellant's assertion that just compensation was not tendered for its property.

CONCLUSION

Giving careful consideration to all the facts set forth in the pleadings as well as all reasonable inferences which may be derived therefrom, and, applying the prevailing Utah law thereto, the dismissal of appellant's complaint by the lower court was proper and should accordingly be affirmed.

Respectfully submitted,

TED CANNON
Salt Lake County Attorney

By 
QUENTIN L. R. ALSTON
Deputy County Attorney
Attorneys for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that one this 5th day of June, 1981,
I mailed two (2) copies of Respondent's Brief via U. S. Mail
in a sealed envelope with postage prepaid thereon and addressed
to appellant's attorney as follows:

Thomas J. Klc
Attorney at Law
4625 South 2300 East
Salt Lake City, Utah 84117

Quentin R. Clinton