1984

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

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

L. LYNN ALLEN and MERLE ALLEN,

Plaintiffs/
Respondents,

vs.

THOMAS M. KINGDON and JOAN O. KINGDON,

Defendants/
Appellants.

Case No. 18290

BRIEF OF RESPONDENTS

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NATURE OF THE CASE

This is an action by the Plaintiff to have earnest Money and other monies paid persuant to a Sale Agreement of residential real estate. There was also a Counterclaim.

DISPOSITION IN THE LOWER COURT

The honorable Jay E. Banks tried this case without a Jury on March 5, 1981, and found that the earnest Money agreement had been entered into but it had been rescinded or modified by the parties in many respects.

$1,000.00 was paid as earnest money and $9,800.00 was paid as additional down payment on a conditional payment check. Judge Banks found that the earnest money and additional down payment were to be refunded to the Buyers, but that the

Buyers (Plaintiffs) had wrongfully filed a mechanics lien and that Defendants were entitled to $1,000.00 in punitive damages. The $1,000.00 Judgment was offset against the $10,800.00 Plaintiffs Judgment resulting in a net Judgment for the Plaintiffs of $9,800.00.

RELIEF SOUGHT ON APPEAL

The Plaintiffs/Respondents seek that the Supreme Court uphold the judgement of the Lower Court.

STATEMENT OF FACTS

The Plaintiffs/buyers entered into an agreement with the Defendants to purchase a home owned by the Defendants on or about February 12, 1978. This agreement was written and admitted as exhibit P15 into the Trial.

The document was signed by both Plaintiffs and both Defendants.

At the time when the additional $10,000.00 was due the parties started negotiating because the Defendants wanted to keep a light fixture, which was agreed, and the $200.00 deduction was made from the $10,000.00 due and so the buyers only paid the sellers an additional $9,800.00. The buyers requested that the sellers repair the patio, but the sellers refused. The buyers requested that the sellers paint the front of the home, the court found that the sellers agreed to do this. The sellers later requested that the date of possession

be extended until their new home was finished. The buyers agreed to that extension. The buyers later requested that the sellers pay rent for the extension, but the sellers refused to pay rent unless the buyers would close the transaction and the sellers could get paid.

The sellers failed to paint the front of their home and when the day for closing came the buyers refused to pay tne full amount of earnest money but insisted on a $500.00 deduction because of the failure to paint.

Because of this claim the matter never closed, and Mrs. Allen left the closing discussion without saying anything. Mrs. Kingdon left and said the Kingdons would not refund the earnest money. The court found that after the wives had left Mr. Kingdon said that he would refund the earnest money to the buyers.

Later the sellers had their attorney send a letter to the Plaintiff demanding the closing of the transaction which was refused. The sellers later moved out of their home into their new home and never rented the home. The court found that they failed to mitigate their damages by trying to rent it, and that whatever the value of the home the court found that the sellers still had the home.

ARGUMENTS

POINT I

THE GREATER WEIGHT OF AUTHORITY PROVIDES THAT A WRITTEN CONTRACT WITHIN THE STATUTE OF FRAUDS MAY BE RESCINDED ORALLY.

Although there are a minority of cases to the contrary, the law regarding oral rescission is well stated as follows;

> It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in holding that a contract in writing and by law required to be in writing, may in equity be rescinded by parol, and this, eventhough the contract may have been under seal. Such rescission may be effected not only be express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract. 2 Warville on Vendors § 826 (2d ed.).

This statement was cited as definitive of the law in Utah under Cutright v. Union Savings & Investment Co., 33 Utah 486, 94 P. 984 (1908) In that case, one Jenkins purchased, persuant to a real estate contract, real property from the Defendant. Jenkins fell behind in payment and, when the defendant tried to collect, returned the key to the property and indicated his unwillingness to bring payments current and remain in posession. Jenkins assignee sued, claiming that the rescission was invalid, arguing that any modification or rescission of a contract under the Statute of Frauds must

also be in writing and not merely oral. The trial court ruled against the Plaintiff, and the Utah Supreme Court affirmed.

In the present case, the lower court has held that an oral rescission of an earnest money agreement for the purchase of land is valid. This decision is supported by Utah case law and in addition represents the greater weight of authority in all jurisdictions. 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 592 (3d ed. 1961) and 28 Rocky Mtn L. Rev. 269 (1956)

There is no Utah case law exactly on point. However, other jurisdictions provide excellent support for the decision of the lower court. A case precisely on point was decided by the Supreme Court of Colorado based on a Statute of Fraud essentially identical to the controlling Utah Statute.

The Colorado statute read:

> No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or 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 by writing. C.S.A. chapter 71 §6 (1935).

The Utah Code Ann. § 25-5-1 (1953) varies little in wording and is identical in meaning:

> 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 other wise than by act or 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 by writing. Utah Code Ann §25-5-1 (1953).

Niernburg v. Feld, 131 Colo 508, 283 P.2d 640 (1955) is fact specific to the case at bar. Defendants/Sellers (Husband and Wife) entered into a sales agreement with the Plaintiffs/Buyers (Husband and Wife) for the sale of certain real estate owned jointly by Defendants. The Buyers paid a deposit agreeing to pay the balance upon closing. The contract included a liquidated damages clause requiring the forfeiture of deposit on failure to pay the balance. Prior to closing the buyers advised the sellers they "couldn't go through with the deal." At a conference with only the husbands present, just prior to closing, there was an oral agreement to mutually rescind the contract. At that time the seller made an oral promise to refund buyers deposit upon certain terms which were shortly fulfilled. Subsequently seller refused to refund as promised and buyer brought an action to recover his deposit. From a lower court judgment in favor of the buyer, seller appealed alleging error in three areas similar to those presented by the seller in the present case. They were:

> 1. An attempted executory rescission or modification of a prior written agreement is invalid as being in violation of the Statute of Frauds.

2. That a subsequent oral promise was without consideration and therefore void, because no benefit was conferred or detriment suffered.

3. The oral promise of defendant Phillip Niernberg given to Plaintiffs did not constitute a rescission of the written agreement, because one of the parties to the written agreement was not a party to the subsequent oral agreement and one joint obligor could not agree to a rescission without the consent of the other obligor. Niernberg, 283 P.2d at 640.

In opposing all three allegations and affirming the decision of the lower court the Colorado Supreme Court held respectively: First,

> It seems to be the better - reasoned rule that an executory contract involving title to, or an interest in, lands may be rescinded by agreement resting in parol. The Statute of Frauds concerns the making of contract only, and does not apply to the matter of their revocation. The requirement for the making of a contract is one thing and the revocation or rescission thereof is another, and we are satisfied to announce as the law in this jurisdiction that such executory contracts may be rescinded by the mutual consent of parties thereto. Id at 642.

Second, regarding the promise to repay the deposit by the seller:

> As to the question of lack of consideration, we find that in the instant case there was a promise for a promise involving the release of each party from further performance, and this mutual consideration is sufficient to support the agreement. Id at 642.

Third, regarding the absense of the sellers wife:

> Neither is he in position to successfully contend as a reason for escape, that he is

> not liable because his wife was not a party to the rescission. If he assumed to act in her absence and she is dismissed from the case, he should be bound by his own actions and declaration. Id at 642.

The decision of the lower court in the case at bar complies almost exactly with the Niernberg decision and represents the weight of authority.

The honorable Judge Banks, after hearing all the evidence, determined that the earnest money agreement was rescinded at closing (R-134). In addition each husband was the effective and the apparent agent of their respective wives to rescind the contract. (R-133), These findings were correctly made and represent the law in this jurisdiction. A respected treatise on the law of contracts properly states "The Statute of Frauds does not mention contracts for rescission or discharge and such contracts are, therefore, not affected by its terms." 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 592 (3d ed. 1961).

POINT 2

A FORFEITURE OF BUYERS DEPOSIT WOULD BE PUNITIVE IN NATURE AND WAS PROPERLY REFUSED ENFORCEMENT BY THE LOWER COURT.

The seller promised, at the time of rescission to refund buyers deposit. The lower court cited the following in its finding of fact: " After Mrs. Allen and Mrs. Kingdon left, Mr. Kingdon agreed to refund the earnest money to the Plaintiffs." (R-133)

The record correctly states that " The bank officer; the only disinterested witness who testified, stated that Mr. Kingdon said that the deal was off and that Mr. Allen could have his money back. Also, that the money was in the bank, and that he would pay it the next day." (R-108)

Based on this testimony and the evidence as a whole the lower court determined that such a promise had been made by the Seller. The defendant/seller, has failed to present the required preponderance of evidence to the contrary. The standard of review on appeal has long been established in this state. "On review, the Supreme Court will accord considerable deference to judgement of trial court due to its advantaged position and will not disturb action of that court unless evidence clearly preponderates to the contrary, or the trial court abuses its discretion or missapplies principles of law. Openshaw v. Openshaw, 639 P.2d 177 (1981). Neither abuse of discretion nor a missapplication of principles of law have been demonstrated by a clear preponderance of evidence to warrant the imposition of a harsh forfeiture on buyer.

A. The Law in This Jurisdiction Disfavors The Enforcement of Forfeitures.

The lower court found that the loss to both Buyer and Seller approximately balanced such that "The liquidated damages provision of the contract is too

harsh and should not be enforced by the court." (R-134) The language of forfeiture referred to states:

"In the event the purchaser fails to pay the balance of said purchase price or complete 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." Plaintiffs Exhibit 15-P lines 39-40.

It should be clear that the provision above cited represents an attempt to enact an inequitable forfeiture. It simply provides that if the purchaser causes the sale to fail, seller is entitled to keep all monies paid, with no allowances for amount. In this case, the seller attempted to use the clause to enact a $10,800.00 penalty. The lower courts refusal to enforce such a provision is in line with the law in this jurisdiction which disfavors forfeitures. In Russell v. Park City Utah Corp., 589 P.2d 888 (Utah 1976) the court states that forfeitures are not enforced in the law, and forfeiture provisions will be strictly construed against the one who seeks to enforce them. In stronger language, the Morgan v. Sorensen, 3 Utah 2d 428, 286 P.2d 229 (1955) court states that forfeitures are odious to the law. Such provision must not be enforced in the case at bar.

B. As a Matter of Law, Buyer is Entitled to a Refund of Earnest Monies in Accord with the Judgement of the Lower Court.

Finally, even if "mutual promise" and "unjust forfeiture" were not sufficient to allow buyer a

refund, he is entitled to a refund as a matter of law. Utah Code Ann. 25-5-1 (1953) provides that more than one writing may be used to satisfy the requirements of the statute of frauds provided some nexus between writings is shown. Gregerson v. Jensen, 617 P.2d 369 (1980). Buyer wrote a check for $9800.00 with an inscription referring to the earnest money agreement. The inscription provided for the signed acceptance of Seller in the following words: (P EX 14-P)

> Earnest money paid 1,000.00
> Additional Earnest 10,000.00
> Total Earnest Monies
> paid subject to closing less
> credit lighting fixture. 11,000.00
> Lot 10 Cottonwood Hills Sub 3. . . 200.00
>
> $9,800.00

Utah case law provides that the requirements of the statute of frauds may be satisfied by more than one writing where:

> Either by express reference in signed writing to unsigned one or by implied reference gleaned from contents of the writing and the circumstance surrounding the transaction, in which case parol evidence may be used to connect unsigned document to one that has been signed by person to be charged. Gregerson, 617 P.2d at 370 (1980).

The court in Gregerson held that where a check was inscribed by a purchaser in the manner stated above and where the inscription expressly referred to the parties with Sellers knowledge of the subject matter, that the two writings must be read together. Id. at 370.

The check in the present case complies with the requirements set by the Utah Court in Gregerson and therefore must be read together with the Earnest Money Agreement. The inscription provides for the return of Buyers money by Seller on failure to close.

POINT 3

THE LOWER COURT, BY ITS DECISION, FOLLOWS THE EQUITABLE TREND TOWARDS WIDER ENFORCEMENT OF ORAL PROMISES.

In the case at bar it is undisputed by either party that the written contract, the Earnest Money Agreement, was subsequently modified by oral agreement a number of times. This occurred despite provisions in the agreement forbidding such modifications exept in writing. The conclusion that must be drawn is that oral modification was an accepted means of contract development and that a demand for strict performance under the writing does not comport with the course of dealing evidenced by the parties.

Although there are cases to the contrary, the greater number of cases follow the trend that a written executory contract for the sale of land may be reasoning behind this trand is informatively stated in the following statement:

> There is a trend "towards wider enforcement of oral promises." This trend was reflected as

> early as 1885 when Mr. Justice Stephens said that the Statute of Frauds "is a relic of times when the best evidence on such subjects was encluded on a principle now exploded." The Thousands of cases that have applied interpreted the Statute of Frauds show how obscure and inadequate the statute has become. In June of 1954 the Law Reform Act in England just about completed the burial of the statute in that country. The Law Revision Committee stated that the statute has to a great extent been modified by the decisions of the courts in trying to save contracts, and that it is possible that it produced more fraud and perjuries than it repressed. 28 Rocky Mountan L.Review 271,270 (1956).

It is clear in this case that oral modifications were very consistent with the intentions of the party. A substantial injustice would result if Plaintiff were estopped from exercising his rights arising from these oral agreements when there is clear evidence that such a contract was made.

CONCLUSION

The lower court found that the operative contract, the Earnest Money Agreement, was entered into by the parties. That various oral changes were made by the parties. That defendants failed to perform one of those changes and consequently, at closing, Plaintiff refused to pay the full purchase price. Both parties then, by oral agreement rescinded the agreement at closing. In addition, the court found that the seller promised to refund the entire earnest money; a retention of which, as liquidated damages, would be too harsh and should not be enforced by the court.

The weight of authority in case law and simple justice require that the finding, conclusion and decision of the lower court be affirmed. Respondent/Buyer therefore, respectfully requests that the decision of the lower court be affirmed with costs and attorneys fees for this appeal.

DATED this 18 day of June, 1984.

Boyd M. Fullmer ~~Assoc.~~
Attorney at Law

by Boyd M Fullmer

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of this Brief of Respondents to Snow, Christensen, and Martineau, attorneys for Appellants Defendants 10 Exchange Place 11th Floor: Salt Lake City, Utah 84110 This 18 day of June, 1984.

Boyd M Fullmer