1982

Dale M. Madsen and Bobby G. Madsen et ux v. Christian A. Anderson and Linda P. Anderson : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DALE M. MADSEN and BOBBY G. MADSEN, et ux, Plaintiffs and Respondents, vs. CHRISTIAN A. ANDERSON and LINDA P. ANDERSON, Defendants and Appellants.	:	Case No. 18228

BRIEF OF APPELLANT

Appeal from Judgment of the Fourth Judicial District Court

Utah County, The Honorable J. Robert Bullock, Judge

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NATURE OF THE CASE

This case was initiated to exercise a forfeiture provision in a Uniform Real Estate Contract based upon an alleged failure to pay real property taxes for the years 1976 and 1978.

DISPOSITION IN LOWER COURT

In November, 1981, the instant case was tried to the court without a jury. The court entered a Judgment of Forfeiture and gave possession of the real estate in question to Respondents subject to the payment by Respondents to Appellants of the sum of $1,000.00. Appellants' motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Appellants, Christian A. Anderson and Linda P. Anderson seek a reversal of the judgment of the lower court and entry of judgment consistent with the laws of the State of Utah.

STATEMENT OF FACTS

On October 30, 1975, Christian A. and Linda P. Anderson, husband and wife, executed a Uniform Real Estate Contract to purchase real property consisting of a home and lot from Dale and Bobby Madsen for a total purchase price of $20,000.00. The Andersons paid $100.00 earnest money to apply toward the down payment and the balance of $2,900.00 making a total down payment

of $3,000.00 and agreed pursuant to the Real Estate Contract to make monthly payments of $143.53 for a term of 20 years. The contract contained the usual provisions requiring the Andersons to pay the real property taxes as found in paragraph no. 11 of said Uniform Real Estate Contract. Paragraph fourteen of the contract allowed the Madsens to pay the taxes in the event Andersons failed to pay and to collect reimbursement for the amount so paid together with interest.

During the term of the contract, the Andersons, whose original ties were in Utah County, Utah, and who desired to return upon retirement, lived successively in Henderson, Nevada, and Santa Fe, New Mexico, and rented the real property in question to a third party and expended sums totalling $2,380.00 for improvements to said property.

Tax notices on the property were sent by the county to the Madsens for the years 1976, 1977, 1978 and 1979. Apparently, in 1978, the notice was sent to the Andersons by Madsens, who then paid the taxes. The reason for the inconsistency in mailing the tax notice was not explained at trial. Mr. Madsen testified that when he received the tax notices for 1976 and 1978 he paid them. Nevertheless, he made no demand for payment from the Andersons until after he had received the tax notice for the year 1979. At that time, he asked to be reimbursed in the amount

of $690.93 and gave notice of default under the contract (Exhibit "4"). At that time the Andersons' agent in Utah asked Madsens for proof of payment (Exhibit "7"). In response to the request, the Andersons received a copy of a check drawn by Madsens to the county treasurer in the sum of $690.93 and a tax notice showing payment of $227.68 (Exhibit 3). That obvious discrepancy was never explained by Madsens or their attorney until discovery proceedings which were initiated after filing of the lawsuit. After the explanation was made through the discovery proceedings, the Andersons tendered $690.93 but the same was refused by the Madsens.

On March 18, 1980, Madsens, through their attorney, sent a notice that they were exercising their option under paragraph 16(a) of the Real Estate Contract and if the "default" were not remedied within five days from that date, they would declare a forfeiture of Andersons' interest under the Contract. Said letter was followed on April 9, 1980, by a Notice to Quit under Utah Code Annotated §78-36-3.

It should be noted that that Madsens have never claimed a default in the monthly payments and their only other claim was for waste, spoil and destruction, which was not proven at trial and there is no finding of fact or conclusion in support of waste, spoil or destruction. Indeed, the Andersons made each and every installment payment up through the date of trial, November, 1981. Consequently, in addition to the $3,000.00 down

payment made by the Andersons, they had made monthly payments for six years of $143.53 or $10,334.16, for a total of $13,334.16. Furthermore, they had made improvements valued at $2,380.00. The Judgment below required forfeiture of all such payments and forfeiture of any benefit of the their bargain in having clear title conveyed to the Andersons upon payment of all installments. The Judgment below also required return of the real property to the Madsens upon the condition that Madsens pay $1,000.00 for Andersons equitable interest in the property. Thus for clearly ascertainable money damages of $690.93, the Andersons were penalized a total of $12,334.16, plus $2,380.00 for improvement costs and a complete loss of the benefit of their bargain, that is the property.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING A BREACH WHICH COULD TRIGGER A FORFEITURE OF BUYERS' INTEREST AND DENY THEM THE BENEFIT OF THEIR BARGAIN.

The Andersons had faithfully paid each and every installment required by the terms of the contract through the time of trial and had kept the covenants of the contract for over six years and had improved said property at an expense of $2,380.00 and had shown every indication by their conduct of wanting the benefit of their bargain and a willingness to perform

the contract and receive clear title thereto at the end of the installment period.

Paragraph no. 11 of the Uniform Real Estate Contract requires buyers to pay the real property taxes. Paragraph no. 14 of said contract allows sellers an option if buyers do not pay the taxes of doing so themselves and collecting reimbursement from buyers.

Under such provisions, the damages of sellers are clearly ascertainable upon their paying the taxes, exercising that option under paragraph no. 14 of the contract. In the event of buyers failing to reimburse after demand, presumably an action could be maintained and a judgment obtained by the sellers without disturbing the other provisions of the contract. (Presumably that could be a reason why sellers bargained in advance for the option to pay the taxes under paragraph no. 14, so they could continue to have the benefit of their bargain of an enforceable sale of the property without disturbing the contract or risking a loss through a tax sale, and also to protect themselves in being able to collect or obtain reimbusement for any amount paid by sellers for real property taxes.)

The exercise of the option to pay the real property taxes by sellers gave rise to a cause of action against buyers for a clearly ascertainable amount of money damages but did not

trigger a forfeiture of buyers interest in the contract which could deprive the buyers of the benefit of the their bargain.

POINT II

BUYERS ARE ENTITLED TO THE BENEFIT OF THEIR BARGAIN WHERE THEY HAVE SUBSTANTIALLY COMPLIED WITH PERFORMANCE OF A CONTRACT OVER A LONG PERIOD OF TIME.

Buyers paid all the installment payments which totalled $13,334.16 including the down payment toward a total purchase price of $20,000.00 plus 8% interest on the balance of $17,000.00 over 20 years. Sellers were never in jeopardy of losing their interest in the property which they had agreed to sell to buyers. Indeed, the sellers saw fit to pay the tax for 1976 and 1978 and didn't notify buyers of the same or demand payment until the tax notice for 1979 arrived.

Sellers, by exercising their option under paragraph no. 14 of the contract, have only a right to a claim for money damages without disturbing the contract provisions relating to any other matter including the obligation to convey clear title to the buyers when all installments are paid as the same fall due.

POINT III

SELLERS WAIVED ANY RIGHT TO CLAIM A FORFEITURE BY EXERCISING THEIR OPTION UNDER PARAGRAPH NO. 14 OF THE CONTRACT AND FURTHER BY THEIR CONDUCT OF ALLOWING BUYERS TO DEPEND UPON

THEM FOR NOTICE OF THE TAXES DUE AND NOT PROVIDING CLEAR PROOF OF AMOUNTS DUE FOR EACH CLAIMED YEAR.

When buyers were notified of the sum of $690.93 being payable for 1976 and 1978 they, through their agent, acted reasonably in asking for proof of payment and upon that request, received one cancelled check copy showing $690.93 and one tax notice for the year 1976 for $227.68. Such a response was confusing and naturally would invoke further inquiry to determine actually what amount was owed. The further inquiry was made, but no further explanation was given until after this action had been filed and the discovery proceedings produced the explanation.

The seller or the buyer could have required the County Treasurer to forward the tax notice to the buyers or could have requested the treasurer to continue to forward the tax notice to the sellers. There is no indication that either party made a request, but it is apparent that the tax notices for the years in question were mailed to the sellers who failed over a period of years to let the buyers or their agent know or to make demand for payment.

It is equally clear that the buyers never refused to make reimbursement but did request a clarification of the amount and for the particular years.

Sellers allowed the buyers to rely upon them for tax notices for the years in question. Sellers also exercised their

option under paragraph no. 14 to pay the taxes and seek reimbursement. By such conduct, sellers waived any right to claim a forfeiture for a breach of contract based solely upon non-payment of taxes for the years in question.

POINT IV

IF THE FAILURE TO PAY TAX BY BUYERS, WHICH IS THEN PAID BY SELLERS AND REIMBURSEMENT IS REQUESTED, IS CONSIDERED A TRIGGERING EVENT REQUIRING A FORFEITURE OF THE INTEREST OF BUYERS, THEN THE FORFEITURE PROVISIONS UNDER PARAGRAPH NO. 16 OF THE CONTRACT ARE UNENFORCEABLE.

Under the circumstances of the instant case, to declare a forfeiture of the buyers' interest would be unconscionable and would be so harsh so as to shock the conscience of a court of equity.

In the instant case, the buyers are ordered by the trial court to forego the benefit of their bargain of acquiring clear title to a parcel of real property including a home and lot and are further required to forfeit $13,334.16 in payments toward a total purchase price of $20,000.00, and are further required to forfeit $2,380.00 in improvement costs, while the sellers damages were clearly ascertainable and were only in the sum of $690.93.

Sellers clearly had a cause of action for money damages for the sum of $690.93 plus interest, costs and attorney's fees. The case of Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989,

the court interpreted what it called the spirit of the Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952), page 990,

> It calls for adhesion to a principle that equity historically has indulged, that it abhors unconscionability shocking to such a degree that the function of equity would be misconceived and misapplied by the enforcement of such unconscionability, even though it may have been the subject of contract.

If the conscience of the court is not shocked under the circumstances of the lower court's ruling in the instant case, it is difficult to imagine a circumstance which would invoke a twinge for the exercise of equity in voiding the enforceability of the forfeiture provisions of a Uniform Real Estate Conntract.

In the case of Jacobsen v. Swan, 13 Utah 2d 59, 278 P.2d 294, the court spoke of a forfeiture being unconscionable and a provision for such unenforceable if, (page 298),

> . . . it would be so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated, so that a court of equity will refuse to enforce the provisions.

The cases which have stated the principle on the enforceability of forfeiture provisions under contract, bargained for in advance of any breach, have been concerned in many instances with a claim made by a defaulting buyer for the return of all payments made after defaulting and showing a willingness of giving up the property and no intention of performing the contract. In the instant case the buyers clearly wanted the bene-

fit of their bargain (wanted to continue with the purchase of the property). These buyers are perhaps within the definition of "necessitous buyers" described in a concurring opinion in Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963), Page 398.

POINT V

FORFEITURE IS AN UNCONSCIONABLE AND UNUSUALLY HARSH REMEDY WHERE BUYERS HAD MADE PAYMENTS OF $13,334.16 AND IMPROVEMENTS OF $2,380.00 ON A $20,000.00 CONTRACT WHERE DAMAGES TOTALLED NO MORE THAN $690.93.

Paragraph 16(a) of the Uniform Real Estate Contract provides that in case of default by the buyers, the sellers may elect to rescind the contract and retain all monies received as liquidated damages. An alternative remedy, paragraph 16(b), allows the seller to bring suit and recover judgment for all delinquent payments. Although there is a third remedy, paragraph 16(c), Madsens' Complaint sought only relief under the first two sub portions of paragraph 16.

In the Perkins v. Spencer, 243 P.2d 446 (1952), this court considered the remedy provided in paragraph 16(a) of the Uniform Real Estate Contract and ruled against a harsh and and unconscionable application thereof. In that case, the contract provided for a purchase price of $10,500.00 with a down payment of $2,500.00 and monthly payments of $75.00. The down payment and three monthly payments had been made by the buyers when the

seller alleged a breach of contract and asked that all payments be forfeited as liquidated damages. After the district court granted such relief, this court reviewed that decision and remanded the case saying, page 449

> It will be observed that in all cases where the stipulation for liquidated damages was enforced, it has some reasonable relationship to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery.

Of the forfeiture provisions in such cases, the court said, page 450, ". . . we have uniformly held it to be unenforceable."

In this case the contract provided for a purchase price of $20,000.00. In addition to the monthly payments which total $10,334.16, the Andersons paid $2,380.00 in needed and reasonable improvements. Thus they had paid $15,714.16 by the time the court below ruled that possession and ownership of the real property should revert to Madsens upon payment by them to Andersons of $1,000.00. Since the alleged default amounted to failure to pay $690.93 in property taxes, the liquidated damages ordered by the court amounting to $14,714.16 was clearly unconscionable and exorbitant.

In the case of Johnson v. Carman, 572 P.2d 371 (Utah 1977), this court considered the question of liquidated damages and held that payments 34% greater than the actual damages were

"grossly excessive" as liquidated damages and, would not be enforceable. In the instant case, the amount to be retained by the seller is 1787% of the amount of the damages of $690.93.

The principle set forth in the above cases was reaffirmed by this court in 1981 in the case of Morris v. Sykes, 624 P.2d 681 (Utah 1981). In that case the buyer had paid $23,216.00 on a $40,000.00 contract. Upon default, the seller sued for forfeiture. The lower court had ordered a forfeiture but also required that the seller refund $14,121.00 to the buyer. The court held that, (page 684).

> . . . where a forfeiture under the literal terms of a contract results in awarding to a party a sum so entirely disproportioned to any damages he may have suffered that it shocks the conscience of the court, a court of equity will neither approve or enforce such a penalty.

In every case where a forfeiture has been deemed unenforceable, the Supreme Court in dealing with its conscience was offended by the fact that in allowing the property to be returned to seller, the effect was to impose an unconscionable penalty, which was entirely disproportionate to any damages the seller may have suffered. That would clearly be the effect of the judgment in the instant case with respect to the Andersons.

CONCLUSION

The evidence in this case does not justify an interpretation that a default requiring forfeiture was triggered when

sellers paid taxes as was their option under paragraph 14 of the contract and reimbursement was sought from buyers. The court has stated in Wingets Incorporated v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972), that when interpreting a contract, the court prefers an interpretation which will bring about an equitable result over a harsh or inequitable one.

The evidence in this case does not justify imposing a penalty of forfeiture of liquidated damages grossly in excess of any actual damage which was incurred by the sellers or which could have been contemplated at the time of execution of the contract. Unless the forfeiture provision in the instant case is declared unenforceable and the trial court decision is reversed--clearly the conscience of the court will be shocked and results in succeeding cases will become harsher.

DATED this 24th day of May, 1982.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant to: Heber Grant Ivins, Attorney for Respondent, 75 North Center, American Fork, Utah 84003, postage prepaid on the 25th day of May, 1982.

Ilene M Richman