1984

Associated Industrial Developments, Inc., A California Corporation v. J. Paul Jewkes And Lorna Jewkes, Husband And Wife : Brief of Respondent

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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

BRIEF OF RESPONDENT

---

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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BRIEF OF PLAINTIFF-RESPONDENT ASSOCIATED INDUSTRIAL DEVELOPMENTS, INC.

NATURE OF THE CASE

This case was brought by Respondent to foreclose a Trust Deed which secures a first deed note. The Appellant answered claiming plaintiff did not live up to prior agreements and counterclaimed claiming the plaintiff would be unjustly enriched if the mortgage was foreclosed.

DISPOSITION IN THE LOWER COURT

The lower Court granted a Decree of Foreclosure in the sum $265,777.81 principal and $29,919.79 interest, attorney fees in the sum of $26,577.00 and dismissed defendants Counterclaim.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the trial Court's Decree and award of attorney fees be affirmed.

STATEMENT OF FACTS

The land which is the subject matter of this lawsuit was, (prior to dissolution of the partnership) owned by a partnership by the name of Cedar Hills Development Company. In March 18, 1977, the Cedar Hills Development Company partnership entered into a contract with an entity known as Timpanogos Cove Development Corporation. The contract was entitled a "Continuing Option". The "Continuing Option" affected 193 acres of land. (Exhibit No. 1). By the terms of the "Continuing Option", Timpanogos Cove, the optionee, had the right every ten months to pay the sum of $123,500.00 and to acquire title to twenty acres of land of optionee's own choosing out of the total 193 acres. So long as the optionee paid the sum of $123,500.00 every ten months, the optionee could preserve its right to acquire future parcels of the affected land. In the event the optionee failed to make any payment to entitle it to obtain title to acreage, the optionee's right to acquire additional acreage was lost. The optionee acquired 113 acres of land

by successive payments and conveyances. The land conveyed was chosen by the optionee. The land which optionee chose isolates the remaining 80 acres, the land foreclosed upon, from access except by going over or through the 113 acres which was chosen and received.

The Cedar Hills Development Company partnership was dissolved in 1980. The rights of Cedar Hills Development Company as optionor in the "Continuing Option Agreement" was assigned to Associated Industrial Development Inc., hereinafter referred to as AID. Before the dissolution of Cedar Hills Development Company, hence before the assignment of the partnership's interest to Associated Industrial Developers, the rights of Timpanogos Cove were assigned to the defendant Jewkes. Jewkes is a real estate developer of some 34 years of experience and apparently became interested in the acquisition of the property affected by the Continuing Option by reason of the fact that he owned some 200 acres in the immediate vicinity of the affected land.

The payment required by the "Continuing Option" to be made in May of 1981 was not made. The payment required by the "Continuing Option" was the sum of $123,500.00. Instead of paying the sum of $123,500.00, Jewkes paid $30,000.00 and entered into an agreement of May 15, 1981, which modified the "Continuing Option". The agreement was called "Extension of Option Agreement". (Exhibit No. 3).

The "Continuing Option" as originally drawn required certain acts of the optionor. Before the agreement of May 15, 1981 which modified the Continuing Option, earlier agreements had been made between AID and Jewkes modifying the terms of the "Continuing Option", call the "Amendment to Continuing Option", Exhibit No. 2.

The "Continuing Option" to Purchase required certain acts of the optionor. The optionor had to guarantee certain water and sewer line, extensions, hook up fees, and sufficient water and sewer capacity to service the 193 acres. Exhibit No. 2, called "Amendment to Continuing Option to Purchase" deleted from the "Continuing Option to Purchase" the optionor's obligation to furnish sewer and water hook up fees to the warrant that there was sufficient water and sewer capacity in the Cedar Hills Development utility system to service the 193 acres. The remaining act that AID was to perform that of extending water and sewer lines to a point designated by the buyer, was excused by Jewkes in exchange for payment of the agreed cost of that performance to Jewkes (Exhibit No. 6). All other prior agreements and understandings and obligations were merged into the deed of trust and the note by the express terms of the written agreement called "Extension of Option Agreement" (Exhibit No. 3).

The terms of the agreement, Exhibit No. 3, modifying the "Continuing Option" contained provisions, among other things, providing that the method of payment by Jewkes for the remainder of the land affected by the "Continuing Option" would be changed. Instead of payments every ten months in the principal amount of $123,500.00 plus interest, payments were to be made at a reduced rate. Instead of payments every ten months in the amount of $123,500.00, plus interest, semi-annual payments of $25,000.00 plus interest were agreed to. In return for accepting smaller payments, Jewkes agreed to modifications in the contractual arrangement. Jewkes agreed that instead of enjoying the rights of an optionee he would take title to all of the land and agree to pay for all of the land. He agreed to accept title to eighty acres being the remaining land affected by the Continuing Option and to execute a trust deed note and a trust deed in the sum of $265,777.81 securing the balance of the purchase price. Jewkes also agreed that the prior agreements existing between the parties would be merged into the deed, Deed of trust and the deed of trust note.

On the 10th day of November 1981, AID conveyed the land affected by this action, the remainder of the land affected by the "Continuing Option", to Jewkes and took back a deed of trust and a deed of trust note signed by Jewkes and by his wife. The payment required to be made the deed of trust note on the 15th day of May 1982 was not made and action was instituted in the District Court of Utah County to foreclose the deed of trust and the note as a mortgage as provided by 57-1-23 UCA.1953.

At the trial the execution and validity of the trust deed, trust deed note were not in issue and the principal amount due and amount owed as interest were not in issue. The amount of attorney was in issue. Appellant in his answer set forth certain affirma defenses, those being failure to perform certain covenants under containing option to purchase, and delay in performance of convey clear title to the land conveyed. Appellant further cross claime claiming unjust enrichment.

ARGUMENT

POINT I

PRIOR AGREEMENTS, UNDERSTANDINGS, AND OBLIGATIONS, SETFORTH EXHIBIT No. 1, "CONTINUING OPTION TO PURCHASE", EXHIBIT No. "AMENDMENT TO CONTINUING OPTION TO PURCHASE", EXHIBIT No. "EXTENSION OF OPTION AGREEMENT" WERE EITHER PERFORMED, EXCUSED AGREEMENT OR MERGED INTO THE DEED, THE TRUST DEED, AND THE TRUST NOTE.

Appellant in his answer and counterclaim, setforth certa defenses and allegations to the effect the plaintiff had not lived to certain agreements. Appellant alleged that,

(a) Clear title to various parcels of property was not deliver until long after payment was made; and,

provision requiring respondent to furnish water and sewer to property were not promptly performed.

As to (a) appellant introduced exhibit No. 7, which set forth the claimed delays. Upon close examination of the exhibit the only delay and consequence related to the 20 acre conveyance of 11-18-78. As to the other conveyances, the exhibit shows that there was no obligation or that they were to receive a title insurance policy within a reasonable time taking into consideration that title insurance are not normally issued immediately after the deed is issued, because the title has to be researched. The testimony of appellant shows delays, but there is no mention of damage in dollars. Upon cross examination at T 105 and T 107 Appellant states that he could have sold land before the economic down turn and as such there was no damages to appellant. The property has not been sold even though he received sixty acres through conveyances by 1978, (Exhibit No. 7) and has not been sold as of date of trial.

The record shows that Appellant owned 420 acres which includes 240 acres purchased from the respondent all of which were contiguous. The record further shows that the property has been approved for subdivision but that no plats had been filed to date of trial.

As to respondent's obligation to furnish water and sewer contained in Exhibit No. 1 "Continuing Option to Purchase", they were not waived or excused in return for payment of money or were modified. Those agreements in Exhibit No. 1, paragraph 9 and 10 were modified by paragraph No. 3 in "Amendment to Continuing Option to Purchase" (Exhibit No. 2), which sets forth the following:

"(3) The parties mutually agree to delete from said OPTION TO PURCHASE LAND paragraph No. Nine (9) and paragraph No. Ten (10) on page 5."

The only remaining obligation to be performed under the "Continuing Option to Purchase" which related to sewer and water hook-ups was excused by payment of $1,500.00 as shown by Exhibit No. 6.

Exhibit No. 3, paragraph No. 9, of the "Extension of Option Agreement" states as follows:

> "Upon the conveyance of the land by AID to Jewkes in November of 1981, all prior agreements, understandings and obligations will be merged into the deed and into the trust deed note and the trust deed. If Jewkes does not pay the forty thousand dollars ($40,000.00) on or before November 15, 1981, then his rights under the continuing option and under this agreement shall terminate."

Respondent claims that all agreements contained in prior agreements have either been performed, waived, excused by payment, or have merged.

The only two cases that Respondent has found that deal with mergers in Utah are Kelsey v. Hansen 419 P.2nd 198, 1966 and Stubbs v. Hemmert 567 P2nd, page 168, 1977. Both involve earnest money agreements.

Stubbs deals with an earnest money agreement where there was a sale of commercial property and the agreement provided seller could remove equipment located upon the property sold. The court held that the intent of the parties was the seller could leave the equipment in the building after delivery of the deed and had the right

re-enter and remove it. The intent was clear. There was no merger. In the present case those agreements that were not waived or excused in return for a monetary consideration were specifically, if any, merged into the deed by the intent and language set forth in Paragraph No. 9 of Exhibit No. 3. The collateral agreements if any, that were not waived or excused were intended to be merged.

Respondent plead estoppel as a defense in its third defense. Appellant testified that he did not at the closing when he paid his $[illegible],000.00 and received his deed did not raise any of the objections that he raised in his answer. Appellants deposition page 21, which was published T 97.

The alleged defenses of appellant to the foreclosure of the trust deed either were excused waived, performed, or merged, or defendant is estopped from asserting them.

ARGUMENT

POINT II

DEFENDANTS' CLAIM OF UNJUST ENRICHMENT CANNOT BE ADJUDICATED AT THIS TIME BECAUSE THE CLAIM IS NOT RIPE.

The Utah Supreme Court in First National Bank of Salt Lake City v. Haymond, 57 P.2nd 1401 (1936), has squarely addressed this issue. The Court noted:

> We are in accord with the general doctrine announced ... that a court of equity has inherent authority to see that equity shall be done to all parties in a mortgage foreclosure proceeding. The lawmaking power, however, may place, and in this jurisdiction has placed, limits on such authority and has prescribed rules for its exercise. *** Thus the equitable powers which the Courts may exercise ... may in this jurisdiction be exercised only after sale (and) upon proper application by the party who claims to be injured.

> Thus the trial court has finished its duties with respect to foreclosure proceedings when the decree of foreclosure and the order of sale are entered unless the matter of the proceedings had at the sale is brought to the attention of the court by the proper proceeding. (Cites omitted.) It will be noted that under our procedure, a trial court is not called upon to confirm the sale of mortgaged property. The clerk must, as a mere ministerial duty, enter a deficiency judgment against the proper parties when the return of the sale shows that the mortgaged property is not sold for an amount sufficient to pay the amount due and owing. (57 P.2nd at 1404 and 1405)

This decision makes it clear that the powers of the court may be exercised only after the sale and upon proper application of the injured party.

In this case the sale has not taken place, the party seeking relief has not been harmed. This motion is therefore not ripe for decision and is procedurally incorrect.

The lower court held in its Findings of Fact, paragraph No. 12 the following:

> "12. As to defendants' counterclaim on the theory of unjust enrichment, the court finds that since plaintiff elected to treat the trust deed as a mortgage that the rule state in Perkins v. Spencer, 121 P. 468, 243 P.2d 446, is not applicable to this proceeding. Any enhancement in value of the property by reason of improvements made by defendants would be reflected in bids at the sheriff's sale, and in any event defendants retain their rights of redemption."

The appellant had the option to take release of 20 acres after making certain payments, Exhibit No. 1. He received 113 acres increment and isolated the 80 acres foreclosed upon from access except through the released property, T.T.C. In the event that a lower is received at a sheriff sale the appellant has contributed to a

[illegible] by his own choice. He has been a land developer for 34 [illegible] and owns in excess of 200 acres adjoining the 80ty acres and had knowledge of the condition he created pertaining to the subject property. He should not be able to ask the equity be considered in view of his own conduct.

ARGUMENT

POINT III

AN ATTORNEY'S FEE OF TEN PERCENT IS REASONABLE IN THIS CASE BECAUSE OF THE GREAT TIME AND LABOR EXPENDED; THE DIFFICULTY AND COMPLEXITY OF THE PROBLEMS WHICH WERE ENCOUNTERED; THE EXPERIENCE OF THE LAWYER INVOLVED; THE BENEFITS WHICH ACCRUED FROM THE CONTROVERSY; AND THE PROFESSIONAL RESPONSIBILITY AND POTENTIAL LIABILITY PLACED UPON THE ATTORNEY IN VIEW OF THE LARGE SUMS OF MONEY INVOLVED.

Utah Code Annotated 78-37-9 in pertinent part provides:

> 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 not withstanding; 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 for the plaintiff. ...

With only minor modification, this has been the statutory rule [illegible] attorney's fees in mortgage foreclosures for the State of Utah [illegible] turn of the century. The precursor of 78-37-9 UCS was [illegible] and 3505 of the Compiled Laws of the State of Utah of

1907. There is no substantive difference between the current [illegible] statute and sections 3504 and 3505 of the Compiled Laws of the State of Utah in 1907.

Utah case law interpreting these provisions is definitive. In Kurtz v. Ogden Canyon Sanitarium Company, 37 Utah 313, 108 P. [illegible] (1910), the Utah Supreme Court held that the matter of attorney's fees in mortgage foreclosures is, to a large extent left to the discretion of the trial court. In interpreting sections 3504 and 3505 of the Compiled Laws of Utah of 1907, the court held that a provision in a note secured by a mortgage which provided for attorney's fees of ten percent was reasonable and that assertions to the contrary were without merit.

Jensen v. Lichtenstein, 145 P. 1036 (1914), also interpreted sections 3504 and 3505. In Jensen the court held:

> By a "Reasonable fee", no doubt, is meant one which is reasonable under all the facts and circumstances of each case. What is reasonable, therefore, in large measure at least must depend upon the amount in controversy, the labor, and responsibility imposed upon the attorney in obtaining judgment as these may have arisen from the issues presented and tried. If an attorney is required to do no more than prepare the formal pleadings and decree in a default case, a smaller sum, no doubt, would be reasonable, than in a contested case, and especially in one where the issues were numerous and where intricate questions of both fact and law arose and had to be determined. (145 P. 1036 at 1038, emphasis added)

More recently, the Utah Supreme Court has cited the holdings of Jensen and Kurtz. In Mason v. Mason, 160 P.2d 730 (1945), the court quoted extensively from both cases, citing with approval the rules expounded therein. More recently, in Lockhart Co. v. Anderson, 646 P.2d 678 (1982), the court referred with approval to the holding of Jensen.

As pointed out in Jensen, the trial courts in each case become familiar with all the issues, know just what facts and circumstances develope at the hearing, and thus are in a position to derive an intelligent and just conclusion respecting the amount that should be allowed as the reasonable fee contemplated by our statute. In the event that the court has insufficient data upon which to base a finding it may, as pointed out in Kurtz, call to its assistance attorneys engaged in practice and take their judgment under oath respecting the amount that would be reasonable in any given case. That is in fact what was done in the instant case.

The Supreme Court of the State of Arizona has considered this issue in a factual setting very similar to the instant case. In McCune v. Dynamics Research Inc., 442 P.2d 550 (1968), plaintiff brought an action to foreclose a note and mortgage in the amount of $170,000.00. In that case, counsel for the plaintiff presented affidavits to the court in which their counsel set forth in chronological order the conferences, trips, negotiations, filings of various pleadings, court

appearances, taking of depositions, and legal research. Counsel indicated that he had 14 years of practice and that in his opinion reasonable fee for his services was $17,000.00 or ten percent.

The defendant in McCune did not file controverting affidavits did he request time to submit evidence with regard to the attorney's fees. The court held that attorney's fees are generally within sound discretion of the trial court's judgment and that in that case, since plaintiff had not responded to the affidavits, there was evidence to dispute the services rendered nor the proposition that the fee was reasonable. The court held that ten percent of the amount in controversy, in consideration for the work involved, did not amount to abuse of discretion by the trial court in this regard. The court held that the trial courts judgment for attorney's fees of ten percent were proper.

In the present case, Heber Grant Ivins, attorney from American Fork, Utah, testified that for a contested foreclosure such as this with the large sum of money involved and in view of the complexity of the case, which involved a counter-claim, which required depositions and numerous written interrogatories as well as considerable legal research, and as a consequence of the responsibility assumed by the attorney, and based upon American Bar Association guidelines; that ten percent was a reasonable attorney's fee.

At trial, when counsel for the plaintiff offered to testify in support of his attorney's fees, counsel for the defendant objected and was sustained, T 50. This being the case, the defendant has waived cross examination of plaintiff's counsel and his opportunity to challenge the amount of attorney's fees. The defendant cannot object to the testimony of plaintiff's counsel's attorney's fees, thereby preventing the introduction of this evidence and subsequently complain to the court that the fees are unreasonable. This is because defendant's opportunity to prove unreasonableness is through cross-examination of plaintiff's counsel. Therefore, in the same manner in which defendant failed to challenge the reasonableness of attorney's fees in McCune above, defendant has failed in this case to present evidence that plaintiff's counsel's fees are unreasonable. The only evidence on the question is the testimony of attorney Ivins which indicates that the fee is reasonable.

CONCLUSION

The evidence conclusively supports the trial court's finding that the affirmative defenses were either, waived, performed or merged in the trust deed and trust deed note. The unjust enrichment theory of appellant is not applicable to defendant's counter claim. Attorney fees awarded by the lower Court were reasonable. The trial court's ruling should therefore be affirmed.

Respectfully submitted this 1 day of February, 198[illegible].

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed, postage prepaid, two copies of the foregoing Respondent's Brief to H. Hal Visick, Esq., for Ray, Quinney and Nebeker, 92 North University Ave, Provo, Utah, 84601, this _____ day of _____, 1984