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Robert L. McMullin v. Lynwood F. Shimmin and Jacquie A. Shimmin : Brief of Respondents

Utah Supreme Court

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Cotro-Manes & Cotro-Manes; Attorneys for Respondents and Defendants;

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UNIVERSITY UTAH

AUG 6 1959

IN THE SUPREME COURT
of the
STATE OF UTAH

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ROBERT L. McMULLIN,

Appellant and Plaintiff,

vs.

LYNWOOD F. SHIMMIN and
JACQUIE A. SHIMMIN,

Respondents and Defendants.

Clerk, Supreme Court, Utah

Case No.
8998

BRIEF OF RESPONDENTS

COTRO-MANES & COTRO-MANES

*Attorneys for Respondents
and Defendants*

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IN THE SUPREME COURT of the STATE OF UTAH

ROBERT L. McMULLIN,

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Plaintiff's statement of facts in his brief is substantially correct. However, exception is taken to the last sentence of these facts wherein reference is made to the trial court's ruling. The court's ruling was that the plaintiff was not entitled to maintain an action for specific performance where he had sold and conveyed away the property and was therefore unable to specifically perform himself.

STATEMENT OF POINTS

POINT ONE. Plaintiff cannot enforce specific performance of a contract to sell land where subsequent to the contract's execution he sold and conveyed all the property covered by the contract to a third party.

POINT TWO. Plaintiff is barred after conveying the property to a third party from recovering damages as an incident to the equitable action of specific performance.

POINT THREE. Plaintiff having retained the earnest money is barred from recovery in an action at law for damages.

ARGUMENT

POINT ONE

PLAINTIFF CANNOT ENFORCE SPECIFIC PERFORMANCE OF A CONTRACT TO SELL LAND WHERE SUBSEQUENT TO THE CONTRACT'S EXECUTION HE SOLD AND CONVEYED ALL THE PROPERTY COVERED BY THE CONTRACT TO A THIRD PARTY.

The law is clear and unequivocal that the vendor of land cannot maintain an action of specific performance to compel the vendee to perform the purchase of said land where the vendor has sold or conveyed the property to a third party.

“ * * * it has been repeatedly held that a vendor cannot enforce specific performance, where subsequent to the execution of the contract he has conveyed a

substantial part of the property therein embraced to a third person."

Suburban Improv. Co. v.
Scott Lumber Co., 4th Cir., 1933,
67 F. 2d 335, 90 A.L.R. 330

Additional cases citing this proposition of law are found in the following annotations: 4 A.L.R. 408, 57 A.L.R. 1253, 1263, 90 A.L.R. 337. The recent case of First National Bank vs. Laperle, 117 Vt. 144, 86 A. 2d 635, 30 A.L.R. 2d 958, clearly summarized the law when the court ruled:

"A decree for specific performance in favor of a vendor in a land contract cannot properly be granted after full conveyance of the premises in question."

The Utah Supreme Court in the case of Foxley v. Rich, 35 U. 162, 99 P. 666, ruled that plaintiff's conduct of selling the property prior to the rendition of the decree for specific performance would constitute a repudiation of the contract by the plaintiff and therefore he would be precluded from maintaining an action for specific performance. The court said, *inter alia*, at page 670.

"But the true principle upon which the decisions rest is that the effect that such a conveyance will be given depends upon the intention of the parties, and upon whether the title is in fact placed beyond the control of the vendor so his acts amount to a repudiation of his contract. If such is the effect, the vendee need not perform."

The facts in the case now before the court show that the land in question was sold and conveyed by the plaintiff to third parties after the commencement of the action, but months before the pre-trial on November 7, 1958. R. 13, R. 22. The

record further shows that the consideration paid by the new purchasers was in excess of the amount that the defendants were to pay for the same property.

“Specific enforcement will not be decreed if the plaintiff has himself committed a material breach unless refusal of the decree will effectuate an unjust penalty or forfeiture.”

Restatement of Law, Contracts, Sec. 375

The plaintiff, having received a greater amount from the new purchasers than he would have from the defendants, cannot be heard to say that the refusal to grant the decree will effectuate an unjust penalty or forfeiture.

POINT TWO

PLAINTIFF IS BARRED AFTER CONVEYING THE PROPERTY TO A THIRD PARTY FROM RECOVERING DAMAGES AS AN INCIDENT TO THE EQUITABLE ACTION OF SPECIFIC PERFORMANCE.

Under the common law, specific performance being an equitable action precluded the equity court from awarding damages as an incident to an action for specific performance. However, this situation was changed by the passage in England of what is known as the “Lord Cairn’s Act.” (Chancery Amendment Act, 21 and 22 Veit., Ch. 27, Sec. 1). The application of this act has lead to an equity court awarding damages in an action for specific performance as an adjunct to or in lieu of a decree of enforcement, thereby giving complete adjudication

in one action. The law as practiced today has generally allowed the inclusion of a prayer for damages as an alternative to specific performance in an action in equity for specific performance.

However, as stated in 49 Am. Jur. 196, Specific Performance, Sec. 173:

"The awarding of damages by a court of equity in a suit for specific performance in lieu of a decree of performance is exceptional, for the very reason that jurisdiction of such suit depends on the essential fact that a judgment at law for damages would not be an adequate remedy, and jurisdiction to award damages is exercised only under special circumstances, to prevent injustice."

A plaintiff, in making an election to sue for specific performance instead of an action at law for damages, must of necessity proceed through the equitable action with clean hands.

Pomeroy, in his work, "Specific Performance of Contracts," 3rd Ed., Sec. 354, p. 762, states:

" * * * the plaintiff must perform all the terms on his part, and that the party coming into a court of equity for its relief must himself do equity."

If the plaintiff has made specific performance impossible due to his own actions, the equity court cannot then accord that plaintiff equitable relief or any relief which arises out of the equitable action.

"Ordinarily, a bill for specific performance will not be retained for the assessment of damage where the plaintiff fails to make out a case for specific perform-

ance and no other special equity is shown which will support jurisdiction of the court * * * ”

49 Am. Jur. 196

Specific Performance, Sec. 173

The law is clear that where the plaintiff knows at the time of bringing the action that specific performance is impossible, there can be no award of damages, but the plaintiff will be left to his remedy at law. Pomeroy's Specific Performance of Contracts, 3rd Ed., Sec. 475, pp. 957, 958.

So, too, where the plaintiff, after the commencement of the action, has voluntarily done an act which makes specific performance impossible, through no fault of the defendant, the plaintiff is precluded from continuing on his action for specific performance. He must then either dismiss his action and start anew or amend his pleadings in conformity with the rules on civil procedure to sue in an action at law for damages.

There is nothing under the rules of civil procedure which would preclude the plaintiff from amending his pleadings. However, his failure to amend and his affirmative stand on his pleadings, then constitutes an election, upon which election the plaintiff is then bound by any subsequent rulings of the court.

An examination of plaintiff's pleadings reveals that the plaintiff proceeded in this action on one theory and only one theory, that of specific performance. Rule 8 of the Utah Rules of Civil Procedure allows a plaintiff to state inconsistent claims or counts in his complaint and the whole intent of the Rules is to allow free amendment of pleadings. However,

where plaintiff chooses to stand on his pleadings, then an election of remedies occurs and the plaintiff is bound by this decision.

The plaintiff cites the Utah case of Salt Lake City vs. Industrial Commission, 81 U. 203, 17 P. 2d 239, in support of his contention that he has not made an election of remedies. The Supreme Court, in that case, ruled:

"While there is some conflict in the adjudicated cases as to the effect of the mere commencement of an action, the authorities are quite generally agreed that it is the first decisive act of election that is binding and that subsequent acts may not be said to constitute an election."

In a Utah case which is factually more closely allied to the case now before the court than the Salt Lake City case, the Supreme Court held:

"The true rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must be actually bringing an action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent remedies. 20 C. J. 19-37 and cases there cited. With such elements present, an election once deliberately made by the institution of a suit, by which the remedy is sought to be recovered, is final and his failure to secure satisfaction by means of the remedy which he has adopted furnishes no legal reason to permit him to resort to the other." (Citing cases).

Cook vs. Covey-Ballard Motor Co.
69 U. 161, 253 P. 196

Additional Utah cases on election appear in the annotation in 6 A.L.R. 2d 80.

The record discloses that plaintiff did not in fact attempt to amend his pleadings up to and including the date of the hearing on his motion to alter judgment. This failure constitutes an election to stand on the equitable action. Plaintiff did this because of the ruling of the court in the *Andreasen vs. Hansen Case*, U., 335 P. 2d 404, which ruling bars the plaintiff from maintaining an action for damages because of his failure to tender back the earnest money to the defendants. The plaintiff seeks to maintain his equitable action for specific performance and obtain damages in lieu of enforcement of the contract, and thereby go around the *Andreasen case*. However, as stated above, the law is that where the plaintiff has, through his own conduct, made specific performance impossible, the action will not be retained by the courts for assessment of damages which the plaintiff may have suffered.

“Pursuant to the principle that a court of equity once having properly acquired jurisdiction in a suit for specific performance will make a complete adjudication of all matters properly presented and involved in the case, the court will in proper cases where, *through no fault of the plaintiff*, specific performance cannot or will not be decreed, grant, in lieu thereof, monetary damages which the plaintiff may be entitled to recover at law in an action for breach of contract.”

49 Am. Jur., 195, Specific Performance, 172
(Emphasis ours)

49 Am. Jur. 197, Specific Performance, Sec. 173, states:

“Even when the plaintiff has made out a proper case

for the retention of his bill and the awarding of damages in lieu of a specific performance, the court will not grant that substituted remedy unless it is requested, or unless damages are claimed."

While it is true that plaintiff in his prayer for relief did request damages, in the body of the complaint itself there are no allegations of any special damages as required by Rule 9(g) of the Utah Rules of Civil Procedure, which provides:

"Special Damage. When items of special damages are claimed, they shall be specifically stated."

The only damages alleged by plaintiff in his complaint is for a reasonable attorney's fee. As ruled by this court in the Andreassen case:

"The award of attorney's fees is conditioned upon the necessity for incurring them and upon the plaintiffs being justified in their demands."

In the case now before the court, the plaintiff's conduct in selling the property to a third party is evidence of the fact that the action for specific performance was not necessary, and that the incurring of attorney's fees for the purpose of commencing an action of specific performance was completely unnecessary.

Further, the damages asked for in plaintiff's prayer for relief, "that plaintiff have judgment against defendants for the difference between the contract price and the fair market value of the property," limits the amount of damages that the plaintiff could recover, as the court cannot go beyond plaintiff's demands and award greater damages, especially where the plaintiff at no time attempted to amend his pleadings to incorporate claims of greater damage.

What, then, is the amount of the damage that the court could award? The contract price of the property was \$17,500.00. The property was sold by plaintiff for \$17,950.00. This court, in the recent decision of Vrontikis Bros. et al vs. State Tax Commission, ruled:

“The accepted formula for determining fair market value is * * * what would a purchaser willing to buy but not required to do so, pay and what would a seller willing to sell but not required to do so ask.”

Certainly, the plaintiff cannot say that he was under any compulsion to sell this property, and, as a third party bought the property, as a matter of law it may be said that the fair market value of the property in question was \$17,950.00.

What, then, has the plaintiff suffered? There was no need to retain the services of an attorney for an action of specific performance, when the plaintiff's conduct points out that he never did have the intention of enforcing specific performance against the defendants, and, as to damages, the plaintiff received \$450.00 more for his property than he would have received had he sold it to the defendants.

POINT THREE

PLAINTIFF HAVING RETAINED THE EARNST MONEY IS BARRED FROM RECOVERY IN AN ACTION AT LAW FOR DAMAGES.

The case now before the court stems from a factual situation similar to the Andreasen vs. Hansen case. The same earnest money receipt and offer to purchase used in the Andreasen

case was used in this matter and the same representations that if the purchasers did not want the house the money paid would be forfeited and the matter closed. Like in the Andreasen case, the plaintiff in this matter chose to retain the earnest money (\$100.00), and has never tendered its return to the defendants. This retention constitutes the exercising of the option by the vendor (plaintiff) to retain the earnest money as the agreed and liquidated damages.

Plaintiff in his brief alleges that the trial court based its decision on the Andreasen case. This is not borne out by statement of the trial court made during the argument on the motion to alter judgment.

“Well, the motion to alter the judgment will be denied, and the ruling of the court on November 7 will be affirmed because it appears that the plaintiff has put it beyond himself to specifically perform at this time.”

R. 23

The issue in this case is not whether or not plaintiff should have tendered back the earnest money, because plaintiff has not amended his pleadings to come in damages. The issue of this case is whether or not plaintiff by having sold and conveyed the property is barred from maintaining his equitable action on specific performance. Of course the Andreasen case is in issue as far as its effect on the matter if the plaintiff had amended his pleadings so as to come in damages, or if plaintiff's actions can be construed to be an amendment of his pleadings. If there has been an amendment effectuated, the pleadings and record do not so indicate.

SUMMARY

The plaintiff, by selling and conveying the property he was seeking to compel the defendants to purchase by specific performance of a contract, has precluded the court from decreeing specific performance or awarding damages in lieu of the specific performance. The plaintiff is barred by having retained the earnest money paid to him by the defendants from maintaining an action at law for damages. The pleadings and the record show that the plaintiff in any event has not been injured in any way by the defendants, but in fact has profited some \$450.00 by the defendants' refusal to purchase the property. Plaintiff is not entitled to any relief and the trial court was correct in dismissing plaintiff's complaint for specific performance with prejudice.

Respectfully submitted,

COTRO-MANES & COTRO-MANES

*Attorneys for Respondents
and Defendants*