1965

F. M.A. Financial Corporation v. Build, Inc., A Corporation, Owen E. Conrad, Betty Conrad, His Wife, Michael Platner and Jane Doe Platner, His Wife, and Ruth Duffy : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

F. M. A. FINANCIAL CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

BUILD, INC., a corporation, OWEN E. CONRAD, BETTY CONRAD, his wife, MICHAEL PLATNER and JANE DOE PLATNER, his wife, and RUTH DUFFY,

Defendants and Appellants,

Case No. 10292

APPELLANTS' BRIEF

Appeal from the Summary Judgment of the Third District Court for Salt Lake County
Honorable Marcellus K. Snow, District Judge

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STATEMENT OF THE KIND OF CASE

This is an action on a promissory note and the foreclosure of a real estate mortgage given to secure its payment. To the answer of the defendant Build, Inc., lack of consideration, the plaintiff's motion for summary judgment was granted. The defendant's motion for modification of the judgment and for per-

mission to amend its answer to include the defenses of accord and satisfaction, account stated, and laches was denied.

DISPOSITION IN LOWER COURT

The case was heard on the 15th day of October, 1964, on the plaintiff's motion for summary judgment, and again on the 16th day of November, 1964, on the defendant's motion to modify the judgment so as to permit the defendant to amend its answer. The plaintiff's motion for summary judgment was granted. The defendant's motion for modification and for leave to amend was denied. From both rulings the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Summary Judgment and for leave to amend its answer so as to include the defenses of accord and satisfaction, account stated, and laches, so that the merits of the defenses can be tried.

STATEMENT OF FACTS

The note and mortgage sued upon were given on the 15th day of February, 1960, by the defendant to the Cook Realty Company (R-1) as payment of the real estate commission for the sale of the defendant's apartment house, which sale completely failed, the pur-

chaser having moved out and the defendant having been forced to retake possession of the property and to defend a suit for misrepresentation at great loss to itself (R-23, 25). The defendant refused to make further payments on the note to which the Cook Realty Company acquiesced and an agreement was reached between the defendant and the Cook Realty Company that if the defendant would make one more payment of $50.00 ,that the note and mortgage would be cancelled, which payment was made by the defendant on the 15th day of December, 1960, (R-48) and that no further demand was made upon the defendant until this suit was commenced on the 13th day of August, 1964, (R-32), and that the defendant has made substantial investments relying upon the representations of the Cook Realty Company which it would not otherwise have made, and will suffer great and irreparable injury should the plaintiff be permitted to foreclose the note and mortgage sued upon (R-48, 49).

ARGUMENT

POINT I.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A SUMMARY JUDGMENT.

The defendant in this case "is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light

most favorable to him." The quoted portion is taken from the decision in the case of Morris v. Farnsworth Motel, 123 U. 289; 259 P2nd. 297, handed down June 23, 1953, which decision was referred to in the case of Samms v. Eccles, 11 U2nd, 289; 358 P2nd. 344, decided January 10, 1961, from which the following quotation is taken:

> "A motion for summary judgment is in effect a demurrer to the claims of the plaintiff, saying: assuming they are true, no right to recover is shown. It is regarded as a harsh measure which the courts are reluctant to sanction because it deprives the adverse party of an opportunity to present the evidence concerning her grievance for adjudication. For this reason plaintiffs' contentions must be considered in the light most favorable to her advantage and all doubts resolved in favor of permitting her to go to trial; and only if when the whole matter is viewed, she could nevertheless, establish no right to recover, should the motion be granted."

These are some of the "claims" of the defendant in the instant case: that the consideration for the note and mortgage sued upon wholly failed (R-11); that the defendant was forced by the misrepresentations of the Cook Realty Company in selling the defendant's property to reassume its possession and to stand trial under heavy loss and adverse circumstances (R-58-60); that an accord and satisfaction was entered into or an account was stated between the parties on the 15th day of December, 1960, (R-48); that the plaintiff or its predecessor has permitted three and a half years

to elapse without asserting any claim against the defendant on the note and mortgage sued upon (R-57); and that relying upon the representations of the Cook Realty Company the defendant has substantially altered its course and would sustain great and irreparable loss should the summary judgment be permitted to stand (R-48-49).

POINT II.

APPLICATION OF THE PRINCIPLES OF JUSTICE AND EQUITY DICTATE A TRIAL OF THE DEFENDANT'S CLAIMS.

> "The desirable objective in administering justice under law is for the court to see that any person who has a cause with any merit whatsoever is afforded the privilege of a trial. And where doubts exist they should be resolved in favor of fulfilling such objective." Randy Rivas v. Pacific Finance Company, 397 P2nd 990 at 992; Utah citation not given, December 28th, 1964.

Baur v. Pacific Finance Corp., 14 U2nd 283; 383 P2nd. 397:

> "As we have heretofore declared, the granting of a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure which courts should grant only when it clearly appears that taking the view most favorable to the complaint and any facts which might properly be proved thereunder, no right to redress could be established; and unless

it so clearly appears, doubt should be resolved in favor of allowing him the opportunity to present his proof."

Taking the view most favorable to the defendant, there was a complete failure of the consideration (R-11) for the note and mortgage and a hearing on the question should be allowed.

> "And then when it became evident that the thing had blown right up, and it was a bad transaction, I told Mr. Cook in his office of the events that had transpired, that the whole thing had caused a great distress to the property, great jeopardy to it, and of the impending lawsuit. And I advised him that I no longer intended to make the payments on it. And he recognized and agreed,and said, 'Richard, make one more payment today, and let's forget the whole thing.' "

Smith v. Brown, 1917, 50 U. 27; 165 P. 468: "In action on note evidence was admissable to show want of and failure of consideration in view of Compiled Laws 1907, Paragraph 1580." Also Central Bank of Bingham v. Stephens, 1921, 58 U. 358; 199 P. 1018.

Resolving the doubts in favor of the defendant, there was an accord and satisfaction and an account stated between the defendant and the predecessor of the plaintiff and a trial of the issue should be had.

> "That on or about the 15th day of December, 1960, the Cook Realty Company, the plaintiff's assignor, agreed with this defendant in settlement of a controversy that had arisen between the parties, that in consideration that the de-

fendant would pay to the said Cook Realty Company, the sum of $50.00, that the said Cook Realty Company would cancel a certain note and mortgage, held by it against this defendant, and that as a result of the said agreement, this defendant issued to the said Cook Realty Company a check for the sum of $50.00, in full settlement of the said note and mortgage." (R-48).

Ralph A. Badger & Co. v. Fidelity Building & Loan Assn., 94 U. 97; 75 P2nd 669: "The settlement of an unliquidated or disputed claim where the parties are apart in good faith presents consideration for an accord and satisfaction."

The fact that the plaintiff's predecessor caused and permitted three and a half years to elapse without making any demand for payment upon the defendant "and that this defendant has made substantial investments that it would not have made but for the said conduct of the said Cook Realty Company, and that if the said Cook Realty Company (or the plaintiff) were now permitted to require payment from this defendant that the defendant would suffer great and irreparable loss" (R-48-49), makes available to the defendant the defense of laches, and an opportunity should be given it to present the facts on that issue.

Larsen v. Larsen, 5 U2nd, 224; 300 P2nd 596: "Where the father's failure to make such payments was induced by her representations or actions and where as a result of such representations or actions the father has been lulled into failing to make such payments and into changing his position which he would not have done but for such representaions, and that as a result of

such failure to pay and change in his conditions it will cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, she may be thereby estopped from enforcing the payment of such back installments." See also 70 A.L.R. 2 1277, and 13; A.L.R. 886.

POINT III.

THE COURT ERRED IN ALLOWING THE PLAINTIFF AN AMOUNT OF $775.00, OR ANY AMOUNT FOR ATTORNEYS FEES.

The record is silent as to attorneys fees. There is no evidence at all in the record as to any amount that is reasonable for attorneys' fees.

CONCLUSION

The court erred in granting the plaintiff's motion for Summary Judgment and also in refusing to grant the defendant's motion for modification of the Summary Judgment and for leave to amend its answer to allow the defenses of accord and satisfaction, account stated and laches. The case should be remanded with instructions.

Respectfully submitted,

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