1973

# Stanford B. Petersen and Carol A. Petersen v. Intermountain Capital Corporation and D. Spencer Nilson v. Stanford B. Petersen : Brief of Respondent

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

## BRIEF OF RESPONDENT

**Appeal from District Court of Salt Lake County, Utah**
**Honorable Stewart M. Hanson, Judge**


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# BRIEF OF RESPONDENT

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## STATEMENT OF NATURE OF THE CASE

Plaintiffs, Petersens sued Defendant, Intermountain Capital Corporation, for damages by reason of an alleged breach of contract. Involved in the transactions between the parties was a Promissory Note and Mort-

gage, executed by Plaintiffs in favor of Defendant. The foreclosure of the Note and Mortgage was later brought in a separate case and the lower court consolidated the two cases, treating the second case as a counterclaim.

## DISPOSITION IN THE LOWER COURT

Judgment was granted by the trial court in favor of Defendant on the counterclaim for the amount of the Note, interest and attorney's fees and a foreclosure of the Mortgage. The Plaintiffs' Complaint was dismissed upon its merits and with prejudice.

## STATEMENT OF FACTS

As in Plaintiffs-Appellants' Brief, Plaintiffs shall be referred to as Petersen and Defendant, Intermountain Capital Corporation, shall be referred to as ICC.

Appellants' Statement of Facts is incomplete and must be enlarged.

In the exchange of properties between Petersens and ICC, as shown in the January 22, 1966 agreement (Exh. 8-P), there was a provision (Paragraph 5) contemplating a future loan of $20,000.00 within one year, and with ICC solely to determine the time, and providing for a Promissory Note at 9 per cent per annum to be paid in three equal annual installments with a *First* Mortgage on the Wyoming Properties as the security. The Wyoming Properties were involved in the exchange

agreement, known by ICC and valued at least in the sum of $67,200.00 (Exh. 4-D).

Money was very tight, in fact the tightest money market in the history of the country, and not available to loan by ICC to Petersen during 1966 and early 1967 (R. 46, 47, 48, 59, 61, 70) although attempts were made by ICC to help and to offer some of their receivables, or their other property, to Petersen to try and generate the funds, but each time Petersen indicated that he could wait. These conversations also extended beyond the years time of January 22, 1967 (R. 70).

On April 5, 1967, a demand was made by letter to ICC to loan within seven days the $20,000.00 to Petersen or Petersen would either declare a forefeiture of the January 22, 1966 Agreement or institute a legal action for specific performance or damages (Exh. 9-P). Within a day or two after receiving the demand letter, Mr. Whiteley of ICC went to the home of Petersen and asked what the least he could get by with until they could do something better, and Petersen responded that he really needed $5,000.00. Mr. Whiteley then promised to come up with at least $5,000.00, which was arranged for and consummated on May 12, 1967 (R. 71, 72). That $5,000.00 Note was secured by a Mortgage on a Salt Lake City property rather than the Wyoming Property to accommodate Petersen. Mr. Whiteley had requested the Wyoming Property be used as security but Petersen indicated there was not time to get a title report (R. 74, 75).

Over two years later, on July 7, 1969, Petersen filed their law suit for damages against ICC, after ICC's auditor had requested confirmation of the $5,000.00 Note from Petersen, which had not been paid (R. 73). No effort was made to bring that case to trail until suit was brought on the $5,00.00 Note in December 1971, after which time the two cases were consolidated.

On October 1, 1966, almost four months before expiration of the year provided for in the January 22, 1966 Agreement, Petersen sold the Wyoming Properties under a Uniform Real Estate Contract to James S. Milliron, with a $17,000.00 credit or down payment and $50,2000.00 to be paid over a period of years at $3,600.00 per year with interest at 6 per cent per annum. Paragraph 6 of said contract also showed the existence of an encumbrance and obligation against the properties in favor of the Bank of Salt Lake in the sum of $12,000.00 (Exh. 4-D).

Furthermore, in January 1967 Petersen had talked with Milliron about discounting the contract for cash (R. 49, 50). On May 5, 1967, seven days before the $5,000.00 loan was made to Petersen by ICC, Petersen in fact discounted the contract to Milliron for cash and had no further interest or security in the Wyoming Properties to pledge to ICC (Exh. 16-P, R. 50).

None of these facts concerning Milliron was made known to ICC by Petersen, and ICC was not otherwise aware of these facts until long after May 12, 1967 (R. 63, 73).

In addition, it was for the first time learned at the trial of these cases by ICC and their counsel that at the time of the $5,000.00 loan on May 12, 1967 by ICC, Petersen simply never intended to pay back that $5,000.00 loan (R. 66, 67). Further, ICC would not have made the loan of $5,000.00 to Petersen had Petersen disclosed these facts (R. 73, 74).

## ARGUMENT

### POINT I

### THE TRIAL COURT DID NOT ERR IN FINDING THAT THE ACTIONS OF THE PARTIES WAIVED AND/OR EXTENDED SPECIFIC PERFORMANCE OF THE JANUARY 22, 1966 AGREEMENT, AND THAT THE PROMISSORY NOTE AND MORTGAGE EXECUTED IN EXCHANGE FOR $5,000.00 CONSTITUTED AN ACCORD AND SATISFACTION.

Appellants Points I and II of their argument shall be treated and answered together in respondent's Point I. However, it should be particularly noted that if the lower court correctly found on any *one* of the points that appellants assign as error, to-wit; (1) That the conduct of Petersen created an impossible situation, which would and did prevent ICC from performing the January 22, 1966 agreement as to the $20,000.00 loan ,or (2) that the $5,000.00 note and mortgage dated May 12, 1967

constituted an accord and satisfaction, or (3) that specific performance by ICC of the January 22, 1966 agreement was waived and/or extended by the actions of the parties, then the trial court's decision of dismissing Petersens case for damages for breach of contract and awarding judgment in favor of ICC on their note and mortgage must be upheld by this court.

The trial court simply found no basis for breach of the January 22, 1966 agreement, as far as ICC was concerned. In that agreement (Exh. 8-P) paragraph 5 it states as follows:

> "Intermountain also agrees to loan Petersen $20,000.00 within one year from the date of the execution of their agreement. The time that said loan is to be made within said one year period shall be determined solely by Intermountain. Said indebtedness shall be evidenced by a promissory note providing for the payment of the principal amount of $20,000.00 plus interest at the rate of 9% per annum on the unpaid balance in three (3) equal annual installments. Payment of said indebtedness shall be secured by a first mortgage on the Wyoming properties."

This paragraph 5 is the only portion of the entire agreement that is in controversy. It was a promise by ICC to loan money in exchange for a return promise by Petersen to give a *first* mortgage on the Wyoming properties as security and to be paid back in 3 annual payments at 9% interest.

It is apparent from the facts in the case that the parties by mutual consent, or by their actions intended

and actually did extend the time of performance of these promises beyond the years time of January 22, 1967, mentioned in said paragraph 5 (R. 46, 47, 59, 61, 62, 70). Counsel for appellants seems to admit this fact also as stated in his Brief at pages 7 to 9 wherein the conversations between the parties were noted. Then, in the last paragraph on page 9 counsel states:

> "The conversations between Petersen and Whiteley show that both of them recognized that the original agreement was still to be performed."

Also in the record at page 70, lines 18 to 26, Mr. Whiteley testified as follows:

> "So we were in bad circumstances for working capital, and we explained this to Mr. Petersen, and I know there were several meetings after the years time when he indicated that he needed the money and he needed it badly, and at each time we told him we were doing all we could and we were expecting to have some money in and we hoped that we would be able to handle it but could he please wait a little longer. And on each occasion he said, 'alright, let me know when you can do something. I will wait.' "

It is also obvious that Petersen had waived and/or extended specific performance of the $20,000.00 loan promise beyond January 22, 1967, by his letter, through his attorney, to ICC of April 5, 1967 (Exh. 9-P). The letter states as follows:

> "Demand is hereby made upon you to advance $20,000.00 to the Petersens according to the terms of the agreement within seven days from

> the date of this letter. In the event you fail to do so, Petersens will either declare a forfeiture of the agreement and proceed to regain their interest in the Travelodge Motel, or institute legal action for specific performance or damages."

In other words ICC was given 7 days from April 5, 1967 to comply with the demand and to make arrangements with Petersen. ICC through Whiteley, thereupon made arrangements, within a matter of 2 days, to satisfy Petersen with a promise to come up with $5,000.00 as a loan. This was then consummated by May 12, 1967.

Consequently, there was no breach by ICC of the January 22, 1966 agreement, for the parties had acquiesced in or consented to an extension of and/or a waiving of the time of performance, at least to May 12, 1967, when the $5,000.00 was loaned. It is also obvious that after May 12, 1967, there was no way that ICC could have breached paragraph 5 of the agreement mentioned, for Petersen had in fact repudiated said paragraph 5 in doing away completely with the Wyoming properties, the security upon which the $20,000.00 loan was to be based, as of May 5, 1967 (Exh. 16-P, R. 50). There is therefore ample evidence from the facts and testimony in this case to support the trial courts findings and conclusion on this point.

It is also well settled in the law that there may be a waiver by approval or acceptance of performance different from the agreement made. In 17 Am. Jur. 2nd page 838, section 393, it states:

> "As a general principle, the performance of conditions or of promises is dispensed with when it is waived by acceptance of performance differing from the performance required by the contract. Such acceptance may be express or it may be implied from conduct."

In 17 Am. Jur. 2nd, page 835, section 390, we read:

> "Strict and full performance of a contract by one party may be waived by the other party, in which case there is, to the extent of the waiver, no right to damages for the failure to perform strictly or fully."

Then again in the same section 390 at page 836 and 837, we quote:

> "An unexplained delay in enforcing a contract may constitute evidence of waiver and acquiescence in nonperformance."

Our case comes within these general principles, in light of Petersen's acquiescing in the delay for the loan beyond January 22, 1967 and in light of his demand letter of April 5, 1967, his acceptance of the $5,000.00 loan on May 12, 1967, and finally his unexplained delay in trying to enforce the alleged contract provisions over two years later.

Furthermore, on May 12, 1967, when ICC loaned $5,000.00 to Petersen and was induced to take different security than was called for in paragraph 5 of the agreement, it simply had to be in lieu of and in satisfaction of the obligations and promises stated in said paragraph 5 and thus constituted an accord and satisfaction of any

claim Petersen may have had. It was either an accord and satisfaction, or it was a fraud upon ICC, or perhaps both, for on May 12, 1967 when Petersen accepted the $5,000.00 loan he knew he could in no way provide the Wyoming properties as security for a $20,000.00 loan, for he had completely disposed of it on May 5, 1967.

It is clear from the evidence that Petersen considered that $5,000.00 to be the only loan he was going to get from ICC. Counsel for appellants quoted from the record at page 63 part of the testimony of Petersen on cross-examination where Petersen admitted that on May 12, 1967, he asked for $20,000.00 from ICC and was told they could not loan that sum, but did come up with $5,000.00. However, counsel failed to quote the next two questions and answers which are pertinent. They are as follows:

> Q. "Now, why—now, let me ask you this. Did you ever disclose to him that you had sold the property in Wyoming?
>
> A. No.
>
> Q. Then why were you insisting on $20,000.00 even after May 5th when you disposed of all of that property, knowing that you could not have given security for the $20,000.00?
>
> A. The reason I asked him was I was just wondering if he would have ever paid me the $20,000.00, and, second, knowing that I had discounted the contract $20,000.00 I felt he owed that $20,000.00 in damages."

It is apparent, then, that even though ICC did not fully realize (because of the non disclosure) on May 12,

1967, the complete satisfaction of the January 22, 1966 agreement by the $5,000.00 loan, Petersen knew it, realized it and accepted it in that light, and cannot now deny it or take advantage of the situation, for ICC accepted the fact once they had knowledge of the true circumstances. We believe that this situation comes within the definition of accord and satisfaction as set out by this court in *Browning v. Equitable Life Assurance Soc. of the U.S.*, 94 Utah 532, 72 P 2nd 1060 (1937) Reh. den. 94 Utah 570, 80 P 2nd 348 (1939):

> "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."

In our case a $5,000.00 loan was given or performed by ICC in place of a $20,000.00 loan and the recipient accepting the same was Petersen. The consideration was an acceptance by ICC of security less than and different from the Wyoming properties previously agreed upon.

The trial court therefore, properly ruled that the actions of the parties waived and/or extended specific performance of the January 22, 1966 agreement, and thus there was no breach by ICC, and further the loan of $5,000.00, on May 12, 1967 constituted an accord and satisfaction.

## POINT II

## THE CONDUCT AND ACTIONS OF PETERSEN CREATED AN IMPOSSIBLE

SITUATION, WHICH DID PREVENT OR EXCUSE ICC FROM PERFORMING THE AGREEMENT AS TO THE $20,000.00 LOAN REFERRED TO IN THE JANUARY 22, 1966 AGREEMENT.

Since the money market was so tight during 1966 and 1967, the only way ICC would loan $20,000.00 to Petersen was on the condition and promise of repayment in three equal annual installments, at 9% interest and secured by a *First* Mortgage on the Wyoming Properties, of substantial value, being in excess of $67,000.00.

On October 1, 1966, almost four months before the year was up, which was provided for in the January 22, 1966 agreement for making the loan, at ICC's option, Petersen sold the Wyoming Properties on contract to James Milliron and this was not disclosed to ICC (Exh. 4-d; R. 63, 73).

Counsel for appellants would have us believe that this action of Petersen made no difference, that he was still entitled to a $20,000.00 loan regardless of his encumbering the security. However, Paragraph 5 of the agreement created dependent promises. Petersen had no right to rely on ICC's promise to loan $20,000.00 if ICC could not rely on Petersen's promise to pay it back in three annual payments, meaning over $6,600.00 per year plus 9% interest, with the Wyoming Properties as security (First Mortgage). Petersen could not force or require ICC to take substitute security, even if it had been available, any more than ICC could have forced a

substitute loan upon Petersen without changing the agreement or by mutual consent of the parties. There was also no evidence in the record that Petersen had other security of the value of the Wyoming Properties.

When Petersen sold the properties to Milliron he changed the security in such a way that he made it impossible for him to perform his part of the agreement. The contract with Milliron provided for $3,600.00 annual payments and 6% interest. The security value was reduced $17,000.00 and in addition another $12,000.00, encumbrance was shown with the Bank of Salt Lake. Paragraph 8 of said contract also states:

> "The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed six per cent per annum and payable in regular installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract."

Petersen had therefore obligated himself, under that contract, in October 1966, not to make loans on that property that would exceed 6% interest per annum and where the annual payments would not exceed $3,600.00. It was, therefore, not possible under that contract for Petersen to use the Wyoming Properties as security with ICC, where 9% interest was to be charged and over $6,600.00 was to paid annually.

Counsel for Appellants argues, however, that Milliron would have agreed to change the contract to accommodate Petersen, but their statement is only hearsay and self serving and does not change the contractual facts, and is of little value in light of the further fact that Petersen did not reveal to ICC this sale until long after he had obtained some money from them.

Now where the promises of the parties are dependent, or amount to a counter promise, or a condition precedent, as in our case, Petersen simply has no standing in Court and cannot recover on his alleged claim for Breach of Contract for failure of ICC to loan $20,000.00, unless Petersen was able to perform his part of the promise or condition for the loan and provide the security as agreed.

In 17 Am. Jur. 2nd, Section 362, at Page 805, it states this general rule:

> "Generally, therefore, the performance of a dependent promise or covenant is a condition to recovery on the counterpromise or countercovenant. . . . The rule is that it is a good defense to an action on a contract that the obligation to perform the act required was dependent upon some other thing which the other party was to do and has failed to do."

Also in 17 Am. Jur. 2nd, 898 Section 441, it states:

> "It is held that a party who seeks to recover damages from the other party to a contract for a breach must show that he himself is free from fault in respect to performance of a dependent promise, or counterpromise, or a condition precedent."

Furthermore, in Section 355 of 17 Am. Jur. 2nd at Pages 792-793, we read:

> "In the case of concurrent obligations the party seeking the legal enforcement of the stipulation of the other must first show a compliance with his own. On principles of general justice, if the acts are to be done at the same time, neither party to such a contract can claim a fulfillment thereof, unless he has first performed or is ready to perform all acts required on his own part."

Again this subject is treated in 17 Am. Jur. 2nd, 880, Section 425 as follows:

> "If the impossibility of performance arises directly or even indirectly from the acts of the promisee, it is sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned."
>
> "It is also the rule that a party may not insist upon the performance of a contract or a provision thereof where he himself is guilty of a material or substantial breach of that contract or provision. The party first committing a substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform a promise, if the promises are dependent. A failure to perform a promise, the performance of which is a condition precedent, is an excuse for nonperformance of the promise or promises made by the other Party."

The annotation in 84 A.L.R. 2nd, Section 12 (b) at Page 65 under the heading "Impossibility caused or preventable or remediable by promisee," further emphasizes:

> "A standard treatise states that if the impossibility of performance arises directly or indirectly from the acts of the promisee, it is a sufficient excuse for nonperformance by the promisor. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned. Nonperformance of a contract in accordance with its terms is excused if performance is prevented by the conduct of the adverse party."

On January 22, 1967, Petersen was not able to comply with his part of the agreement even if he had made a proper demand. When Petersen finally did make a demand for performance by ICC on April 5, 1967 and ICC managed to come up with $5,000.00 in response to that demand, Petersen induced ICC to take other security than the Wyoming Properties, knowing that he could not comply with his part of the agreement. This was tantamount to nullifying the agreement. In 84 A.L.R. 2nd at Page 32, wherein the question of impossibility of performance is annotated, it states:

> "Williston comments that existing impossibility known to one party and not to the other would probably render the transaction voidable for fraud."

Also it states at 17 Am. Jur. 2nd, Section 403, Pages 850 and 851 as follows:

> "Ignorance of facts warranting or excusing nonperformance or repudiation of the contract does not affect the right to assert such facts, after they are discovered as such justification or excuse. A party sued for breach of contract may ordi-

narily defend on the ground that there existed at the time a legal excuse for nonperformance or repudiation, although he was then ignorant of that fact."

If there was any question about the repudiation of Paragraph 5 of the January 22, 1966 agreement by Petersen in October 1966, there should be no question about it by May 5, 1967 when Petersen disposed of all the Wyoming Properties and still kept ICC dangling and in the dark on his true intentions. We, therefore, submit that the trial court had ample evidence and law to sustain its conclusion that Petersen's conduct and actions did create an impossible situation and did prevent or excuse ICC from performing as to the $20,000.00 loan.

## POINT III

## THE TRIAL COURT DID NOT ERR IN DISMISSING PETERSEN'S COMPLAINT UPON ITS MERITS AND WITH PREJUDICE.

There is sufficient evidence and law to support the lower courts findings and conclusions on all of the points discussed in this Brief, in dismissing Petersen's Complaint for damages, but we reiterate that the court would be justified in its ruling on any *one* of said issues.

Contrary to counsel for appellants' statement, ICC's answer does not admit to any breach of contract. It denies a refusal to loan $20,000.00 to Petersen and

then sets out several affirmative defenses. There wa also no evidence of breach.

Furthermore, the action of Petersen in selling th Wyoming Properties in October of 1966, before the tim had expired for performance by ICC, and obtainin $17,000.00 in cash or property as a down payment there fore negates any argument of counsel for Petersen tha he suffered any damages that could be attributed t ICC on the loan. It was not as though ICC owe $20,000.00 to Petersen. If the loan had been made o $20,000.00, it would have to be paid back and secure by the Wyoming Properties, but Petersen had alread obtained $17,000.00 on those Properties and so he can "have his cake and eat it too," as he was apparentl trying to do, and then hold ICC for damages.

The lower court was, therefore, justified in dismiss ing Petersen's Complaint under the circumstances.

## CONCLUSION

In the trial of this case, many of the facts were stip plated to and there was no real controversy or absenc of supporting proof on the issues. Thus, the Supreme Court must follow the findings and judgment of th lower court. (See *Whittaker vs. Ferguson*, 16 U. 240 51 P. 980).

It is quite obvious that by October 1966, Petersen could see that money was tight and difficult to obtain and so he sold the Wyoming Properties, and although he

had repudiated his part of the agreement of January 22, 1966, Petersen continued to press for the loan of money from ICC. Had ICC known of the sale to Milliron, that would have ended the problem because ICC would have made no further attempts to obtain money to try and satisfy, what they thought was their continuing obligation. Then when the demand letter of April 5, 1967 came, ICC did manage to come up with $5,000.00 to satisfy that demand. Therefore, on May 12, 1967 when the $5,000.00 loan was consummated, and in view of the fact that on May 5, 1967, Petersen had completely done away with the Wyoming Properties, had failed to disclose this to ICC, and had no intention to pay the money back, the obligation (if any) on the part of ICC had been completely satisfied as to the January 22, 1966 agreement.

Consequently, the lower court's decision in dismissing Petersen's Complaint and rendering judgment in favor of ICC on the $5,000.00 note and mortgage, together with interest and attorneys fees should be upheld.

Respectfully submitted,

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