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

Utah Supreme Court

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IN THE SUPREME COURT

UNIVERSITY UTAH

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STATE OF UTAH

FILED
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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

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

The parties to this appeal are agreed upon the facts except as to the final ruling of the lower court. If respondents' position on that ruling is correct, there would be no need for this appeal because plaintiff's claim for damages would not be precluded and a new action could

be commenced to recover them. It appears most likely, however, that respondents would and could successfully impose the defense of res judicata in any such new action on the present state of the record.

STATEMENT OF POINTS

POINT I.

PLAINTIFF IS NOT SEEKING TO ENFORCE SPECIFIC PERFORMANCE OF THIS CONTRACT BUT RATHER ASKING FOR THE ALTERNATIVE RELIEF FOR DAMAGES PRAYED FOR AT THE TIME THIS ACTION WAS COMMENCED.

POINT II.

A SELLER SHOULD NOT BE BARRED FROM RECOVERING DAMAGES AS AN ALTERNATIVE REMEDY TO SPECIFIC PERFORMANCE BY REASON OF SELLING THE SUBJECT PROPERTY AFTER BRINGING AN ACTION TO ENFORCE THE CONTRACT OF SALE.

POINT III.

PLAINTIFF HAVING RETAINED THE EARNEST MONEY SHOULD NOT BE BARRED FROM RECOVERY IN AN ACTION AT LAW FOR DAMAGES EVEN IF THE DECISION OF *ANDREASON v. HANSEN* IS SOUND ON ITS PARTICULAR FACTS.

ARGUMENT

POINT I.

PLAINTIFF IS NOT SEEKING TO ENFORCE SPECIFIC PERFORMANCE OF THIS CONTRACT BUT RATHER ASKING FOR THE ALTERNATIVE RELIEF FOR DAMAGES PRAYED FOR AT THE TIME THIS ACTION WAS COMMENCED.

Appellant could not and does not contend that he is entitled to a decree for specific performance inasmuch as he was able to sell the property in question prior to the trial of this cause in the pursuance of his business and in mitigation of his damages and defendants' liability. Thus, the authorities cited by respondent under this point are irrelevant in appellant's opinion. This comment with respect to the Utah case of *Foxley v. Rich*, 5 U 162, 99 P 666 (1909), cited by respondents, however, ought to be made to avoid any misunderstanding that the factual situation there was in any way comparable to the case in question. In that case a buyer brought an action to recover money paid on an executory contract by reason of an alleged conveyance that made it impossible for the seller to perform the contract. He contended that such conduct on the part of seller constituted an abandonment and repudiation of the agreement. The

question there was whether or not an absolute conveyance had been made to a third party by the seller before any breach by the buyer and before any action had been taken to enforce the contract. Appellant has no quarrel with the holding of that case but respectfully submits it has no bearing in this one where the conveyance made by the plaintiff-seller, which admittedly was absolute, was made only after the defendant-buyers had refused to perform their contract and the plaintiff-seller had commenced this action to enforce the contract.

POINT II.

A SELLER SHOULD NOT BE BARRED FROM RECOVERING DAMAGES AS AN ALTERNATIVE REMEDY TO SPECIFIC PERFORMANCE BY REASON OF SELLING THE SUBJECT PROPERTY AFTER BRINGING AN ACTION TO ENFORCE THE CONTRACT OF SALE.

The crucial issue in this appeal is whether or not the following statement from respondent's brief on page 8 is a correct statement of the law and whether it is applicable to this appeal. "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."

Taken literally, such statement is not applicable because plaintiff is not seeking a decree of specific performance in pursuing this action, as noted in Point I above. To the extent it conveys any meaning that no relief including damages as an alternative, may be granted in such a situation, it is applicable if the condition stated of "through no fault of defendant" is satisfied. Of course, the lower court did not attempt to determine fault in this proceeding and this court can not prejudge it. Thus, even if it finds support in the law (no authorities have been cited to that effect), the essential condition to its application has not been established. In addition it would appear novel to require, which such statement appears to imply, plaintiff to establish fault of defendant occurring *after* complaint is filed against him, as well as before, in order to pursue a remedy he had from the outset. Appellant asserts such is not the law. Respondents acknowledge on page 8 of their brief that a plaintiff-seller may commence a new action at law for damages after selling the property so as to preclude the granting of specific performance in a prior equity suit. Respondent fails to offer any explanation as to why a new action may be commenced for the relief prayed for here but an existing suit can not be prosecuted under such circumstances. The trial court did not take the position now asserted

by respondent that "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." In fact the trial court originally considered it an action for damages only (R 23).

Respondent would now support the dismissal with prejudice on the grounds that plaintiff elected to stand on a pleading for specific performance rather than amending the pleadings to convert it into an action for damages. This is curious inasmuch as the trial court extended to plaintiff an opportunity to pursue the first alternative prayer of specific performance by abandoning the alternative prayer for damages, which plaintiff refused to do (R 22, 23).

Plaintiff contends that no amendment of the pleadings was essential. Technically the pleadings here could not have been amended but only supplemented by reason of developments since the complaint was filed. Respondents argue that the failure to include a prayer for special damages, which did not exist and were not ascertained until after the commencement of the action, for the commission paid by plaintiff for the sale necessitated by defendants' breach of their contract was fatal. However, the dismissal with prejudice was not based on the failure of

the pleadings to state a cause of action but on the pre-trial court's view that under the facts of this case and the holding of the Supreme Court in the case of *Andreason v. Hansen*, which was not even decided, at least officially, at that time, that no cause of action existed which could be properly pleaded by plaintiff. If, however, respondent is correct in this position, appellant respectfully submits that the lower court's dismissal should have been *without* prejudice, since it would not have been on the merits of the cause. Plaintiff could hardly have "stood on his pleadings" to avoid the rule in the *Andreason* case inasmuch as that case was not even decided at that time.

Can the dismissal with prejudice be founded upon plaintiff's failure to pray for special damages? The special damages, if it truly is such, is the real estate commission paid by plaintiff in order to sell this property and pay part of that commission. As to the attorney's fees, it would certainly be imposing the need for impossible foresight to see that many months hence property purchased by a defaulting buyer could be resold for the contract price or more. If the right to attorney's fees is so conditional, the assurance assumed by contracting parties that the agreement can be enforced without cost to the injured party is certainly illusory.

Respondent's contention as to the prayer limiting the amount of recovery (except in default cases) is clearly contrary to the provision of Rule 54c(1) which states: "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings . . ." Furthermore, our rules permit an amendment even after judgment to conform to the evidence (R. 15 b). In addition, Rule 15(b) provides that even failure to so amend after judgment does not effect the result of a trial of issues. Amendments during the course of a trial are proper and had respondent here objected to the introduction of testimony proving such special damages as appellant's real estate commission for reselling the property, it is hardly likely that the trial court would even grant a continuance to permit the respondent to meet such evidence as a condition of such amendment since he was already fully apprised of plaintiff's claim in this particular, except as to amount, by reason of plaintiff's answer to respondent's interrogatory #2 (R 11, R 13).

Undoubtedly the issue as to respondent's liability for the real estate commission paid by plaintiff would have been made a part of the pre-trial order and any

necessary or desirable amendments made to the pleading pursuant to Rule 16 had not the pre-trial judge immediately come to the conclusion that plaintiff had no cause of action as a result of the holding in *Andreason vs. Hansen*, supra, which he knew would be announced in that case by this Honorable Court.

Counsel for respondent can hardly be unaware that the court would be requested to award damages to plaintiff for the normal 5% real estate commission he had to pay on \$17,950.00 sale less the \$450.00 he received in addition to defendants' price and his attorney's fees and court costs in this matter.

POINT III.

PLAINTIFF HAVING RETAINED THE EARNEST MONEY SHOULD NOT BE BARRED FROM RECOVERY IN AN ACTION AT LAW FOR DAMAGES EVEN IF THE DECISION OF *ANDREASON v. HANSEN* IS SOUND ON ITS PARTICULAR FACTS.

The instant case is readily and properly distinguishable from that case for the following reasons:

1. In the *Andreason* case the property was resold before the action for damages was commenced. In this case an action to enforce the contract by specific performance or in the alternative for damages was commenced before the property was sold.

2. The property here was not immediately resold for a much lesser amount, but rather held for many months to obtain the highest possible price for it. Thus, damages were reduced rather than increased by the plaintiff's subsequent sale.

3. Plaintiff here was not an attorney and held to the higher standard expected of members of that honorable profession, at least in legal matters. (This is not to imply that contractors are not also honorable.)

4. Plaintiff was not guilty of laying any "deceptive nets," is not attempting any "over-reaching" in requesting his actual damages, and did not undertake to enforce this contract "with vengeance."

CONCLUSION

The cause should be remanded to the District Court for trial on the merits.

Very respectfully submitted,

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