

1972

Rodney M. Larsen v. Eva Free Kelly : Appellant's Petition For Rehearing

Utah Supreme Court

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J. Lambert Gibson; Attorney for Defendant-Respondent
Gerald E. Nielson; Attorney for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

RODNEY M. LARSEN,
Plaintiff-Appellant,

vs.

EVA FREE KELLY,
Defendant-Respondent.

Case No.
12413

Appellant's Petition for Rehearing

Appeal from a Judgment of the Third District Court
In and for Salt Lake County, Utah
The Honorable James S. Sawaya, Judge

GERALD E. NIELSON
840 Kennecott Building
Salt Lake City, Utah
Attorney for Plaintiff-
Appellant

EVA FREE KELLY
Pro Se

FILED
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Clerk, Supreme Court, Utah

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ARGUMENT

POINT I

THE SUPREME COURT'S CONCLUSION THAT THE RECORD SUPPORTS THE FINDING OF THE TRIAL COURT THAT "DEFENDANT AT NO TIME AGREED TO AN EXTENSION AND THAT AT NO TIME DID SHE AGREE TO ANYTHING BUT

STRICT PERFORMANCE OF THE TERMS OF THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE," IS:

A. IN ERROR; AND

B. IS NOT CONCLUSIVE OF THE ISSUE OF WHETHER PLAINTIFF PERFORMED OR WAS EXCUSED FROM PERFORMING BECAUSE IT DOES NOT TAKE INTO ACCOUNT PLAINTIFF'S ARGUMENT THAT ABSENT SPECIFIC AGREEMENT ON THE PART OF DEFENDANT SHE IS ESTOPPED BY HER CONDUCT TO DENY THE CONTINUING VALIDITY OF THE EARNEST MONEY AGREEMENT.

Plaintiff-Appellant's contention that the finding that Plaintiff did not agree to an extension of time, is not supported by the record, is based (1) on the conversation of the parties at Defendant's home on or about May 25th and (2) upon the modification by Plaintiff of the original offer of Defendant which included the April 15th date as follows:

"Home to be completed with items as per attached sheet. Said work to be completed *10 days after a loan commitment* is given by the bank on property at 2870-72-74 South 3rd East," (emphasis added),

which modification was agreed to by the signature of each of the parties. In that connection note that the provision was hand-written by Defendant; that by and

from its position on the Earnest Money Agreement it was intended to modify the original offer. If it creates an ambiguity with the April 15th completion provision, all rules of construction of ambiguities favor the "ten (10) days after a loan commitment," completion date.

Plaintiff's principal reliance is upon the conversation of about May 25th in Defendant's home between Plaintiff and Defendant and Defendant's agent, Enoch Bautista. *Plaintiff* testified that he explained to Defendant at that meeting that American Savings would approve the loan subject to a pledged savings account and that she (Defendant) indicated she did not need all of her money at that time and that the \$5,000.00 could remain in the pledged savings account. He further testified that based on that conversation he immediately undertook to finish the items Defendant required to be done on the Clark Street property per the list she had attached to the Earnest Money Agreement (R. 111, line 18 to R. 112 line 18 and R. 131 line 10-22).

Defendant testified that they decided in that conversation that the offer would be accepted according to when the house was completed (R. 95 line 28-30); that she would not have turned the offer down because of the pledged savings account (R. 99 line 25 and 26); that as a result of that conversation, Plaintiff was still working on the transaction and that it was her intention that he should (R. 146 line 26-30).

Since that conversation occurred at a time well after the April 15th date, Plaintiff contends that while he

cannot point to testimony wherein Defendant said in so many words that she agreed to extend the time for completion of the agreement, it is clear either that she did agree to extend the time for completion or that she acquiesced in the extension of it or that she regarded the agreement itself as providing for a later time. No other explanation has been offered by Defendant and Plaintiff respectfully submits no other explanation is possible. Nor is that testimony in any way denied, contradicted or controverted by other factual testimony.

Even if Defendant did not agree to modify the time within which the contract could be completed, either by the addition to the Earnest Money Agreement or by her conversation in the latter part of May, she is estopped to deny its continuing validity. She testified that she knew Plaintiff was continuing to work on the transaction and she intended that he would (R. 146 line 26-30). Plaintiff, in reliance on that understanding, incurred substantial expense to complete the Clark Street property in accordance with Defendant's specification (R. 123 line 11-25).

If the court now allows Defendant to repudiate the agreement because it was not completed by April 15th it is saying she can knowingly allow Plaintiff to expend time and money on the premise that they have an agreement and thereafter at her pleasure deny that agreement. Plaintiff contends it is a classic situation for the application of the rules relating to estoppel and waiver cited by Plaintiff at page 8 of his original Appellant's brief.

Note that the Supreme Court's decision recites that Defendant by her counsel notified Plaintiff that the contract was terminated at a meeting on or about May 25th. The meeting on or about that date was one between Plaintiff, Defendant and one Enoch Bautista in Defendant's home. The meeting referred to by the court occurred ten (10) days to two (2) weeks later in a realtor's office. There was no communication between the parties between those meetings. Defendant's precipitous termination was the very next communication from Defendant to Plaintiff after the meeting of May 25th. Plaintiff's improvements of the Clark Street property were done as a result of the May 25th meeting and before the termination meeting.

CONCLUSION

It is with some reluctance and much trepidation that Plaintiff asks the court to reconsider this appeal and then simply quibbles about what the record shows the facts were.

Plaintiff feels that the Supreme Court has over-emphasized a finding of fact prepared by Defendant's counsel and eventually signed by Judge Sawaya, even though it did not represent his recollection of the matter at the time of the hearing on Plaintiff's objections to those proposed findings and was later adopted by Judge Sawaya at Plaintiff's request upon the failure of Defendant's counsel to prepare new findings in accordance

with the court's oral instructions given to him at the hearing (see substance of the court's order R. 80-81).

That problem may have been compounded by Plaintiff's failure to request oral argument. Plaintiff failed to request oral argument because Defendant had not filed a brief and was not represented by an attorney. Plaintiff did not wish to appear to pick on a defenseless woman. It later develops that the record was checked out by Lambert Gibson and Defendant's pro se brief was filed on the day before the hearing on appeal.

Plaintiff respectfully asks the court to reconsider this matter and urges that it find that Defendant is not entitled on or about *May 25th* to knowingly induce or even allow Plaintiff to incur substantial expense on the strength of an agreement and thereafter terminate that agreement for Plaintiff's failure to complete it prior to *April 15th* of the same year.

Respectfully submitted:

Gerald E. Nielson

Attorney for Plaintiff-Appellant

840 Kennecott Building
Salt Lake City, Utah 84111