1959

Lone Star Uranium & Drilling Co. v. Leland J. Davis and Barbara N. Davis et al : Brief of Respondent

Utah Supreme Court

S. Rex Lewis; Howard and Lewis;

In the Supreme Court of the State of Utah

LONE STAR URANIUM & DRILLING COMPANY, a corporation,
Plaintiff and Appellant,

vs.

LELAND J. DAVIS, and BARBARA N. DAVIS, his wife, RAY DAVIS and MARY G. DAVIS, his wife,
Defendants and Respondents.

CIVIL

NO. 8986

RESPONDENT'S BRIEF

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NEW CENTURY PRINTING CO., PROVO, UTAH

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STATEMENT OF THE CASE

Defendants agree with plaintiff's opening statement setting forth how this action was brought before the Court. However, all of the facts in their proper sequence were not stated. Defendants state the facts as follows:

On November 5, 1954, plaintiff and defendants entered into the particular option agreement and contract to purchase which is set forth in appellant's brief and which is

made an exhibit to the action. Pursuant thereto the defendants filed an action against James Mallory and Wesley Edwards and as a result of the action, in January, 1955, ousted Mallory and Edwards from possession and since that date defendants have been in the actual possession of the property (Tr. 23, 24 Davis). Since January of 1955 the defendants have been ready, willing and able to convey the property to the plaintiff free and clear of the claim of Mallory and Edwards (Tr. 25 Davis) (Tr. 43 Bentley), however the plaintiff failed to and refused to tender performance on its part. The plaintiff at all times stated that it was ready to perform and that it intended to perform, but that no tender of performance was ever made on its behalf (Tr. 33 Davis) (Tr. 44 Bentley). Plaintiff notified defendants on several occasions, including occasions after the expiration of the six-month period, that said plaintiff intended to complete the purchase when the outstanding judgment was paid (Tr. 29 Davis - Ex. 7), however, no tender of performance was ever forthcoming. The deeds were placed in the bank (Tr. 44 Bentley), abstracts were prepared (Tr. 32 Bentley), and delivered to plaintiff's attorneys, Rod Dixon and Wilcox, (Tr. 49 Bentley) (Tr. 51 Metos, L. 21-22) and defendants were ready, willing and able to perform the contract of sale and purchase. On August 17, 1955, the plaintiff demanded from the defendants the $2,500.00 previously paid to the defendants by the plaintiff still without ever having tendered performance on its part.

STATEMENT OF POINTS

POINT 1

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE DEFENDANTS' MOTION TO DISMISS AND IN FAILING TO GRANT THE DEFENDANTS' MOTION TO DISMISS.

POINT 2

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND THAT PLAINTIFF EXERCISED ITS OPTION TO CONTINUE THE CONTRACT IN EFFECT FOR AN ADDITIONAL YEAR.

POINT 3

THE TRIAL COURT'S CONCLUSION OF LAW AND JUDGMENT OF NO CAUSE OF ACTION ON PLAINTIFF'S COMPLAINT IS SUPPORTED BY THE UNDISPUTED EVIDENCE.

POINT 4

THE TRIAL COURT ERRED IN NOT GRANTING JUDGMENT TO THE CROSS-PLAINTIFFS FOR SPECIFIC PERFORMANCE OF THE CONTRACT BASED ON THE UNDISPUTED EVIDENCE.

POINT 5

THE TRIAL COURT ERRED IN ITS FAILURE TO AWARD DAMAGES TO THE CROSS-PLAINTIFFS CONTRARY TO THE UNDISPUTED EVIDENCE.

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE DEFENDANTS' MOTION TO DISMISS AND IN FAILING TO GRANT THE DEFENDANTS' MOTION TO DISMISS.

Plaintiff, to prove its prima facie case, merely submitted into evidence Exhibit 1 and Exhibit 2. Exhibit 2 is a copy of the option agreement and contract to purchase. Exhibit 1 is a certified copy of a Decree and an Amended Decree in the matter of Leland Davis versus James H. Mallory and Wesley Edwards filed in the District Court of San Juan County, State of Utah. By the introduction of plaintiff's Exhibit 2 and by the provisions thereof, it will be noted that the said option agreement and contract to purchase provides "or at the option of the buyer, the time within which the sellers shall have to retake possession of the property from the above named lessees, Mallory and Edwards, and finally and absolutely terminate said lease, may be extended for an additional period of time not to exceed one (1) year from date of this agreement." Plaintiff put on no evidence that it did not exercise the option and extend the agreement for a period of one year.

Plaintiff, by its Exhibit 1, merely put on evidence to the effect that an encumbrance existed against the property. Plaintiff further failed to put on any evidence that plaintiff had tendered performance to the defendants.

The law is clear that prior to bringing an action for breach of contract the vendee need offer to perform.

Spellman—How To Prove A Prima Facie Case—3rd Edition Page 473, 476, 569, 570.

The rule is stated in 1 Am. Jur. at Page 427 as follows:

"Thus performance, or offer to perform, is generally a necessary condition precedent to the bringing of an action on a contract."

And at 1 Am. Jur. 454 it is further stated:

"There must be either a performance or a waiver of all conditions precedent before the cause of action can arise upon a conditional contract."

An annotation at 40 ALR 693 entitled:

"Payment or tender of unpaid purchase money as condition precedent to the right of a purchaser of land to rescind on the ground of defects in or want of title."

The rule is stated as follows, Page 693:

"The general rule is that in the case of a contract containing concurrent conditions or mutual and dependent covenants, either an offer of performance or of readiness to perform by one party must be shown before he can charge the other with a breach, and without a breach there can be no ground for rescission. Boyd v. McCullough (1890) 137 Pa. 7, 20 Atl. 630."

The note further states, Page 693:

"Where the time of performance passes without anything being done, the time for performance becomes indefinite, but the obligations of the parties are nevertheless mutua land concurrent. Boyd v. McCullough (Pa.) supra. See also Poheim v. Meyers (1908) 9 Ca. App. 31, 98 Pac. 65, in which it is held that where the

vendee in a contract in which time is of the essence is in default, he cannot, without tendering the balance due, recover a payment theretofore made on the contract, on the ground that the title of the vendor is defective.

The decisions on the subject appear to warrant the following generalizations: Where the vendor has until the time for performance to obtain title to the property which he has contracted to convey, or to remedy defects in such title, the purchaser cannot, prior to the time of performance claim the right to rescind because of such defects, and so must make a tender in order to put the vendor in default. Papesh v. Wagnon (1916) 29 Idaho, 93, 157 Pac. 775; Laub v. De Vault (1908) 139 Ill. App. 398; Claude v. Richardson (1905) 127 Iowa, 623, 103 N. W. 991. Greenby v. Cheevers (1812) 9 Johns. (N.Y.) 126; Pioneer Gold Min. Co. v. Price (1915) 189 Mo. App. 30, 176 S. W. 474; Goldman v. Willis (1901) 64 App. Div. 508, 72 N. Y. Supp. 292; Ward v. James (1917) 84 Or. 375, 164 Pac. 370, 372.

Where no time is fixed for completion of the transfer, there being merely an understanding that it is to take place within a few days of the signing of the contract, the purchaser must tender the balance of the purchase price in order to put the vendor in default. Goldman v. Willis (1901) 64 App. Div. 508, 72 N. Y. Supp. 292.

Where under the terms of the contract the obligation to pay precedes or accompanies the obligation to make title, the purchaser must, in order to put the seller in default, pay or offer to pay the purchase money; and hence cannot rescind on the ground of a defect in the title without tendering performance on his part. Dennis v. Strassburger (1891) 89 Cal. 583,

26 Pac. 1070; Leach v. Rowley (1903) 138 Cal. 709, 72 Pac. 403; Eames v. Germania Turn Verein (1881) 8 Ill. App. 663; Claude v. Richardson (1905) 127 Iowa, 623, 103 N. W. 991; Hartley v. James (1872) 50 N. Y. 38."

Concerning an encumbrance to pay money, the note states, Page 701:

"Inability of the vendor to perform is not established by proof of the existence of encumbrances prior to the time for performance, since the vendor is not bound to perfect his title until that time. Laub v. De Fault (1908) 138 Ill. App. 398; Greenby v. Cheevers (1812) 9 Johns. (N. Y.) 126; Papesh v. Wagnon (1916) 29 Idaho, 93, 157 Pac. 775.

Although the decisions are not entirely harmonious, the weight of authority is that the purchaser does not establish the vendor's inability to make title by proving the existence of an encumbrance on the date fixed for performance. Pate v. McConnel (1894) 106 Ala. 449, 18 So. 98; Griesemer v. Hammond (1912) 18 Cal. App. 535, 123 Pac. 818; Claude v. Richardson (1905) 127 Iowa, 623, 103 N. W. 991; Pioneer Gold Min. Co. v. Price (1915) 189 Mo. App. 30, 176 S. W. 474; Campbell v. Prague (1896) 6 App. Div. 554, 39 N. Y. Supp. 558; Whitney v. Crouch (1918) 105 Misc. 268, 172 N. Y. Supp. 729; Ziehen v. Smith (1896) 148 N. Y. 558, 24 N. E. 1080; Woodman v. Blue Grass Land Co. (1905) 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. But see as apparently contra, Blunt v. Kelly (1920) 219 Ill. App. 327; Burk v. Schreiber (1903) 183 Mass. 35, 66 N. E. 411; Richards v. Jarvis (1925) - Idaho, - , 238 Pac. 887.

And this has been held even in a case in which the mortgage was not yet due and payable, on the

ground that it was possible that the mortgagee would be willing to accept payment and release the lien before maturity of the obligation. Pioneer Gold Min. Co. v. Price (1915) 189 Mo. App. 30, 176 S. W. 474. But see contra, Seibel v. Purchase (1904) 134 Fed. 484, where it is held incumbent upon the vendor to show that the mortgagee was ready to accept payment."

The case of Gillmore v. Green (Wash.) 235 Pac. 2d 998, the Washington Court states at Page 1002:

"The burden is upon the plaintiffs, vendee, to allege and prove that the vendor cannot perform when the time for performance arises."

"--the duty to pay -- and the duty of vendor to convey are concurrent, dependent and mutual acts, and the vendee may not rescind the contract without a tender of the purchase price. 'We stated in Eberhart v. Lind, 176 Wash. 316, 319, 23 Pac. 2d 17, 18,' It is a well settled rule that a party in default cannot maintain an action of rescission without first tendering performance or showing a willingness to perform or else clearly establishing such facts as would excuse performance by him."

The Court goes on to state that on a time contract neither party can put the other in default without a tender of performance. See Gledhill v. Malouf (Utah) 197 P. 725.

POINT 2

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND THAT PLAINTIFF EXERCISED ITS OPTION TO CONTINUE THE CONTRACT IN EFFECT FOR AN ADDITIONAL YEAR.

The option agreement and contract to purchase does not state how the plaintiff will exercise its option to extend the agreement for an additional year. Thus it would appear that the option might be exercised in any one of a various number of ways. The record is clear that after the 5th day of May, 1955, the plaintiff indicated its intention to complete the contract. Exhibit 7 dated June 9, 1955, (Tr. 29, L. 13 Davis) is a telegram from the President of the plaintiff company which states "We will close Brumley Ridge deal when our attorneys advise us to do so. They say judgment still outstanding on Brumley Ridge." The deeds from defendants to plaintiff were placed in escrow on June 2, 1955, (Bentley Tr. 44, L. 4) and the plaintiff was so notified. Exhibit 7 was the answer to the letter of Mr. Bentley advising the plaintiff that the deeds were in escrow. In addition, the plaintiff, through its president, Robert Yarber, verbally informed the attorney for the defendants, on or about April 17, 1955, that the defendants had a deal and that he could not understand why Davis was worried about it. (Tr. 45, L. 6-15 - Bentley). Also, Mr. Tom Metos, an officer of the plaintiff corporation and an attorney for the plaintiff corporation, in June or July of 1955, had a conversation with one of the defendants (Tr. 51 L. 9-10 Metos) wherein Mr. Metos testified (Tr. 36 L. 1): "He asked - I asked - rather, I mentioned to him that the judgment against the claim that Mallory and Edwards had hadn't been verified and that due to that fact why we were not going through with the contract until it was later cleared up; and we later changed our minds and demanded our money back."

Thus it is clear from the uncontradicted testimony

that by the acts and statements and telegram of the plaintiff that it exercised its option to continue the contract for an additional year and, consequently, the defendants could not have been in default even under the plaintiff's theory.

POINT 3

THE TRIAL COURT'S CONCLUSION OF LAW AND JUDGMENT OF NO CAUSE OF ACTION ON PLAINTIFF'S COMPLAINT IS SUPPORTED BY THE UNDISPUTED EVIDENCE.

From what has been previously stated under Points 1 and 2 it is clear that the trial court's conclusion of law that plaintiff has no cause of action against the defendants is supported both by the evidence and the law and that there is no evidence to the effect that the plaintiff should recover against the defendants.

POINT 4

THE TRIAL COURT ERRED IN NOT GRANTING JUDGMENT TO THE CROSS-PLAINTIFFS FOR SPECIFIC PERFORMANCE OF THE CONTRACT BASED ON THE UNDISPUTED EVIDENCE.

The uncontradicted evidence is to the effect that the defendants had good title to the property and were ready to convey a good and sufficient title to the plaintiff under the terms of the agreement. Since there is no evidence to the contrary and since the agreement concerns real property, the defendants are entitled, by law, to a decree of specific performance against the plaintiff.

POINT 5

THE TRIAL COURT ERRED IN ITS FAILURE TO AWARD DAMAGES TO THE CROSS-PLAINTIFFS CONTRARY TO THE UNDISPUTED EVIDENCE.

The evidence is clear and uncontradicted that the defendants spent money in reliance upon the contract and in reliance upon the assurance on the part of the plaintiff that the plaintiff would perform. The evidence is clear that the defendants expended the sum of $11,364.75 in reliance on the contract and in reliance upon the performance of the plaintiff (Tr. 31, 32 - Davis). The evidence is undisputed that defendants made the foregoing expenditures in reliance upon the contract and based on said evidence the defendants are entitled to have judgment entered in the amount of said expenditures.

Respectfully submitted,

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