

1982

Jon Michael Cady and Carolyn Cady et al v. Reta May Johnson and Jared L. Johnson : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JON MICHAEL CADY and CAROLYN :
CADY, husband and wife, :
TELFORD REALTY COMPANY and :
RICH EDWARDS, dba ALL SEASONS :
REALTY, :

Case No. 18373

Plaintiffs-Appellants :

vs. :

RETA MAY JOHNSON and :
JARED L. JOHNSON, :

Defendants-Respondents :

APPELLANTS' BRIEF

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Clk. Supreme Court

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	:	
Defendants-Respondents	:	

STATEMENT OF THE CASE

This is an appeal filed by the appellants seeking an order from this Court, reversing the Order of Dismissal in respect to the plaintiffs' Second Cause of Action and remanding the matter for trial on plaintiffs-appellants' Second Cause of Action and for a further order reversing the award of attorney's fees awarded defendants-respondents.

RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek two orders. First an order reversing the trial court's Order of Dismissal on plaintiffs-

appellants' Second Cause of Action. Second, an order reversing the trial court's award of attorney's fees and awarding the plaintiffs-appellants costs for the appeal.

STATEMENT OF ISSUES

1. Did the trial court err in dismissing plaintiffs' Second Cause of Action on the basis that were not sufficient facts to establish a cause of action in equity or third-party beneficiary?

2. Did the trial court err in granting the defendants-respondents a judgment for attorney's fees pursuant to U.C.A. 78-27-56?

STATEMENT OF FACTS

The plaintiffs, Jon Michael Cady and his wife, Carolyn Cady, on or about July 8, 1980 did enter into an Earnest Money Contract with the defendants herein. At that time it was represented that defendant, Jared L. Johnson, was executing the agreement for and on behalf of his mother.

Pursuant to the contract, the Cadys, through their broker, Telford Realty Company, and the defendants, with the assistance of Rich Edwards of All Seasons Realty, did proceed to make arrangements to consummate the sale. Financing arrangements were made with United Savings & Loan in Bountiful. A demand was

made on the plaintiff Cadys to vacate the premises even at an earlier date than August 20, 1980, which they did in hopes of assisting in the closing of the sale. Final financing arrangements were finally completed by the defendants and closing was scheduled for August 25, 1980.

The plaintiffs all appeared at United Savings to execute the closing documents and disburse the funds. The defendants did not appear and on that date did advise the plaintiffs that they were not going to proceed on the contract and close. Subsequently, a letter dated August 25, 1980 was sent to plaintiff Rich Edwards indicating that the Earnest Money Offer was being withdrawn and a request for tender back of the earnest money receipt was made. Incidentally, Mr. Edwards received the letter more than a week after the date thereon.

A demand for specific performance was made on the plaintiffs, however, it was ignored.

Efforts were made to serve the defendants with a ten-day summons but were not successful. Subsequently, the Complaint was filed the latter part of April, 1981. Plaintiffs were finally served shortly thereafter.

An Answer was filed. The matter was subsequently noticed up and eventually pre-tried, and set for trial on February 19, 1982.

The plaintiffs-appellants, upon researching certain issues at the time of trial did made a Motion to Dismiss the plaintiffs'

First Cause of Action due to the fact that the case of Andreason v. Hansen, 8 Utah 2d 370, 355 P.2d 404 (1959) was dispositive of the issue and the plaintiff Cadys elected to retain the earnest money as liquidated damages. However, the matter as to the Second Cause of Action was then submitted to the Court on the basis of stipulated facts and argument for a determination by the Court of whether or not there were sufficient facts to establish a cause of action either in equity or as a third-party beneficiary contract.

The Court, after some argument from both parties did dismiss plaintiffs' Second Cause of Action and then awarded costs and attorney's fees to the defendants in the sum of \$1,592.00.

ARGUMENT

I

DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS-APPELLANTS' SECOND CAUSE OF ACTION ON THE BASIS THAT THE FACTS WERE NOT SUFFICIENT TO ESTABLISH A CAUSE OF ACTION EITHER IN EQUITY OR AS A THIRD-PARTY BENEFICIARY CONTRACT?

The defendants-respondents did not dispute the fact of the Earnest Money Contract nor that both of the plaintiffs-appellants, Telford Realty and Rich Edwards, did assist in the negotiations and preparations for the subsequent sale and financing of the sale. As indicated in the record, (TR p. 10, line 13) plaintiffs-appellants, Telford Realty did in the subsequent sale

of the home receive their share of the sales commission and therefore was only out the time and efforts made in the initial sale.

However, plaintiff-appellant Rich Edwards did not participate in the subsequent sale and as a result did lose his share of the real estate commission, being approximately 3% or \$1,500.00.

Defendants-respondents' arguments were primarily based on the idea that no comity existed between the defendants-respondents and plaintiffs-appellants and furthermore that the defendant-respondent, Jared L. Johnson, did not have a written power of attorney so that he could not legitimately bind his mother to any contract and last, that the plaintiffs-appellants' Cause of Action is tied to the Earnest Money Agreement and they are foreclosed from any recovery due to plaintiff-appellant Cady's election to retain said earnest money.

The manifest injustice resulting from such arguments is readily apparent in respect to plaintiff-appellant Rich Edwards, for without the defendants-respondents' refusal to perform on the contract, Mr. Edwards would have received his commission.

Neither he nor plaintiff-appellant Telford Realty could force the plaintiff-appellant Cadys to tender back the earnest money nor was it contemplated in the agreement that retention of the earnest money would be for any damages incurred by either

Telford Realty or Rich Edwards for defendants-respondents' failure to perform on the contract. Nor could plaintiffs Telford Realty or Rich Edwards make a claim against plaintiff Cadys inasmuch as they were always willing to perform pursuant to the Earnest Money Agreement.

Equity dictates that where a party has been damaged, that they should have recourse against the party damaging them, i.e. the defendants-respondents, especially where that party has no recourse or valid claim against any other party to the transaction.

In such a case the Court might limit such damages to payment for the reasonable time and expenses incurred, rather than the real estate commission but the trial court essentially held there was no cause of action and dismissed plaintiffs-appellants' Second Cause of Action, thereby even precluding the plaintiffs-appellants from presenting any evidence of their claim.

The trial court further summarily ruled that there was no cause of action under a theory that the plaintiff-appellant Telford Realty was a third-party beneficiary. The prevailing doctrine in the United States as set out in Corpus Juris Secundum, Vol. 17A P. 952 on Contracts §519(3) is that "with some qualifications, a third person for whose benefit a contract was made may sue thereon, even though he is a stranger to the contract and the consideration therefor."

Two Utah cases seem very much in point. First, Walker Bank & Trust Co. v. First Security Corp., 341 P.2d 944 and 9 Utah 2d 215 where the Utah Supreme Court held as follows:

"Privity of contract is a prerequisite to holding one liable for breach of duty thereunder, but there are duties to others than the immediate parties, where from the nature of contract, it is evident to promissor that the contract is for the benefit of third persons and that failure to discharge his duty would adversely affect them."

Second, the Utah Supreme Court held in Continental Bank & Trust Co. v. Stewart, 291 P.2d 890, 4 Utah 2d 288, that a third person may enforce a contract made for his benefit.

It is submitted that the court erred in summarily dismissing plaintiffs-appellants' Second Cause of Action without at least addressing the issues concerning whether or not the plaintiffs-appellants were donee or creditor beneficiaries pursuant to the case law and whether or not the cause of action was subject to the plaintiff-appellant Cady's retention of the earnest money.

II

DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANTS-RESPONDENTS JUDGMENT FOR ATTORNEY'S FEES PURSUANT TO U.C.A. 78-27-56.

That particular statute enacted in 1981 which became effective May 12, 1981 reads as follows:

"In civil actions, where not otherwise provided by statute or agreement, the Court may award reasonable attorney's fees to a prevailing party if the Court determines that the action or defense to the action was without merit and not brought of asserted in good faith."

It is submitted that the Court committed reversible error in three respects:

First, there were no Findings of Fact by the Court in support of the statute that the "action was without merit and not brought or asserted in good faith."

Inasmuch as the statute is only one year old, I could not find any Utah cases dealing with it.

The Court, in addition to filing Supplemental Findings did execute the Findings and Conclusions prepared by the defendants-respondents. The only statements pertinent to the issue is paragraph 5 of the Findings prepared by the defendants-respondents wherein it is stated "that said fees were incurred in defending a suit which plaintiffs knew or should have known they could not win."

The Court in its Supplemental Findings held in the third paragraph:

"Pre-Trial conference was held on November 23, 1981. Plaintiffs were ordered by the Court to research the legal effect of Plaintiffs failure to tender a refund of the earnest money. There was no question of fact as to the earnest money, that is, Plaintiffs did not tender the refund. Plaintiffs failed to brief this question of law and other questions of law relative to the statute of frauds. Research of the law would have clearly indicated to the Plaintiffs that they did not have a cause of action against the Defendants. A motion to dismiss could have then been heard without the necessity of trial. Counsel for the Defendants asked the Court to confirm the necessity of an appearance for trial since the legal issues were dispositive about one week prior to trial of the case. Judge Douglas L. Cornaby personally contacted Plaintiffs'

attorney and was assured that there were trial issues and that trial would proceed on the date in question. It was not until the trial date that the Court learned for sure that there were no issues to try.

The statute requires two Findings--that the action was without merit and not brought or asserted in good faith.

The term "without merit" has been defined pursuant to Words and Phrases, Vol. 46 P. 170 as meaning in a securities case, "a defense bordering on frivolity." In turn, a "frivolous pleading" as defined in Words and Phrases, Vol. 17A P. 376 "is one so clearly untenable or the insufficiency of which is so manifest upon bare inspection of pleading the Court is able to determine its character without argument or research." Sherrill v. Stewart, 21 So. 2d 11, 17, 197 Miss 880 or Nolen v. State, 150 P. 149, 48 Okla 594.

The term "good faith" has numerous connotations and interpretations depending upon the context of its use.

In general, it is defined in Words and Phrases, Vol. 18A P. 85 as follows: "The phrase 'good faith' generally imports that in any given case transaction involved was honestly conceived and consummated without collusion, fraud, or knowledge of fraud, and without intent to assist in fraudulent or otherwise unlawful design." Appel vs. Morford, 144 P.2d 95, 97, 62 Cal. App. 2d 36.

It is submitted that a brief review of the transcript clearly demonstrates that the cause of action and the pleadings

do not fit within the definitions prescribed by the law and furthermore there was no evidence submitted to the court to support any such Findings and Conclusions nor did the Court make a Finding or Conclusion that the case was without merit and not brought or asserted in good faith.

Second, the Complaint herein, after some difficulty in getting the parties served, was filed the latter part of April, several weeks before the applicable statute became law. Inasmuch as the wording of the statute refers to action without merit and not brought or asserted in good faith, then a strict construction of the language of the statute would seem to preclude its application to a case filed previous to the enactment of said statute, even if the Court found that the action was without merit and not asserted in good faith. Furthermore, in the subject case, the defendants-respondents neither plead the statute in his original Answer nor was there any allegation that the Complaint was without merit and not filed or pursued in good faith. The only reference in the defendants' Answer was a prayer requesting attorney's fees and court costs.

Third, and perhaps the most critical to this issue is that the judgment for attorney's fees was not based on sworn testimony. In Aiken v. Burrows, 514 P.2d 533, 30 Utah 2d 116 (1953) this Court summarily reversed an award for attorney's fees on the basis that such was not based upon sworn testimony.

The rule seems to be that any award for attorney's fees must be based upon evidence properly submitted to the Court either by stipulation of the parties, affidavit or sworn testimony. The reason for the rule is self-evident inasmuch as it becomes difficult for the Court to ascertain the reasonableness of the fees without having some evidence properly before the Court upon which to base its decision. Furthermore, opposing counsel should have an opportunity to at least contest and examine the question of the amount of the fees.

No stipulation by the parties was filed with the Court. No affidavits were filed and defendant-respondent was not sworn nor did he give testimony under oath subject to cross examination.

The defendant-respondent, in his argument alludes to attorney's fees on TR P. 7, lines 3-5. Again, on TR P. 8, lines 1-15 wherein he indicates that he and Mr. George Handy have expended 24.5 hours on the case at \$62.50 per hour for \$1,592.50. Counsel further suggests that the statute (U.C.A. 78-27-56) is applicable but talks in terms of substantial rather than without merit and lack of good faith, the criteria in the statute itself.

These are the only references in the entire file as to the award for attorney's fees. Again, I would submit that absent any stipulation of the parties, sworn testimony, or an affidavit, that the trial court is not in a position to award attorney's fees, nor was there any Findings or evidence submitted to the Court

upon which the Court could determine the reasonableness of those fees. A review of the file and transcript reveals that the defendants-respondents filed an Answer, wrote three letters and attended a pre-trial and trial, both of which combined lasted at the most one hour. Twenty-four and one-half hours would appear to be totally excessive under the circumstances.

CONCLUSION

It is respectfully submitted that:

1. This Court should reverse the Order of Dismissal and remand the case back to the District Court for further hearing on the plaintiffs' Second Cause of Action.


2. This Court should reverse the trial court's judgment for attorney's fees on the basis that:

(a) The evidence was not sufficient to support a judgment for attorney's fees, pursuant to U.C.A. 78-27-56.

(b) That the statute should not be retroactively applied.

(c) That the judgment was not based on sworn testimony as is required pursuant to previous Utah State Supreme Court rulings, in particular, Aiken v. Burrows, 514 P.2d 533 (1973).

Dated this 23rd day of June, 1982.



MELVIN C. WILSON

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of June, 1982,
I mailed a true and correct copy of the foregoing Appellants'
Brief to C. DeMont Judd, Jr., Attorney for Defendants-Respondents,
2650 Washington Blvd., Suite 102, Ogden, Utah 84401, postage
prepaid.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.