

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF PLAINTIFFS-RESPONDENTS

Appeal from Judgment of the Fourth Judicial District Court
Utah County, The Honorable J. Robert Bullock, Judge

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FILED

AUG - 9 1982

Clark, Supreme Court, Utah

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G. MADSEN, et ux,	:	
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	:	
Defendants and	:	
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<u>Kay v. Wood</u> , 549 P 2d 709 Utah (1976)	6

REFERENCE

"Forfeiture Under Installment Land Contracts In Utah" 6
Utah Law Review Volume 4 Page 803 (1981).

NATURE OF THE CASE

Plaintiff exercised forfeiture provision in Real Estate Contract for failure of Buyer to pay property taxes for years 1976, 1978, and 1979, upon property purchased from Plaintiff.

DISPOSITION IN LOWER COURT

Trial judge declared a forfeiture of the contract and made an equitable adjustment of respective rights of parties in his decision. Respondents were ordered to pay \$1,000.00 to Appellants, and such amount has been tendered.

RELIEF SOUGHT ON APPEAL

Respondents maintain the courts decision was correct and should be sustained by this court.

STATEMENT OF FACTS

Appellants' attorney's Statement of Facts is not accurate. The most misleading aspect of such statement, is what it does not contain. This may have resulted from Appellants' attorney not being present at the trial. The Appellants' purchased a home in Alpine, Utah, from Respondents, in October of 1975,

for \$20,000.00, with \$3,000.00 being paid down, \$1,200.00 of which was paid to Appellant's brother, who acted as broker. (Tr. 112 line 15). The home was immediately rented and was never occupied by Appellants. For most of the rental period, \$200.00 a month was received, (Tr. 71 line 12) and the house payments were \$147.53 a month, over a 20 year period. Thus, the Appellants received approximately \$7,400.00 in rental, and paid \$5,310.61 in monthly payments.

The contract provided for payment of property taxes by Appellants, but were not paid for the years of 1976, 1978, and 1979. (Tr. 72 lines 16-28) Appellants' brief states Appellants paid taxes, except for 1976 and 1978, however this is not accurate.

After Respondents paid three (3) years taxes, they retained attorney, David K. Robinson, who notified Defendants-Appellants on November 14, 1979, that a default had occurred and cited the provisions of paragraph 16 A of the contract, (Pl. Exhibit "4") the default was not remedied, and on March 18, 1980, another certified letter demanding payment was sent along with proof of payment of taxes. When the default was not remedied, a Notice to Quit was served on the 22nd day of April, 1980. Not until May 14, 1980,

was a partial tender made to cure the default. This was some six (6) months after the original notice was received.

Appellants contend they are justified in not paying three (3) years taxes, because they were not sent the tax notice, and after their payment by Respondents was still justified in non-payment because of a lack of proof of payment.

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN FINDING A BREACH OF CONTRACT AND A FAILURE TO REMEDY THE SAME, JUSTIFYING A FORFEITURE.

The provision regarding payment of taxes by the Buyer is a material provision and its breach could lead to the sale of the property by the county. Appellant, CHRISTIAN A. ANDERSON, left the management of the property with his brother, a licensed Real Estate Broker, who had paid the taxes one (1) year following the sale. The brother testified he paid approximately 100 different taxes each year on properties he owns. (Tr. 112 line 21) Thus, he was professionally trained and knew the importance of keeping taxes paid.

Appellants argue, but cite no supporting case law

that Sellers-Respondents waived a right to claim forfeiture, by exercising their option under paragraph 14., ie paying the taxes. Paragraph 12 states: "The Buyer agrees to pay the general taxes after November 1, 1975." Paragraph 14 states: "In the event the Buyer shall default in the payment of...general taxes...as herein provided, the Seller may, at his option, pay said taxes...and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand." (Underlined for emphasis) Paragraph 16A then states: "Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, etc."

Nothing in the contract requires the Seller to pursue a money judgment against Buyer if he pays property taxes. Buyer had a ninety (90) day grace period, after failure to comply with terms of the contract, and was given this period by Plaintiffs-Respondents' Exhibit "4". They were then given five (5) days to cure the default in March of 1980. (Pl. Exhibit "5") However, no attempt to pay was made until May 14, 1980, approximately 180 days after original notification. Argument that further proof of payment was required is without merit, as these

figures were a matter of public record, and a canceled check, and certificate of redemption, had been sent to Appellants, long before a partial tender was made.

The Trial Court was best suited to pass judgment upon the demeanor of witnesses and good faith exhibited by Appellants, and concluded their conduct justified a forfeiture of interest in the contract.

ARGUMENT II

THE JUDGMENT ENTERED WAS NOT UNREASONABLE, UNCONSCIONABLE, NOR IN THE NATURE OF A PENALTY, AND SHOULD BE SUSTAINED.

This Court stated in Jensen vs. Nielsen, 26 Utah 2nd 98, 485 P 2d 673,

"Courts will refuse to enforce forfeiture of amounts paid under real estate contract only if circumstances are such that if forfeiture were applied it would be so grossly excessive in relation to any realistic view of loss that might have been contemplated by parties that it would so shock the conscience that a court of equity would refuse to enforce such forfeiture."

In the above case, the loss was between \$1,000.00 to \$3,518.00, depending upon evidence accepted, and forfeiture was upheld.

In Belsinger vs. Behunin, 584 P 2d 801 Utah (1978), Buyer paid \$30,000.00 on a \$90,000.00 contract, with \$10,000.00 down, and was in possession

twenty-seven (27) months. Forfeiture was decreed with Buyer receiving net credit of \$8,612.00.

The case of Kay vs. Wood, 549 P 2d 709 Utah (1976), and Johnson vs. Carman, 572 P 2d 371 Utah (1977), both decreed forfeiture after substantial payments had been made.

For a late review of the subject, see article entitled "Forfeiture Under Installment Land Contracts In Utah" Utah Law Rev. Volume 4 Page 803 (1981).

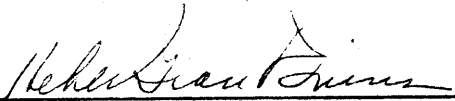
The Court set forth in detail, its reasoning in arriving at an equity in Buyer of \$1,000.00. (See Tr. 125 & 126) In ruling from the bench following trial, the Court recognized that the Buyer's payment was \$50.00 per month less than the rental income. The Court found Sellers were entitled to attorney's fees in the amount of \$780.00, but did not order Buyers to pay the same. The Judge then ordered Sellers to pay \$1,000.00 to Buyers. In addition, Sellers have paid \$690.00 in taxes, while Buyers have been in possession. Thus, the Court found Buyers' equity to be \$2,470.00. With the \$1,200.00 commission paid, together with the prospect of another commission upon resale, certainly the judgment entered is not unconscionable.

CONCLUSION

The Court was justified in finding, when a Seller pays three (3) year's delinquent taxes, which should have been paid by Buyer, and gives him several months to cure the default, but is ignored until after a Notice to Quit is served, that there is ample justification for invoking the forfeiture provision. That no unconscionable penalty was involved by the judgment entered and it should be sustained.

DATED this 5th day of August, 1982.

Respectfully submitted,



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