1973

Stanford B. Petersen and Carol A. Petersen v. Intermountain Capital Corporation and D. Spencer Nilson v. Stanford B. Petersen : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT
of the STATE OF UTAH

STANFORD B. PETERSEN and CAROL A. PETERSEN, his wife
Plaintiffs-Appellants,

vs.

INTERMOUNTAIN CAPITAL CORPORATION,
Defendant-Respondent.

D. SPENCER NILSON,
Plaintiff,

vs.

STANFORD B. PETERSEN, et. al.,
Defendant.

Case No. 12984

APPELLANT'S BRIEF

Appeal from Judgment of Third District Court for Salt Lake County, Honorable Stewart M. Hanson, Judge.

BACKMAN, BACKMAN & CLARK
RALPH J. MARSH
1111 Deseret Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

SPAFFORD & YOUNG
GAYLEN S. YOUNG, JR.
2188 Highland Drive
Salt Lake City, Utah
Attorneys for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

Page

TEXTS CITED

IN THE SUPREME COURT
of the STATE OF UTAH

STANFORD B. PETERSEN and CAROL A. PETERSEN, his wife
Plaintiffs-Appellants,

vs.

INTERMOUNTAIN CAPITAL CORPORATION,
Defendant-Respondent.

D. SPENCER NILSON,
Plaintiff,

vs.

STANFORD B. PETERSEN, et. al.,
Defendant.

Case No. 12984

APPELLANT'S BRIEF

NATURE OF CASE

This is an action for breach of an agreement to loan $20,000 within one year from the date of the agreement which was consolidated with an action between the same parties for foreclosure of a note and mortgage. This latter action was treated as a counterclaim.

DISPOSITION OF CASE BY LOWER COURT

The lower court dismissed the action for breach upon its merits based upon findings and conclusions that specific

performance had been waived, that performance was prevented and that the parties had entered an accord and satisfaction. The court further awarded a decree foreclosing the note and mortgage.

RELIEF SOUGHT ON APPEAL

The judgment dismissing the action for breach should be reversed with instructions to determine the amount of damages resulting from the breach and offsetting the amount due under the note and mortgage.

STATEMENT OF FACTS

On January 22, 1966 the plaintiffs, Stanford B. Petersen and Carol A. Petersen (hereinafter called Petersen), entered into a written agreement (Exh. 8-P) with defendant, Intermountain Capital Corporation (hereinafter called ICC), under which Petersen exchanged his interest in a motel for certain property located in Casper, Wyoming (hereinafter called the Wyoming property) and $30,000.00. The agreement further provided that ICC was to loan Petersen $20,000 within one year from the date of the agreement, the time within that year to be determined by ICC, to be repaid in three annual installments with nine percent interest and to be secured by a mortgage on the Wyoming property. (Para. 5, Exh. 8-P). The agreement also provided that time was "of the essence of this agreement" and that it "may not be altered or amended except by written agreement executed by all of the parties."

Petersen was in need of money during the entire year of the agreement and thereafter and John Whiteley, the president and manager of ICC, knew of his need for money (R. 43-44, 69, 71). The purpose of this loan provision in the agreement was to take care of some pressing financial obligations of Petersen (R. 43-44). Petersen contacted Whiteley several times during the year and regularly after the year expired to obtain the funds ICC had agreed to loan. Each time Whiteley responded that they didn't have the funds to make the loan. Finally, on April 5, 1967, a formal demand letter (Exh. 9-P) was sent to ICC by Petersen's attorney threatening legal action if the loan was not made. After receiving the letter Whiteley went to Petersen's home and again said he couldn't make the loan because he didn't have the money. (R. 48).

Petersen had already lost a dairy equipment business because of his lack of funds (R. 49) and had numerous obligations to meet in connection with that business. He had previously, in October of 1966, contracted to sell the Wyoming property to James S. Milliron for $67,200.00 under a Uniform Real Estate Contract containing the standard provision allowing the Seller to "secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bear-interest at the rate of not to exceed six percent." The balance due on the contract was $50,200.00 and it would have had a balance far in excess of the $20,000.00 that ICC was to loan. Therefore, there was still adequate security for the loan. Milliron, the Buyer under the Uniform Real Estate Contract, knew of Petersen's need to mortgage the

property to ICC and had no objection thereto (R. 49 65). Because of Petersen's immediate need for funds and ICC's failure to loan it to him as agreed, he approached Milliron about paying the contract off in cash for a discount. An agreement was signed by Petersen and Milliron on May 5, 1967 by which the $50,200.00 balance on the contract was discounted to $30,900.00 cash. With these funds Petersen was able to pay his pressing obligations but he suffered a loss of $19,300.00 in order to do so. Had ICC honored the agreement to loan $20,000.00, Petersen would not have discounted this contract (R. 60) and he would have mortgaged the Wyoming property to ICC in spite of the contract to Milliron (R. 67).

On May 12, 1967, soon after discounting this contract to Milliron, Petersen went to see Whiteley again. Whiteley then agreed to have ICC lend $5000.00 to Petersen to be secured by a mortgage on a home on Camino Way in Salt Lake City. No request was made that the Wyoming property be used as security for this loan. (R. 59, 62-63). At the time of this loan Petersen requested that ICC make the loan of the entire $20,000.00 but Whiteley again refused. Several times following the $5,000.00 loan, Petersen asked Whiteley about the additional $15,000.00. Each time Whiteley said he needed more time to get the other $15,000.00 (R. 63, 72-73).

The $5,000.00 loan was due in 60 days but was not paid. ICC didn't ask for any payment because Whiteley realized they had been slow in loaning the money. Much later ICC's auditor sent a request to Petersen to confirm the balance due on the loan. Petersen responded that he

felt he had been damaged by ICC's breach and that the loan would be offset against the damages suffered. No further action was taken until July 3, 1969 when Petersen filed this action for breach of the agreement of January 22, 1966. ICC answered the complaint and on August 20, 1971 assigned its $5,000.00 note and mortgage to D. Spencer Nilson. Nilson commenced a foreclosure action on December 20, 1971. Petersen filed an Answer and Counterclaim asserting that Nilson was not a holder in due course and was therefore subject to all defenses and claims against ICC and asking that the two actions be consolidated for trial. The lower court ordered the cases to be consolidated for trial and at the trial ICC and Nilson admitted that Nilson was not a holder in due course and that the case could be handled as a claim and counterclaim between Petersen and ICC (R. 35, 41-42). At the trial there was substantial evidence of loss to Petersen.

ARGUMENT

I.

THE LOWER COURT ERRED IN FINDING THAT THE LOAN OF $5,000.00 BY ICC TO PETERSEN ON MAY 12, 1967 WAS AN ACCORD AND SATISFACTION.

ICC has claimed in this action that the $5,000.00 loan was an accord and satisfaction with respect to its original obligation to loan $20,000.00. Yet, the phrase "accord and satisfaction" was never used by the parties at any time. It is important, therefore, to determine the definition of

the phrase. This court, in *Browning v. Equitable Life Assurance Soc. of the U.S.*, 94 Utah 532, 72 P. 2d 1060 (1937), *reh. den.*. 94 Utah 570, 80 P. 2d 348 (1938), has stated at 1068:

> An accord is an agreement between parties, one to give or perform, the other to receive or accept, such agreed payment or performance in satisfaction of a claim. The "satisfaction" is the consumation of such agreement. There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration. Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration. In this case we do not see the elements of an accord and satisfaction. True, there was a claim. It was filed and paid in accordance with demand with no dispute. If a doctor sends me a bill for $20.00 when it should have been $30.00 and I pay it, it is not an accord and satisfaction. It is merely a payment of less than I owe.

In this case there is no evidence of an agreement (that is—offer, acceptance and consideration) between ICC and Petersen to perform and accept anything different from their original agreement. There was no written agreement to accept the $5,000.00 loan in complete satisfaction of the obligation to lend $20,000.00. In fact the only testimony in the record indicates a positive intention of both parties that the original $20,000.00 was to be made in the future. Petersen's testimony on cross-examination was as follows from Page 63 of the record:

"Q. At the time of the $5,000.00 loan did you not ask him about the other $15,000.00?

A. I asked him about the whole $20,000.00. I says, 'Can you loan me the $20,000.00?' And he says, 'No.'

Q. All right. So he came up with $5,000.00, is that correct?

A. That is correct.

Q. And did you ask him about the additional fifteen periodically after that?

A. You say I asked him about the fifteen?

Q. Yes.

A. Yes, about a month later I asked him if he could still come up with the $20,000.00."

Whiteley's testimony on direct examination was as follows from Pages 71-73 of the record:

"A. After April 5th. We sat in his dining room and discussed this, and he was very nice about this, and he said, 'You have got to get me something just about as fast as you can and I need it badly, and this is why I have gone to the attorney.'

And I said, 'What is the least that you could get by with until we can do something better?'

And he said, 'Well, I really need $5,000.00.'

And I said, 'Then we will see that you get at least $5,000.00. Give me a few days to work on it and we will certainly come up with that much.'

Q. And did you?

A. We did.

Q. Did he say anything about this would solve his problem?

.....

A. He indicated at his home a day or two after we got the letter that the $5,000.00 would solve his problem at that time, and that we could take more time on the balance. Then when we gave him the check he said, 'Thanks, you have saved my life.'

Q. This was on May 12th?

A. Right.

Q. 1967? Were there other conversations after that time with Mr. Petersen concerning trying to get another $15,000.00 for him?

A. Yes, several times. I would get him on the phone or he would drop into the office, or he had a travel agency on Second South, I would drop in there to talk to him, and he would say, 'Are you ready on the other $15,000.00?'

Q. All right. And what would you respond?

A. And I said, 'Well, we would like a little more time. We are trying to get you that money and will if we can.'

And he said, 'Fine. Let me know when you can.'"

This is the only evidence in the record bearing on the question of accord and satisfaction. "What is the least that you could get by with until we can do something better" and "we could take more time on the balance" certainly negates any claim of accord and satisfaction. And the repeated inquiries concerning the other $15,000.00 and requests for "a little more time" recognizes that the original obligation was still considered binding by both parties. Furthermore, no consideration was given by ICC

to support a new agreement and there was no dispute about the amount or terms of the obligation the settlement of which would constitute consideration. Therefore, neither the facts nor the law support a finding of accord and satisfaction.

This case is similar to *Bennett v. Robinson's Medical Mart, Inc.*, 18 Utah 2d 186, 417 P. 2d 761 (1966), where this court held that acceptance of a check marked "payment in full of the account stated below" was not an accord and satisfaction. The court stated at 764:

> "Plaintiff testified that upon receipt of the check he went to the Defendants and discussed the matter, telling them that he did not regard it as payment in full and the dispute between the parties over the matter is what precipitated this lawsuit. He was unquestionably entitled to the money he did receive; and the dispute was as to whether he had more coming. The dispute negates any accord...."

Likewise, Petersen accepted the $5,000.00 loan, although there was no indication that it was "payment in full." The conversations between Petersen and Whiteley show that both of them recognized that the original agreement was still to be performed. The failure to perform that agreement caused the filing of this lawsuit by Petersen. He was unquestionably entitled to the $5,000.00 loan he received (though he was entitled to more favorable terms); the lawsuit was as to whether he had more coming or damages in lieu thereof. This, too, negates any accord. Also of relevance is the fact that the original agreement could not be "altered or amended except by written agreement." There

was no written alteration or amendment and therefore the original agreement was still in effect. The lower court's determination that there was an accord and satisfaction was therefore in error.

II.

THE LOWER COURT ERRED IN FINDING THAT SPECIFIC PERFORMANCE OF THE AGREEMENT OF JANUARY 22, 1966, WAS "WAIVED AND/OR EXTENDED" BY THE ACTIONS OF THE PARTIES.

Waiver is usually defined as the voluntary relinquishment of a known right. BLACK, LAW DICTIONARY, at 1752 (4th ed. 1951). There is no evidence in the record indicating that Petersen voluntarily, or otherwise, relinquished his right to the $20,000.00 loan. Indeed, his repeated demands, both during and after the year expired, that the loan be made evidence the contrary intention. (R. 46-47, 69, 70). There is no indication anywhere in the record that Petersen was waiving his rights or extending the date for performance. The agreement provided expressly that time was "of the essence of this agreement". Performance by January 22, 1967 was critical to Petersen because of the pressing nature of his financial obligations and this fact was known to and admitted by Whiteley. All of these facts support only the conclusion that Petersen at all times insisted on full and timely performance and none of them support even an inference of waiver or extension by Petersen. The later conversations between Petersen and Whiteley quoted in Point I above

also show that full performance was expected by both parties even after the breach. Again the requirement that any alterations or amendments to the agreement be in writing would preclude any waiver or extension of specific performance except by a new written agreement. It follows that the lower court's conclusion that specific performance was waived or extended was without support in the record and therefore in error.

III.

THE LOWER COURT ERRED IN FINDING THAT PETERSEN PREVENTED ICC FROM PERFORMING THE AGREEMENT TO LOAN $20,000.00 by JANUARY 22, 1967 BY CONTRACTING TO SELL THE WYOMING PROPERTY TO JAMES S. MILLIRON IN OCTOBER, 1966.

Because of Petersen's pressing need for funds during 1966 and because of the loss he had suffered on the Wyoming property he purchased from ICC (R. 55-57), Petersen executed a Uniform Real Estate Contract with James S. Milliron, in October, 1966, under which he agreed to sell the Wyoming property to Milliron for $67,200.00 with the balance, after down payment, of $50,200.00 payable in annual installments over 25 years. No title to the property was conveyed to Milliron. Petersen was only obligated to convey title after the contract was paid in full which would have taken 25 years. ICC's contention is that, as a matter of law, this contract sale of the Wyoming property prevented ICC from loaning the $20,000.00 to Petersen since the $20,000.00 loan was to be secured by a mortgage

on the Wyoming property. Without any evidence, other than the contract itself (Exh. 4-D), the lower court found that Petersen had thereby prevented ICC from performing its agreement to loan the $20,000.00.

The contract sale to Milliron, of course, did not prevent ICC from making the loan to Petersen. Neither Whiteley nor anyone else connected with ICC even knew about the sale to Milliron (R. 70) and this obviously did not prevent his performance. The implication by the lower court is that the contract sale to Milliron made the Wyoming property unavailable as security for the loan to be made by ICC. Assuming this to be true, *arguendo*, Petersen might have provided other security for the loan which would have satisfied ICC. Whiteley testified that he would have considered other security for the loan and then displayed an amazing lack of candor when asked if he would have accepted better security than the Wyoming property. His response was, "I doubt it." (R. 74). It is obvious from the testimony of both parties and from the purpose of the original agreement that the loan of $20,000.00 to Petersen was the essence of the agreement while the security for the loan was not. In fact ICC did accept other security for the $5,000.00 loan when it "partially" performed and made no request that the Wyoming property be used as security. (R. 59)

Had Whiteley told Petersen that he had the $20,000.00 and would make the loan as agreed, any problem in obtaining the Wyoming property as security would have been revealed. If other acceptable security could not be obtained, then Petersen would have had the burden of

clearing up the problem on the Wyoming property. Still assuming that the contract sale to Milliron made the property unavailable as security, Petersen could have requested Milliron to make the property available for this purpose. The testimony shows that Milliron knew of this need and had already agreed to it (R. 49, 65). Petersen could have gone further and repurchased the property from Milliron or given him some consideration to make the property available as security for the loan from ICC. The point is that this was Petersen's problem (which he had already solved) and had nothing whatsoever to do with the obligation of ICC. In no conceivable way did this prevent performance by ICC. Whiteley explained that ICC's failure to perform was only due to its own inability or perhaps, if he was not candid on this point too, its own unwillingness and refusal to perform.

The above arguments assume that the contract sale to Milliron made the Wyoming property unavailable as security. The fact is, however, that this contract sale in no way prevented Petersen from mortgaging the property to ICC. Title to the property was still in Petersen and would not have been conveyed to Milliron for 25 years when the contract was paid in full. The contract contained the standard clause giving Petersen the "option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder," which was $50,200.00, well in excess of the contemplated $20,000 loan. It is common practice under these Uniform Real Estate Contracts for the seller to mortgage the property sold to banks or other lenders to leverage

already making under the contract and his interest rate would be no greater than he already agreed to pay. That purpose doesn't apply in this case since the contemplated mortgage to ICC would be paid off long before the contract (3 years as opposed to 25 years). Furthermore, should Milliron decide to payoff his contract and demand a deed prior to the time Petersen had repaid the mortgage to ICC, a portion of the repayment could be applied by Petersen to ICC's loan in order to obtain a release of the mortgage and convey clear title to Milliron.

ICC's argument also overlooks the fact that Petersen could have mortgaged the Wyoming property to ICC even if this caused him to breach his contract with Milliron. That, again, is a problem only for Petersen, which he may or may not be able to resolve with Milliron. In this case he had already resolved that matter with Milliron. But, had Petersen not resolved it, Milliron's remedy against Petersen would have been suit for breach of a covenant of their contract and for damages suffered, if any. That matter between Milliron and Petersen and the consequences to Petersen, could have no consequence to ICC. Even assuming Petersen could be required by Milliron to obtain a release of the mortgage to ICC, that could only work to the advantage of ICC in getting its loan paid off since it could refuse to release its mortgage until it was paid in full. The fact that the performance by A an agreement with B causes a breach of a separate agreement between A and C does not prevent the performance of the first agreement by A. Further, it does not excuse performance of the first agreement by B. This is certainly the case

where, as here, the agreement between A and C was made subsequently to the agreement between A and B. It is true that some cases hold that a contract which is entered for the purpose of effecting a breach of a prior inconsistent contract is void and unenforceable by either party. However, all of these were entered with knowledge of the prior inconsistent contract and for the purpose of causing a breach thereof. 17 Am. Jur. 2d Contracts Par. 187; Annotation, 83 A.L.R. 32. These cases are not authority for invalidity of the first agreement. As applied to this case if applicable at all, these authorities support the invalidity of the later contract between Petersen and Milliron since that agreement, so ICC argues, causes the breach of the prior inconsistent agreement. Therefore, the Milliron agreement is void and presents no obstacle to the performance of the Petersen-ICC agreement. No authorities have been found, nor could they find any support in logic which hold the prior agreement unenforceable by reason of the later inconsistent agreement.

The Wyoming property was available as security for a loan from ICC at all times during the year specified in the agreement and thereafter until it was obvious that ICC was not going to perform. Title to the Property was not conveyed until May 5, 1967, one month after Whitelee had refused to make the loan in response to the demand from Petersen's attorney. The contract sale to Milliron still left $50,200.00 equity in the property to secure a $20,000.00 loan. ICC had available all the security it needed and bargained for. It was not "prevented" or excused from performance by the contract sale to Milliron and the

lower court's holding to this effect should be reversed.

IV.

THE LOWER COURT SHOULD HAVE CONCLUDED THAT ICC BREACHED ITS AGREEMENT TO LOAN $20,000.00 TO PETERSEN BY JANUARY 22, 1967, OR THEREAFTER, AND SHOULD HAVE AWARDED THE RESULTING DAMAGES.

The Lower Court dismissed Petersen's complaint for breach of the agreement to loan $20,000.00 to Petersen apparently on the basis of its determination that the $5,000.00 loan was an accord and satisfaction, that specific performance had been waived or extended and that Petersen "prevented" ICC from performing. Points I, II and III above show that the court was in error in making these determinations and therefore its dismissal of Petersen's complaint has no basis.

The facts necessary to establish Petersen's cause of action are clearly admitted in ICC's Answer and in the evidence. The agreement of ICC to loan $20,000.00 to Petersen by January 22, 1967 and the failure to perform that agreement are admitted in the Answer (R. 3). The evidence of both parties shows a breach of the contract. Petersen introduced substantial evidence of loss and damage to him directly resulting from ICC's breach of the agreement. ICC produced nothing to controvert any of this. The evidence shows direct cash losses of $19,300.00 from the necessity to discount the Milliron contract to raise cash and of $10,000.00 from loss of Petersen's dairy

equipment business. The evidence and exhibits further showed damage to Petersen's credit for which further amounts should be awarded. Of course, the $5,000 loan by ICC to Petersen should be offset against these damages and the balance awarded to Petersen as net damages resulting from breach of the agreement by ICC. Since this evidence is before this court, the order reversing the lower court's judgment should include directions to award damages in accordance with the above evidence.

It should be pointed out that Petersen had already suffered his damages prior to May 12, 1967 when the $5,000.00 loan was made. A loan of $20,000.00 by January 22, 1967 would have prevented these damages. The evidence and exhibits indicate that the weeks following January 22, 1967 were the most difficult for Petersen. Finally, in hopes of pressuring ICC into performing its agreement to help Petersen out of his financial difficulty, he had his attorney send a demand letter to ICC on April 5, 1967. This produced an immediate reaction from Whiteley but no loan and no promise of a loan in the near future. The funds still were not available, according to Whiteley. It was obvious to Petersen that ICC was not going to perform its agreement. He had heard that same story from Whiteley for a year. He had no choice but to find some other means out of his difficulty and the discount of the contract to Milliron for cash, and the consequent loss to him, was the only means available to him. Whiteley's belated decision to loan $5,000.00 to Petersen on May 12, 1967, after Petersen's loss had occured, was too little and too late to prevent the consequences of his

breach. He, of course, admitted having knowledge of Petersen's desperate financial situation and could therefore have foreseen the consequences of his breach. In view of all this Petersen was certainly justified in withhholding repayment of the $5,000.00 loan until ICC had responded for the damages which it caused.

CONCLUSION

The lower court made several findings of fact that find no support in the evidence. Many of the conclusions of law find no support in the findings of fact. All of these were challenged by Petersen in his motion to amend the findings and conclusions. The lower court summarily refused to make any amendments even though a cursory reading of the transcript shows the obvious error in the findings and conclusions. This brief has considered only those errors considered most detrimental and basic to the judgment of the lower court.

The record contains no evidence supporting the conclusion that an accord was agreed to by Petersen and ICC. There was no offer, no acceptance and no consideration. An accord is a new agreement which must contain all the basic elements necessary to support a contract. None of that appears here and in fact all the evidence shows that both parties were looking to the original agreement even after the alleged accord and satisfaction took place. Much of the same evidence clearly establishes that there was no voluntary, or otherwise, relinquishment of a known right by Petersen. Therefore, there could be no waiver or extension of specific performance of the agreement. Since the

agreement expressly provided that alterations or amendments must be in writing, the alleged accord and satisfaction and waiver or extension would be of no effect anyway. Further, the contract sale by Petersen to Milliron in no way prevented Petersen from using the Wyoming property as security for the loan from ICC. Petersen still had title to the property, his agreement with Milliron allowed such a mortgage, Milliron was aware of and had consented to the mortgage, and even a breach of that contract by Petersen would not prevent Petersen from mortgaging the property to ICC. This in no way excused performance by ICC. Whiteley's own testimony proves that his failure to perform was either ICC's inability or unwillingness to perform and was not related to any action of Petersen. ICC had the burden of proof on all of these matters and has failed to carry that burden. Therefore, the lower court's judgment should be reversed with directions to enter judgment in favor of Petersen and award damages in accordance with the evidence.

Respectfully submitted,

BACKMAN, BACKMAN & CLARK

By: _____

Ralph J. Marsh