

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF OF THE STATE OF UTAH

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DEVAR C. PACK and
CAROLYN PACK,

:

Plaintiff-Respondent,

:

Case No. 18,136

:

vs.

:

HULL DEVELOPMENT CO., INC., a
Utah Corporation,

:

Defendant-Appellant.

:

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BRIEF OF ~~APPELLANT~~ *Respondent*

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Appeal from the denial of Motion for a new trial and Motion
to Amend the Findings of Fact, Conclusions of Law and Judgment.
Honorable George E. Ballif, Judge.

---0000000---

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Clark, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I.	
THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT ANY DEFAULT IN PAYMENTS HAD BEEN WAIVED BY APPELLANT----	3
POINT II.	
APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON ITS OWN FAILURE TO PRESENT EVIDENCE WHICH WAS READILY AVAILABLE PRIOR TO TRIAL. THE TRIAL COURT WAS WITHIN ITS SOUND DISCRETION IN REFUSING TO GRANT A NEW TRIAL-----	4
POINT III.	
THE TRIAL COURT'S FINDING THAT APPELLANT FAILED TO GIVE ADEQUATE NOTICE OF DEFAULT AND OPPORTUNITY TO CURE WAS CORRECT REGARDLESS OF WHETHER OR NOT THE UNIFORM REAL ESTATE CONTRACT WAS EFFECTIVE-----	5
POINT IV.	
THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT INTEREST TO APPELLANT WHERE APPELLANT HAD REFUSED TO ACCEPT PAYMENT-----	6
POINT V.	
APPELLANT'S ADDITIONAL CLAIMS OF ERROR IN POINT IV OF ITS BRIEF ARE UNSUBSTANTIATED-----	6
CONCLUSION-----	7

Cases Cited

Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah, 1977)---	3
Tanner v. Baadsgaard, 612 P.2d 345 (Utah, 1980)-----	3
Hansen v. Christensen, 545 P.2d 1152 (Utah, 1976)-----	3

Egan v. Egan, 560 P.2d 704 (Utah, 1977)-----	5
Gregorson v. Jensen, 617 P.2d 369, 372 (Utah, 1980)-----	5
Valley Bank and Trust Co. v. Gerber, 526 P.2d 1121 (Utah, 1974)-----	6

Other Authorities Cited

Utah Rules of Civil Procedure, 60(b)(7)-----	4, 5
Utah Rules of Civil Procedure, 59(a)(4)-----	4
Utah Rules of Civil Procedure, 60(b)(2)-----	4

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CAROLYN PACK, :
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 :
vs. :
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Utah Corporation, :
 :
Defendant-Appellant. :

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STATEMENT OF NATURE OF CASE

Respondents DeVar C. and Carolyn Pack commenced an action in the Fourth Judicial District Court of Utah County against the Appellant seeking specific performance of a contract for the purchase and sale of certain real property. The case was tried before the Honorable George E. Ballif on May 28, 1981.

DISPOSITION IN THE LOWER COURT

The District Court entered judgment in favor of the Plaintiffs and against the Defendant granting the Plaintiffs specific performance of the contract and judgment for attorney's fees in the sum of \$2,000.00. Defendant submitted motions for a new trial, and to amend the Findings of Fact, Conclusions of Law, and Judgment. The court denied each of the motions.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the lower court, a new trial, or amendment of the Findings of Fact, Conclusions of Law, and Judgment of the lower court.

STATEMENT OF FACTS

In August, 1977 Plaintiffs and Defendant executed an "Earnest Money Receipt and Offer to Purchase" for the purchase and sale of Lot 48, Plat "A", Temple Heights Subdivision in Provo, Utah. That agreement provided, among other things, for a purchase price of \$17,500.00, for a down payment of \$2,000.00, six monthly payments of \$500.00, payments of \$250.00 per month thereafter until paid, and stated "The following special improvements are included in this sale: Sewer x . . . water x . . ." The parties agreed to execute a Uniform Real Estate Contract, more formally setting forth their agreement.

Thereafter, Defendant sent to Plaintiffs a Uniform Real Estate Contract (hereinafter UREC) which provided that Plaintiffs pay \$300.00 for water and sewer into the property. Plaintiffs protested that the UREC was not consistent with the Earnest Money or their prior understanding. Substantial correspondence concerning the disputes followed and Plaintiffs did not maintain the payment schedule.

By letter dated October 23, 1979, Defendant gave notice that unless payments were brought current they would "cancel this transaction" and assume that Plaintiffs "acquiesce in the cancellation . . ." A payment of \$2,142.00 was made in response to that letter. In the ensuing five months four \$250.00 payments were made. One of those payments, together with a check for \$5,666.42, was returned to Plaintiffs with a letter purporting to cancel the transaction dated October 23, 1979. That check was never negotiated. Plaintiffs subsequently mailed an additional payment of \$608.00 which check was never cashed.

Total payments made by Plaintiffs on the purchase were \$8,617.00. The balance owed on the purchase as of July 12, 1979 was \$11,372.93.

On July 20, 1981 Defendant filed a motion for a new trial supported by the affidavit of David Thomas on the grounds that material facts were not offered into evidence. Defendant also filed a motion to amend the Findings of Fact, Conclusions of Law, and Judgment. All of said Motions were denied by the Court.

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT ANY DEFAULT IN PAYMENTS HAD BEEN WAIVED BY APPELLANT.

By letter dated February 28, 1979, (R. 35) Appellant gave notice to the Respondents that unless payments were brought current by March 25, 1979, it would "cancel this transaction" and assume that Respondents "acquiesce in the cancellation . . ." A payment of \$2,142.00 was made in response to that letter and three subsequent payments were accepted. (R. 58). No evidence was offered at trial of any subsequent notice of default or opportunity to cure.

It is well settled, and not disputed herein, that by accepting numerous non-conforming payments a party waives strict performance of the contract. Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah, 1977), Tanner v. Baadsgaard, 612 P.2d 345 (Utah, 1980). It is also well settled that where strict compliance has been waived a forfeiture can't be enforced without notice of default and reasonable opportunity to cure. id. at 347, Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah, 1976).

Appellant, in arguing that the delinquency in payment was not

waived at the time of the forfeiture, relies on a telephone call which is first heard of in the affidavit of David Thomas in support of Appellant's motion for a new trial. (R. 91-92). Clearly the evidence which the court had before it at the time of its ruling supported its finding of a waiver. The court could not possibly have considered an affidavit which was not yet forthcoming. Appellant has shown no basis to reverse the trial court on this point. The real question with regard to waiver is whether the subsequent affidavit required the court to grant a new trial.

POINT II

APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON ITS OWN FAILURE TO PRESENT EVIDENCE WHICH WAS READILY AVAILABLE PRIOR TO TRIAL. THE TRIAL COURT WAS WITHIN ITS SOUND DISCRETION IN REFUSING TO GRANT A NEW TRIAL.

There are two rules which provide for new trial based upon new evidence. Appellants are clearly barred under those rules and are seeking a way around those rules under the general provision providing for "any other reason justifying relief . . ." Rule 60(b)(7) Utah Rules of Civil Procedure.

Rule 59(a)(4) Utah Rules of Civil Procedure provides for a new trial based upon newly discovered evidence which could not, with reasonable diligence, have been presented at trial. Rule 60(b)(2) likewise provides for a new trial based upon newly discovered evidence which could not have been discovered in time to comply with Rule 59. In the instant case there is no claim that the evidence which Appellant seeks to rely on could not have been presented at trial. Instead, Appellant seeks to obtain a new trial based upon new evidence under

the provisions of Rule 60(b)(7) Utah Rules of Civil Procedure. Appellant cites Egan v. Egan, 560 P.2d 704 (Utah, 1977), as support for its position that it should be allowed relief from the judgment based upon additional evidence. In that case newly discovered evidence clearly showed the prior judgment to have been erroneous and the evidence could not have been discovered in time for trial. id. at 705. This court has ruled that it is essential for the moving party to show that its new evidence could not, by due diligence, have been discovered in time for trial. Gregorson v. Jensen, 617 P.2d 369, 372 (Utah, 1980). It would be unjust for the court to require less of a showing merely because Appellant referred to a different Rule which by its terms is not specifically applicable.

POINT III

THE TRIAL COURT'S FINDING THAT APPELLANT FAILED TO GIVE ADEQUATE NOTICE OF DEFAULT AND OPPORTUNITY TO CURE WAS CORRECT REGARDLESS OF WHETHER OR NOT THE UNIFORM REAL ESTATE CONTRACT WAS EFFECTIVE.

The court, in its Decision (R. 83) and in the Findings of Fact (R. 86) states that the attempted contract termination was not consistent with the requirements of the Uniform Real Estate Contract. This statement cannot be construed as a ruling that the provisions of the Uniform Real Estate Contract were binding on the parties. The court was saying that whether the Uniform Real Estate Contract was effective or not, the letter dated October 23, 1979 was not effective to terminate the contract between the parties. This statement was necessitated by the confusion of the Appellant in arguing at the trial that the Uniform Real Estate Contract was controlling as to what steps were necessary for termination of the contract and

then arguing, in his trial brief that it was not controlling. (R. 131, R. 73). The court had no reason to determine which standard of notice was required when it was clear that neither standard was met.

POINT IV

THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT INTEREST TO APPELLANT WHERE APPELLANT HAD REFUSED TO ACCEPT PAYMENT.

The court found that the appellant refused to accept payment from the respondents and refused to convey the subject real property to the respondents. (R. 86). The parties stipulated that a check of \$250.00 was received by the appellant and then returned, uncashed. They further stipulated that an additional check of \$608.00 was mailed to appellant which was also uncashed. It would be unjust to allow a party to collect interest through protracted litigation merely by refusing to accept payment prior to the commencement of the litigation. It is well settled that where one of two parties must suffer, the one who caused the loss must bear the burden. Valley Bank and Trust Co. v. Gerber, 526 P.2d 1121 (Utah, 1974).

POINT V

APPELLANT'S ADDITIONAL CLAIMS OF ERROR IN POINT IV OF ITS BRIEF ARE UNSUBSTANTIATED.

The claimed errors of law listed on page 12 of Appellant's brief are all adequately discussed in other points and are without merit. The Appellant lists, in addition, the following claims of errors of fact:

1. The finding that Appellant refused to accept payments. The stipulation entered by the Appellant makes it clear that Appellant did refuse certain payments. (R. 58).

2. The "confusion over whether attorney fees were stipulated." The amount of attorneys fees was stipulated. (TR. 123). The award of attorneys fees was justified by the agreement between the parties. (Ex. 25).

3. That the court did not consider the notice to cure given by David Thomas, and 4. That the court did not consider the termination given by David Thomas. That the court was fully justified in refusing to grant a new trial based upon the subsequent affidavit of David Thomas is adequately discussed in Point II.

The "many errors of law and fact" claimed by Appellant were not errors at all. The fact that Appellant claims to have additional evidence which it chose not to produce at trial is not a basis for reversal of the trial court's decision.

CONCLUSION

The trial court's findings that any default in payments had been waived, that Appellant was not entitled to interest, that Appellant failed to give adequate notice of default and opportunity to cure, and that Respondents were entitled to a decree of specific performance are fully supported by the evidence. Appellant is not entitled to a new trial based upon its own failure to produce evidence which was readily available at the time of trial.

Respectfully submitted,

John G. Mulliner

MAILING CERTIFICATE

I hereby certify that I served the foregoing Brief of Respondents
by mailing a true and correct copy thereof, postage prepaid, to:

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DATED this _____ day of March, 1982.

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