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Marcell Pitcher v. C. W. Lauritzen : Appellant's Reply Brief

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In the Supreme Court of the State of Utah

MARCELL PITCHER,

Plaintiff and Respondent,

- VS -

C. W. LAURITZEN,

Defendant and Appellant,

Case

No. 10563

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
First District Court for Cache County

Lewis Jones, Judge

JAN 13 1967

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C. W. LAURITZEN,

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APPELLANT'S REPLY BRIEF

This reply brief is limited to (1) answering the points relied upon by the respondent on his cross appeal and (2) answering new matter set forth in the respondent's brief.

CROSS APPEAL

The respondent has cross appealed from the trial court's finding that the earnest money receipt was a valid contract in its inception.

STATEMENT OF FACTS ON CROSS APPEAL

The earnest money receipt involved in this case provides as follows:

“EARNEST MONEY RECEIPT AND OFFER
TO PURCHASE

“To: Ravsten Realty Logan, Utah April 16, 1962

In consideration of your agreement to use your efforts to present this offer to the Seller, I/we C. W. Lauritzen hereby deposit with you as earnest money the sum of (\$100.00) One Hundred Dollars to secure and apply on the purchase of the property situated at: 220 acre Pitcher farm, 60 acres Bambrough farm and 160 acres Weston Farm, together with all water rights, owners interest in well, pump and sprinkler pipe, Cornish City, Cache County, State of Utah, including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures except —

The following personal property shall also be included as part of the property purchased: —

The total purchase price of (\$100,000.00) One Hundred Thousand Dollars shall be payable as

follows \$100.00 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you:

\$..... on delivery of deed or final contract of sale which shall be on or before May 1, and \$..... Balance of purchase price to be paid as follows 30 acres in North Logan as indicated by map valued at \$50,000.00, \$25,000.00 cash from loan on sellers farm and seller to carry balance on contract or second mortgage at 5% interest, until the balance of \$..... together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at% per annum on the unpaid portions of the purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before, 19..... All risk of loss and destruction of property, and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except: none

The following special improvements are included in this sale: Sewer ☐-Connected ☐. Septic Tank and/or Cesspool ☐. Sidewalk ☐. Curb and Gutter ☐. Special Street Paving ☐. Special Street Lighting ☐. Culinary Water (City) ☐. Other Community System ☐. Private ☐. (Legend: Yes (x) No (o))

Contract of Sale or Instrument of conveyance to be made on the approved form of the Salt Lake Real Estate Board in the name of C. W. *Layritzen*.

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 5 days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

Ravsten Realty

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract to date or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or In the event of sale of other than real property, seller will provide

evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission equal to the minimum recommended by the Salt Lake Real Estate Board. In the event the seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

April 20/62

Date

/s/ Marcell Pitcher
Seller

/s/ C. W. Lauritzen
Purchaser

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

/s/ Marcell Pitcher
Seller

April 20/62

/s/ C. W. Lauritzen 8-14-62''
Purchaser

Exhibit 1, R. p. 6

The parties met with the real estate agent, Ravsten, and together went out and inspected the 30 acres in

North Logan before the earnest money receipt was signed. (Tr. 67, 68). (Ravsten's dep. p. 6) The defendant provided a sketch map which was before the parties when they inspected the property. (Tr. 67, 79, 128). The defendant caused his 30 acres of land in North Logan to be surveyed and a legal description to be prepared. (Tr. 74, 158, 159). The plaintiff delivered his abstract of title to his agent, Ravsten. (Tr. 73). The foregoing supplements the statement of facts contained in appellant's brief.

STATEMENT OF POINTS ON CROSS APPEAL

POINT I

EVIDENCE RELATING TO THE MAKING OF THE CONTRACT MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLANT.

POINT II

THE PREPONDERANCE OF THE EVIDENCE SUPPORTS THE FINDING THAT THE EARNEST MONEY RECEIPT IS A VALID CONTRACT.

ARGUMENT

POINT I

EVIDENCE RELATING TO THE MAKING OF THE CONTRACT MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLANT.

The law is well settled in equity cases that the appellate court shall review the evidence. The law is equally well settled that in doing so the court shall consider the evidence in the light most favorable to the findings and will not disturb them unless the evidence clearly preponderates against them.

Cook vs. Gardner, 14 Utah 2d 193, 381 P.2d 78.

Nokes vs. Continental Min. & Mill Co., 6 Utah 2d 177, 308 P.2d 954.

It will be noted that in arguing his case the respondent has, throughout his brief, ignored this rule with respect to the question of the validity of the agreement. Where the evidence is in conflict he has stated only the evidence supporting his position. Under the cases cited above the evidence supporting the finding involved in the cross appeal must be considered in the light most favorable to the appellant.

POINT II

THE PREPONDERANCE OF THE EVIDENCE SUPPORTS THE FINDING THAT THE EARNEST MONEY RECEIPT IS A VALID CONTRACT.

This court has held in several cases that an earnest money receipt in the form used by the parties may constitute a binding contract provided (1) there has been mutual assent manifesting an intention to be bound,

and (2) the obligations of the parties are set forth with sufficient definiteness that it can be performed.

Bunnell vs. Bills, 13 Utah 2d 83, 368 P.2d 597

Reese vs. Harper, 8 Utah 2d 1119, 329 P.2d 410.

Andreason vs. Hansen, 8 Utah 2d 370, 335 P.2d 404.

It is of course necessary for the parties to agree upon essential terms, namely, the property to be sold, the purchase price, the terms of payment and the interest, if any, on the deferred balance. To meet the requirements of the statute of frauds there must be a memorandum in writing, subscribed by the party by whom the sale is to be made. See Section 25-5-3, Utah Code Annotated, 1953.

Let us see whether the essential terms have been agreed upon in the Earnest Money Receipt and Offer to Purchase involved in this case. There is a designation of the land not by legal description but by reference, to the "Pitcher farm," the "Bambrough farm," the "Weston farm" and acreage in each at Cornish, Utah together with the water rights and the "owners interest in well, pump and sprinkler pipe." The Pitcher property consisting of the Pitcher farm, the Bambrough farm and the Weston farm, was pointed out to the purchaser on the ground. (Deposition of Ben Ravsten, p. 4). The North Logan property was pointed out to Mr. and

Mrs. Pitcher by their agent Mr. Ravsten prior to the execution of the contract. (Deposition of Ben Ravsten, p. 6). Such matters as legal description can be supplied by proof. There is no uncertainty as to the land sold.

The purchase price is set out specifically as \$100,000.00. The terms of payment are likewise set out specifically as follows: \$100.00 cash — 30 acres in North Logan as indicated on map valued at \$50,000.00, \$25,000.00 in cash from a loan on the seller's farm and the balance on a contract or second mortgage at 5% interest.

In the case of *Bunnell vs. Bills*, supra, the court indicates that the parties are bound by an agreement such as that here involved if "the intention of the parties can be ascertained with reasonable certainty." In the Bunnell case Stevens was the Seller and Bunnell was the Purchaser. That case like this one involved a transfer of other property as part of the purchase price. It also involved certain personal property recited in the receipt "as listed" but no list was attached. Stevens was making the same kind of attacks on the validity of the contract as made here. I quote at length from the Supreme Court's opinion sustaining the validity of the contract:

"... Stevens contends that because of the provision concerning Bunnell's property at 904 East 1st South, the receipt was at most an agreement to agree. Stevens argues that because the receipt

did not set forth the 'price, terms, interest, etc.' relating to the Bunnell property, it was to be handled as a separate transaction. However, when the receipt is interpreted under the circumstances that existed at the time of its creation, and in light to the conduct and statements of the parties, it is clear that the transfer of Bunnell's property was intended as part of the whole agreement. The fact that part of the performance is that the parties will enter into a contract in the future does not render the original agreement any less binding. The transfer of Bunnell's property was no more a separate transaction than were the cash payments that Bunnell had agreed to make in the future. The receipt provides that 'all rights and interest in (Bunnell's) property (are) * * * valued at \$15,000' and are transferred to Stevens 'on delivery of deed (to the Alta Motor Lodge) * * * which shall be on or before January 1, 1960.' When Stevens contracted to buy the Alta from Bills there was no provision as to any interest to be charged. At trial he had no doubt about the binding effect of that contract. There was no question that the parties, by failing to provide for interest in the contract, intended that no interest was to be charged. However, Stevens now asserts that by failing to include an interest provision, his contract with plaintiff is incomplete. Stevens also argues that the receipt fails to set forth the price and terms relating to Bunnell's property, even though the receipt expressly states that such property has an agreed value of \$15,000, and that it is to constitute part of the consideration for the Alta. Furthermore, the receipt sets forth the time and the type of instrument to be used for the transfer of Bunnell's property. Stevens' contention that the provision relating

to the transfer of Bunnell's property is merely an agreement to agree and that the receipt is therefore not binding is nothing more than an attempt to evade the obligations of a valid contract. As the court pointed out in *Moody v. Smith*, a party to a contract cannot seek to alter a portion thereof under the guise of attacking the existence of such portion as a separate contract.

Stevens' further attack upon the contract is to the effect that there was no meeting of the minds as to the personal property that was to be included with the transfer of the *Alta* and with the transfer of Bunnell's property. As to the personal property to be included with the *Alta*, the receipt recited 'as listed,' but when the receipt was entered as evidence at trial no list was attached. The only evidence of the items of personal property was presented by Bunnell. She testified that she had made a copy of the list that was intended by the parties to be included in the agreement. Because the receipt clearly shows that personal property was to be included in the transfer of the *Alta*, Bunnell's written copy was admissible to clear up the ambiguity created by the absence of an attached list. When the receipt is read along with Bunnell's copy of the list, the intention of the parties is made clear.

The weakness of Stevens' attack upon the agreement becomes even more apparent when considering his contention that personal property was to be included in the transfer of Bunnell's property. The receipt contains no indication that Bunnell was to transfer personal property, but Stevens now claims the agreement was incomplete because it contained no such provision. On its

face the receipt is clear. Stevens was a business-man who was familiar with property transaction. If personal property was to be included it should have been so stated in the instrument. Stevens' failure to include such a provision in the receipt is not sufficient to relieve him from liability for his breach of the agreement. . . ."

Upon the examination of the respondent's points on cross appeal (Res. brief pp. 25, 26) it is apparent that the cases cited above take care of point 1 as to the adequacy of the description. See also Ravsten's deposition, p. 4. Point 2 relates to the map of the North Logan property. The defendant testified that the parties had the map before them when they examined the property before making the agreement. (Tr. 67). The trial court was entitled to believe this testimony. The finding, No. 4, that *no map was exhibited to the plaintiff at the time he signed the agreement* is not inconsistent with the defendant's testimony that the parties had the map before them when they went over the land before executing the agreement. The testimony relating to the map must be examined in the light most favorable to the defendant.

There was no uncertainty in the contract as to who was to make the \$25,000 loan on the seller's farm. Obviously only the owner could make the loan and just as obviously the loan would be paid by the buyer. Otherwise, the seller would not get his \$100,000 purchase price. The conduct of the parties makes this intention clear.

See the testimony of Ben Ravsten, the plaintiff's agent. (Ravsten deposition pp. 10-15, Tr. pp. 123-128). This disposes of point 3.

Point 4 that the contract fails to set forth whose obligation it was to pay the existing mortgage to the FHA is disposed of by the plain terms of the earnest money receipt, Exhibit 1. See the last sentence of unnumbered paragraph 2.

Point 5 that the earnest money agreement "was expressly signed upon the representation and belief that the real estate agent had or would have a sale for the 30 acres before the terms of the final contract would be agreed upon before May 1, 1962, is entirely without merit because there is nothing in the written agreement, Exhibit 1, to support such contention and there is nothing in the record to show that the defendant knew about the mental reservations of the plaintiff. There is no evidence that at the time the agreement was made any such belief of the plaintiff that the deal was conditional upon the sale of the 30 acres was communicated to the defendant. In fact, the plaintiff's agent, Ravsten, testified that within a week after the agreement was signed, the plaintiff and defendant met with him and discussed the transaction. We quote:

"A. As I recall, Mr. Pitcher's main concern was what he could do with the North Logan property. He made a statement to me on the morning that

he signed the agreement that 'You understand that you will get no commission out of the sale, out of this sale, until the North Logan property is sold.' And we discussed some of the possibilities of how that might be sold, the possibility of raising money out there through a loan that might be had on it. I told him that it would be necessary to take the first step, complete the first sale first before we'd be in a position to sell the other property. He said, 'Find out what can be done with it. Find a buyer for it.' And I agreed with him that there would be no commission involved until something was done with the North Logan property. And as I remember when we met in the office it was to follow through a little more on some of the details relative to that." (Ravsten deposition, pp. 9-10).

Point 6 is a statement that there was never a meeting of the minds as to the terms of the contract and that the words and conduct of the parties established that the earnest money receipt was merely a temporary receipt to be finalized later. This point is not supported by the evidence. After executing the agreement the plaintiff decided that he was not bound by it. This is very clearly expressed by the plaintiff in his own words. See appellant's brief, pp. 5, 6. There is absolutely no evidence that the defendant treated it other than a final binding contract. See pp. 14 and 15 of appellant's brief.

REPLY TO RESPONDENT'S ANSWERING BRIEF

The points argued in the respondent's answering brief will be discussed in order.

1. Under point 1, page 9 of the respondent's brief it is argued that the plaintiff is entitled to the reasonable value of the hay and straw. These crops were raised on the land described in the earnest money receipt and were not sold to the defendant. The defendant was told by both the plaintiff and by Ravsten his agent that the hay belonged to the defendant and to "come out and get it." (Tr. 153, 154, 193). No price was mentioned, (Tr. 194) no weights were requested, (Tr. 199) and the first time the defendant knew that the plaintiff expected payment was when he heard from the bank in 1963. (Exhibit 5).

The claim for the hay and straw should be considered by a court of equity in connection with the determination of the equitable issues in the case. As indicated in the appellant's brief he contends that he has not been at fault and that the failure to perform is entirely the fault of the plaintiff.

2. The respondent argues under point 2 that the earnest money receipt is not specifically enforceable. No reference under this heading is made to any of the many well reasoned Utah cases on the subject. The cases cited

contain very general statements of law on facts which are not pertinent. No consideration is given to the cases cited on page 9 of the appellant's brief, nor to the case of *Bunnell vs. Bills*, supra, and the other cases cited in this brief in our answer to the cross appeal. We refer to the argument above on pages 7 to 14 meet the respondent's second point.

3. The respondents third point is that there was sufficient evidence of abandonment to sustain the court's finding. The respondent's argument consists of general statements as to what the record contains, but there is no attempt to answer the appellant's point that it takes inention on the part of both parties to abandon, and that the many documented statements on page 14 of appellant's brief show no intention on the part of the defendant to abandon. No answer is made to the contention that abandonment is not pleaded and was never before the court. On the issue of abandonment see the following case in addition to those cited in the appellant's brief, p. 15. *North American Uranium v. Johnston*. (Wyo.) 316 P.2d 325.

The quotation from the record on page 20 of the respondent's brief, "Just tell him the deal is off." (Tr. 64) is deliberately misleading. The statement was made by the defendant on June 16, 1963 with reference to a proposal to enlarge the transaction by including additional land and farm machinery. (Tr. 68, 69). The ex-

planation of the statement by the defendant (Tr. 195, 196) was not contradicted.

The argument under point 3 that the contract was abandoned because the parties failed to exchange deeds before May 1, 1962, the date fixed by the earnest money agreement for performance, is entirely without merit. Both parties by their conduct for more than a year performed acts which recognized the existence of the agreement. See pp. 14 and 15 of appellant's brief for a list of many acts of the defendant participated in by Ravsten, the plaintiff's agent.

4. The respondent's fourth point relating to impossibility of performance fails entirely to meet the argument on both the facts and the law in the appellant's brief pp. 10-13.

5. The fifth point urged by the respondent is that it would be inequitable and unjust for the court to specifically enforce the agreement three years or more after it was executed. The respondent is wrong on the time. This suit was filed less than two years after the agreement was made and during those two years the defendant was energetically, through the plaintiff's real estate agent, seeking to get him to perform. (Tr. 70, 82, 159, 195). The defendant had his attorney write letters to the plaintiff. Exhibits 2 and 3. The plaintiff did not answer them. See the deposition of Marcell Pitcher, Exhibit Y, pp. 27, 28.

CONCLUSION

The finding that the earnest money receipt was a valid contract is sustained by competent evidence and it was the duty of the trial court to specifically enforce it. The defenses of abandonment, the making of valuable improvements and impossibility of performances are subterfuges to cover up a wilfull breach of contract. The plaintiff should not be permitted to profit by his own defaults.

Respectfully submitted,

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