

1960

Robert J. Erishman and Darylene L. Erishman v. Marr B. Overman : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

JUN 24 1960

ROBERT J. ERISHMAN and
DARYLENE L. ERISHMAN, his wife,
Plaintiffs and Appellants,
vs.
MARR B. OVERMAN,
Defendant and Respondent.

Clerk, Supreme Court, Utah
RESPONDENT
BRIEF OF
Case No. 9226

RESPONDENTS BRIEF

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

DAINES & DAINES
Robert W. Daines
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and Respondents.

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RESPONDENTS BRIEF

STATEMENT OF FACTS

On the 20th day of March, 1957, the plaintiffs and the defendants entered into an agreement for the sale and purchase of a home located in Logan, Utah. Prior to the signing of the contract, the plaintiffs had signed a written listing agreement and gave the same to an agent of the Utah Mortgage Loan Company, a real estate agency. On the listing there was given certain information as to the improvements on the home and the property, among which it was listed, that there was Sewer connecting the home to the Logan City Sewer System, when in fact no such sewer or connection existed. It was admitted by the plaintiff that he gave this false information as to the sewer connection. It was this listing that was shown to the defendant a woman with 5 children who was looking for a home.

The Defendant visited the premises and went over the listing with the real estate agent. She found that everything was as listed as far as she was able to observe when visiting the premises. The Defendant testified that she relied on the listing.

R-17

Q You didn't ask Mr. Baugh about it other than to observe the listing?

A Yes, I did. That is, I didn't ask him. He quoted to me that "I have a home that is connected to the sewer, it's down close to the school; it's within walking distance from town," and he said, it's completely furnished."

And it was frankly admitted by the Plaintiff that the false information as to the sewer connection was given by the Plaintiff in the listing agreement to the Utah Mortgage Loan Agent, and that Mr. Baugh's statement was taken from information gained therefrom. The transaction substantially was carried on in reliance on the listing agreement and there was very little negotiation between Mrs. Overman and the Plaintiff personally. Mrs. Overman entered into possession of the property on March 20, 1957 and made a down payment of \$500.00 which left a balance due of \$5,650.00, bearing interest at 5% per annum. There was a monthly payment due under the contract of \$50.74. The first monthly payment was May 1, 1957. Everything went smoothly until July 18, 1958 when the Defendant found that she needed repairs to the home to an extent greater than she had ready cash to take care of and on

July 18, 1959, a letter was written to the Plaintiffs explaining the circumstances and proposing a refinancing arrangement, wherein the Plaintiff would have received \$1500.00 cash and substantially the same monthly payment on a second mortgage (Defendant's Exhibit No. 1).

On August 12, 1958, the Defendant received a letter indicating that they were willing to take the refinancing arrangement (Defendant's Exhibit No. 2). About the same time the Defendant began to have trouble with the sewer system and sewage backed up into her basement. In investigating the sewer difficulty, it was discovered that the home was not connected to the Logan City sewer system as it was represented to be by the Plaintiffs in the listing, and as she had understood it to be when she purchased the property. On August 30, 1958, the Defendant wrote a letter and informed the Plaintiff that the home was not connected to the sewer system, as it had been represented to her to be, and that it would be necessary for her to make the connection in order to make the home livable. She also told the Plaintiffs the approximate cost involved in making the sewer connection, and asked them what they would be willing to do in taking care of the same. (Exhibit No. 3).

In answer to the letter of August 30, 1958, the Plaintiff wrote (Exhibit No. 4) "Since we listed the house as being connected to the sewer, although we were not cognizant of the fact it was not, we feel that an allowance of \$100.00 is all we can make. This allowance of \$100.00 can be deducted from the amount owed when the second mortgage arrangements are made."

It should be noted by the Court that the parties were still negotiating both a settlement as to the sewer connection and arranging details for refinancing as of September 8, 1958, and that the Plaintiffs admitted their responsibility for the sewer, but did not offer to take care of the full cost or the out-of-pocket expenses caused by the necessity to install the missing sewer.

The Defendant made no payments under the contract after she discovered that the sewer was not connected, and she continued to try and settle the matter. In her letter marked Defendant's Exhibit No. 5 she informed the Plaintiff that she was entitled to all of the costs of the sewer installation, credited on the escrow agreement. The matter continued on without credit being given or any agreement being made as to a settlement for the payment of the sewer until March 11, 1959, when the Plaintiffs served notice on the Defendant declaring a forfeiture of the escrow agreement.

On May 22, 1959, the Plaintiffs filed a complaint asking for damages for wrongful detainer and alleging that the contract was null and void because of failure in payments from September 1, 1958.

The Defendant filed an Answer and Counter Claim wherein the Defendants alleged that the contract would not have been entered into except for the false representation as to the condition of the home and that it was connected to the Logan City Sewer, and the Defendants asked for relief which would essentially restore the parties to the status quo.

ARGUMENT POINT I

There was ample evidence to support the court's finding of fact No. 3.

R-34 Direct examination of Defendant:

Q You didn't ask Mr. Baugh about it other than to observe the listing?

A Yes, I did. That is, I didn't ask him. He quoted to me that "I have a home that is connected to the sewer, it's down close to the school, it's within walking distance from town," and he said, "it's completely furnished."

R-Page 34 "And will you state to the jury, why you wouldn't have entered into this contract."

A. I borrowed money to make the down payment on the contract. I was working on a shoe string. If I had thought for one minute that I would have additional expense for the connection of the sewer I would never have entered into it.

Q "That is you wouldn't have entered into the contract under the same terms.

A "That's right."

Exhibit 11 shows the listing agreement and that it listed the sewer and the connection. It is this same listing that was checked over by Mrs. Overman. Also that there was substantial evidence in the record to support finding in Fact number 7.

The Plaintiff testified as to all of the costs of the improvements and the defendant's witness, George Judah, testified as to their effect on the market value of the property.

R-60 Mr. Judah testified that he was acquainted with the property in question and that he had examined the property just prior to the time that Mrs. Overman purchased it and that he was acquainted with the position of the furnace in the home and its general condition. He also testified that he had examined the furnace just prior to the trial and knew the condition of the new heating system which had been installed and that all of the changes that had been made had been desirable and had increased the value of the home.

Mr. Judah was asked if he had an opinion as to how much the heating system had improved the value of the home. He stated that the actual cost would be as close as he could come to a reasonable value of the appreciation of the property as a result of the improvement, and that this would be between \$700 and \$800, and that \$800 would not be unreasonably high figure.

R-65 Mr. Judah testified that the improvements to the back steps would also add to the value of the home the cost involved. The Plaintiff R-32 testified that the material for the back porch and steps cost \$123.00 and that the labor was \$81.00. The sewer connection cost an additional \$239.00 giving a total of out-of-pocket expenses of \$1,243.00. He also testified that after considering a five or six percent depreciation in the property that it would be sold for around \$7,000.00 or a little better. This

would put the appreciation of the property at \$900,00. Therefore, there was evidence to support the jury in a special verdict at R-11 where the jury found after hearing the testimony of all of the witnesses and visiting and inspecting the premises and being instructed by the Court found that the reasonable value of the improvements made by the Defendant was \$837.00.

It is stated in the Appellants Brief that because a sewer connection was not mentioned in the Escrow Agreement that it was not a part of the contract and that the Plaintiffs did not intend to convey the property with a sewer connection. In this respect the respondents refer the court to the listing agreement (Exhibit 11) and also Plaintiffs Exhibit No. 4 wherein the Plaintiff admits that he did in fact intend to convey a sewer with the property.

As the sewer was a part of the real property it was not necessary to specifically state in the contract that there was to be a sewer connection as it would be conveyed in the general description of the real property and in this case all of the parties have admitted in court that it was intended to be so.

The Respondent points out to the Court that it is not relying for its relief on the doctrine of fraud or deceit, but rather on a material misrepresentation of fact. It is contended that the quotation, taken from the 24 Am. Jur. Section 32, Page 377, Fraud and Deceit, does in fact support the Defendant's position, even though in this case we are not relying on fraud.

The Plaintiff has directed the Court to the Testimony of Grant W. Campbell to show that there was no increased

efficiency due to the change over from propane gas to natural gas. It should be pointed out in this respect that on the cross examination of Mr. Campbell that he was not sure of the year in which the gas bills were incurred which he referred to on direct examination and that some of the gas bills were probably from years prior to the time she took possession of the property in question and made it impossible to distinguish what the actual fuel bills were for the Erishman home.

R-78

Q You wouldn't know whether it was 1956, 57, or 57-58.

A That is correct.

Q It's 57-58?

A I don't say that sir.

R-84

Q Now, if in fact Mrs. Overman didn't move into the house until some time in March of 1957, and I make an offer of proof to that extent, your honor, can explain why your records would show that you made deliveries to Mrs. Overman October 12, December 19, and January 28 of 1956?

A It's just like I told you a few moments ago. I wasn't sure on the date today, but I know that when maybe I should clarify myself a little more on one factor, Sir. When she converted to natural gas, it became necessary that I pick up a tank that she had.

It is submitted that although the plaintiffs witness, Mr. Campbell, made some definite statements on his direct examination as to the actual costs of heating with propane gas by Mrs. Overman that his cross examination makes it quite clear that he was not even sure that the charges were made for gas used in the home in question or that they were all charges for gas. However, he did make one point clear and that was that it was cheaper to heat with Natural gas than with propane gas.

R-82 and R-83

Q An where there is natural gas available, isn't it generally considered cheaper to operate from natural gas than it is propane gas?

A Yes, Sir.

Q Considerably cheaper, isn't it?

A I have heard statements anywhere from one per cent up to sixty-five per cent.

Q Do you have an opinion yourself as to how much?

A Yes, I do.

Q Would you state that?

A Approximately fifteen per cent.

Q So in any event, even if you had a propane system there that was adequate, it would have a tendency to enhance the value of the house because it would be cheaper to heat it with natural gas, wouldn't it?

A I don't know that it would enhance the value of the home. It would decrease the living cost of the home.

It is submitted that the jury and the court had substantial evidence to support the jury verdict.

The Plaintiff in her brief on Page 13 argues that the sewer was not considered important by the parties as it was not mentioned specifically, in the agreement which was not the final contract entered into by the parties, and that for that reason it cannot be considered as an important item. It should be noted that both of the parties in their testimony which was not objected to at the trial, admitted that the sewer was taken into consideration and the Plaintiff frankly admits that he intended to sell property connected to the Logan City Sewer, and the Defendant in her testimony as set out R-15 that she intended to purchase property connected to the Logan City sewer. This fact is borne out by the entire record, and the importance of this fact was testified to by the Defendant in that she stated that she had to borrow money to make the down payment and that every item that might increase the price was certainly important to her. It is also clear that a sewer which had been represented to exist by the Plaintiff buried in the ground is not an easy item to separate from the real property and it necessarily is included along with the general description of the real property which is to be conveyed and it is not an item which would have to be specifically set apart to make sure that it did go with the real property. The Defendant did check over the items in the listing and all that she was able to see by her examination of the property indicated that the

listing was correct. It is submitted that the examination would not reasonably raise any suspicion on the part of the Defendant that the sewer which they could not see by a visual examination was not actually as represented.

The Plaintiff states that the earnest money receipt and offer of purchase which was entered into on March 16, 1957, was controlling as to what was considered important by the parties and that because the sewer connection was not marked on that agreement, that it cannot be considered as important. It is pointed out by the respondent that this was not the final contract of the parties and that none of the improvements were listed for the simple reason that this was not the final contract. The final agreement which does not provide a special square to be crossed out for sewer connection was entered into on March 20, 1957, and it is Defendant's contention that the general description of the real property by meets and bounds included the sewer with the general description, which was represented in the escrow agreement and was intended to be covered as such by both of the parties.

POINT 2

THE ATTEMPT AT FORFEITURE WAS NOT EFFECTIVE.

It is alleged by the appellants that the contract had been forfeited and that because of such forfeiture the contract was not subject to rescission at the time of this trial. However, at the time that the Plaintiffs attempted their forfeiture under the provisions of the contract, there were certain credits that were due to the Defendant by reason of the Plaintiff's misrepresentation and the parties had been negotiating for the settlement of the same, but

no agreement had been reached. Under these circumstances, the courts were generally in accord that a forfeiture could not be declared and advantage be taken of a forfeiture clause while the vendor is in default. 134 A.L.R. 1065.

VENDEE'S RIGHT TO RECOVER BACK AMOUNT PAID UNDER EXECUTORY CONTRACT FOR SALE OF LAND.

Approaching the matter somewhat differently, it may be said that there is good ground for distinguishing between the case of a vendee a refund from a vendor who stands on a subsisting contract which he is able to perform, and who demands specific performance, or damages as for total breach by the vendee, and a case where the vendor, because of his own default or inability to perform is not able to confront the vendee with an obligation of continued performance. In the first case the contract remains alive for all purposes and bars a recovery by the vendee, since, according to the general American Doctrine, his obligation to perform excludes any right to a refund. But in the second case, the vendor's acts or the circumstances as to the title or otherwise, may relieve the vendee of any obligation to continue performance and at the same time free him of any liability to forfeiture, since the cases are generally inconsistent with the idea that a vendor in default may enforce a forfeiture. The case now before the court is one where vendor had materially misrepresented the property to the defendant vendee and this was discovered prior to the plaintiff claiming any default and after this the defendant claimed that she was entitled to

certain credits which she was never given. There was no dispute that the defendant was entitled to some credit but the parties were still attempting to negotiate a settlement when the plaintiff attempted to declare a forfeiture.

Carpenter vs. First Trust & Savings Bank 54 P2d 495 has been cited by the Appellant to show that assurances by the vendor that improvements would be replaced, was not grounds to justify a delay of the vendee of giving notice of her election to rescind. It is pointed out that in that case the court found that the evidence did not support a finding that such assurances had been given and upheld a finding by the lower court that such assurances had not been given.

It is suggested that in fact because of the wording used, that such assurances would justify a delay in the vendee making an election.

The Defendant had demanded that the cost of the sewer connection be credited in full to the payments on the contract, and the plaintiff had offered to pay only \$100.00 or only about half of the price.

Rienhart vs. Welchman, Oregon case 65 P2nd 1420, 134 A.L.R.

“Where the time of the essence provision of the contract had been waived the court seemed to concede that an ineffectual attempt to forfeit the contract by unreasonably short notice and a retaking of the land would have rendered the vendor liable to return what had been paid on the contract.

The letters, Exhibits 1, 2, 3, and 4 make it clear that the Plaintiff had waived by his action any claim up to

September 8, 1958, any claim for forfeiture due to late payments and that at that time there was in dispute the exact amount due on the contract and the amount which was to be credited for the cost of the sewer connection, and Defendants Exhibit No. 5 was September 19, 1958, makes a demand for the actual cost of the sewer connection in the sum of \$243.30. Under these circumstances, the law is clear that the plaintiff was in no position to take advantage of the forfeiture clause of the contract. That there could be no continuing default on the part of the Defendant as long as the damages had not been determined or a settlement had been reached as to the damages caused by the false representation of the Plaintiff. The Defendant made her position clear by refusing any further payment on the contract until these matters were cleared up, and no payments were made after the discovery that the sewer was not connected. Therefore, the attempt to declare a forfeiture, under these circumstances, would be of no effect in cancelling the rights of the Defendant under the contract or which may have arisen due to the misrepresentation of the Plaintiff's vendor.

The appellants have cited the Case of Peck vs. Judd 226 P2d 712 for the proposition that the defendant had waived her right to recover for the misrepresentation be cause of the delay in giving up the property.

This case can be distinguished on several points, (1) there was no showing in this case of any misleading as to adjustments to take care of the fraud or any new contract which the parties had tentatively agreed to enter into which was the reason for the delay as in the present case, as is clearly shown by the letters which were entered into evidence. Also, the cited

case involves an apartment house where there were large sums of money paid in rent to the defendant each month which was clearly prejudicial to the rights of the plaintiff.

POINT 3

THAT THE DEFENDANT RESPONDENT WAS ENTITLED TO RECOVER ALL IMPROVEMENTS THE AMOUNT TO WHICH THEY HAD ENHANCED IN MARKET VALUE THE HOME AND ALL MONEY PAID IN RELIANCE ON THE CONTRACT MINUS A REASONABLE RENTAL VALUE FOR THE PROPERTY WHILE SHE WAS IN POSSESSION.

The right to relief in this type of a case is set out in 9 Am. Jur. Cancellation of Contracts, Section 40, Page 385. "On the other hand, a vendee in possession who rescinds a contract for the sale of land because of the misrepresentation of the vendor is entitled to the purchase money paid, the value of permanent improvements erected in good faith, the amount of taxes paid, and interest on these several sums deducting from the aggregate the value of the rent while the vendee remained in possession. As to the latter item, however, it should be noted that the vendee will not be obliged to pay rent in excess of the profits actually received."

There was no reason for Mrs. Overman to doubt, after receiving the letter from Mr. Erishman, but that the misrepresentation as to the sewer was the result of an honest mistake on the part of Mr. Erishman, and under these circumstances, she had a duty to give him an opportunity to correct his mistake and she had every reason to believe

that it would be taken care of in a reasonable manner. This is evident from the correspondence of the party in Exhibits 1, 2, 3, and 4.

Kerns vs. Bank of Mantou, 242 Pac. 2nd 817

In this case the plaintiff was sold a parcel of land and in checking over the land actually conveyed, found that it was not the same land as had been represented and the defendant claimed that he had waived his rights to rescission because of paying the taxes and finding a buyer for the property after he knew of the mistake.

The court held that these were not acts of dominion over the property, as the plaintiff had a duty to protect the property and maintain it in order to preserve his right to rescission.

In the case before the court the defendant was placed in a similar position when the sewer stopped working the home became unlivable and it became necessary to replace the sewer to maintain the value of the property and backing of the Sewer caused the back steps to become unusable and it was necessary to repair them in order to maintain the property, also the repairs to the ceilings were certainly an item necessary to the maintenance of the property.

Certainly all of these items were such as would mitigate the damages of the defendants which the defendant had a duty to do at least to a reasonable extent.

9 Am. Jur.- Cancellation of Instruments, Sec. 32, pp. 377 and 78.

The jurisdiction of equity to decree the cancellation of an instrument because of the time of its execution the

parties, or even one of them, labored under a mistake of fact, provided that such mistake is material to the transaction and affects the substance thereof, rather than a mere incident or the inducement for entering into it, is well recognized and frequently invoked, especially if an element of fraud is present or a confidential relationship exists. This rule is applicable whether the instrument relates to an executory agreement or one that has been executed. However, before granting relief it must be made to appear that the fact concerning which the mistake was made was one that animated and controlled the conduct of the parties. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.

A contract will not be rescinded for a mistake in favor of the complainant, correction of which, upon its discovery, he refused to allow.

It is clear that any of the improvements which the court allowed the defendant to recover for were improvements which would be reflected in the increased sale value of the home and would be a windfall to the plaintiff.

This would be rewarding the plaintiff for his misleading the defendant into believing that he would agree to a refinancing arrangement and that the misrepresentation as to the sewer connection was only and honest mistake for which she could expect a reasonable compensation. The plaintiff had been planning to make the improvements prior to her discovery of the sewer problem and that to allow the plaintiff to recover the improvements which had been put on the property as a result of his

own misleading would be contrary to the rules of equity which should govern the court in setting the damages in a case of this kind. The general rules of restoring the defendant to the status quo which should govern the court in a case of this kind does not limit the court in all cases to the time of the discovery of an honest mistake or misrepresentation. These rules are set out in 9 Am. Jur. Sec. 39, Page 384.

“Restoration of Defendant to Status Quo. Under the maxim of equity that he who seeks equity must do equity, the plaintiff in an action to cancel or rescind an instrument must generally, as a condition of obtaining such relief, restore the defendant to the position which he occupied before the transaction in question. The plaintiff is generally required to restore or offer to restore, the benefits he has received, not as a condition of acquiring the right to sue, but because of the equitable maxim that he who seeks equity must do equity. Certainly the plaintiff will not be allowed to derive any unconscionable advantage from the cancellation and usually he will be denied relief when it is not possible substantially to restore the defendant to the status quo. The mere inability of the plaintiff to make restoration does not relieve him of his obligation to do so, or permit the court to grant him relief. Thus, a vendor of land who sues in equity to rescind a conveyance or cancel a recorded contract to convey, will be required to restore the consideration received by him.

CONCLUSION

That as this is an attempt by appellants to enforce a forfeiture provision at a time when they themselves were

in default because of their false representation as to the sewer, and further to limit recovery by respondents because they were able to get the defendant to believe that they were willing to make proper adjustments, and lead her to believe that they would allow refinancing to take care of improvements on the home, that a Court of Equity should not allow them to have the benefit of improvements made as a result of this type of leading on.

Certainly it would be unconscionable for the plaintiff to receive the benefits of the improvements made in reliance on negotiations which could be expected to lead her to believe that there had been an honest mistake that would be taken care of and also that they would agree to a type of refinancing so that she would be able to pay for these improvements.

That under the circumstances of this case, that it was proper and in accordance with the laws to restore the defendant to the status quo by awarding to her the sums paid under the contract and the value of the improvements she had made on the home less a reasonable rental while she was in possession. And that the judgment of the District Court was supported both by the law and the facts as appears from record.

Respectfully submitted,

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