

1963

Lester Ralph Romero and Maxine Romero v. Victor Schmidt et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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LESTER RALPH ROMERO and
MAXINE ROMERO, his wife,*Plaintiffs and Appellants,*

vs.

VICTOR SCHMIDT and RAE
SCHMIDT, his wife; TOM B. WILCOX
and MRS. TOM WILCOX, his wife;
and MR. ART CASEY and MARIE
CASEY, his wife,*Defendants and Respondents.*

Clerk, Supreme Court, Utah

No. 9922

BRIEF OF RESPONDENTS

Appeal from the Judgment of the District Court
of the Third Judicial District for Salt Lake County,
Honorable Merrill C. Faux, JudgeRonald C. Barker
2870 South State St.,
Salt Lake City, Utah
*Attorney for Appellants*L. Brent Hoggan of
Kirton & Bettilyon
336 South Third East
Salt Lake City, Utah
Attorney for Respondents

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LESTER RALPH ROMERO and
MAXINE ROMERO, his wife,

Plaintiffs and Appellants,

vs.

VICTOR SCHMIDT and RAE
SCHMIDT, his wife; TOM B. WILCOX
and MRS. TOM WILCOX, his wife;
and MR. ART CASEY and MARIE
CASEY, his wife,

Defendants and Respondents.

No. 9922

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

Action to foreclose real estate contract as note and mortgage. Respondents allege tender of payments prior to notice of acceleration by Appellants and estoppel as a defense.

DISPOSITION IN LOWER COURT

Those elements necessary to prove Plaintiffs' and Appellants' case were admitted and the defenses alleged were tried by the court sitting as a court of equity with an advisory jury. Judgment of no cause of action was entered against Plaintiffs and Appellants and from that judgment Appellants have appealed.

RELIEF SOUGHT ON APPEAL

Defendants and Respondents seek judgment of this court affirming the judgment of the District Court of no cause of action in favor of Defendants-Respondents and against Plaintiffs-Appellants.

STATEMENT OF FACTS

For purposes of convenience Plaintiffs and Appellants will hereinafter be referred to as Appellants. Defendants and Respondents Victor Schmidt and Rae Schmidt, his wife, will hereinafter sometimes be referred to as Schmidt or Schmidts; Defendants and Respondents Tom B. Wilcox and Mrs. Tom Wilcox, his wife, will hereinafter sometimes be referred to as Wilcox or Wilcoxs and Defendants and Respondents Mr. Art Casey and Marie Casey, his wife, will hereinafter sometimes be referred to as Casey or Caseys.

Inasmuch as Appellants have failed to elucidate all pertinent facts in connection with this appeal, Respondents invite the court's attention to the evidence and record in the following particulars.

Appellants as sellers and Respondents Schmidt as buyers entered into a Uniform Real Estate Contract for the purchase and sale of 325 Oakley Street, Salt Lake City, Utah (R-7 and 8). Said Uniform Real Estate Contract is not dated but shows that the buyer is to receive possession of the described property on July 17, 1961. The contract is in the standard form and that

provision under paragraph 4 of the Uniform Real Estate Contract providing for the date from which interest is to be charged is blank (R-7 and 8).

The Respondents Schmidt made each of the payments maturing on the contract promptly as they came due to and including the payment of August, 1962 (R-100). In September of 1962 the Respondents Schmidt assigned their interest in said Uniform Real Estate Contract to the Respondents Wilcox who accepted the same with the idea and for the purpose of reselling the property (R-109). On or about September 26, 1962 Wilcox entered into an Earnest Money Receipt and Offer to Purchase with Respondents Casey (Ex. 3-P). The real estate broker through whom said Earnest Money Receipt and Offer to Purchase was procured was Alder-Wallace Inc. (R-129, lines 13-19). Wilcox and his partner, James Richard Glavas (R-109, lines 24-28) contacted Appellant Lester Romero and/or Romero's associate, John W. Taylor several times concerning the unpaid balance due on the Uniform Real Estate Contract (R-110-118; R 147-151; R 156-159). Romero was also contacted on two occasions by H. Mervin Wallace, broker for Alder-Wallace, Inc., the real estate agent handling the transaction between Wilcox and Caseys (R 131-133). During the course of an early conversation between Taylor, Glavas, Romero and Wilcox (R 158-159) a discrepancy in the contract balance was noted and Mr. Romero stated to Mr. Taylor, "John, work it out with them, see what you can do. See if you can get the prob-

lems solved." (R.159, lines 14-15). Thereafter the parties had various meetings in an attempt to work the problem out but were never able to harmonize their divergencies.

During the course of these negotiations Wilcox gave Romero his personal check for \$89.00 (R 113, lines 18 to 20). This check was dishonored by the bank. The check (Ex. 2-P) shows on the back thereof that it was sent through the clearing house twice, the first time on October 9, 1962 and the second time on October 15, 1962 and that it was finally returned to the Appellant Romero on the 18th day of October, 1962. Romero immediately took the check to the office of his attorney (R. 161). No further notice was given by Romero to Respondents or to Wallace that negotiations were ceased and that strict performance was demanded (R 161-162) and on October 24, 1962, Romeros caused a notice (R 9 and 10) to be served upon Respondents wherein Romeros elected under the provision of paragraph 16(c) of the Uniform Real Estate Contract (Ex. 1-P) to treat said contract as a note and mortgage; to declare the entire unpaid balance on said contract to be immediately due and payable, and to foreclose said mortgage and note. Payment was not made of the full balance demanded and on January of 1963 Romero commenced this action for foreclosure.

The record will show that the Appellants could have received all payments due on the contract (R 131-133) and in point of fact all payments due on the contract have been paid to Romero who has received and credited

the same to his account since the decision of the trial court in connection with this matter. At no time have the Respondents or either of them attempted to renig on their obligation or to give Appellants anything less than they were entitled to under the terms of the Uniform Real Estate Contract. All efforts of Respondents have been directed toward obtaining a correct contract balance upon which Respondents Casey could rely in accepting the buyer's interest in said Uniform Real Estate Contract and agreeing to assume and pay the same. Respondents have at all times been willing to pay Appellants all sums due to them (R 33 Affirmative Defense No. 5). Appellants are entirely whole in this transaction and would not lose one cent as the result of the judgment entered by the trial court. Respondents have made no effort to avoid payment or to assert that the balance of the contract was more than Appellants were entitled to, but have been willing, at all times, to fully comply with the terms of the contract, upon receipt of certain necessary cooperation from Romero which Romero failed to provide. These facts will be more fully developed in the following argument.

ARGUMENT

POINT I.

RESPONDENTS MADE A LEGALLY SUFFICIENT TENDER OF DELINQUENT PAYMENTS TO APPELLANTS' PRIOR TO APPELLANTS' NOTICE ACCELERATING THE BALANCE DUE UNDER THE UNIFORM REAL ESTATE CONTRACT, THUS CUTTING OFF APPELLANTS' RIGHT TO FORECLOSE SAID UNIFORM REAL ESTATE CONTRACT.

The law concerning tender of delinquencies prior to notice accelerating the full unpaid balance is succinctly stated in the following text from 36 Am. Jur. Mortgages, Section 400, pages 887-88:

Although there is authority to the contrary, the prevailing rule is to the effect that a tender of arrears due on a mortgage containing an acceleration clause, made before the holder of the mortgage has exercised his option to declare the entire amount of the debt due, prevents the exercise of such option.

Was there, in this case, a legally sufficient tender of delinquent payments, prior to notice by appellants, accelerating the balance of the Uniform Real Estate Contract?

H. Mervin Wallace, the broker for Alder-Wallace, Inc., the company brokering the sale of the subject property from Wilcox to Casey (R 129, lines 6-19) stated in his testimony that he had a conversation by telephone with the appellant, Lester Romero, on Friday, October 12, 1962 (R 130, line 29) and again on October 15, 1962. (R. 131 lines 24-28). In the telephone conversation of October 15, 1962, H. Mervin Wallace stated:

A. That if there was any delinquency the contract would be brought to date; that our people were taking it over as of October 1; and, if there was any delinquency, it would be brought to date. (R 113, lines 24-27).

At the time of this conversation Wallace was holding money in his trust account of a sum sufficient to pay all delinquencies on the contract (R 133, line 30 and 134,

lines 1-4). Wallace had authority to disburse these funds in any manner necessary to close the deal (R 143, lines 27-30 and R 136, lines 19-25).

In 52 Am. Jur. on Tender, Section 24, page 232, we read:

That where the condition is one which the debtor has the right to insist on, a tender made subject to that condition is valid. (See also Woods vs. Dixon, 93 Ore. 681, 240 P2d. 520).

It is submitted that under the facts of this case there was a tender and that the condition attached to the tender of payment of all delinquencies on the Uniform Real Estate Contract was one upon which the respondents had a right to insist. Inasmuch as the respondents Casey were agreeing to assume and pay a contract, it was necessary that they know the balance thereof (R 129, lines 23-30, R 134, lines 11-15). Appellants have maintained throughout that this balance could have been mathematically ascertained by the respondents, independent of any action by appellants. The fallacy of this argument lies in the fact that respondent Wilcox made various attempts to obtain the correct balance as did H. Mervin Wallace (R 111-112, R 113, lines 18-27, R 114, lines 6-29, R 117, lines 11-27 R 131, 132 and 133). Notwithstanding each of these attempts the balance on the contract which Romero gave was incorrect. The balance which Romero gave as of September, but would not confirm, was \$11,417.74 or \$11,328.74, depending on the interpretation of the conversation between Wallace

and Romero on October 15, 1962, (R 141, lines 26-30, R 142, lines 1-8), whereas the actual and correct balance on said contract of August 1, 1962, was \$11,147.75 (R. 126, lines 15-17). Interest on the correct balance to September would be approximately \$61.00, leaving a discrepancy of \$120.00 to \$209.00. To expect a buyer to assume an obligation the exact extent of which could not be verified by the creditor would make the transfer of property in the modern commercial world impossible. The buyer would be unwilling to assume a balance unless he could verify if that was the amount due and that verification must come from the creditor. This would then make it impossible for a seller to sell.

One further argument is pertinent with reference to the appellants' contention that respondents could have made the simple mathematical calculation necessary to determine the unpaid balance of the contract (Appellants' Brief, page 11). The Uniform Real Estate Contract (Exhibit 1-P), under paragraph 4 is silent on the date from which interest is to be charged. The rate of interest is stated but the date at which it is to commence is not mentioned and the balance could, therefore, be calculated only by the mutual consent of Romero and respondents, or their agent. Respondents were, therefore, placed in a position where it was necessary to obtain the information requested from Romero prior to stating a balance on the contract Caseys would be required to assume and pay.

Appellant stated to the Court in his brief, page 5; that there is no showing that the tender occurred prior

to the date of notice accelerating the balance on the contract. There is testimony of H. Mervin Wallace in the record that his tender of payments to Romero was made on October 15, 1962 (R 133, lines 12-30, R 134, lines 1-6, R 136, lines 19-25). The Court had this testimony before it and concluded that:

The tender to Plaintiffs of all delinquent payments on the contract was made prior to the time notice was given by Plaintiffs in which they stated their intentions to accelerate the balance due under the Uniform Real Estate Contract between Plaintiffs as Sellers and Defendant Schmidt as Buyers. (R 83, Findings of Fact No. 3).

It is an undisputed fact that the notice accelerating the payments was dated October 24, 1962 (R 9 and 10) which was 9 days subsequent to the date of tender by Mr. Wallace, agent for Wilcox and Casey.

Appellant also cites in his brief page 5 the disagreement between the testimony of Romero and Wallace. Wallace testified that he had made a tender and Romero testified that he had not. This disparity in testimony was resolved by the finder of the facts in favor of Wallace's testimony (R 83, Finding of Fact No. 3). There is evidence in the record to support the finding (R 133 lines 12-30; R 134 lines 1-6; R-136 lines 19-25) and this finding by the trial Court should not be disturbed.

Appellant further argues that since the check of Wilcox marked insufficient funds was not returned to

Romero until October 18, 1962, and that since the conversation between Romero and Wallace took place on October 15, 1962, Romero could not, at the time of his conversation with Wallace, have known that the contract was in default (Appellant's Brief, pages 5 and 6). A cursory examination of the check (Exhibit 2-P) shows on the back thereof that the check went through the clearing house twice, once on October 9, 1962, and once on October 15, 1962. The first of these dates was 6 days prior to the conversation between Romero and Wallace and the second one on the date of the conversation between Romero and Wallace. The date of October 18, 1962, was the date on which it was finally returned to Lester Romero but since it had been dishonored as early as October 9, 1962, Romero could have had notice of the dishonor prior to his conversation on October 15, 1962, with Wallace. This conclusion is further fortified by the fact that the check went through the clearing house twice. It could only be concluded that it was sent through a second time at the instruction of the depositor who would have had notice of its dishonor on the first deposit.

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In addition, Romero told Wallace in their conversation of October 15, 1962, that the contract was in default (R 133, lines 5-9, R 140, lines 26-30, R 141, line 1). Romero could only have made this statement to Wallace in truth if he knew at the time that the check had been dishonored, inasmuch as the contract would not have been in default had the check not been dishonored.

At the conclusion of the evidence, the Court submitted the case to the advisory jury for a special verdict. Interrogatory 3 in said special verdict asked: "Did the Schmidts or anyone acting in their behalf make a tender of payment to the Romeros?" Answer, "Yes" (R 80).

This finding by the advisory jury, which finding was adopted by the Court, is sustainable by evidence in the record and is a conclusive answer to appellant's contention that no tender was made. The testimony of Wallace (R 133 lines 24-27 and R 136, lines 19-25) is clearly sufficient to sustain such a finding by the advisory jury and by the Court. The findings of the advisory jury and Court that a valid tender was made to appellants prior to their notice accelerating the balance on the contract, and the judgment of the Court entered as a corollary thereto, should be sustained.

It is further submitted to the Court in connection with this argument that a tender beyond that which was made to Romero would have been useless. Wallace testified that:

A. "... When I asked (Romero) if I could use that figure, as a closing figure, he told me he was going to foreclose on the place." (R 133, lines 5-9).

The attitude of Romero as disclosed by the entire record was that he failed to cooperate in arriving at the balance on the contract and that on October 15, 1962, he was going to foreclose on the place. In 52 Am. Jur. on

Tender, page 218, section 5, we read under the heading "Necessity in Equity", the following:

As at law, an actual tender by the debtor is unnecessary when it is plain, from the acts or conduct of the other party or the circumstances or situations of a transaction or property, that a tender would be nugatory, since equity does not require a useless and idle formality.

The illustration of this point states:

A further illustration of the rule in equity, it has been held that a tender of the amount due on a contract for the sale of real estate is not necessary, if the vendor states that it will be useless.

It is submitted that had the money been displayed to Romero on October 15, as Mr. Barker, in his Brief, (pages 9 and 10) argues, there is ample evidence to support a conclusion that Romero would have rejected and repudiated such a tender (R 123, lines 5-9). In connection with this argument, see also 55 Am. Jur., Vendor and Purchaser, Section 601, pages 994-995 and Clark, et al v. Paddock (Idaho) 132 Pac. 795.

POINT II.

APPELLANTS ARE ESTOPPED BY THEIR ACTS AND OMISSIONS TO EXERCISE THE ACCELERATION CLAUSE IN THE UNIFORM REAL ESTATE CONTRACT AND TO FORECLOSE SAID CONTRACT AS A NOTE AND MORTGAGE.

In the Florida case of *River Holding Company v. Nickel*, et ux, 62 So. 2d., 702, the Florida Court observed:

A court of equity is a forum for the administration of justice.

In the recent California case of *Bisno, et al v. Sax, et al*, 346 P2d. 814, the Court observed that:

Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated, but for its intervention.

In 36 Am. Jur. on Mortgages, Section 398, page 886, the following statement is made:

The Mortgagee may be estopped from exercising an option to accelerate the maturity of the mortgage by his conduct, as where he has wrongfully prevented the payment and thereby caused the default creating the option.

It is the contention of respondents that the appellants are estopped from exercising the option to accelerate the contract by their conduct (R 41, Affirmative Defense No. 3, R 51, paragraph 2).

The Court submitted the following question to the advisory jury:

5. Did the Romeros fail or refuse to reasonably participate in proceedings or measures that would determine the exact amount then on the contract?

A: Yes (R 80, Interrogatory No. 5).

The Court adopted this finding in its Findings of Fact (R 83, Finding No. 2). There is evidence to support this finding in the testimony of Glavas. (R 113, lines 18-27, R 114, R 117, lines 22 to 29) and in the testimony of Wallace (R 171, lines 7 to 13). The record is clear that

appellants or appellants' agent, John Taylor, never at any time gave to respondents or respondents' agent the correct balance on the contract. Romero, in his testimony, stated that the balance on the contract as of September was \$11,417.74 (R. 160, lines 15 to 18). The correct balance on the contract as of August was \$11,147.75 (R. 126, lines 15 to 18). This is a discrepancy of \$269.99, less accrued interest of approximately \$61.00 to show the respective figures on parallel dates or a discrepancy of approximately \$208.99. Respondents were led to believe that Romero would cooperate with them in adjusting this discrepancy in figures and in working the problem out. Under examination by his counsel, Romero testified as follows (R 159 lines 3-16):

Q. What transpired then?

A. They said: "We would like to talk to you for a few minutes."

I said: "I am on my way to an appointment, but I will be happy to sit down to see if we can work it out."

They said: "We need a balance."

I went and got John; I said, "John, do you have the balance for these people?"

He said, "Yes". So, we sat down and started talking about what the balance was and it looked like it was going into a long conversation. I had to get off to my appointment.

I said, "John, work it out with them; see what you can do. See if you can get the balance solved."

So I left at that time.

Thereafter, various meetings were held between "John" (John W. Taylor, an associate of Romero) (R 145 and 146) at which the parties attempted to work out the discrepancy and come to a correct balance. These negotiations were terminated when Romeros, by and through their attorney, and without further notice to Wilcox or Schmidt, and without giving them any opportunity to remedy the default, served notice terminating the buyers' rights in the contract and exercising their election to accelerate the balance due (R 9-10). Respondents submit to the Court that to allow appellants to have judgment against respondents, Wilcox and Schmidt for a sum in excess of \$11,500.00 together with attorney fees, without first having given said respondents an opportunity to remedy the default prior to notice of acceleration is precisely that type of inequitable conduct spoken of in the Am. Jur. citation at section 398 of Mortgages, which should estop the appellants from accelerating the maturity of the mortgage.

This principle is well recognized by the Utah Supreme Court. In the case of *Pacific Development Company v. Stewart*, 113 Utah 403, 195 P2d, 748, the Court dealt with the question of whether a seller could be estopped by his conduct toward the buyer, leading the latter to believe that strict performance of his contract would not be required and made the following pertinent observation, at page 750:

There is no question that the acceptance by the seller of buyers' past due payments and *its other conduct* toward the buyers' leading the latter

to believe that strict performance would not be required by the seller, imposes upon the seller the duty of giving the buyer a reasonable notice before it may insist upon strict performance by the buyer. (Emphasis added)

In *Brown v. Chowchilla Land Company*, 59 Cal. App. 164, 210 Pac. 424, at page 427, the Court states:

The requirement of notice after the receipt of overdue payments, without objection, is based upon the equitable consideration that *by his conduct*, the vendor has lead the vendee into the belief that the former will continue to waive the strict performance of the contract. (Emphasis added)

While the Stewart case is not on all fours with the facts of this case, it is abundantly clear that our Court has recognized that the seller under a contract can, by his conduct, impose upon himself the duty to give reasonable notice to the buyers before insisting upon strict performance by the buyers. In the case now at bar, the record discloses that the conduct of the appellant toward the respondents, lead the latter to believe that they would cooperate in obtaining a contract balance and working out the problem incident to transfer of the property from Wilcox to Caseys. Then, without notice, all rights of respondents in and to the property, by virtue of said real estate contract, were terminated and appellants now attempt to take an unconscionable advantage of respondents by a foreclosure, with its attendant costs and attorney fees.

The trial court, after hearing the witnesses and seeing their demeanor on the witness stand, was impressed with this facet of the evidence and was doubtless expressing in its findings, its statement to counsel. (See R 176 lines 18-30, R 177, lines 1-6 and R 185, lines 1 to 24).

That the contract states that time is of the essence, there can be no doubt. That the contract also gives to the appellants the right of foreclosure, there can probably equally be no doubt. However, as pointed out in 19 Am. Jur. on Estoppel at Section 40, page 639:

The effect of an estoppel in pais, is to prevent the assertion of what would otherwise be an unequivocal right or to preclude what would otherwise be a good defense.

Appellant has objected to the language in the Court's Findings of Fact, with reference to the question of fraud. In 19 Am. Jur., Estoppel, Section 46, page 646, we read the following:

"Estoppel in pais is sometimes said to be a matter of morals, and it has been stated that to permit the enforcement of estoppel of this character such as will prevent a party from asserting his legal rights to property, there must generally be something turpitude in his conduct. In its last analysis the doctrine rests upon the principle of fraud, and it has been said that in cases where a party is concluded from asserting his original rights in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting are generally referable to principles, other than those of equitable estoppel. *In many instances, however, it is neces-*

sary to extend the terms "fraud" or "fraudulent", to situations which are more accurately described as "unconscionable" or "Inequitable." Neither actual fraud nor bad faith is generally considered an essential element." (Emphasis added)

It is submitted that in the case now under consideration, fraud or fraudulent should come within the words of the Am. Jur. text cited and be more accurately described as "unconscionable" or "inequitable." Taken in this light, the Findings of Fact are each sustainable. The Court found:

That appellants misrepresented the unpaid balance due on the contract (R 83, paragraph 5).

This finding is supported by the testimony of Romero that the balance of the contract as of September was \$11,417.74, whereas the correct balance as of August, 1963, was \$11,147.75 and interest adjusting that figure to September, 1963, would be approximately \$61.00, leaving a discrepancy of approximately \$209.00. (R 160, lines 16-18 and R 126, lines 15 to 18.

The trial court found:

That respondents were mislead by appellants' conduct to believe that Appellants would cooperate in arriving at a contract balance. (R 83, paragraph 5).

The testimony of Romero in which he indicated that they would cooperate in arriving at a balance has been set forth in detail in a prior portion of respondents'

brief and need not be recited again at this point. Suffice it to say that such conduct on the part of Romero could have led the trier of the fact to the conclusion that respondents and Romero would work towards solution of the contract balance. The other Findings of Fact, to-wit, Findings No. 6, 7, 8, 9, 10, 11 and 12 (R 83 and 84) are each sustainable by evidence in the record and should be affirmed by this Court.

That inequitable conduct on the part of a creditor will prohibit his accelerating the debt has been recognized by various courts. In *Murphy vs. Fox et. al*, (Okla.) 278 P.2d 820, there was a breach of the mortgage by the defendant through defendant's failure to pay taxes on the real estate before delinquency. Other allegations of default were made. The Court in that case cited the opinion of Chief Justice Cardoza in the leading case of *Graff vs. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884, 70 A.L.R. 988 as follows:

There is no undeviating principal that equity shall enforce the covenants of a mortgage, unmoved by an appeal ad misericordiam, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course. . . .One could give many illustrations of the traditional and unchallenged exercise of a like dispensing power. It runs through the whole rubric of accident and mistake. Equity follows the law but not slavishly nor always. *Hedges vs. Dixon County*, 150 U.A. 182, 192, 14 S. Ct. 71, 37 L. Ed. 1014. If it did, there could never be occasion for the enforcement of equitable doctrine. 13 Halsbury, *Laws of England*, page 68.

To all this, acceleration clauses in mortgages do not constitute an exception. They are not a class by themselves removed from interference by force of something peculiar in their internal constitution. In general, it is true that they will be enforced as they are written. In particular this has been held by a covenant in a mortgage accelerating the maturity of principal in default of punctual payment of an installment of the interest. . . . Less favor has been shown to a provision for acceleration of a mortgage in default of punctual payment of taxes or assessments. We have held that such a provision, though not a penalty in a strict or proper sense, is yet so closely akin thereto in view of the forfeiture of credit that equity will relieve against it if default has been due to mere menial inattention and if relief can be granted *without damage to the lender*. (Emphasis added)

The case now under consideration is one where the relief asked for by respondents can be granted and *without damage to (the lender) appellant* (emphasis added). The Oklahoma Court in the Murphy case went on to state (page 826) that:

This Court has adhered to the principal that in a suit of equitable cognizance to foreclose a real estate mortgage the trial court may refuse foreclosure where there has been a technical default due to a mistake or mere menial inattention, and at no damage to the mortgages security or prejudice to the mortgagees.

The California Court in the case of *Bisno et. al. vs. Sax et. al.* 346 P2d 814, stated at page 821:

That a court of equity will relieve the debtor from the enforcement of an acceleration clause when confronted with general equitable grounds therefore seems to be settled at law. . . . *This is true where the Court considers an acceleration of maturity as a penalty or not.* (Emphasis added)

The California Court then quotes the case of *Bard vs. Rabinfried Realty Company*, 126 Misc. 427 213 N.Y.S. 44, 45, as follows :

Whatever the holding may be on this matter of definition, the courts have shown a tendency to get away from the general rule, and in a number of cases have relieved mortgages from their defaults on the basis of doing equity. (Ibid, page 822)

California Court further quotes the New York case of *Casper vs. Anderson Apartments*, 196 Misc., 555 94 N.Y.S. 2d 521, 525 as follows :

There is no undeviating rule that equity must enforce the covenants of a mortgage regardless of surrounding circumstances. The whole system of equity jurisprudence presents an excellent example of the triumph of equitable principles over strict and inapplicable documents of common law. . . .

The Utah Court has also recognized this rule in the case of *Home Owners' Loan Corporation vs. Washington*, 161 P2d 355.

Appellant makes a point of the fact that the fraud as shown in the Findings of Fact is not pleaded or set forth in particularity nor is it set out in the pre-trial order (Appellant's brief pages 13-17). In addition to

what has heretofore been said in this brief with reference to fraud in equitable actions being in the nature of unconscionable or inequitable conduct the respondents have the following rebuttal to appellants' argument.

Appellant states that:

Respondents waive their right to raise additional defenses by not asserting those defenses in their answer as required by Rule 12(b) of Utah Rules of Civil Procedure. (Appellants' brief, page 13.)

The last sentence of Rule 12(h) reads as follows:

The objection or defense, if made at the trial, shall be disposed of as provided in rule 15(b) in the light of any evidence that may have been received. (Rule 12(h) U.R.C.P.)

Rule 15(b) titled Amendments to Conform to the Evidence, states:

When issues not raised by the pleadings are tried by *express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues *may* be made upon motion of any party at any time after judgment; but *failure so to amend does not effect the result of the result of the trial of these issues.*" (Rule 15(b), U.R.C.P.) (Emphasis added)

It is submitted that the Findings of Fact conform to the evidence submitted at the trial and that the issues at the trial were tried by the express or complied consent of the appellants who raised no objection to the evidence submitted to the Court with reference to the

issues of fraud or misrepresentation, using in this context the word fraud in its broadest context to include unconscionable or inequitable conduct. (See 19 Am. Jur. on Estoppel, Section 46, page 646).

The findings of the Court with reference to the inequitable or unconscionable conduct giving rise to estoppel (R 83 and 84) are within the ambit of the Court's pre-trial order (R 51, paragraph 2).

The evidence sustains the findings of the trial court with reference to inequitable and unconscionable conduct on the part of appellants and equity has clearly prescribed principles which would relieve respondents from the harsh consequences of allowing appellants to prevail in this action and accordingly the judgment of the trial court should be affirmed.

CONCLUSION

The respondents have, at all times, been ready, willing and able to perform under the terms of the Uniform Real Estate Contract. The appellants, by extending the simple cooperation that common courtesy would dictate of most, could have made this entire action with its attended costs and expenses unnecessary. Sustaining by this Court of the trial court's decision will work no hardship on appellants but will place them in the position of receiving every cent which they are entitled to under the Uniform Real Estate Contract leaving them whole. But for Appellants' conduct all payments would have been made before acceleration.

Accordingly, respondents respectfully submit that the judgment of the trial court was correct and should be affirmed.

Respectfully submitted,
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