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Marion E. Tibbits and Rose Wheelwright Tibbits v. Rhuel O. Openshaw and Darlene O. Openshaw : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARION E. TIBBITTS, and
ROSE WHEELWRIGHT TIBBITTS,
Plaintiffs and Respondents,

vs.

RHUEL O. OPENSHAW and
DARLENE O. OPENSHAW,
Defendants and Appellants.

Case
No. 10512

UNIVERSITY OF UTAH

RESPONDENT'S BRIEF SEP 30 1966

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondents are of the opinion that the Statement of Facts as related by the defendants is incomplete and unilateral and in order for the Court to have before it all of the facts, we will relate them as follows:

Plaintiffs, prior to July 31, 1962, were engaged in constructing two houses on property owned by them in Riverdale, Weber County, Utah. The real property is described in the plaintiffs' Exhibit A and involves Lots 7 and 8, Rainbow Subdivision in Weber County, Utah, together with a piece of adjoining undivided property.

Plaintiffs, as builders, employed a licensed contractor, Lawrence Lutz, to do the carpentry work and some of the cement work on the houses to be built on Lots 7 and 8, (T. 31, 22) and to supervise the other employees and their work (T. 30, 31). They also employed licensed contractors to do the cement work, (T. 29) electrical work (T. 117), plumbing and heating (T. 27, 117), and the roofing (T. 116).

Defendant Darlene O. Openshaw became interested in purchasing the two homes together with the adjacent vacant property and on several occasions went through the two homes while they were in various stages of construction and apparently was satisfied with what she saw (T. 75). Upon the completion of the houses on Lots 7 and 8, and on July 31, 1962, the plaintiffs and defendants had Attorney Dale T. Browning prepare a Uniform Real Estate Contract, (plaintiffs' Exhibit A) covering the sale of the above referred to real property. The deeds to the real property were placed in escrow with Franklin D. Maughan, an abstractor of Ogden, Utah (Plaintiffs' Exhibits B and C). Defendants entered into possession of the property, rented the upstairs of one home for \$150.00 a month and the other home was rented for a

total of \$255.00 (T. 48). Defendants made the payments pursuant to said contract until a balance of \$4,379.32 was left remaining.

Although the contract provided that the total property would not be released to the defendants until the entire purchase price was paid in full, the defendant, Darlene O. Openshaw, on October 22, 1964, informed Mr. Maughan, the escrow agent, that the final payment had been made and requested that the deeds be delivered to her. This statement was false, there being approximately \$4,379.32 still owing. However, the escrow agent had the deed recorded in the defendants' name (T. 96, 81). Suit was filed March 17, 1965, seeking a re-conveyance of the property until the contract was completed or for the sum owing.

DISPOSITION OF THE TRIAL COURT

At the conclusion of the parties' evidence the jury viewed the premises and inspected the houses and the cause was submitted to the jury on special interrogatories, Special Interrogatory No. 9 reading as follows: "1. Do you find it proven by clear and convincing evidence that the plaintiff perpetrated a fraud upon the defendants as the term 'fraud' is here used in these instructions?" To this interrogatory, the jury answered "no", and pursuant thereto the Court rendered judgment in favor of the plaintiffs as prayed for together with costs, interest and attorney's fees.

ARGUMENT

POINT 1. THERE WERE NO IMPLIED WARRANTIES IN REGARD TO THE HOUSES; THE HOUSES WERE BUILT IN A WORKMANLIKE MANNER AND SUITABLE FOR HABITATION; THERE IS NO EVIDENCE THAT THE BUILDER-VENDOR DID NOT COMPLY WITH THE BUILDING CODE OF THE AREA IN WHICH THE STRUCTURES ARE LOCATED.

It is strongly urged by the defendants-appellants that there was a breach of warranty on the part of the plaintiffs-respondents in the construction of the homes and the sale of the real estate. The Court's attention is called to paragraph 20 of the Uniform Real Estate Contract entered into between the parties and which is identified as plaintiffs' Exhibit A, which reads as follows: "It is hereby expressly understood and agreed by the parties hereto that the buyer accepts the said property in its present condition and that there are no representations, covenants or agreements between the parties hereto with reference to said property, except as herein specifically set forth or attached hereto."

The ruling of the Court is correct as is shown in *Jensen's Used Cars vs. Rice* (Utah) 7 Ut. 276, 323 P. 259, 260.

"Elementary it is that in construing contracts we seek to determine the intention of the parties, but it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed in writing and endorsed by them as signatories thereto. Were this not so, business, one with another, among our citizens would be relegated to the chaotic and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society, welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language for which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. *The rule excluding matters outside the four corners of a clear and understandable document is a fair one and one's contentions concerning his intent should extend no further than his own clear expression.*

"It is urged correctly that to admit matters outside a contract would do violence with the principles that one is bound by his manifestations of assent and that irrespective of such contentions such matters properly are excludable by

the parole evidence rule, which rule counsel suggests is one of substantive law rather than one of evidence. Whatever kind one calls it, the rule that excludes such evidence is a common-sense rule."

In the case of *Steiber vs. Palumbo* 347 P. 2d 978 (Ore.), the defendant sold a *completed home* to the plaintiff. Plaintiff claimed a breach of warranty because of lack of proper footings under the house. In the consummation of the transaction only three papers were employed, an earnest money receipt, a deed and a mortgage. None of the three papers contained any warranty of the quality of the house or the character of the soil under it. The Court affirmed the lower Court which had previously stated: "There is no such thing as an implied warranty in connection with the sale of real estate". And the Supreme Court stated: "No decision has come to our attention which permitted recovery by the vendee of housing upon a theory of implied warranty". In doing so, they cited *Williston on Contracts*, Revised Edition, Section 926: "One who contracts to buy real estate may indeed refuse to complete the transaction if the vendor's title is bad, but one who accepts a deed generally has no remedy for defective title, except such as the covenants in his deed may give him. Therefore, if there are no covenants he has no redress, though he gets no title. Still more clearly, there can be no warranty of quality or condition implied in the sale of real estate.

"It is generally true also that any express agreements in regard to land contained in a contract to sell it are merged in the deed if the purchaser accepts a conveyance."

Further quoting from *Levy vs. C. Young Construction Co.*, 1958 26 N.J. 300, 139 Atlantic 2d, 738:

"Absent any covenant binding defendant to sell a well constructed house, plaintiffs cannot sue upon an implied warranty * * * *

"As defendant notes, the policy reasons underlying the rule that the acceptance of a deed without covenants as to construction is the cut-off point so far as the vendor's liability is concerned are rather obvious. Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with the ownership and control of the premises. They could never be certain as to the limits or termination of their liability. The rule which we impose in the circumstances of the present action works no harshness on purchasers of real estate. Plaintiffs had an opportunity to protect themselves by extracting warranties or guaranties from the defendant in the contract of sale and by reserving them in the deed * * *."

In *Harmon National Real Estate Corporation vs. Eagan* 241 N.Y. Supplement 708, 709, suit was brought by a mortgagee and the defendant mortgagor counter-claimed on the ground "That at the time the house was sold to the defendant the plaintiff well knew that the same was uninhabitable." The Court said:

"For after the contract of sale has been executed and the conveyance accepted, the Grantee must rely solely on the covenants in his deed. If his deed contains no covenants he is without a remedy, either for eviction or encumbrance. Upon the sale of real property, the rule caveat emptor applies * * * no implied covenant arises from a conveyance of real property."

In the case of *Kerr vs. Parsons*, 1948, 83 Ohio App. 204, 82 N.E. Second 303, 305, the action was based upon the plaintiff's purchase of a second-hand house; after purchase he brought an action for damages against the Seller on the ground that the latter had falsely represented that a well on the premises would supply enough water for household uses. A verdict and judgment for the defendant were reversed because of prejudicial instructions. Inter

alia it was noted that the trial court had charged as to warranty. In reversing the appellate Court said:

"Ordinarily there is no implied warranty as to the condition of real estate sold or leased and oral evidence of a warranty would not be admissible to add to a deed or lease."

In the case of *Berger vs. Burkoff* 1952, 200 Maryland 561, 92 At. 2d, 376, 378, the action was based on the claim that the basement in a new home was improperly waterproofed. It was the contention of the appellants that there was an implied warranty not expressed to furnish a structurally satisfactory house. The Court held there were no implied warranties in the sale of real estate. To the same effect, see the New York case of *Dolezel vs. Fialkoff*, 2 At. 2d 642, 151 N.Y. Sup. Second 734.

Although Oregon has a statute stating specifically that there are no implied warranties, the Oregon case previously cited of *Steiber vs. Palumbo* concluded as follows: "It will be noticed from the foregoing that even apart from legislations such as O.R.S. 93.140, the law refuses to imply in favor of the purchaser of an existing house warranties as to quality. As to purchasers of that kind, the rule of caveat emptor applies and he must reduce his purported warranties to written contractual form if he expects to base an action upon them."

For further citations in regard to this proposition, see 78 A.L.R., 2, 446.

Defendants-appellants cite three main cases in support of their theory. In *Carpenter vs. Donohoe* 338 P. 2d 399 (Colo.) and *Jones vs. Gatewood* 381 P 2d 158 (Okla.), both cases deal with "hazardous" condition or conditions that make the houses not fit for habitation. The Carpenter case dealt with walls caving in that made living in the house hazardous and the Jones case concerned itself with water seeping through the concrete slab

that made the house unlivable. These cases are therefore distinguishable from the case at bar for the reason that the houses have been occupied continuously since possession by defendants either by defendants themselves or by others who pay well for the privilege.

The third case relied upon, *Schipper vs. Leavitt & Sons, Inc.*, 207 A. 2 314 is a purely tort case and has no application to the case at bar.

It is difficult to see how it can seriously be contended that the houses were not suitable for habitation inasmuch as the upstairs of the white house was rented for \$150.00 per month and the brown house for a total of \$255.00 (T. 48) and at the present time the defendants-appellants are residing in the white house (T. 38).

In regard to the workmanship on the homes and the quality of lumber used therein, Mr. Lutz, defendants' witness, stated that the carpentry work was satisfactory, (T. 24) and that the lumber was strong enough, (T. 36). Harvey Hill, defendants' witness, stated that the lumber used was satisfactory if the spanning was proper, (T. 63) but that he did not know whether or not the requirements for proper spanning had been complied with (T. 69). There was other evidence from another licensed contractor that the materials that went into the houses made for good construction (T. 162).

Concerning the furnace, there was absolutely no testimony as to whether or not the furnace was ventilated properly, but there was testimony that the furnace was installed by a licensed heating contractor (T. 27,117).

The electrical work was done by a licensed electrical contractor and not by the plaintiffs-respondents (T. 117).

Plaintiffs-respondents deny that there was any express warranty that the roofs were "20 year roofs" (T. 116) and defendants-appellants' witness, Harvey Hill, stated that he did not know for a fact that the roofs were not what are called "20 year roofs" (T. 68).

Although there was testimony that the houses were at least partially insulated plaintiffs-respondents deny that there was any representation whatsoever made as to whether or not the houses were fully insulated (T. 116).

The construction loan was obtained through State Savings & Loan Company of Salt Lake City and several inspections were made by representatives of State Savings & Loan Company prior to releasing the construction money (T. 149).

Although defendants-appellants, over objection, introduced zoning ordinances, building codes and electrical codes, there was no evidence whatsoever that the structures in question did not comply with the zoning ordinance, the building codes or electrical codes.

POINT 2. DEFENDANTS-APPELLANTS SHOULD BE BOUND BY THE CONTRACT THAT THEY EXECUTED.

Defendants-appellants' point 2 would appear to be beyond argument inasmuch as there is ample evidence from defendants' witnesses as well as plaintiffs' that if there were in fact any implied warranties, that they were not breached. There seems to be more than ample evidence to support the jury's verdict.

In raising the point, defendants-appellants presume that the only reason that they did not prevail was because of the paragraph 20 in the Uniform Contract which stated that there were no warranties either express or implied—this is not so—defendants-appellants did not prevail because they failed to convince the jury, either from evidence or a careful view and inspection of the prem-

ises that the houses were poorly constructed, of defective materials, or were not fit for human habitation.

However, it is the established law in this state that contracting parties, not acting under disabilities shall be bound by the terms of their contracts.

Jensen's Used Cars vs. Rice, 7 Ut. 2 276, 323 P. 2d 259.

In addition to the express provisions of the contract, defendants-appellants obtained deeds of Warranty which contained no covenants or restrictions. This was the second chance defendants-appellants had to protect themselves if they were concerned, which they were not. After the deed was accepted, defendants-appellants could rely only on the covenants in the deed and there were none in regard to the items of which they complain. See *Harmon National Real Estate Corp. vs. Egan* 241 N.Y. Sup. 708, 709. *Steiber vs. Palumbo*, *Supra.*, *Levy vs. C. Young Const. Co.*, *Supra.*

It wasn't until three years later, after suit was instituted for final payment or return of the deed that the alleged defects were brought to light. Defendants-appellants are guilty of laches if there is any merit to their complaints. Section 60-3-9, Utah Code Ann. 1953 provides as follows:

"But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty *within a reasonable time after the buyer knows, or ought to know*, of such breach, the seller shall not be liable therefor."

Inasmuch as there were no warranties contained in the Uniform Real Estate Contract, plaintiffs-respondents' Exhibit A, nor were there any reservations contained in the Deed issued pursuant to said contract, plaintiffs-appellants' Exhibits B and C, there were no warranties implied or expressed, therefore they could not be breached and the defendants-appellants have given no reason why they should not be held to their contract. *Jensen's Used Cars vs.*

Rice 7 Ut. 2d, 276, 323 P. 2d, 259, 260; *Harmon National Real Estate Corporation vs. Eagan*, 241 N.Y. Sup. 708, 709, *Levy vs. C. Young Const. Co.*, Supa.

CONCLUSION

The evidence shows that the houses were well constructed with good materials and good workmanship; that they were fit for habitation; that there were no warranties expressed or implied and no breaches thereof and that defendants-appellants should be held to their contract and the verdict of the jury affirmed by this Court.

Respectfully submitted,

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