1982

L. Lynn Allen and Merle Allen v. Thomas M. Kingdon and Joan O. Kingdon : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

L. LYNN ALLEN and MERLE ALLEN,

Plaintiffs/
Respondents,

v.

THOMAS M. KINGDON and JOAN O. KINGDON,

Defendants/
Appellants.

Case No. 18290

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court,

Salt Lake County, The Honorable Jay E. Banks, Judge

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NATURE OF THE CASE

This is an action for return of earnest money paid pursuant to a sale agreement of residential real estate. There was also a Counterclaim for the wrongful filing of a mechanics lien on the property.

DISPOSITION IN THE LOWER COURT

This case was tried without a jury to the Honorable Jay E. Banks on March 5, 1981. Judge Banks held that the earnest money agreement had been rescinded by the parties and the plaintiffs (buyers) were entitled to the return of their earnest money paid, $10,800. Judge Banks also held that the

plaintiffs had wrongfully filed a mechanics lien against the property and that defendants and counterclaimants were entitled to $1,000 in punitive damages for the filing of this lien. The $1,000 judgment was set off against the $10,800 judgment, resulting in the judgment for the plaintiffs in the amount of $9,800.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment of the lower court and entry of judgment in favor of the defendants and against the plaintiffs. In the alternative, defendants seek reversal of the judgment of the trial court and a remand for a trial on the issue of damages. Only the plaintiffs' judgment against the defendants, not the counterclaim, has been appealed.

STATEMENT OF FACTS

On February 12, 1978, the plaintiffs (buyers) entered into an agreement to purchase a home owned by the defendants (sellers). The agreement was in writing and was admitted into evidence in the trial of this case as Exhibit P15. The document reads as follows:

> I/We L. Lynn Allen and Merle Allen hereby deposit with you as earnest money the sum of ($1,000) One Thousand and No/100 Dollars in the form of check to secure and apply on the purchase of the property

situated at 4855 Bron Breck, Salt Lake City, Salt Lake County, State of Utah. . .

The total purchase price of ($87,500) Eighty-Seven Thousand Five Hundred and No/100 Dollars shall be payable as follows: $1,000 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you: $0.00 when seller approves sale; $86,500 on delivery of deed or final contract of sale which shall be on or before April 15, 1978, and additional down payment of $10,000 to be made by 3/15/78. . .

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. It is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

The document was signed by Merle W. Allen and L. Lynn Allen as Purchasers and by Thomas M. Kingdon and Joan O. Kingdon as Sellers.

At that time buyers gave sellers the $1,000 in earnest money. Later when the additional $10,000 was due the sellers requested they be allowed to keep a light fixture which was in the home. The buyers agreed to this for a $200 deduction, and so the buyers paid the sellers an additional $9,800. (Findings of Fact numbers 2 and 3). The buyers also request-

ed that sellers repair the patio of the home but the sellers refused. The buyers requested that the sellers paint the front of the home. The court found that the sellers agreed to this. The sellers requested that the date of possession be extended until their other home was finished. The buyers agreed to this extension. They later requested that the sellers pay rent for the extension of time but the sellers refused to pay rent unless the buyers would close the transaction and the sellers could get their money.

The sellers did not paint the front of the home. When the day for closing came, the buyers refused to pay the full amount of the earnest money agreement but insisted on a $500 deduction because of the fact that the front of the home was not painted. (Findings of Fact number 5).

The sellers refused to convey title unless the buyers would pay the full price of the earnest money agreement.

After some discussion Mrs. Allen left saying nothing. Mrs. Kingdon left and said that the Kingdons would not refund the earnest money to the plaintiffs. Although it was hotly contested at the trial, the Judge found that after the two women had left Mr. Kingdon said that he would refund the earnest money to the buyers.

Ten days after the attempted closing, the seller's attorney sent a letter to the buyers. The letter was received as Exhibit 10D and reads as follows:

> Dear Mr. Allen:
>
> Mr. Thomas Kingdon has retained me to handle a dispute as to earnest monies deposited to secure the purchase of the above real estate.
>
> Accordingly, please be advised that Mr. Kingdon has had the above residence on the market to sell so as to minimize his damages since June 4, 1978. He desires that I indicate to you his intention to retain the normal 6 percent real estate commission ($5,250) plus any additional damages he incurs in reselling the residence subject to the earnest money agreement, a copy of which is attached.
>
> Upon the resale of his home and a final determination of damages, he will refund the portion of your $11,000 which might belong to you. As an alternative, you may save these damages by closing on the purchase within ten days of the date of this letter (June 22, 1978) under the terms of the earnest money agreement attached.
>
> Sincerely,
>
> W. Michael Howery

The sale between the plaintiffs and the defendants was never consummated. The home was on the market for nearly a year and was eventually sold for $89,100, less a real estate commission of $5,346. As a result of the one year delay in selling, defendants incurred additional interest expenses, as well as miscellaneous expenses in maintaining the home. Evidence was submitted to show that their total loss including

purchase price and additional expenses as a result of the breach of contract was $15,088.60 (defendants Exhibit 18-D).

Because sellers had incurred damages in excess of the $10,800 deposit, they refused to return any part of the deposit to the buyers. Consequently, the buyers brought this suit to recover the deposit.

ARGUMENT

POINT I

A WRITTEN CONTRACT CONCERNING AN INTEREST IN LAND MAY NOT BE MODIFIED OR RESCINDED ORALLY.

The evidence in this case was undisputed that the parties entered into an earnest money agreement whereby the buyers agreed to pay $87,500 for the real property. Nothing in the earnest money agreement refers to any defects to be cured in the property or changes to be made, such as repairing the patio, painting the front or the like. Furthermore, the agreement provides:

> 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 considered to be a part of this transaction unless incorporated in writing herein.

The evidence as to what happened subsequently was in dispute. The buyers say that the sellers agreed to paint the

front of the house. The sellers testify to the contrary. Although the court believed the buyers, and found that the sellers had agreed to paint the front of the house, the written agreement must be enforced because it cannot be modified or terminate by mere verbal statements. Utah Code Ann. §25-5-1 (1976) provides:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing. (emphasis added)

The Utah Supreme Court held in the case of Zions Property, Inc. v. Holt, 538 P.2d 1319 (Utah 1975):

> It is elementary that when a contract is required to be in writing, that same requirement applies with equal force to any alteration or modification thereof.

There was no evidence and no finding that anyone agreed to change the purchase price. The evidence was also clear, and the court found that at the closing the sellers were prepared to go through with the sale at the purchase price agreed to. The buyers refused to go through with the sale at the agreed purchase price. The buyers claim that the sellers consented to a termination of the agreement at the closing and agreed to return the earnest money. The sellers denied

this. Although the court believed the buyers again on this issue and found that the sellers had agreed to return the earnest money, it is also clear that a contract required to be in writing cannot be orally terminated. In the case of Cutright v. Union Savings & Investment Company, 33 Utah 486, 94 P. 984 (1908), the court held:

> No doubt the transfer of any interest in real property, whether equitable or legal, is within the statute of frauds; and no such interest can either be created, transferred or surrendered by parol merely . . . No doubt, if a parol agreement to surrender or to rescind a contract for the sale of land is wholly executory, and nothing has been done under it, it is within the statute of frauds, and cannot be enforced any more than any other agreement concerning that interest in real property may be. [Emphasis added.]

The Cutright case is very instructive as to the law regarding the oral rescission of contracts which are required to be written. In Cutright the buyer purchased a home under a real estate contract, moved in and made payments for several months. He then became dissatisfied, moved out and returned the key to the house to the seller, orally expressing his intention to abandon the contract. The seller accepted the key with the intention of releasing the buyer. A few days later the buyer changed his mind and sought to carry out the contract. The seller refused, treating the contract as having been rescinded.

The court stated that the general rule is that contracts regarding the sale of land must be written, as must all modifications and rescissions thereof. Such contracts may be taken out of the statute of frauds, however, by the doctrine of part performance. In Cutright, surrendering the key by the buyer and accepting it by the seller constituted part performance. If Allen or Kingdon had done anything immediately following the alleged oral rescission sufficient to constitute part performance, the rescission would be effective. For example, if Kingdon would have sold the home, therefore making it impossible to complete the contract, the oral rescission would have been effective. Similarly, had Allen taken some step which would have made it impossible for him to complete the contract, the rescission would have been effective. There was, however, no evidence that either of the parties did so. Only ten days after the alleged oral rescission Kingdon's attorney sent Mr. Allen written notice that Kingdon was still willing to go through with the contract at the original price and that if Allen was not willing to meet his contractual obligation Kingdon intended to enforce the provisions of the contract (Exhibit 10).

There is no indication that the purchase price was ever changed either orally or in writing. There is no evidence that any action was taken by either of the parties between the time

of the alleged oral rescission and the time that sellers expressed, in writing, through their attorney in Exhibit 10 that they intended to rely upon and enforce the contract.

POINT II

THE SELLERS ARE ENTITLED TO RETAIN THE ENTIRE $10,800 IN EARNEST MONEY

The earnest money agreement provides as follows:

> In the event the purchaser fails to pay the balance at 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.

There is nothing ambiguous in this language. It entitles the seller to retain "the amounts paid hereon." The amounts referred to in the earnest money agreement are the $1,000 which the earnest money describes as a "deposit" and the "additional down payment of $10,000 to be made by 3/15/78."

The issue, however, is not whether the $10,000 payment was "earnest money" or whether it wasn't. The document entitles Kingdons to retain as liquidated damages the amounts paid hereon." Clearly the $9,800 payment was an amount paid pursuant to the agreement made, in writing, under the earnest money receipt.

Furthermore, the liquidated damage amount is not excessive when compared to the actual damages which were sustained.

In fact, there was evidence that the total damages sustained, exclusive of attorneys' fees exceeded $15,000 (Exhibit 18).

CONCLUSION

Under Utah law, unlike some other jurisdictions, a contract required to be in writing cannot be orally rescinded or modified. There is no question that the written contract was breached by the buyers. Even if the sellers agreed orally at the time of the breach that the contract could be rescinded, no action was taken on the part of either the buyers or the sellers to establish part performance between that time and ten days later when the sellers informed the buyers in writing that they intended to rely upon the agreement, that they were still willing to go ahead with the agreement, but that if the buyers did not wish to purchase the property they would retain as much of the earnest money as was required to meet their actual damages.

Because it took a year to sell the home, the actual damages sustained exceeded the $10,800 which was paid by the buyers, Consequently none of the deposit was ever returned.

As a result of buyers breach of contract, sellers suffered damages in excess of the deposit paid. The court should enter

judgment in their favor or in the alternative remand this case to the trial case for a determination of damages.

DATED this 27 day of May, 1982.

SNOW, CHRISTENSEN & MARTINEAU

By Scott Daniels
Scott Daniels

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the Brief of Appellants, postage prepaid, this 27th day of May, 1982, to the following:

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Jill Robison

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