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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 : Respondent's Brief

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.

RESPONDENT'S 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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Case No. 10292

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to foreclose a real estate mortgage given to secure the payment of a promissory note, which was in turn given in payment of a real estate commission earned by Cook Realty Company.

DISPOSITION OF THE LOWER COURT

On plaintiff's Motion for Summary Judgment based upon the pleadings and deposition of Richard J. Strom-

ness (R-15) the trial court found for the plaintiff and against the defendant (R-34). Subsequently the defendant filed a Motion for Modification of Judgment (R-36) which was denied (R-61).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the rulings of the trial court.

STATEMENT OF FACTS

Respondent disagrees with the Statement of Facts in appellant's Brief on the grounds that (1) it is incomplete, and (2) it is misleading. The Statement of Facts is misleading when it states that the sale of the defendant Build, Inc.'s apartment house completely failed (Appellant's Brief p. 4), whereas the transaction did not fail completely. The defendant later repossessed the apartment house he sold to defendants Conrad (D-12). (Note: The deposition of Richard J. Stromness, president of defendant Build, Inc., is a part of the record but was not paginated as such. References to pages of the deposition are indicated by "D.") However, the defendant retained all of the consideration it had received as down payment on the sale of the apartment house (D-10, 11). Respondent asserts that a more objective statement of the facts is:

On or about August 3, 1959, Build, Inc., virtually wholly owned by Mr. Richard Stromness (D-3), executed a listing agreement with Cook Realty Company to sell

an apartment house located at 32 West Seventh South Street, Salt Lake City, Utah (D-4, 5), and agreed to pay a real estate commission as recommended by the Salt Lake Real Estate Board (D-5, 6). The recommended real estate commission at the time of the listing agreement was 5% of the sale price of the property sold (D-8). On or about December 19, 1959, the defendant Build, Inc. entered into an "Earnest Money Receipt and Exchange Agreement" whereby it agreed to sell the apartment house to defendants Owen E. Conrad and Betty Conrad, his wife, and agreed to receive as a down payment a duplex located at 5867 South 157 West, Murray, Utah (D-7, 8). The sale price of the apartment house, as agreed to by Build, Inc. for purposes of computing the commission, was $77,500.00 (D-7), 5% of which is $3,875.00. At the time of completing this transaction, Build, Inc., by Mr. Stromness, signed an agreement incorporating the foregoing provisions and again agreeing to pay a real estate commission to Cook Realty Company (D-7, 8 and Plaintiff's Ex. 2 to Deposition).

On February 15, 1960, the defendant Build, Inc., by Mr. Stromness, executed a promissory note and mortgage in the sum of $3,875.00 in favor of Cook Realty Company, the mortgage covering the duplex property received in exchange for the apartment house (D-9, 10). The note and mortgage were given in payment of the real estate commission mentioned. The mortgage was duly recorded (Ex. P. 2) and the defendant Build, Inc. paid four payments of $50.00 each on the said obligation, the last one having been made on December 15, 1960 (D 11, 12). From February 15, 1960 to the date this

suit was filed, Build, Inc. has considered itself the owner of the duplex property and has treated it accordingly (D-10, 11). On August 10, 1964, Cook Realty Company assigned the note and mortgage to respondent herein (R-33; Ex. P. 3, 4).

ARGUMENT

POINT I

A PARTY OPPOSING A MOTION FOR SUMMARY JUDGMENT MUST FILE SOME EVIDENCE TO REBUT THE EVIDENCE RELIED UPON BY THE MOVING PARTY.

Appellant has quoted language from numerous cases indicating the desire of courts to give each party its day in court. With this general language respondent has no quarrel. However, when evidence has been obtained and the opposing party is conversant with that evidence and it is upon this evidence which the moving party will rely, the opposing party owes a duty to submit at least an indication of contrary evidence rather than just unsupported allegations. *Dupler v. Yates,* 10 Utah 2d 251, 351 P.2d 624 (1960).

In the case before the court the plaintiff and respondent relied upon the instruments (note and mortgage, etc.) and the deposition of Build, Inc.'s president, Mr. Stromness, with the exhibits attached to the deposition. Build, Inc. offered no additional evidence, with the exception of two Affidavits (R. 48, 49, 57) which principally reiterate the contents of the deposition. As

was stated in *Dupler v. Yates, supra,* at 10 Utah 2d at 369:

> Certainly, if the summary judgment procedure is to be effective, it must be held that when adequate proof is submitted in support of the motion the *pleadings* are not sufficient to raise an issue of fact. [Emphasis supplied]
>
> * * *
>
> Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case, or specify in an affidavit the reason why he cannot do so.

As will be seen in the following points, there is no basis for any of the allegations made by the defendant in support of its original defense (R-11), or any of the defenses enumerated in its Motion for Modification of Judgment (R-56).

POINT II

THERE IS NO BASIS IN THE RECORD FOR ANY OF THE DEFENSES RAISED BY DEFENDANT.

A. LACK OF CONSIDERATION.

The defendant originally pleaded lack of consideration for the note and mortgage as a defense to this suit brought thereon. The undeniable and undenied facts are that the defendant owned an apartment house which he listed with Cook Realty Company under a standard form written real estate contract (D-5, 6 and Plaintiff's

Ex. 1 to Deposition). The real estate commission at the time of the listing agreement was 5% of the sale price of the property (D-8). The defendant Build, Inc., having been introduced to the defendants Conrad through the efforts of Cook Realty Company, entered into an agreement to sell the apartment house to the defendants Conrad and received the duplex which is the subject of this action as a down payment (D-7, 8). The sale price of the apartment house was $77,500.00 (D-7 and Plaintiff's Ex. 2 to Deposition), 5% of which is $3,875.00, the original face amount of the note sued upon.

At the time this suit was brought, Build, Inc. was still the record title owner of the duplex property which it received as a down payment for the sale of its apartment house (D-10). With respect to the duplex, Build, Inc. has made payments on the first mortgage thereon (D-10), it has collected the rents from the property, arranged for the necessary maintenance and lawn cutting on the property, and when vacancies occurred it has obtained tenants to fill them; in all respects it has treated the duplex as though it owned the property (D-11).

Counsel for plaintiff misstates the case when he says that the consideration for the sale completely failed (Appellant's Brief pp. 4, 5). Build, Inc. prevailed in a suit brought against it by the Conrads for misrepresentation (D-14). While Build, Inc. did in fact repossess the apartment house, it also retained the down payment, i.e., the duplex. There was ample consideration for the sale and the note and mortgage given for the commission which considerations never did fail and have not failed

to the present time. The realtor is not responsible for subsequent events which transpire between parties the realtor introduced.

B. ACCORD AND SATISFACTION.

An accord and satisfaction is defined at *1 C.J.S. 462, Accord and Satisfaction, Sec. 1* as an agreement whereby one of the parties undertakes to give or perform and the other to accept, in satisfaction of a claim, something other than or different from what he is, or considers, himself entitled to; and a satisfaction is the execution or performance of such agreement. However, in order to have an accord there must be a proper legal consideration. *1 C.J.S. 473, Accord and Satisfaction, Sec. 4.* See also *Ralph A. Badger & Company v. Fidelity Building & Loan Association,* 94 Utah 97, 75 P. 2d 669 (1938).

It is well settled in Utah that where a claim or demand is liquidated and is not in dispute and is presently due or overdue, the payment by the debtor and acceptance by the creditor at the place where payment of the debt is proper to be made, of a part only of the debt, or any amount of money less than the whole amount which is due, affords no consideration for an agreement by the creditor to discharge the unpaid balance of the debt. *Gray v. Bullen,* 50 Utah 270, 167 P. 683 (1917).

In connection with its claimed defense of an accord and satisfaction, the appellant relies upon *Ralph A. Badger & Company v. Fidelity Building & Loan Association,* 94 Utah 97, 75 P.2d 669 (1938) as holding that "the

settlement of an unliquidated or disputed claim where the parties are apart in good faith presents consideration for an accord and satisfaction." Even by Mr. Stromness' own testimony, the parties were never "apart," "in good faith," or otherwise. Mr. Stromness testified that he felt he had made a bad deal when he sold his apartment house and that Mr. Cook had told him if he made one more payment he would forget the whole thing (D. 12, 13). The *Badger* case holds that where a claim is definitely and admittedly owing, the agreement to take a lesser amount, though followed by a satisfaction of that agreement, is not good unless attended by some consideration. 94 Utah 97 at 98.

C. ACCOUNT STATED.

An account stated is an agreement between the parties as to the accuracy of an account and that the balance struck is correct; there must be a promise then, express or implied, for the payment of such balance. *1 C.J.S. 693, Account Stated, Sec. 1.* "It is not proper to rest a stated account upon a liquidated demand already agreed upon and which either party is bound to pay, as, for instance, a promissory note . . ." *1 C.J.S. 700, Account Stated, Sec. 15d.* Since that is this situation exactly, there is no basis for an account stated. There is nothing contained in Mr. Stromness' deposition nor in any other papers filed which indicates otherwise.

D. LACHES

There is nothing in the record to support a defense of laches. As a matter of fact, we do not see how an

action on a note and mortgage given pursuant to the laws of the State of Utah can be defended on the ground of laches, when the period prescribed by the Statute of Limitations has not run. Laches is a defense based upon the inaction of a claimant for a long period of time, coupled with a change of position by the person against whom the claim is asserted, all of which would make it inequitable for the claimant to assert his claim. It is essentially an equitable defense.

Section 78-12-23, Utah Code Annotated, 1953, provides that there is a six year Statute of Limitations on obligations in writing. The present statute is substantially the same as *Section 104-2-22 Utah Code Annotated, 1943,* which has been held to govern mortgage foreclosure proceedings. *Crompton v. Jensen,* 78 Utah 55, 1 P.2d 242. It seems fairly well established that where mortgage foreclosures are governed by a Statute of Limitations, the equitable principle of laches is not applicable to the defense of a foreclosure proceeding brought before the expiration of the statutory period. *McKinnon v. Bradley,* 165 P.2d 286, 178 Ore. 45; *Riordon v. Ferguson,* 147 F.2d 983 (2d Cir. 1945); *Monroe County Savings Bank v. Baker,* 264 N.Y.S. 101, 147 Misc. 522. The reasoning behind these cases is quite obvious. A mortgage holder may now wish to give a mortgagor every opportunity to avoid the loss of his property. But if by so doing he may be precluded from enforcing his debt because of his delay, he will rush to the courthouse at the first default, a rather unfortunate situation.

We submit therefore, that laches is no defense to a foreclosure action where the applicable Statute of Limitations is six years and the action has been brought only slightly over four years from the date of the inception of the obligation. The cases and annotations cited by Appellant are not pertinent and do not support its position.

POINT III

THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED, THERE WAS NO BASIS FOR GRANTING THE DEFENDANT'S MOTION FOR MODIFICATION OF JUDGMENT AND THE RULING OF THE LOWER COURT SHOULD BE AFFIRMED.

The case was commenced the first week in August and service was made upon the defendant prior to August 14, 1964 (R-32). The defendant filed its Answer September 2, 1964, alleging as its only defense the lack of consideration for the obligation sued upon (R-11). The plaintiff thereafter served Notice of Taking of Deposition (R-13, 14) and did in fact take the defendant Build, Inc.'s deposition, by and through its principal owner and officer, Richard J. Stromness, on September 12, 1964 (D-1). In that deposition plaintiff explored all of the facts surrounding this transaction, to the end that the plea of lack of consideration was shown to have no substance in fact. Still no steps were taken by defendant's counsel to amend or otherwise qualify its pleadings.

Thereafter the plaintiff made its Motion for Summary Judgment (R-15). The defendant filed no pleadings until after the date scheduled for the hearing on the Motion; at that time defendant's counsel filed a Memorandum in which he argued as reason for denial of the motion the defense of an accord and satisfaction (R-23). There was no contention of laches or account stated at that time. In spite of the improper way in which the issue of accord and satisfaction was raised, the court considered and rejected it as a defense. Properly so. It was not until the Motion for Summary Judgment was granted and the Findings and Decree were entered that the defendant raised the issue of account stated and laches (R-56); it raised these issues without any explanation as to why they had not been raised before.

The law requires that after a judgment has been rendered, the losing party must show that there existed reasons for a contrary result of which he, in the exercise of due diligence, was not aware. *Rules 59 and 60(b) Utah Rules of Civil Procedure; Kettner v. Snow,* 13 U. 2d 382, 375 P.2d 28. Nothing which the defendant, its president or its counsel has presented, either in the Affidavits, in the deposition, or in any other pleading filed herein, contains evidence or material which could not have been presented for the court to consider at the time of the hearing on the Motion for Summary Judgment. Indeed, all the essential facts now alleged were then presented. To allow the defendant to come in and amend its pleadings and raise a whole new series of issues, based on no

new facts nor a showing of diligence, would emasculate *Rule 56 U.R.C.P.*

POINT IV.

ATTORNEYS' FEE SHOULD BE ADJUSTED.

The attorneys' fees awarded plaintiff were based upon the Advisory Schedule of Fees and Charges published by the Salt Lake County Bar Association. The fees were computed on that section of the Schedule pertaining to unsecured notes and contracts rather than secured notes and contracts. As a result the attorneys' fee was in excess of the amount recommended by the County Bar by the sum of $42.07. The plaintiff agrees to reduce its judgment by that amount.

CONCLUSION

The trial court's ruling in these matters was correct and the judgment below should be affirmed.

Respectfully submitted,

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