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Arnell H. Welchman and Eva B. Welchman v. Merrill J. Wood dba Wood Realty Company and Milo D. Carter : Brief of Appellants

Utah Supreme Court

Victor A. Spencer; Attorney for Plaintiffs and Appellants;

IN THE SUPREME COURT

of the

STATE OF UTAH

ARNELL H. WELCHMAN and EVA B. WELCHMAN,

Plaintiffs and Appellants,

vs.

MERRILL J. WOOD, d/b/a Wood Realty Company, and MILO D. CARTER,

Defendants and Respondents.

Case No. 9160

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This is an appeal from the dismissal with prejudice of plaintiffs' action for damages for breach of a contract of agency, or in the alternative, for restitution of a commission paid to defendants by plaintiffs. The order of

dismissal was made at the trial of the action, following statements of plaintiffs' counsel to the jury and to the court of plaintiffs' proposed evidence.

This constitutes the second appeal by plaintiffs in the action, the case having come up on appeal from a summary judgment, as case number 8718, and a decision in plaintiffs' favor having been rendered therein on March 28, 1959 (337 P2d 410).

Throughout this brief, R indicates pages of the record, and D pages of the deposition that has been published in the action. Italicized emphasis throughout has been added by appellants. The following statement of facts was taken from appellants' brief in the first appeal, to which has now been added additional details bearing upon the points now before this court.

STATEMENT OF FACTS

Plaintiffs had a pressing need for money, in order to pay debts. They decided to sell their house to raise it (D. 34, 35). Accordingly, they entered into a written listing agreement with defendant Wood on March 8, 1956 (D. 4; R. 43). This listing agreement *did not require a trade of properties.* It provided, in handwriting, "Will exchange for *money,*" and in the fine print on the reverse side was the provision, ". . . *If I agree* to an exchange of said property, . . ." (R. 43).

Wood assigned his salesman, defendant Carter, to seek a buyer (D. 15). Defendants did not present plaintiffs with any offer until April 28, 1956. On that day Carter came to plaintiffs with an offer from a couple by the name of Granger to exchange their residence valued at $10,000 for plaintiffs' residence valued at $21,000, with the balance, after adjusting equities, to be paid to plaintiffs by Grangers in monthly installments, under a real estate contract (D. 14, 9).

Plaintiffs were at first unwilling to accept Grangers' offer because it would not produce the cash that they sorely needed (R. 1; D. 14, 27, 32). Carter assured them that they would obtain sufficient cash from the transaction because defendants could make available to them $8,600 under an F.H.A. loan on the Granger house, which would result in almost $3,500 net cash for plaintiffs, and defendants could sell their proposed real estate contract with Grangers for at least $4,000 cash (R. 1; D. 14, 15, 16, 26, 27, 35, 36). Plaintiffs expressed concern that defendants might not be able to make available these sums.

They asked Carter a number of times if he was sure that defendants could get such a loan and could sell such a real estate contract for at least $4,000 — that if he wasn't, it would be better not to sell the house (D. 27; R. 29-31). Carter assured them that there was nothing to worry about. He said, "I will see that you get this loan. I will sell your contract for no less than four thousand dollars, and thereby you can attain your

money." (R. 29). He discussed the matter with Wood over the phone and promised them that these amounts would be forthcoming (R. 1; D. 14, 15, 16, 26, 27, 36, 37).

Solely in reliance upon Carter's representations, promises and assurances, and in consideration thereof, plaintiffs agreed with defendants to make the trade with Grangers (R. 1; D. 9, 14, 32, 35, 36, 37, 39). Defendants thereby became entitled to receive a commission of $1,050 from plaintiffs plus an additional commission of almost $500 from Grangers, none of which they would have been entitled to otherwise unless they had produced a buyer who would "exchange for *money*" (R. 1, 31; D. 10, 11, 37). Plaintiffs acting in reliance upon this oral modification completed the transaction with Grangers and subsequently paid the commission to defendants, so that plaintiffs fully performed everything that they agreed to perform under the new agreement with defendants (R. 2; D. 10, 11, 12, 32, 37, 39, 42, 43). By completing the trade with the third party, Grangers, plaintiffs materially and irrevocably changed their position.

Defendants failed to make available to plaintiffs any F.H.A. financing, because of a substantial defect in the foundation of the house (Grangers') to be financed, and failed to sell the Granger contract for $4,000, because they found no one who would buy it at that price (R. 2; D. 30, 17, 19, 37). As a result, plaintiffs incurred heavy damages (R. 2, 3; D. 20-24, 31, 38, 39).

STATEMENT OF POINTS

POINT I

PLAINTIFFS' PROPOSED EVIDENCE SHOWS AN AGREEMENT BY DEFENDANTS TO OBTAIN PARTICULAR RESULTS, REGARDLESS OF THE RISK OF IMPOSSIBILITY.

POINT II

IT IS A QUESTION OF FACT, FOR THE JURY, TO DETERMINE WHETHER OR NOT PERFORMANCE WAS IMPOSSIBLE.

ARGUMENT

Plaintiffs are entitled to have their proposed evidence, and every fair inference fairly arising therefrom, considered in the light most favorable to them, in determining whether or not this nonsuit was proper. 53 Am Jur 264, Trial, §§327, 313, 314.

POINT I

PLAINTIFFS' PROPOSED EVIDENCE SHOWS AN AGREEMENT BY DEFENDANTS TO OBTAIN PARTICULAR RESULTS, REGARDLESS OF THE RISK OF IMPOSSIBILITY.

In Williston on Contracts (Revised Student Edition) 908, §1934, it is stated:

> *"A promise impossible of performance may be binding.*

" 'A man may contract that a future event shall come to pass over which he has no, or only limited, power.' Sage *v.* Hampe, 235 U. S. 99, 104, 35 S. Ct. 94, 59 A. Ed. 147. 'If the occurrence of an event which is not within human control is in terms promised, the words are interpreted as a promise to be answerable for proximate harm unless the event occurs.' Rest., Contracts, §457 Comment b. Not only may such a promise be binding in case of supervening impossibility but it also may be binding though performance was impossible when the promise was made. Indeed, such promises are common . . ."

The trial court and defendants' counsel have characterized the question of assumption of risk of impossibility of performance as a question of "warranty" (R. 15, 19, 20, 36). Such designation seems appropriate and will be followed somewhat by appellants herein.

As Arnell Welchman recalls the conversation on April 18, 1956, Carter made repeated "assurances" that the particular results would be forthcoming. "Assure", "insure", "guarantee" and "warrant" are essentially synonymous. A definite and certain assurance to obtain a particular result can in law constitute a warranty.

The trial Court ruled that "a statement of events that can occur, that *will* occur, but all *future*" does not constitute a warranty (R. 20). The court said that he does not believe that Carter's "statements of *assurance* and the statement that he did say that this could be done" has legal effect of warranty (R. 20). The court seemed to disregard the definition of warranty, which includes

certain promises that future events will come to pass, as well as certain representations as to present facts. Black's Law Dictionary (3d Ed), at page 1832, defines warranty, as used in contracts, as, "An undertaking or stipulation, in writing, or verbally, that a certain fact in relation to the subject of a contract is *or shall be* as it is stated *or promised to be.*" See the Sales Act, UCA, 1953, 60-1-12, which in defining express warranty declares that, "Any affirmation of fact *or* any *promise*" is a warranty under certain circumstances.

It is stated at 46 Am Jur 494, Sales, §313, Express Warranties, Generally:

> ". . . A seller may give a warranty against a future event. It is to be noted that the statutory definition of an express warranty includes any promise of the seller relating to the goods. To constitute an express warranty, the term "warrant" need not be used; no technical set of words is required, and a warranty may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should so do. It is not necessary that the warranty be in writing; a valid warranty may be made orally, and, if so made, will be given the same effect as a written one, . . ."

Arnell Welchman could not recall the exact language used by Carter, but he is definite and certain that such language constituted repeated assurances that the money would be forthcoming from the sources promised. Plaintiffs made clear to him that an exchange of properties would do them no good unless it produced money. With

knowledge of this, Carter gave them assurances that defendants would obtain money for them in such ways:

R. 16, line 26: ". . . he at that time assured us . . ."

R. 17, line 9: ". . . He assured us he could."

R. 17, line 28: "He did guarantee to me a certain sum."

R. 18, line 5: "That is what they assured us."

R. 18, line 20: "That was the figure he had assured us he could do — that was the figure he promised us he would be able to do, he assured us, because we were worried. We asked him a number of times if he was sure, and if he wasn't, the way things stand, it would be better not to sell the house."

R. 25, line 2: "Mr. Carter assured us . . ."

R. 29, line 16: "[Carter said] 'I will see that you get this loan.' He said that 'I will sell your contract for no less than four thousand dollars and thereby you can attain your money.' That is the thing I questioned in the whole deal. He said he could do this and that, and I doubted because I was lacking experience in the matters, but he said he could, so I took his word for it; . . ."

R. 31, line 14: "He said that he could sell the contract for no less than four thousand dollars, and he said that he would be able to finance the home. He assured us."

These statements must be viewed in reference to the entire situation between the parties, and particularly in light of plaintiffs' statements to Carter of their ultimate, and essential, purpose. It is a matter of properly interpreting the new, orally modified, contract. 12 Am Jur, Contracts, sets out certain well-recognized rules of interpretation, as follows:

> At page 754, §231: ". . . The language of a promisor is to be interpreted in the sense in which he knew or in which he had reason to suppose it was understood by the promisee. Stated in slightly different words, the language and acts of a party to a contract are to receive such a construction as at the time he supposed the other party would give them or such a construction as the other party was fairly justified in giving to them, and he will not at a later time be permitted to give them a different operation in consequence of some mental reservation. . . ."
>
> At page 776, §242: "There can be no doubt that the court may look beyond the form into which the parties have cast their agreement. The spirit and purpose of an agreement as well as its letter must be regarded in the interpretation and application thereof. In fact, it is the substance of an agreement rather than its form — the spirit rather than the letter — which must control its interpretation. . . ."
>
> At page 777, §242: ". . . All contracts must be interpreted with reference to their subject matter. . . . As an aid to ascertaining what the parties intended and understood by the words employed, the object in making the agreement

may be taken into consideration. Schofield v. Zions Co-op Mercantile Inst. 85 Utah, 281, 39 P. (2d) 342, 96 A.L.R. 1083; Anderson v. Great Eastern Casualty Co. 51 Utah 78, 168 P. 966. . . . It is always of much importance in the interpretation of a contract upon which doubt arises to ascertain what was the attitude of the parties to the subject and to find out what was their main purpose and object in making it. If this can be done, the terms of the contract will be so interpreted as to promote the main purpose, if the language employed will fairly permit such construction. . . ."

At page 785, §247: ". . . In interpreting an agreement, a court should, to the best of its ability, place itself in the situation occupied by the parties when the agreement was made and avail itself of the same light which the parties possessed when the agreement was made so as to judge of the meaning of the words and of the correct application of the langauge to the things described. . . . General or indefinite terms contained in a contract may be explained or restricted by the circumstances surrounding its execution. The scope and application of most words vary according to the nature of the subject under discussion and the circumstances under which they are used."

At page 792, §250: ". . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the

> interpretation which makes a rational and probable agreement must be preferred. The interpretation of any instrument ought to be broad enough to allow it to operate fairly and justly under all the conditions to which it may apply. A court will not place an unjust interpretation upon a contract, unless the terms thereof compel it to do so. . . ."

In Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N.E. 774, the principle is stated:

> "Courts will seek to discover and give effect to the intention of the parties, in construing a contract, so that performance may be enforced according ot the sense in which they mutually understood it at the time it was made, and greater regard is to be had to their clear intent than to any particular words which they may have used to express it."

It is respectfully submitted that application of the foregoing legal principles to plaintiffs' proposed evidence presents substantially more than a scintilla of evidence of a material nature and that, accordingly, the dismissal was improper and a jury question is presented.

POINT II

IT IS A QUESTION OF FACT, FOR THE JURY, TO DETERMINE WHETHER OR NOT PERFORMANCE WAS IMPOSSIBLE.

It is immaterial whether or not defendants assumed the risk that their performance might be impossible if in fact performance was possible.

Paragraph 2 of the First Cause of Action of the complaint alleges the assumption by defendants of the risk that their performance might be impossible. It does not allege that performance was in fact impossible. Paragraph 4 alleges that defendants failed to make available to plaintiffs FHA financing because of a substantial defect in the foundation of the house to be financed, and failed to sell the Uniform Real Estate Contract for $4,000, because no one would buy it at that price. It is not alleged that the foundation defect was not correctible or that the contract could not be sold for an amount not substantially less than $4,000.

It is true that it was impossible to obtain an FHA loan on the house as the foundation then stood, but it is nowhere stated that the defect was not correctible. Nevertheless, plaintiffs have treated, and now treat, this portion of the April 28th agreement as having become impossible for defendants to perform. They do not so treat the other promise.

Arnell Welchman was willing to accept somewhat less than $4,000 for the real estate contract (D. 16), and in the opening statement to the jury, plaintiffs' counsel stated that plaintiffs' evidence would show that the contract was actually resold for over $3,800 by the man who ultimately bought it from plaintiffs. (R. 12). Under defendants' general denial it, therefore, remains an issue of fact, for the jury, to determine whether or not performance of such portion of defendants' promises, with only an unsubstantial variation, was possible. See Restatement of Contracts, §463.

CONCLUSION

Plaintiffs' proposed evidence, viewed in the light most favorable to plaintiffs, does show an agreement by defendants to obtain particular results, regardless of the risk of impossibility.

It is a question of fact, for the jury, to determine whether or not performance of at least a portion of defendants promises was possible.

Accordingly, plaintiffs respectfully submit that the order of dismissal should be vacated.

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