

1982

# Dennis Jenkins v. La Wanna Newman : Brief of Plaintiff-Appellant

Utah Supreme Court

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Robert Felton; Attorney for Plaintiff-Appellant;

William Parsons; Attorney for Defendant-Respondent;

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## RELIEF SOUGHT ON APPEAL

Appellant requests this Court to remand this matter to the Third District Court with instructions to enter judgment in favor of Appellant for damages equal to the fair rental value of the premises (\$265.00 per month) as damages accruing from the date the contract was to be completed, May 14, 1980, until Respondent actually performs as ordered by Judge Croft.

Appellant is entitled to be awarded his costs and attorney's fees.

## STATEMENT OF FACTS

Respondent listed a home located at 1218 Talisman Drive Salt Lake City, Utah for sale with a realtor in early 1980. Appellant and Respondent entered into negotiations for the purchase of this home in April of 1980. The Appellant submitted his initial offer for the purchase of the property on April 19, 1980 by executing a standard Earnest Money Receipt and Offer to Purchase and delivering it to the Respondent's realtor with the earnest money of \$500.00.

The Respondent (Seller) did not accept the original offer and she and her realtor wrote (R.pp 077-78) a counter offer in the space provided on the standard form, signed the contract, and returned it to her realtor. The Appellant signed the completed contract the same day, May 8, 1980 (Exhibit 1).

The contract for the sale of the home was, by its terms, to close on May 14, 1980 at which time the Appellant (Buyer) was to receive possession (Exhibit 1). The Respondent refused to close and, after a trial on July 27, 1981, Judge Bryant H. Croft, Third Judicial Court Judge, found the contract of sale valid and enforceable and ordered the Respondent to immediately complete the sale pursuant to the terms of the contract (R. pp 60, 61).

The sale agreement provided for what is known as a "balloon payment" on or before May 31, 1982 or if Appellant sold the home, whichever should first occur (Exhibit 1). Pursuant to Appellant's Motion to Amend Judgment, Judge Croft amended the original Judgment on November 3, 1981, in that the delay in closing was due to Respondent's refusal to complete the sale, the "balloon payment" should not be payable until two years after the sale is complete (R. p. 63).

Judge Croft did not award the Appellant his damages equal to the fair rental value of the premises during the time Respondent refused to complete the sale, believing that it was inappropriate to extend the time for the "balloon payment" and award rental damages (R. p. 64) even though he found the sale contract specifically enforceable (R. pp. 60 and 63) and that the delay in completing the sale was due to the Respondent's refusal to close (R. p. 63).

Appellant is currently still ready and able to fulfill the terms of the Agreement. The Respondent continues to refuse to complete the transaction.

#### ARGUMENT

##### POINT 1

WHERE PLAINTIFF IS AWARDED SPECIFIC PERFORMANCE FOR THE SALE OF REALTY HE IS ENTITLED TO DAMAGES EQUAL TO THE RENTAL VALUE FROM THE DATE POSSESSION SHOULD HAVE PASSED

The issue for damages in an action for specific performance has been previously considered by this Court. In the case of Johnson v. Jones, 190 U 92, 164 P. 2d 893 (1946) the Court was asked to decide whether an agreement for the sale of an apartment house was definitive enough to allow for specific performance. In conjunction with that request, the issue for the buyer's right to recover damages equal to the rental value of the premises from the date possession was due was unequivocally resolved by this Court in affirming the award of such damages. Justice McDonough, writing for the Court, stated at page 896,

The third general argument is that the court erred in awarding damages for loss of rentals in an amount of the entire rental value of the property, even if specific performance could be decreed. In view of what we have said hereinabove this contention is unsound, for if Appellant had performed, the Respondents would either have enjoyed the actual possession of the apartment occupied

by Appellant and collected the rent from the tenants...

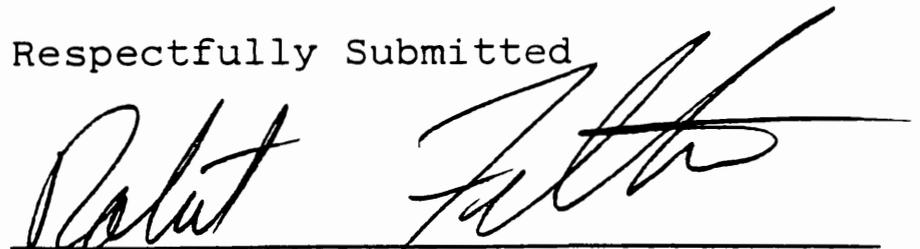
After the original closing date passed the Respondent rented this property for a period of time and she testified that the rental value was \$265.00 per month (R.p. 85). There is simply no factual or legal dispute that the Respondent refuses to complete the transaction and that the proper measure of damages to be awarded the Appellant is a sum equal to the fair rental value of the premises.

#### CONCLUSION

The Respondent's intentional refusal to complete the terms of the written contract signed by herself and the Appellant on May 9, 1980 has caused the Appellant to be displaced from his anticipated home for almost two years. This Court has previously decided that the proper measure of damages in such an instance is the fair rental value.

The order of the district court refusing to award damages should be reversed. This matter should be remanded for entry of judgment for such damages. Also, since attorney's fees were recoverable by Appellant, said fees should be allowed on appeal pursuant to the contract of the parties.

Respectfully Submitted

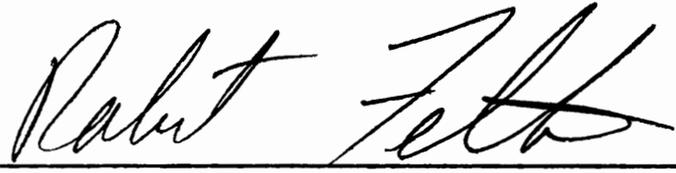


ROBERT FELTON  
44 Exchange Place  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of February, 1982

I mailed two copies of the attached Brief of Plaintiff-Appellant to the office of William Parsons, 536 East 400 South, Salt Lake City, Utah 84102 by sending said copies through the United States mail, postage prepaid.

  
\_\_\_\_\_

EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

This may be a legally binding form, if not understood seek other advice

REALTOR TO: Quinn Properties Inc SALT LAKE 4-19-80 SC  
Name of Broker Company

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the seller, I Dennis J. Jensen  
hereby deposit with you as earnest money the sum of \$ 500.00 Five Hundred and 00/100 DOLLARS  
in the form of check  
to secure and apply on the purchase of the property situated at: 1218 TALISMAN DR

SALT LAKE City SALT LAKE County, State of UTAH

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoves and oil tanks, water heaters, and burners, electric light fixtures excluding pipes, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures except NONE

The following personal property shall also be included as part of the property purchased: AS PER LISTING

The total purchase price of \$ 38,000.00 Thirty Eight Thousand and 00/100 DOLLARS shall be payable as follows: \$ 500.00 which represents the aforesaid deposit, receipt of which is hereby acknowledged by you:

\$ 0 when seller approves sale: \$ FORTY FIVE HUNDRED AND NO/100 delivery of deed or final contract of sale which shall be on or before May 13 1980 and \$ AS PER CONTRACT each month commencing May 13 1980  
MAN TERMS OF CONTRACT WILL BE AS FOLLOWS BUYER WILL ASSUME PRESENT LOAN TO BANKERS LIFE SAVED WILL CARRY BACK A SECOND MORTGAGE WITH REMAINING EQUITY AT A RATE OF 10% INTEREST WITH PAYMENT TO SELLER OF APPROX \$246 PER MONTH FOR 30 YEARS. PROPERTY MUST BE VACANT AT TIME OF CLOSE. SELLER WILL VACANT ALL PLUMBING HEATING & ELECTRICAL IN TIME OF CLOSE

until the balance of \$ AS PER CONTRACT together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 10 % per annum on the unpaid portions of the purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before May 13 1980. All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except: NONE

The following special improvements are included in this sale: Sewer  Connected  Septic Tank and/or Cesspool  Sidewalk  Yard and Gutter  Special Street Paving  Special Street Lighting  Culinary Water (City)  Other Community System  Connected  Private  (Legend: Yes (A) NO (O))  
Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of DENNIS J. JENSEN

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within UPON PRESENTATION days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages.  
It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be part of this transaction unless incorporated in writing herein. I further agreed that execution of the final contract shall constitute this Earnest Money Receipt and Offer to Purchase.

Quinn Properties Inc Agent By Dennis J. Jensen  
Broker Company

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to sale or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or Title Ins & Warranty Deed  
in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 6%  
in the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

4/19/80 Date [Signature] Seller [Signature] Purchaser

This offer is accepted with the following conditions:  
① Total purchase price to be \$41,000.00.  
② Buyer will execute a note to the seller in the form of a 2nd deed of trust for approx. \$30,729.00 at 10.90 interest per annum with a 30-year amortization. Monthly principal + interest payments on said note will be approx. \$269.56 + will be made directly to seller by the 1st of each month. If seller has not received monthly pmt. by the 10th of each month, buyer will pay a \$10.00 late fee. Buyer agrees to pay seller the outstanding principal balance when buyer sells property; Buyer agrees to pay seller the outstanding principal balance on or before May 31, 1982, or whichever comes first. ③ Date of closing and date of possession will be May 14, 1980. ④ Buyer agrees to take property as 5/8/80  
May 8, 1980 [Signature] Seller [Signature] Purchaser

53 (State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)  
54 I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:  
55 Seller \_\_\_\_\_ Date \_\_\_\_\_ Purchaser \_\_\_\_\_ Date \_\_\_\_\_  
56 I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the  Seller  Purchaser on \_\_\_\_\_  
57 \_\_\_\_\_ 19 \_\_\_\_\_, by registered mail and return receipt is attached hereto.