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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ASSOCIATED INDUSTRIAL DEVELOPMENTS, INC., A California Corporation,	)	
Plaintiffs,	)	Supreme Court Case No. 19374
vs.	)	
J. PAUL JEWKES and LORNA JEWKES, Husband and Wife,	)	
Defendants.	)	

BRIEF OF APPELLANT

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an Appeal from a Judgment of
The Fourth Judicial District Court in and for Utah County
Judge Allen B. Sorensen Presiding

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited

Authorities

STATEMENT OF THE NATURE OF THE CASE

This case is an action for foreclosure of a Deed of Trust as a mortgage, and a counteraction for equitable relief based on delays in performance of the sellers covenants and additions in value to the property made by the defendant chappellant.

DISPOSITION IN THE LOWER COURT

Foreclosure was granted in the lower court. Appellant's request for equitable relief was denied. Attorneys fees in the amount of $26,577 were awarded.

NATURE OF THE RELIEF SOUGHT ON APPEAL

Appellant requests that this court order the court below to enter an order granting equitable relief to appellants, based upon their substantial contributions to the value of the property being foreclosed, and the failure of the appellees to perform their covenants with appellant promptly, and, in some cases, failure to perform them at all. Also, that this court reduce the attorney's fees awarded to a reasonable attorney's fee.

STATEMENT OF FACTS

1. On March 18, 1977, Cedar Hills Development Company (the predecessor in the interest of appellees), granted a continuing option to purchase land to Timpanogos Cove Development Corporation and others (appellants predecessors in interest) to acquire certain 193-acre tract located north of the city of Pleasant Grove, Utah. (Transcript pages 52, 53, and Trial Exhibit 1)

2. On November 15, 1977, appellants (hereinafter referred to as "Jewkes") acquired the rights of the buyers under Exhibit 1 to purchase the land (Trial Exhibit 7). (See also Hold Harmless and Warranty stapled to Trial Exhibit 2) On November 15, 1977, the continuing option (Exhibit 1), was amended by the original parties. A copy of the amendment is set forth as Trial Exhibit 2. This amendment was approved by and transferred to appellants.

3. Jewkes made several payments to appellees (hereinafter called AID) and to its predecessors in interest, all of which are set forth in Trial Exhibit 7. Jewkes received the various releases of property therein described, leaving a balance of approximately 80 acres, which is the subject of this action.

4. On May 15, 1981, Jewkes and AID entered into the Extension of Option Agreement and Agreement set forth as Plaintiff's Exhibit 3 at trial. This agreement specifies that appellees would deed the property to Jewkes, taking back a note and Deed of Trust. (Exhibit 3 provides that prior agreements, obligations, and understandings would be "merged" into the deed and into the Trust Deed note and Trust Deed.)

5. The Trust Deed note and Trust Deed, (Plaintiff's Exhibits 4 and 5 at trial), were executed by parties, and although undated, the Trust Deed shows a recording date of Nov. 12, 1981.

6. No more payments were made on the Deed of Trust, and the full balance of $265,777.81 was unpaid at the date of trial (transcript, page 10). The order of the court granting foreclosure states the amount of interest due on June 24, 1981 as $29,919.79 and continuing at the rate of $50.97 per day.

7. AID failed to provide water to the property, and Jewkes did so by obtaining a well permit and drilling a well, at a cost of approximately $100,000. (transcript pages 60,87,88.)

8. No sewer connections were provided to the property. Although Jewkes signed a waiver (Plaintiff's exhibit 6) of a claim for an extension of sewer and water mains to the property, he testified that it was his understanding that this covered only the physical cost of the lines themselves, and did not release AID from the obligation of providing water and sewer services to the property. (transcript, page 85)

9. The only testimony given at trial concerning the value of the property was by Jewkes, who testified that he had been involved in the appraisal, development, and ownership of property for a period of 34 years. Jewkes testified that the 80 acres had a present fair market value of $10,000 to $15,000 per acre. (transcript page 72) No contrary testimony was introduced by AID. Testimony is undisputed in this case that the value of the property is between $800,000 and $1,200,000.

10. Jewkes performed all necessary labor and took all actions necessary (including contribution of his $100,000 water well) to the city of Cedar Hills in order for the annexation of the property to the city of Cedar Hills (transcript, page 88).

11. AID failed to transfer to Jewkes a 1.8 acre pa- containing the frontage of the property on Canyon Road , compelled to do so by Jewkes after a period of 17 months, thus denying Jewkes access to the property and delaying planning. (transcript, pages 89 and 90)

12. The delays set forth above, together with the delays set forth in defendants trial exhibit 7, prevented development of the property in a timely fashion, and resulted in the inability to pay the mortgage on time. (transcript pages 90, 91, and 92)

13. No testimony as to the number of hours spent by counsel in this case was introduced.

14. AID's expert testified that attorney's fees in a foreclosure action should be 10% of the amount due without regard to the effort employed. (transcript, pages 36,37)

15. AID's president testified that he had agreed to pay AID's counsel 10% of the recovery. (transcript, p.48

ARGUMENT

1. UNLESS EQUITABLE RELIEF IS PROVIDED TO JEWKES, JEWKES WILL SUFFER SUBSTANTIAL LOSSES RESULTING FROM BREACHES BY AID, AND AID WILL EXPERIENCE AN UNDESERVED WINDFALL.

Paragraphs 8 and 9 of the Findings of Fact and Conclusions of Law of the court below are erroneous. Paragraph 8 states that "the record does not show any specific periods of delay in the performance of Plaintiff's material duties under the contract between the parties which are claimed by the defendants." Exhibit 7, introduced at trial, details delays of from 3 to 17 months in the delivery of title to property under the agreement. No contrary evidence was introduced at trial by AID and, therefore, the existence of such delays is undisputed.

Jewkes also testified that AID denied that it had sold to him the parcel of property which provided access from the existing highway to the property, and that this dispute was not resolved for 17 months after the date on which title to the property should have been delivered to him. (transcript, pages 89,90). No contrary evidence was introduced by Plaintiffs at trial. In the absence of contrary evidence, the court could not reasonably make the finding that the

record does not reveal delays in the performance of AID's material duties. The court did not indicate that it did not believe the evidence introduced by Jewkes.

In finding of fact 9, the court states "the court finds that Plaintiff has substantially complied with the terms of Plaintiff's exhibit 1." This is entirely contrary to the items mentioned in the paragraph above, and ignores the fact that Jewkes had to furnish water and sewer to the property which had been promised by AID, at an expense in excess of $100,000. No contrary evidence was introduced at trial by AID.

The cumulative delays caused by AID's failure to deliver title and to provide water to the property amounted years. The result is that Jewkes was prevented from developing the property during the favorable Real Estate market which existed at the time the property was purchased. Before marketing the property became possible recession in the Real Estate business had occurred. (transcript, page 81)

At trial, Jewkes, who has served as an Appraiser for the County of Los Angeles, and has been in the Real Estate development and sale business for some 34 years, testified that the value of the property was between $10,000 and $15,000 per acre. No evidence as to value other than this was introduced at trial. The Court therefore was required either to find tha Jewkes was not qualified to testify as

value, or, that the value of the property is between $10,000 and $15,000 per acre, making the total value of the 80-acre parcel in question between $800,000 and $1,200,000. The mortgage obligation is approximately $265,000. Thus, it is clear that if no relief is granted to Jewkes, he will suffer substantial and irreparable harm. AID will also be allowed to escape from the consequences of its many breaches of its agreement with Jewkes.

The Trial Court, in its conclusions of law, noted that the extension of option agreement (Exhibit 6) provided that the preceeding written agreements will be "merged" into the Deed of Trust. The Court concluded from this, that AID is excused from all of its breaches.

The term "merger", however, is susceptible to numerous meanings, the most common of which is the dictionary definition "to blend together so as to lose identity." (American Heritage Dictionary, 1969, p.821) This implies that the term merger was intended to indicate that all of the agreements were joined and became one, rather than that some were nullified, as the court seems to interpret it.

In Williston on Contracts, 3rd edition, Sec. 811, the author discusses the effect of merger clauses in written contracts. He notes that the purpose of such merger clauses is to limit the ability of an agent to vary a standard written agreement by oral promises, and that it is an extension of the parole evidence rule. This, of course, has

no application to the present case, since the preceeding agreements were written, and were not indended to serve a variation against a printed final contract.

The author notes that "a merger clause, for instance, does not prevent the application of the rules as to collateral agreements." At the very least, this provision has created an ambiguity, since the meaning is unclear as what is intended by the word "merger". The common rule of interpreting contracts is that an ambiguity must be interpreted against the party drafting the document. (see e.g. Williston on Contracts, 3rd edition, Sec. 621, entitled "Language will be Interpreted most Strongly Against the Party Using it."

It is therefore clear the covenants of the preceding agreements still apply. In addition to the failure to perform such covenents promptly, the failure of AID to provide water and sewer to the property has caused substantial injury to Jewkes. In addition to these matters Jewkes has expended time and money for planning the property, and has, after much effort, successfully had the property annexed to the city of Cedar Hills, which adds substantial value to the property. (transcript, pages 73-74).

Jewkes has paid to AID more than $600,000 and has performed services which have added substantially to the

value of the property. Owing to the peculiarities of Utah Trust Deed Law, AID is in the position not only to foreclose the mortgage and retake the property, but bid substantially less than the fair market value of the property and seek a deficiency judgement. Utah Law does not require AID to stand behind its implied representation in the sale of property that it was worth the amount for which it was sold. Neither does present law compensate Jewkes for his substantial investment in the property and the greatly enhanced value which the property now has.

Under Utah Trust Deed Law, (Utah Code Sec.57-1-32), any attempt to collect a deficiency judgement requires proof in court that the debtor has bid the full fair market value of the property at the sale. However, if the debtor elects to foreclose the Deed of Trust as a mortgage, as authorized by Utah Code Sec. 57-1-23, no requirement exists for the demonstration that the sale has been at fair market value. (Utah Code Sec. 78-37-2) This is obviously the reason why AID has proceeded to foreclose the Deed of Trust as a mortgage, rather than the far simpler and less expensive procedure of selling the property under the Power of Sale. Jewkes is being required not only to suffer the possibility of a deficiency judgement, but also, to pay greater costs and attorney's fees as a result of the election of AID to proceed in this fashion.

Under the circumstances, it seems clear that equity should be available to prevent the substantial injustice which appears to be occurring in this case. Jewkes is unaware of any case which is directly applicable to the imposition of equitable standards for relief in a mortgage foreclosure on a Deed of Trust. However, Jewkes directs attention of the court to the case of Perkins vs. Spencer 243p,2d, 1952, in which this court refused to grant a forfeiture under a land sales contract where the remaining balance to be paid was small with respect to the value of the property, including the improvements made by the defendant. Similar relief could and should be fashioned by this court to prevent Jewkes from being injured by AID in the fashion suggested in this case.

While Jewkes was not afforded an opportunity in the trial court to suggest types of equitable relief which might be granted, Jewkes believes the following to be possible types of relief: (1) a credit against the obligation owed on the property for the $100,000 water well contributed by Jewkes and other benefits conferred upon the property at the expense of Jewkes; or, (2) an order that AID be required to bid the full fair market value of the property at any Sherrif's sale.

It is plain that the court can and ought to provide equitable relief under these circumstances. It is certain

that the drafters of Utah mortgage and trust deed law did not contemplate the misuse and abuse of the statute under circumstances which would cause so much hardship to the party against whom foreclosure is sought, and such great possible benefits to the foreclosing party. If matters are allowed to stand as decreed in the court below, AID will be in a position to purchase the property at Sherriff's sale, for whatever sum it may bid (assuming, as is usually the case, that no other bidders appear), re-sell the property at a substantially higher figure, and then seek a deficiency judgement for the unpaid balance of the note against Jewkes. This is patently unfair and undesirable.

II. THE ATTORNEYS FEES AWARDED IN THIS CASE BEAR NO RELATION TO THE VALUE OF THE SERVICES RENDERED, ARE EXORBITANT AND UNREASONABLE, AND VIOLATE PUBLIC POLICY.

In the case below, the judge awarded Plaintiff attorney's fees "in the amount of 10% (ten percent) of the principal amount of the debt, the sum of $26,577.00." At trial, AID's expert testified that his usual fee was 10% in such cases, and that he thought a 10 percent fee was reasonable in all foreclosure cases. AID's president also testified that he had agreed to pay counsel a fee of 10%. Thus, the attorneys fee award amounts to a holding by the court that a 10% fee is a reasonable fee in all mortage foreclosure cases.

In fact, the court stated (transcript, page 29), "Mr McMullin, isn't the law governed by the contract between attorneys, clients, subject to an objection as to the question of its reasonablness?" This is an erroneous statement of the law. The agreement between Plaintiff and attorney does not control. Utah Code 78-37-9 provides, in pertinent part:

> "In all cases of foreclosure, when an attorney's fee is claimed by the Plaintiff, the amount thereof shall be fixed by the court, any stipulation to the contrary notwithstanding; provided no other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney to the Plaintiff."

Thus, it is clear that the Court has responsibility to find a reasonable fee which in no case may exceed the amount

charged by the attorney for the Plaintiff. Therefore, the court is incorrect in its characterization of the law as awarding the amount agreed upon betwen the Plaintiff and his attorney, unless it is proven to be unreasonable. The law is just the reverse. The Court is required to fix a reasonable attorneys fee, but even if the attorneys fee agreed upon between the Plaintiff and his attorney is unreasonably low, that is the maximum amount which may be charged.

It is clear that a percentage fee can be rarely be a reasonable fee in cases of mortgage foreclosure. If a fixed percentage is used, the attorneys fee will be unreasonably low in cases involving relatively minor debts (for example, $100 in the case of a $1000 mortgage), and will be unreasonably high, in the case involving a large debt (for example, $1,000,000 in the case of a $10,000,000 foreclosure). In most cases, the same amount of effort will be required, regardless of the size of the mortgage.

The mount at issue is only one factor to be taken into consideration in cases involving attorneys fees. In the case of Jensen v. Lichtenstein, 45, Utah 320, 145p, 1036, the court held that it was error for the court to fix a 10% attorneys fee in a mortgage foreclosure case, without determining whether the fee would be a reasonable one. Also, in the Jensen case, the court noted that a reasonable

fee is one which is reasonable under the facts and circumstances of each case, which must depend upon the amount in controversy and the labor and responsibility imposed upon the attorney in obtaining judgement.

An extensive annotation at 57 ARL3d, 475, entitled Attorneys Fees in Absence of Provision, deals with the question of establishing reasonable attorneys fees. At the conclusion, of the opening section of this note, after extensive discussion, the author summarizes the preceding cases as follows (p. 487):

> It would appear that most, if not all, the factors considered by courts in fixing attorney's fees may be classified under four general headings, namely, (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) The character of the work to be done: its difficulty, its intricacy, its importance, the time and skill required, the responsibility imposed, and the prominence and character of the parties, where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time, and attention given to the work: and (4) the results: whether the attorney was successful and what benefits were derived (citations omitted)

The author further comments in the case of reputation and skill of counsel, noting at page 486, "the reputation of counsel will not alone entitle him to a large fee, the cases generally holding that an experienced and skilled attorney who is performing work requiring little experience or skill is not entitled to compensation on the basis of his experience and skill."

With respect to the amount involved, the author notes at page 485, "the amount involved appears to be particularly

significant in the case of legal services performed for estates and trusts, and in the case of stockholders derivative suits and antitrust actions." Obviously, the amount involved has little effect on the value of services rendered in a foreclosure case.

Mr. Ivins, the Plaintiff's expert witness, indicated that he was basing his estimate of a reasonable attorneys fee on the standard set forth in the American Bar Association disciplinary rule 2-106. However, he gave almost his entire emphasis to the question of the amount at issue. It should be noted that rule 2-106 was not designed to determine what a reasonable fee is, but to determine what fees would be excessive, and therefore subject to discplinary action. The rule is as follows:

> A fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar legal services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent.

In this case, we have a simple foreclosure matter, which is complicated slightly by the requirement of going trial, the trial lasting under a full day. Trial briefs were not filed, and it appears that no large amount of effort has been required on the part of Plaintiff's attorney. Under these circumstances, the court should assess a fee based on the court's experience in judging the amount of work necessary to accomplish the foreclosure at the rate usually charged by attorneys who are competent to handle foreclosure matters in Utah County.

No evidence was introduced at trial as to the amount of AID's attorney's effort in the case. When AID's attorney offered himself as a witness, the testimony was not received. However, since it is the responsibility of the attorney for Plaintiff to prove every aspect of his case, failure to introduce testimony as to the number of hours cannot be used against Jewkes so as to justify an attorney fee award based soley upon the evidence concerning the suggested 10% standard.

In the opinion of counsel for Jewkes, the amount of effort in preparing for and trying this case could not have exceeded 50 hours by any reasaonable standard. Thus, the attorneys fee awarded, ($26,577.00) would produce a rate compensation to AID's attorney of $531.54 per hour. This by any standard for this type of case, would be excessive.

In an annotation at 58 ALR 3d 201, entitled "Attorneys Fees in Real Estate Matters, Section 5, Real Property, Mortages, and Deeds of Trust, the author summarizes cases which have dealt with attorneys fees in mortage and foreclosure matters. It should be noted that in no case cited was an amount approaching that asserted in this case allowed. In fact, in one case, a fee of $27,000 was reduced to $2,000, even though the mortgage in question involved property valued at $350,000. (see 558 ALR 3d 201 p.216, and Lucerne Investment Company v. Estate of Belvedere, Inc. 411F 2d 1205 (CA 1969).

It should also be noted that a fixed percentage fee, in all Real Estate cases, would undoubtedly violate a principle set forth in Goldfarb v. Virginia State Bar, 421 US# 773 (1973). In that case, the United States Supreme Court held that it was unlawful for a state bar association to publish a suggested list of attorneys fees. The court held that attorneys are not a protected class and that the public is entitled to the benefit of price competition in the offering of attorney's services. This is true, even though attorneys are not required to adhere to the published attorneys fee schedule.

If this court were to endorse the holding that a 10% fee is a reasonable fee in mortage foreclosure cases, it would amount to the publication by the court of a fixed fee

for this type of case. This would deprive the public of the benefit of price competiton for attorneys services in the foreclosure of mortgages, and would violate the spirit, not the letter, of Goldfarb v. Virginia State Bar.

On the basis of the preceding, it is clear that the court below has ordered an excessive attorneys fee, and this case must be returned to the court below for the determination of a resaonable attorneys fee.

Respectfully submitted,

H. Hal Visick
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