2001

Daniel C. McKeon and Lisa Mckeon v. Kenneth Crump and Amy S. Crump : Reply Brief

Utah Court of Appeals

Nelson T. Abbot; Counsel for Appellants.
Richard D. Bradford; Counsel for Appellees.

IN THE COURT OF APPEALS
STATE OF UTAH

DANIEL C. McKEON and LISA McKEON, Plaintiff, Appellants and Cross-Appellees, vs. KENNETH CRUMP and AMY S. CRUMP, Defendants, Appellees and Cross-Appellants.	Appellate Court No.: 20010121-CA Trial Court No.: 990404250

Appeal from the Fourth Judicial District Court
for Utah County

Judge Fred Howard

Rule 29(b) Priority Classification: 15

REPLY BRIEF OF APPELLANT

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I.

RETURN OF THE EARNEST MONEY IS NOT A CONDITION PRECEDENT TO FILING SUIT

Defendant now argues that the return the earnest money is a condition precedent to filing suit and that failure to do so prohibits this claim. Defendant has not raised the condition precedent argument until now. It is being raised for the first time on appeal. Because the argument was raised for the first time on appeal, it should not be heard by this court. Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983).

Even if this court were to consider the "condition precedent argument." that argument is not sound. While it is true that conditions precedent can be created by agreement between the parties, "conditions are not favored and [] where doubt exists, they will not be presumed." 1A C.J.S., Actions, §46.

Appellees cite no cases to support their bold proposition that return of the earnest money is a condition precedent to seeking legal or equitable relief. Instead, appellee relies entirely upon the contract language. In this case, the agreement between the parties does not require return of the earnest money prior to filing suit. As explained in the appellant's brief, the contract simply requires return of the earnest money prior to

judgment. That is especially true under our legal system in which inconsistent pleadings are allowed and conditions precedent are not favored by the courts.

At the trial level, the appellees argued that failure to return the earnest money was an irrevocable election of remedies. They appear to have completely abandoned that argument and now urge this court to rely upon a new legal theory. As stated in the appellants' opening brief, the election of remedy analyses relied upon in the earlier earnest money cases does not warrant dismissal of this case.

Defendants do not argue that any public policy favors the strict rule they are pressing this court to adopt, nor do they dispute the public policy arguments raised by the appellants and which support allowing a seller to return the earnest money after filing suit.

II.

THE DEFENSE OF FAILURE TO RETURN THE EARNEST MONEY WAS WAIVED

A. THE DEFENSE OF FAILURE TO RETURN THE EARNEST MONEY MAY BE WAIVED.

The defendants cite no cases or authority for the proposition that the defense of failure to return the earnest money cannot be waived. Because the defense was created by agreement between the parties, it only makes sense that the parties can agree to waive it. As stated previously, this court should not consider the "condition precedent argument"

asserted by the defendants. If this court were to consider that argument, however, that would not prevent the defendants from waiving the defense. Conditions precedent may be waived. 1A, C.J.S., Actions, §46 ("where the conditions are such that they do not prevent the accrual of the right, but operate merely on the remedy, performance thereof may be waived by defendant"). In this case, the condition precedent asserted by the defendants speak solely to the remedy. Failure to return the earnest money does not impact upon the formation or performance of the essential elements of the real estate purchase contract. Instead, failure to return the earnest money impacts solely upon the remedy available. Thus, it can be waived.

B. THE DEFENDANTS WAIVED THE DEFENSE OF THE RETURN OF THE EARNEST MONEY.

Defendants dispute the factual findings made by the trial court judge. Specifically, they claim that the trial court judge incorrectly held that they failed to raise the return of the earnest money in their answer and that they stipulated to waive the defense. An appellee may not seek to modify the decision or judgment below unless the appellee files a timely cross appeal. Halladay v. Cluff, 739 P.2d 643, 645 n.4 (Utah App. 1987). In this case, the defendants did not file a timely cross appeal and their cross appeal has been accordingly dismissed. If this court were to determine that the issue is properly before it, this court should reject the argument on several other grounds.

The defendants claim that they raised the defense in their answer. The closest thing to raising the defense in their answer is the Fourth Defense which reserved the right to raise additional affirmative defenses they learned of during the discovery process. Such a statement is insufficient to raise an affirmative defense and the trial court properly found that the defense was not raised in the answer.

The defendants failed to preserve for appeal their argument that they didn't stipulate to waive the defense. On pages 18 and 19 of their brief, the defendants quote an exchange before the trial court judge and counsel for the defendants. The exchange can be found in the Record at R. 516, page 11. In the exchange, the trial court judge asks Mr. Bradford if he was claiming that the defendants had not stipulated to waive the defense. The trial court judge indicated that he intended to hold an evidentiary hearing if that was at issue. Counsel for the defendants stated that he was simply resting his argument on whether the defense could be waived. Relying upon that, the trial court judge entered his findings without holding an evidentiary hearing.[1]

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[1] THE COURT: If that's true, then, if there's some ambiguity then I would need to have a hearing. But if you're not resting on some ambiguity, you're basically saying you can't waive it."

MR. BRADFORD: That's right, and that is what I'm saying.

THE COURT: So that's why I'm saying I don't want to mince words. If we're going to talk about it some other way, I mean, Mr.

MR. BRADFORD: Whatever the agreement was, whatever the conversation was – and I wasn't there – and whatever the letter says, and however Mr. Abbott intended it, my position is it was not waivable after the fact.

Further, the defendants are required to marshal the evidence in support of the trial court's decision. U.R.A.P. 24(9). The defendants have failed to do so. For that reason, their argument should not be heard.

Finally, the evidence before the trial court clearly showed that the defendants stipulated to waive the defense.

III.

THE TRIAL COURT DID NOT COMMIT ERROR BY RETURNING THE EARNEST MONEY TO THE PLAINTIFFS

Defendants dispute the return of the earnest money to the plaintiffs. An appellee may not seek to modify the decision or judgment below unless the appellee files a timely cross appeal. Halladay v. Cluff, 739 P.2d 643, 645 n.4 (Utah App. 1987). In this case, the defendants did not file a timely cross appeal and their cross appeal has been accordingly dismissed. If this court were to determine that the issue is properly before it, this court should reject the argument on several other grounds.

The defendants argue that the court should not have returned the earnest money because they did not breach the contract. Unfortunately, the defendants made a motion to dismiss the case at the close of the plaintiffs' case. Thus, the trial court never had an opportunity to make a decision on the merits. The defendants now complain that the trial court should have reached a decision on the merits. The defendants created the problem

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THE COURT: Okay.

of which they now complain. They are the ones who requested the trial court judge to abort the trial and dismiss the case without reaching the merits. They cannot now claim harm because of the situation they created.

IV.

THE TRIAL COURT DID NOT COMMIT ERROR BY REDUCING THE AWARD OF ATTORNEYS FEES

Defendants dispute the return of the earnest money to the plaintiffs. An appellee may not seek to modify the decision or judgment below unless the appellee files a timely cross appeal. Halladay v. Cluff, 739 P.2d 643, 645 n.4 (Utah App. 1987). In this case, the defendants did not file a timely cross appeal and their cross appeal has been accordingly dismissed. If this court were to determine that the issue is properly before it, this court should reject the argument on several other grounds.

The defendants argue that they deliberately failed to raise the defense of failure to return the earnest money so that they could obtain a dismissal with prejudice. Only after the plaintiffs rested and they believed they could obtain a dismissal with prejudice did they raise the defense.

The contract states that the prevailing party shall be awarded a reasonable attorneys fee. The fee sought by defense counsel was not reasonable, because the litigation strategy pursued by defense counsel was not appropriate. Attorneys have a duty to expedite litigation. Further, they have a duty not to mislead others involved in

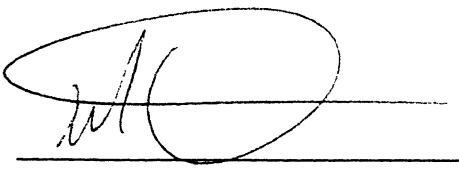
litigation. By holding his defense in his back pocket until after the plaintiffs rested, defense counsel wasted his time, opposing counsel's time and the court's time. Further, by stipulating to waive the defense while harboring a strategy to raise it at a later date, defense counsel mislead opposing counsel. The defense strategy was not appropriate or reasonable and thus no fee should have been awarded for pursuing it.

Finally, defendants do not dispute that the trial court erred by dismissing the case with prejudice. Because the trial court erred in dismissing the case with prejudice, the basis behind the defense strategy was erroneous. Thus, no fee should have been awarded for pursuing that strategy.

CONCLUSION

For the reasons stated above, the appellants (plaintiffs) respectfully request this Court to overturn the order of the trial court dated November 25, 2000 and to remand this case to the trial court with instructions that the trial court deny the motion to dismiss and hear this case on its merits. Further, the appellants request their costs on appeal.

DATED this 11th day of August, 2001.



Nelson Abbott

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant was duly served upon the following by placing said copy in the United States mail, postage prepaid, on this 17 day of August, 2001, addressed as follows:

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