1982

Dale M. Madsen and Bobby G. Madsen et ux v. Christian A. Anderson and Linda P. Anderson : Appellants' Reply Brief

Utah Supreme Court

Arthur L. Kessler, Jr.; Attorney for Appellant;
David Wilkerson; Attorney for Respondents;

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

APPELLANTS' REPLY BRIEF

Appeal from Judgment of the Fourth Judicial District Court

Utah County, The Honorable J. Robert Bullock, Judge

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MISCELLANEOUS AUTHORITY

NATURE OF THE CASE

This case was initiated by Respondents to exercise a forfeiture provision in a Uniform Real Estate Contract due to Appellant's alleged failure to pay real property taxes for the years 1976, 1978, and 1979.

DISPOSITION IN LOWER COURT

On November 10, 1981, the action was tried before the Court sitting without a jury. The Court found that the Appellant's had failed to pay the said property taxes as required by the terms of the subject Uniform Real Estate Contract, and entered a Judgment of forfeiture awarding possession of the real property to Respondents, and ordered Respondents to pay Appellant's the sum of $1,000 for their interest in the property. Appellants brought a Motion for a New Trial which was denied by the trial court.

RELIEF SOUGHT ON APPEAL

Appellants, Christian A. Anderson and Linda P. Anderson, seek a Decree reversing the Judgment of the trial court and an Order for entry of Judgment consistent with the laws of the State of Utah.

STATEMENT OF FACTS

A complete statement of the facts is contained in the Brief of Appellants and will be reiterated here only to the extent necessary for an understanding of the points raised. On October 30, 1975, the Respondents sold by Uniform Real Estate Contract property located in Alpine, Utah to Appellants (Tr. 12).

The total purchase price was $20,000. $3,000 down payment was made and Appellants agreed to pay the $17,000 balance in installments of $147.53 over a twenty (20) year period. In addition to the monthly payments, Appellants agreed, pursuant to paragraph 11 of the contract, to pay the general taxes arising after 1975. No installment payments were ever missed.

Evidently, there was some problem with the parties receiving tax notices for the years subsequent to 1975. The Respondents-Sellers do not recall receiving the tax notices for 1976 or 1978 (Tr. 26), and the Appellants-Buyers do not recall receiving the Notices for 1976 and 1978 (Tr. 34). The tax notice for 1977 was received by the Respondents (Tr. 26), and was sent to and paid by the Appellants (Tr. 34). When the Respondents received the 1979 tax notice, they elected to pay all taxes current and on November 14, 1979, made demand upon Appellants for reimbursement of the 1976, 1978, and 1979 taxes in the total sum of $690.93 (Tr. 27). Upon receipt of the Respondents' letter for reimbursement, the Appellants immediately informed Respondents that, upon receipt and proof of payment of the prior years taxes, reimbursement would be made immediately (Tr. 27-28). Not until March 18, 1980, did the new attorney for the Respondents communicate with Appellants as to the proof of prior taxes paid by the Respondents (Tr. 37). In his letter, the attorney for Respondents made demand for reimbursement within five days pursuant to paragraph 14 of the contract between the parties

(Exhibit 9). Promptly,on March 21, 1980, the attorney for Appellants responded and indicated that the taxes would immediately be reimbursed upon receipt of the tax bill from the Respondents (Tr. 38)(Exhibit 10).

Instead of responding to Appellants' request for verification of taxes paid, the Respondents served a Notice to Quit upon the Appellants on April 22, 1980, over one month after the March 18, 1980 five day demand for payment. The Notice to Quit gave the Appellants five days to vacate the premises.

Prior to the Notice to Quit, on May 14, 1980, Appellants tendered a check for the unpaid taxes to the attorney for Respondents (Tr. 39). On May 23, 1980, counsel for Respondents returned the payment, stating that the amount tendered did not constitute the full amount demanded in the original letter of March 18, 1980 and was not timely (Tr. 39) (Exhibit 12). Counsel for Appellants then tendered the full amount requested, $788.93, on June 4, 1980, which was again returned by counsel for Respondents (Tr. 40) (Exhibit 13).

On June 19, 1980, two months after the Notice to Vacate, Respondents commenced an action for unlawful detainer. At the trial of the action, the Court ruled that there was a breach of the contract justifying a forfeiture of the Appellants' interest in the real property (Tr. 67). Although the Appellants had dutifully made the required contract payments for over six (6) years, and had promptly responded to the Respondents letter of

March 18, 1980 agreeing to reimburse for taxes paid upon proper proof of payment, the Court forfeited the Appellants' interest upon payment of $1,000 by Respondents. Consequently, Appellants lost their property and lost their payments.

ARGUMENT

POINT I

THE RESPONDENTS ELECTED THEIR REMEDY TO PAY THE TAXES AND SEEK REIMBURSEMENT PROVIDED IN PARAGRAPH FOURTEEN OF THE CONTRACT.

Respondents argue in their brief that nothing in the contract between the parties requires the seller to pursue a money judgment against the buyer if the seller pays the property taxes. With this contention the Appellants disagree.

Paragraph fourteen of the Uniform Real Estate Contract contains the exclusive remedy provision available to the seller in the event of non-payment of taxes by a Buyer. That paragraph provides as follows:

> "14. In the event the Buyer shall default in the payment of any special or general taxes, assessments, or insurance premiums as herein provided, the Seller, may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon . . ." (emphasis added)

In this case, the Respondents elected to pay the taxes under paragraph fourteen, and the Respondents are limited to their reimbursement rights under that provision. The Appellants never denied their obligation to reimburse Respondents, promptly contacted Respondents, and tendered payment twice before the Respondents commenced their unlawful detainer action.

Paragraph sixteen of the underlying Uniform Real Estate Contract contains the remedy provisions applicable to the non-payment of the regular monthly payments, and does not apply once the Seller elects the remedy in paragraph fourteen to pay unpaid taxes and seek reimbursement. This construction is supported by language in paragraph 16B of the Contract, which provides that in the event of default by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, the Seller may bring suit and recover Judgment for all delinquent installments, including costs and attorney's fees. The remedy provisions in paragraph sixteen were not intended by the parties to apply to delinquent taxes. Otherwise, the remedy provision in paragraph fourteen pertaining specifically to the non-payment of taxes would be mere surplusage.

Appellants construction of the meaning of paragraphs fourteen and sixteen of the agreement are bolstered by a recent law review article cited by the Respondents on page six of their brief. In "Forfeiture Under Installment Land contracts In Utah",

4 Utah Law Rev. 803, 805 (1981), the author states as follows with respect to the nonpayment of taxes as opposed to the nonpayment of the regular installment payments:

> "Further, should the Buyer fail to pay assessments, insurance or taxes on the property when due, the Seller may make the payments and charge them to the Buyer's balance. (Citing clause 14, Uniform Real Estate Contract). If the Buyer defaults on the installment payments, the contract gives the Seller three options: he may abandon the contract and declare a forfeiture; he may sue for all past due payments; or, he may proceed to foreclose the Buyer's interest as would any mortgagee. (Citing paragraph 16, Uniform Real Estate Contract) (emphasis added)".

By paying the delinquent property taxes and then seeking reimbursement from Appellants, the Respondents elected their remedy and should have been barred from pursuing the inconsistent and alternative remedy of forfeiture. Although the Appellants tendered reimbursement in accordance with paragraph fourteen, the Respondents declared that the contract was also terminated under paragraph sixteen since the reimbursement was not made within five days. There is no five day deadline in paragraph fourteen.

It was inconsistent for the Respondents, on the one hand, to affirm the agreement by paying the taxes and requesting repayment from Appellants, and to also terminate the contract by forfeiting the Appellants interest thereby retaining all the down and regular monthly payments as liquidated damages.

In the case of Cook v. Covey - Ballard Motor Company, 69 Utah 161 253 P. 196, 200 (1927), the Utah Supreme Court stated the basis for the concept of election of remedies:

> "The doctrine of an election rests upon the principle that one may not take contrary positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves a negation or repudiation of the other, the deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

In Cook, supra, the Court also stated:

> "The true rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must actually bring an action or by some other decisive act with knowledge of the facts, indicate his choice between these inconsistent remedies."

By electing under paragraph fourteen to pay the taxes and seek repayment, the Respondents should not have been allowed to go back and elect paragraph sixteen as the applicable remedy.

At a minimum, the remedy provided in paragraph fourteen is one of two co-existing remedies upon which the Seller has the right to elect, and the elected remedy of payment and reimbursement is alternative to and inconsistent with the remedy of forfeiture.

POINT II

THE TRIAL COURT ERRED IN FAILING TO DECLARE THE FORFEITURE REMEDY UNCONSCIONABLE AND UNENFORCEABLE UNDER THE FACTS OF THE PRESENT CASE

Respondents argue in their brief that the Judgment entered by the trial court was not unreasonable, unconscionable, nor in the nature of a penalty. However, the parties testified at trial that Appellants had not failed to make any of the required installment payments. They had paid $3,000 down payment for the property and had made over $2,000 worth of improvements. The contract had been in force for a six year period and Appellants had made total payments of over $13,000.

For the trial Court to order the forfeiture of all but $1,000 worth of payments and improvements, as well as forfeiture of the property, all because Appellants had not tendered the $690.83 as reimbursement for taxes within the stated five day period, was clearly unconscionable and so harsh as to shock the conscience.

In Johnson v. Carman, 572 P.2d 371 (Utah, 1977), this Court stated that the law in Utah with respect to such forfeiture provisions appears well settled. Quoting from Kay v. Wood, 549 P.2d 709 (Utah, 1976), the Court in Johnson, supra, expressed the following regarding forfeiture provisions in real estate contracts:

> "This Court has long been committed to the rule that parties to a contract may agree as to the amount of liquidated damages that shall be

> paid in the case of a breach, that the agreement is enforceable if the amount stipulated to is not disproportionate to the damages actually sustained. The provision in a contract for the sale of real property that all payments which have been made may be forfeited as liquidated damages will not be enforced if the forfeiture will be grossly excessive and disproportionate to any possible loss so as to shock the conscience. (Citations omitted)"

In citing from the Restatement of Contracts, Section 339, also cited with approval in Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952), the Court in Johnson v. Carman, supra, went on to adopt the following rule with respect to liquidated damages:

> "(1) An agreement made in advance of breach fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach unless: (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach; and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. (Emphasis added)"

In this case, the damages constituting the breach are very capable of accurate estimation, because they are for the non-payment of taxes which can be calculated exactly.

The primary reason for the requirement that damages be difficult to estimate, is that when they are ascertainable, the exact damages determined at the time of breach will nearly always be more fair than those guessed at by the parties at the time of contracting. Johnson v. Carman, supra at p. 373-373. In this

action, the amount of the unpaid taxes is capable of accurate estimation and reimbursement by Appellants will make the Respondents whole and provide both parties with the benefit of their bargain. To allow Respondents to retain payments and improvements worth over $15,000 because of a delay in the reimbursement of $690, is disproportionate and shocking to the conscience within the meaning of prior cases decided by this Court.

POINT III

ASSUMING THAT FORFEITURE WAS AN AVAILABLE REMEDY TO RESPONDENTS, RESPONDENTS WAIVED THEIR RIGHT TO DECLARE A FORFEITURE AND COMMENCE AN UNLAWFUL DETAINER ACTION BY REASON OF THEIR PAST INCONSISTENT CONDUCT

The Respondents argue in their brief that they did not waive their right to claim a forfeiture, and that the Appellants' conduct justified the strict application of the forfeiture provision to the Appellants' interest in the property. However, testimony at trial indicated that the Respondents themselves did not strictly comply with the terms of the contract and they thereby waived their right to exact strict compliance from the Appellants.

The Respondents testified that when they received the 1977 tax notice, they delivered the notice to the Appellants' brother, and that the taxes for that year were paid by Appellants (Tr. 35). Respondents made no further inquiry on the status of the payment of taxes until 1979, at which time Respondents received the 1979 tax notice indicating that taxes for 1976 and

1978 were also owing (Tr. 22-23). Instead of sending the 1979 notice to Appellants or Appellants-brother for payment, this time the Respondents paid the taxes and demanded reimbursement. The Appellants also testified that they relied on the Respondents to forward tax notices for payment (Tr. 34-35).

Although the taxes had not been paid as far back as 1976, the Respondents waited until late 1979 and early 1980 to strictly hold Appellants to the terms of the contract. Furthermore, once the Respondents' attorney sent a five day demand for payment on March 18, 1980, the counsel for Appellants immediately responded acknowledging the obligation of the Appellants. Instead of immediately responding to the letter from Appellants' counsel, the attorney for Respondents failed to reply at all until a Notice to Quit the premises was served upon Appellants a month later on April 22, 1980.

Upon learning of the Notice to Quit, counsel for Appellants tendered the amount of the unpaid taxes to the attorney for Respondents, who returned the payment on May 23, 1980 for the reason that it did not constitute the amount demanded in the letter of March 18, 1980, nor was it paid within five days. Counsel for Appellants then tendered the full amount requested on March 18, 1980, which was also returned on June 12, 1980. The unlawful detainer action was then commenced on or about June 19, 1980, over three months from the date of the original five day demand.

The Respondents, by their prior conduct, should be estopped from strictly enforcing the five day demand period against Appellants. Waiver or estoppel is a doctrine of equity proposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another. Morgan v. Board of State Lands, 549 P.2d 695 (Utah, 1976). In the instant case, the Appellants quickly contacted Respondents in response to the five day demand for payment sent March 18, 1980. No legal action was taken for over three months after the five day notice was sent. By not quickly informing Appellants or their attorney upon receipt of the March 21, 1980 request for proof of payment, that the five day period would be strictly enforced, and by failing to take legal action for over three months, Respondents waived their right to refuse later payment on the grounds that it was not strictly tendered within the original five day demand period.

POINT IV

ASSUMING FORFEITURE WAS A REMEDY AVAILABLE TO RESPONDENTS, THE FIVE DAY PERIOD GIVEN TO APPELLANTS TO CURE THEIR DEFAULT ON MARCH 18, 1980 WAS UNREASONABLE AND ARBITRARY.

The record in this case reflects that the Appellants are residents of the State of New Mexico, and did not personally reside in the residence being purchased from Respondents. The

five day demand letter sent in accordance with paragraph 16A of the contract, and dated March 18, 1980, was addressed to the Appellants in Sante Fe, New Mexico. The letter provided that unless reimbursement was made to Respondents within five days after receipt of written notice, the Respondents would be released from all obligations in law and equity to convey said property.

In Corporation Nine v. Taylor, 513 P.2d 417, 421 (Utah, 1973), the Supreme Court of Utah stated as follows with respect to the usual five day notice period provided in the Uniform Real Estate Contract:

> "We agree that in the situation of the usual Real Estate Contract, and perhaps even in this one, the five day notice to perform might be unreasonable and arbitrary if a more reasonable and longer time would have been of any benefit to the Buyer."

In this action, more time certainly would have been of benefit to the Appellants, since they contacted an attorney in American Fork, Utah to respond to the demand letter of March 18, 1980. The Appellants attorney immediately contacted counsel for Respondents and acknowledged that upon receipt of the tax notices, reimbursement would be paid without difficulty. Consequently, negotiations were underway to resolve the dispute, but

to limit negotiations and final settlement to five days was unreasonable and arbitrary and should not have been enforced by the Court.

CONCLUSION

An interpretation of the contract in this action leads to the conclusion that the Respondents elected their remedy under paragraph fourteen of the agreement when they paid the prior years taxes and sought reimbursement from the Appellants. The Appellants did not dispute the obligation to pay the taxes, and acted reasonably in response to the Respondents requests for payment. The damages to the Respondents were clear and ascertainable and a tender of payment was made within a reasonable period of time. It would be harsh and inequitable for this Court to rule that the Appellants were strictly bound by the provisions and time periods set forth in the forfeiture provision of the Uniform Real Estate Contract due to the Respondents' own lack of compliance and due to the grossly excessive and disproportionate loss suffered by the Appellants as a result of the trial Court's strict application and enforcement of the forfeiture provision. For these reasons, Appellants respectfully request this Court to reverse the decision below.

DATED this 7TH day of December, 1982.

RESPECTFULLY SUBMITTED:

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Appellants' Reply Brief to: Heber Grant Ivins, Attorney for Respondents, 75 North Center, American Fork, Utah 84003, postage prepaid on the 7TH day of December, 1982.