1982

Devar C. Pack and Carolyn Pack v. Hull Development Co. Inc. : Brief of Appellant

Utah Supreme Court

Robert D> Lamoreaux; Lamoreaux & Zabriskie; Attorneys for Appellants;
John G. Mulliner; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

DEVAR C. PACK and CAROLYN PACK, Plaintiff-Respondent,	)	Case No. 18,136
vs.	)	
HULL DEVELOPMENT CO., INC., a Utah corporation, Defendant-Appellant.	)	

BRIEF OF APPELLANT

Appeal from the denial of Motions for a new trial and to amend the findings of fact, conclusions of law and the judgment, The Honorable Judge George E. Ballif presiding.

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STATEMENT OF THE NATURE OF THE CASE

The Appellant, Hull Development Co., Inc., a Utah Corporation, appeals from denial of its Motions: for a new trial, to amend the findings of fact and conclusions of law and to amend the judgment.

DISPOSITON IN LOWER COURT

This matter came on for trial in the Fourth Judicial District Court, the Honorable George E. Ballif presiding, on May 28, 1981. The Attorneys for both parties stipulated to all evidence and issues, except for the issue of damages for slander of title, which was testified to by Mr. Hull. All other items were submitted by brief. (Ex. 1; Tr. P. 2-5) All Exhibits for the Plaintiff and Defendant were submitted as joint exhibits for both parties. (Tr. p. 3) On the 10th day of July, 1981, the Court entered judgment for the Plaintiff-Respondent. On July

20, 1981, the Defendant-Respondent filed with the Court motions: for a new trial, to amend the judgment and to amend the Findings of Fact and Conclusions of Law. The motions were submitted on brief and on October 29, 1981, the Court denied each of the motions pending. On Friday, November 27, 1981, a Notice of Appeal was filed, which notice was docketed on Monday, November 30, 1981. It should be noted that no testimony or oral argument was presented before Judge Ballif on any of the issues appealed in this matter.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the District Court's judgment, a new trial, or amendment of the Findings of Fact and Conclusions of the Court.

STATEMENT OF THE FACTS

A careful examination of the facts in this matter will clearly show that there was no waiver of contract payments at the time of forfeiture. They establish that proper notice to cure and reasonable time to cure were given. They also establish that the Court made material errors of law and fact which require reversal of the judgment rendered in the lower court.

On August 27, 1977, the Packs, Plaintiff-Respondent, submitted an Earnest Money Receipt and Offer to Purchase for a lot owned by Hull Development Co., Defendant-Appellant. The Earnest Money Offer was signed by all parties and it specified all necessary terms for the sale. (Ex. 25)

The Earnest Money Offer called for six payments of $500.00 per month and then monthly payments of $250.00 per month until paid in full. This was then orally modified in several respects, which changes were reflected in correspondence dated December 9, 1977, and February 27, 1978. (Ex. 12, 20) As shown in the correspondence, there was a minor dispute over a sewer connection, (Ex. 17 and 18), and the Packs refused to execute a uniform real estate contract form sent them by Hull, (Ex. 16), but they made sporadic payments over the next 2½ years.

Correspondence submitted into evidence show that notice of delinquent payments and urgings to bring payments current were sent by Hull as follows:

December 9, 1977 -- (Ex. 12)
February 27, 1978 -- (Ex. 20)
May 16, 1978 -- (Ex. 21)
December 16, 1978 -- (Ex. 8)
February 28, 1979 -- (Ex. 11)
April 16, 1979 -- (Ex. 15)
October 23, 1979 -- (Ex. 4)

Items submitted into evidence, (Ex. 3) and the record p. 44-46 show the following payments:

April 18, 1977	$ 100.00	
July 14, 1977	2,000.00	cash
Sept. 20, 1977	516.25	
Nov. 18, 1977	608.75	
Feb. 7, 1978	500.00	
Apr. 15, 1978	500.00	
July 12, 1978	500.00	
July 12, 1978	30.00	Taxes
Dec. 4, 1978	500.00	
Dec. 17, 1978	129.56	Taxes?
Mar. 20, 1979	2,142.00	
Apr. 26, 1979	250.00	
May 28, 1979	250.00	

June 25, 1979	250.00
Sept. 24, 1979	250.00
(This check returned-uncashed 10-23-79)	
Total	$8,527.06

The parties stipulated to payments in the amount of $8,617.00.

In addition there were many phone calls from Hull to the Packs concerning the account. More specifically the Affidavit of David Thomas, (R. 91-2), attached to Hull's motions, indicates telephone calls to the Packs as follows:

August 31, 1979	Notice of intent to terminate if default not cured
October 1, 1979	Termination of contract upon failure to cure

It should be noted that after the letter giving notice of strict compliance, dated February 28, 1979, the Packs immediately paid $2142.00 and made payments for three months, then they missed two monthly payments. On August 31, 1979, they were given notice of strict compliance and were given one month (September) to bring payments current. No payments were made in September and on October 1, 1979, a forfeiture was declared and the Packs were notified of such. A check dated September 24, 1979, and sent to the wrong address was received on October 22, 1979. This check in the amount of $250.00 was not enough to cure the default. Affidavit of David Thomas. (R.91-2) On October 23, 1979, written notice of forfeiture was sent to the Packs and the check of $250.00 received the day before was returned to them along with a check in the amount of $5,666.42

which was a return of all principal paid by the Packs. No substantive contacts were made between the parties until August 4, 1980, when Hull contacted the Packs by letter requesting them to remove notices of interest on the record for the lot as another buyer wanted to purchase the lot. (Ex. 2) The Packs brought this action on August 8, 1980, for specific performance of the earnest money offer, and Hull counterclaimed for slander of title.

On July 10, 1981, the Court ruled in favor of the Plaintiffs-Respondents and granted judgment for specific performance. The Court found that Hull had waived strict compliance with the Earnest Money Offer; had not given proper notice as required by the Uniform Real Estate Contract, was not entitled to interest on the balance of the Earnest Money Offer. (R. 82-83) On July 20, 1981, Defendant-Appellant motioned the Court for a new trial based on the above errors of law and upon the grounds that material facts were not before the Court, which facts would require a reversal of the judgment. Hull also motioned on the grounds that the Court and the attorneys were confused as to both the facts and issues before the Court. On October 29, 1981, the Court denied all motions for relief brought by the Defendant. (R. 110)

This appeal is brought on the grounds that the judgment in the District Court contained material errors of law, which require a reversal of that judgment, and also on the

ground that missing facts and confusion of all parties require a new trial in the furtherance of justice.

ARGUMENT

POINT 1

THE DELINQUENCY IN PAYMENTS BY THE PLAINTIFF-RESPONDENT WAS NOT WAIVED AT THE TIME DEFENDANT-APPELLANT DECLARED FORFEITURE OF THE CONTRACT.

It is well recognized that repeated warnings about delinquency without their enforcement is indicative of a willingness to waive strict compliance with the terms of a contract, Pacific Develooment v. Stewart, et ux, 195 P.2d 748 (Utah 1948). However, the Utah Supreme Court has held that a vendor has some latitude in working with a vendee in an attempt to allow him opportunity to cure without waiver of the payment schedule on a contract becoming permanent. See Forsyth v. Pendleton, 617 P.2d 358 (Utah 1980) (waiver for a specified period.) W.P. Harlin Construction Company v. Utah State Road Commission, 431 P.2d 792 (Utah 1967) (waiver on one contract not applicable to another contract between same parties.) Christy et ux v. Guild et ux, 121 P.2d 401 (Utah 1942). (waiver of one payment not continuing waiver--terms specified in contract.)

It is further recognized that where, as in this case, several, or many, payments were late that a vendor could not demand strict compliance without first giving the buyer fair

warning to that effect. Paul v. Kitt, 544 P.2d 886 (Utah 1975); Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980).

This court has determined that fair warning of strict compliance, sufficient to void any previous waiver, must be an affirmative act indicating what the default is and what must be done to cure the default. Hansen v. Christensen, 545 P.2d 1152 (Utah 1976); Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah 1980). The letter of Hull dated February 28, 1979 (Ex. 18), met those requirements and that act was sufficient to cure all previous waivers by Hull. Beneficial Life Insurance Company v. Dennett, 470 P.2d 406 (Utah 1970). After the notice of February 28th, a payment totaling $2,142.00 and three monthly payments of $250.00 each were made. However, after default on two more payments for the months of July and August, 1979, the Packs were again notified that all delinquencies must be cured by September 30, 1979. This notice was given by a direct telephone call to Mrs. Pack by David Thomas on August 31, 1979. (R. 91-92)

This affirmative act was sufficient to put the Packs on notice to cure or forfeit the contract. Notice requirements broadly applied throughout American Jurisdictions are summarized thus:

> "While it has been said that notice required to reinstate the right of rescission or forfeiture after waiver must be definite and specific, such notice need not always be definite and specific, it being sufficient that it may be inferred from the conduct of the vendor and vendee in their dealings with each other that they understood that the right of rescission or forfeiture was to be restored. A vendee

who has acquired knowledge of the intent of the vendor to insist on strict performance, no matter in what form that knowledge comes, must within a reasonable time bring his payments up to date. The notice must contain a demand for payment of what is due, and must give the information that the vendor will insist on prompt payment in the future." (Emphasis added). Corpus Juris Secundum, Vendor and Purchaser, Section 139(b), page 1083.

The amount of time necessary to constitute a "reasonable time", has varied under rulings by this court. Lamont v. Eujen, 508 P.2d 523 (Utah 1973) (four days not enough time); Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah 1977) (ten days not enough time); Pacific Development Co., Supra at 748 (twenty-three days is a reasonable time); Beneficial Life, Supra p.408 (ten months is a reasonable time). It is evident from the above cited cases that this Court has taken the position that a short time (few days) is not a reasonable time, but a longer period, twenty-three days to up to ten months, may be a reasonable time depending on the circumstances.

In this instant case, both the notice of February 28, 1979, and the notice of August 31, 1979, were reasonable, and more specifically the notice of August 31 which allowed one month, thirty (30) days to cure was within the guidelines established by this Court. In any event, the two notices were sufficient to put the Packs on notice that they must cure the delinquency and that no additional waivers would be given.

When the notice of termination was given on October 1, 1979, the Packs could not have been surprised. Apparently they were not duly concerned as the payment received on October 22,

was only in the amount of $250.00, not enough to cure the delinquency. The letter of termination dated October 23, 1979, as a follow-up to the October 1st termination was proper and timely and met all the legal requirements established by this court. There was no waiver of delinquency in effect at the time of termination and the termination was proper, timely and legal. The decision of the District Court should be reversed on this point

It should also be noted that Hull returned all payments of principal to the Packs as required by this Court. Jacobsen v. Swan, 278 P.2d 294 (Utah 1954); Call, Supra, p. 1109.

POINT II

THE COURT ERRED IN FINDING THAT THE LETTER OF OCTOBER 23 WAS INEFFECTIVE BECAUSE IT DID NOT PROVIDE NOTICE AS REQUIRED BY THE UNIFORM REAL ESTATE CONTRACT.

The Earnest Money Agreement and Offer to Purchase form executed by both parties, is a legally binding contract, not merely an agreement to agree. Bunnell v. Bills, 368 P.2d 597 (Utah 1962). In Utah the earnest money agreement is binding even if it stipulates that the parties will enter into a "contract" in the future. Id at 600; D.H. Overmeyer v. Brown, 439 F.2d 926 (10th Cir. 1971). As with any other contract, the terms of the earnest money agreement must be set forth with sufficient specificity and clarity that it can be performed. Pitcher v. Lauritzen, 423 P.2d 491 (Utah 1967); also see

Davison v. Robbins, 517 P.2d 1026 (Utah 1973). The earnest money agreement in this case complies with these requirements. (Ex. 25)

In this case the Earnest Money Agreement was the only binding agreement as the Uniform Real Estate Contract was not executed by the parties. This fact was not contested by either party and was alluded to in the Stipulation of May 28, 1981, (Ex. 1) in the Plaintiff's Answers to Interrogatories of February 2, 1981, and in the trial briefs of both parties. No evidence or facts were presented before the Court which could sustain the Courts ruling that the Uniform Real Estate Contract was binding on either party. It is, therefore, material error for the Court to find that the notice requirements in the default provisions of the Uniform Real Estate Contract were required of Hull. See Court decision dated June 25, 1981. (R. 82-83)

The Statute of Frauds prohibits the court from validating the Uniform Real Estate Contract agreement which was not executed by the alleged parties thereto, when no parol evidence is presented to the Court. Utah Code Annotated 25-5-3; Coleman v. Dillman, 624 P.2d 713 (Utah 1981); Zion Properties v. Holt, 538 P.2d 1319 (Utah 1975) Holingren Brothers v. Ballard, 534).2d 611 (Utah 1975). The notice given by Hull has met the requirements of this court as discussed in Point I above under the Earnest Money Agreement, and the decision of the District Court should be reversed on this point.

POINT III

THE COURT ERRED IN NOT GRANTING INTEREST TO THE DEFENDANT-APPELLANT ON THE OUTSTANDING BALANCE OF THE CONTRACT.

The District Court ruled that the balance due on the contract was $11,379.93 and decreed that upon payment of said sum the title to the disputed property was to be conveyed to the Packs. The sum of $11,379.97 does not include interest as required by the Earnest Money Contract. The motion to amend the Court's decision to include interest in the amount due was denied by the Honorable Judge Ballif. (R. 110)

This Court has ruled as recently as 1979 that as a matter of law interest on amounts found to be due under contracts was to be paid. Lignell v. Berg, 593 P.2d 800 (Utah 1979); See also Utah Code Annotated 15-1-4; Dairy Distributors Inc. v. Local Union 967, 396 P.2d 47 (Utah 1964). The decision of the District Court should be reversed on this point.

POINT IV

WHEN MATERIAL FACTS ARE NOT UNDERSTOOD AND OTHER MATERIAL FACTS ARE NOT PRESENTED AT TRIAL, IN THE FURTHERANCE OF JUSTICE A NEW TRIAL SHOULD BE GRANTED UNDER RULE 60(b)(7) UTAH RULES OF CIVIL PROCEDURE.

In this case many errors of law and fact were made by both the Court and the attorneys. These errors cumulatively require the reversal of the lower Court's decision. Among these errors are the following:

ERRORS OF LAW

1. The finding that a waiver existed, see Point I.

2. The finding that notice under the Uniform Real Estate Contract was required, See Point II.

3. The refusal of the Court to grant interest, see Point III.

4. The finding that notice given to Packs by Hull was, "ineffective in that it did not provide any reasonable time to cure . . . " R. 82-83)

ERRORS OF FACT

1. The finding that Hull refused to accept payments when no additional payments were tendered and no evidence was introduced on this point. (Tr. pp 2-5; Ex. 1. R. 3, 4)

2. The confusion over whether attorney fees were stipulated. (Tr p.4; R. 83-84, 85-87, 98-100)

3. The fact that the Court did not consider the notice to cure given on August 31, 1979, Affidavit of David Thomas in record. (R. 82-83, 91-92)

4. The fact that the Court did not consider the termination given on October 1, 1979. Affidavit of David Thomas in record. (R. 82-83, 91-92)

In addition, the knowledge that material facts and evidence was not available to the Court, at the time of its decision came to the attention of the Court in Defendant-

Appellant's Motions for a new trial. (R. 92-92) Although the Court denied the motion for a new trial under rule 60(b)(7), URCP, a new trial should have been granted because these facts were necessary for justice to be reached in this case. (R. 110)

Rule 60 is designed to allow the Court great latitude in correcting errors, in the furtherance of justice. The Court can relieve parties from such inequities for various reasons. Rule 60(B), Utah Rules of Civil Procedure. Rule 60(b)(7) URCP allows the court even more latitude by allowing relief from judgment for "any other reason justifying relief. . .". In Egan v. Egan, this court stated, "Further, the Supreme Court of this State has ruled erroneous assumptions may be grounds for entering a new order." Egan V. Egan, 560 P.2d, 706 (Utah 1977). In that case, the lower court granted a partial relief from judgment under Rule 60(b)(7). The present case is one in which Rule 60(b)(7) should have been used to prevent an inequity, which will result, if the matter is not reopened for further hearing. It is evident that many erroneous assumptions were made by the court because material facts were not before the Court. This resulted in legal and factual errors being made to the detriment of Appellant. These errors of law and fact require that this case be reversed and a new trial granted in the furtherance of justice.

CONCLUSION

Appellant respectfully submits its analysis of the points of law and equity herein stated. The material errors of

law and fact are of such magnitude that justice can only be served by a reversal of this case. Wherefore, Appellant respectfully requests that the Court reverse the decision of the District Court and grant a new trial in this matter.

Respectfully Submitted,

Robert D. Lamoreaux

ROBERT D. LAMOREAUX
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MAILING CERTIFICATE

I hereby certify I mailed a true and correct copy of the foregoing Brief to John G. Mulliner, Attorney for Respondent, 42 No. University Avenue, Suite 4, Provo, Utah 84601, postage prepaid this 22 day of February, 1982.

Pat Williams

Secretary