1958

Arnold Haymore and Elaine H. Haymore v. Reuben J. Levinson and Yetta Levinson : Brief of Respondent

Utah Supreme Court

Peter M. Lowe; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

ARNOLD HAYMORE AND
ELAINE H. HAYMORE

Plaintiffs,

—vs.—

REUBEN J. LEVINSON AND
YETTA LEVINSON,

Defendants.

Case No. No. 8793

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

On November 7, 1955, the parties executed a written Earnest Money Receipt and Offer to Purchase certain real property located at 4210 Holloway Drive, Salt Lake City, Utah. (Ex. P1). Line 10 of this agreement specified: "the following personal property shall also be included as part of the property purchased: ITEMS ON EXHIBIT 'A'." The exhibit "A" referred to is Exhibit P-2. herein, which was a document prepared by the real estate sales company for the purpose of effecting a sale of this same

property to some other persons and was not prepared for the sale to the defendants and was never signed by the plaintiffs herein (TRS 91 and 111). The plaintiffs and defendants did not discuss the sale of the property at any time prior to signing exhibit 1. The plaintiffs conveyed the property to the defendants on December 1, 1955 (TRS 122), and the defendants gave a mortgage to Prudential Insurance Company of America to secure a loan to them (TRS 93). The $3,000.00, representing the unpaid balance of the purchase price, was deposited with the Security Title and Abstract Company, Salt Lake City, Utah. The plaintiffs set about doing the work set out in Exhibit P-2, and in the process did work not mentioned therein, until Mrs. Levinson demanded that work not listed on Exhibit 2 be done and plaintiff refused to do the work. Defendant then ordered plaintiff out of the house and refused to let him do anymore work (Ex. 3, TRS 5 and 106). There was conflict in the evidence which was resolved by the trial court in his memorandum decision and the Findings of Fact.

STATEMENT OF POINTS

Point I

THE COURT DID NOT ERR IN ITS CONSTRUCTION OF THE AGREEMENT BETWEEN THE PARTIES.

POINT II

THE COURT DID NOT ERR IN ITS FINDINGS THAT NO STRUCTURAL DEFECTS EXISTED AND THAT THERE WERE NO EXPRESS OR IMPLIED WARRANTIES.

ARGUMENT

Point I

THE COURT DID NOT ERR IN ITS CONSTRUCTION OF THE AGREEMENT BETWEEN THE PARTIES.

The appellants assume that there is a clear, unequivocal written agreement by which the plaintiff undertook to do certain work to the individual personal subjective satisfaction of appellants. This is not necessarily so.

The Earnest money Receipt (Ex. P-1) contains the words: "Escrow money to be released on satisfactory completion of work not to exceed sixty (60) days from the date of possession." The trial court made the following decision (R. 155):

> "The provision 'on satisfactory completion of the work' means: The items in Exhibit 2 to be done in accord with the form and plans of the structure originally planned and in a good workmanlike manner. It does not require that the purchaser say 'I am fully satisfied.' "

In 17 C.J.S., Sec. 495 (e) under the sub-heading "Application to Building and Construction Contract" it is said:

> "nevertheless, such a provision is more often construed as not making the owner's declaration of dissatisfaction conclusive, but as requiring merely the performance of the work by the builder in such substantial manner as ought reasonably to satisfy the owner."

In Utah this court has defined the word "satisfactory" as follows:

> "the word 'satisfactory' is defined as relieving the mind from doubt or uncertainty, adequate for the purpose . . . ."

and in another case where the written contract made one party "the sole judge" of the amount of performance to be rendered, the Utah Court has made the party conform to a standard of reasonableness. The Court said:

> "The plaintiff's 'sole judgment' in the matter could not be capricious, unreasonable or arbitrary . . . ." 13th & Washington Corp. v. Neslen, et al 254 P2d 847, —U—.

In the case before the court the written document does not specify the person who is to be satisfied by the work, and it is generally held that in doubtful cases the court will usually construe the contract as meaning sufficient performance as will satisfy a reasonable man in the promisor's position, and especially is this true where labor and material are to be expended on another's property.

> Robie v. Wheeler Shipyard, 3 N.Y. S2d 813, 167 Misc. 279
>
> Shepherd v. Union Central Life Ins. Co., C C A Texas, 74 F2d 180

The courts generally in the field of construction contracts hold that substantial performance by the builder will support a recovery even though the contract requires the work to be performed to the satisfaction of the owner. 9 Am. Jur., Sec. 40, reads in part as follows:

> "The American Courts are united in holding that a substantial performance of a building contract will support a recovery . . . three reasons are given for the rule: — First, since the owner must receive the fruits of the builders labors, it is deemed equitable to require the former to pay for what he gets. The second reason is that it is next to impossible

> for the builder to comply literally with all the minute specifications in a building contract. The third reason is that the parties are presumed to have impliedly agreed to do what is reasonable under all of the circumstances with reference to the subject of performance.
>
> It has been generally held that the rule permits recovery in case of substantial performance even though the contract requires the work to be performed to the satisfaction of the owner, since his judgment in the matter is to be exercised reasonably and not arbitrarily."

Mr. Christensen, a witness for the plaintiffs, was qualified as an expert builder testified that he had made a careful inspection of the defendants property and that the workmanship was above average and there was no evidence at all of inadequate footing (TRS 61-62).

The trial court made its findings of fact that "the plaintiffs completed the major part of the items to be completed. . . . defendants asked that additional work and materials be furnished; plaintiff refused to do the additional work and defendants refused to permit plaintiff to do any further work on the house; . . . ." (R. 159)

It is a matter of fundamental contract law that "a purchaser cannot set up a breach by the vendor, as a defense to an action for the purchase price, where by his own acts he has made it impossible for vendor to perform" (92 CJS p. 465).

The trial courts findings of fact and conclusions of law are supported by substantial competent evidence and by substantive law, respectively, and should be affirmed.

Point II

THE COURT DID NOT ERR IN ITS FINDINGS THAT NO STRUCTURAL DEFECTS EXISTED AND THAT THERE WERE NO EXPRESS OR IMPLIED WARRANTIES.

The written document between the parties (Ex. P1) supplemented by Ex. P-2 show considerable ambiguity. The documents purport to be for the sale of real property together with certain personal property. Ex. P-2 has language in it which identified certain items of personal property; sets out by inference certain materials to be furnished and labor to be performed; and has words of warranty in it. The exhibit P-2 has never been signed by plaintiffs although plaintiff referred to the "work" on Ex. P-2 in his counter-offer contained in Ex. P-1. On December 1, 1955 a final deed of conveyance was given by plaintiffs to defendants and the defendants took actual physical possession of the property.

Ex. P-1 provided on Line 34 that upon execution of the final contract that this Earnest Money Receipt and Offer to Purchase shall be abrogated.

It is also generally held upon the delivery and acceptance of the deed the preliminary contract of sale is merged with the deed and the purchaser cannot set up the breach of a condition as a defense to an action for the purchase price:

> "If the preliminary contract of sale has been merged in a deed, the purchaser may not in the absence of fraud, set up in defense the breach of a condition in the contract that the property should be delivered in a good condition." 92 CJS 469

The pre-trial order (R-26) set out that "5. The defendants do not rely upon any oral warranties". The defendants in their brief contend that there was an "one year guarantee against structural defects" (p. 6 of brief). The only place such a phrase is found is in Ex. P-2 which the plaintiffs did not sign.

The pre-trial order specified: "Defendants contend that the structural imperfections in the house are limited to the carport and a failure to place sufficient footings under the walls of the house." (R. 27)

The trial court made its Findings of Fact (R. 160) "that there were not any structural defects and that there were no express or implied warranties of plaintiffs to defendants as to the condition of the house."

The Findings of Fact by the trial court are to be sustained if there is substantial competent evidence to support them.

Mr. Roberg, a witness for defendants, testified (1 24-26, TRS 22)

> "as far as 'structural defects,' I am not sure. There is shrinkage cracks, or settling cracks, or there is cracks through the floor."

Mr. Roberg then went on (TRS 23) to testify that it is not unusual to get shrinkage cracks in concrete due to temperature changes, and that concrete itself is porous and permits water to come through.

Mr. Christensen, a witness for plaintiffs, was qualified as a building expert and testified (TRS 59, line 29)

Q. Did you examine that patio area for structural defects?

A. Yes.

Q. Did you find any structural defects?

A. No.

Mr. Glen Tucker, a witness for plaintiffs, was qualified as an expert on concrete construction and testified (line 28 TRS 100 er seq.):

Q. Did you see any evidence of structural defect in the patio slab, in its construction?

A. I did not.

The record is devoid of any evidence at all as to inadequate footings for the walls of the house.

The findings of the trial court are well sustained by substantial competent evidence.

CONCLUSION

It is respectfully submitted that the trial court did not err in its construction of the agreement between the parties, and that the court's findings that there was not any express or implied warranties as to the condition of the house, and its further findings that there were not any structural defects in the house are all sustained by law and evidence and should be affirmed.

Respectfully submitted,

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Attorney for Respondents