

1967

# Melvin Engstrom And Alda H. Engstrom, Husband And Wife v. Eldo D. Bushnell And Jenna R. Bushnell : Brief of Respondents And Plaintiffs

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IN THE  
SUPREME COURT  
OF THE STATE OF UTAH

ELVIN ENGSTROM and )  
ELDA H. ENGSTROM, )  
husband and wife, )  
  
Respondents-Plaintiffs, )

vs. )

Civil No.  
10954

ELDO D. BUSHNELL and )  
ENNA R. BUSHNELL, )  
husband and wife, )  
  
Appellants-Defendants. )

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BRIEF OF RESPONDENTS AND PLAINTIFFS

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Appeal from the Judgment of the  
Seventh District Court for Carbon County  
Honorable F. W. Keller  
Judge

---

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IN THE  
SUPREME COURT  
OF THE STATE OF UTAH

WIN ENGSTROM and	)	
DA H. ENGSTROM,		
band and wife,	)	
Respondents-Plaintiffs,	)	
vs.	)	Civil No.
		10954
DO D. BUSHNELL and	)	
NA R. BUSHNELL,		
band and wife,	)	
Appellants-Defendants.	)	

BRIEF OF RESPONDENTS AND PLAINTIFFS

NATURE OF THE CASE

This case involves the interpretation of a Uniform Real Estate Contract on the sale of land in Millard County by the defendants to the plaintiffs. Plaintiffs filed this action in the District Court of Carbon County asking the court to declare invalid and of no further force or effect second mortgages on properties in Price, Carbon County, Utah and in Orem, Utah and that funds held by a real estate agency in Burley, Idaho be declared to be the property of the plaintiffs. Plaintiffs filed a motion for summary judgment on their complaint which was granted by the trial court. Defendants appeal from that decision. Plaintiffs oppose this appeal and take the position that their motion for summary judgment was properly granted by the trial court.

## STATEMENT OF FACTS

Defendants in their statement of fact set forth a number of claimed facts that were not before the court on this motion for summary judgment. Plaintiffs motion for summary judgment was dated May 5, 1966, and was filed May 6, 1966, and is based upon the complaint and answer and counterclaim of defendants and plaintiffs reply to the counterclaim with the various exhibits attached to these pleadings. Answers to interrogatories and depositions were not before the court and were not considered on this motion for summary judgment.

The facts before the court on this motion for summary judgment are, therefore, limited in accordance with these pleadings above mentioned and are as hereinafter set forth.

On May 10, 1963, defendants as sellers and plaintiffs as buyers, entered into a Uniform Real Estate Contract to purchase certain lands in Millard County for the sum of \$58,000 with \$500 paid at the time of the signing of the agreement, receipt of which was acknowledged by the defendants, and the balance of \$57,500 to be paid in installments, which installments are set forth in paragraph three of the contract. A photocopy of this contract executed by the parties appears as Exhibit "A" to plaintiffs complaint and as pages 5 and 6 of the judgment roll.

On the same day plaintiffs executed a promissory note in the amount of \$15,500 payable in installments in the same amount on the same dates and bearing the same interest rate as set forth in a portion of the second sentence in paragraph three of the Uniform Real Estate Contract. This note appears as Exhibit "B" to plaintiffs complaint and is page seven of the judgment roll. Plaintiffs also executed a second mortgage on properties in Utah County, Carbon County, and at Burley, Idaho to secure the payment of this promissory note. The description of these properties and the recording information relating to the second mortgage are set forth in plaintiffs complaint.

On the same date plaintiffs and defendants also executed a supplemental agreement to the Uniform Real Estate Contract which provides for the pasturing of 100 head of cows and 50 head of calves for a period of three months during 1963, and other provisions for the operation of the farm. This supplemental agreement appears as Exhibit A-1 to defendants answer and counterclaim and is page 17 of the judgment roll.

Plaintiffs took possession of the farm on May 10, 1963 and conducted farming operations on the farm during that summer. They were unable to make the payment due on September 1, 1963 of \$3,500. After the expiration of the 30 day grace period the defendants exercised their remedy under paragraph 16-A and gave a five day

notice of the default and stated in their notice that if the defaults were not corrected within the five days that the defendants as sellers, would declare the contract at an end and repossess the property. This notice was dated October 1, 1963 and appears as Exhibit "C" to plaintiffs complaint and pages 8 and 9 of the judgment roll. The plaintiffs did not correct the default within this five day perion and defendants took possession of the property as set forth in the notice, which would be on October 6, 1963. Plaintiffs have never been in possession of the property since that date.

The Uniform Real Estate Contract in paragraph 16 provides three alternate remedies if the buyer, who is the plaintiffs herein, fail to make the payments when they became due. Subparagraph A sets forth a five day written notice and a forfeiture if the defaults are not corrected within the five day period and a repossession of the premises by the seller. Subparagraph B sets forth that the seller may bring suit to recover on any delinquent installment. Subparagraph C sets forth that the seller, upon written notice to the buyer, may declare the entire unpaid balance due and payable and treat the contract as a note and mortgage and foreclose

on it as a mortgage.

The plaintiffs, in filing their complaint in Carbon County for the relief of this second mortgage on the properties, take the position that the defendants had a choice of remedies as set forth above in the next preceding paragraph. Defendants made an election as provided under subparagraph A, forfeited the contract and took back the property. By making this election under the terms of this subparagraph A, they are entitled to retain what was paid down which was the \$500 as liquidated damages and that they can recover no further sums. In support of this claim, after defendants had filed an answer and counterclaim and plaintiffs had filed their reply to the counterclaim, plaintiff then filed a motion for summary judgment based upon these pleadings which had been filed and the exhibits attached thereto which are mentioned above which motion was dated May 5, 1966. Defendants had filed their motion for a summary judgment. Both of these motions for summary judgment were argued to the court on June 21, 1966. On August 25, 1966, District Judge F. W. Keller rendered a memorandum decision wherein he granted plaintiffs motion for a summary judgment and denied defendants motion for a summary judgment. He signed such an order on October 18, 1966. The courts memorandum decision and this order appear as further



additions to the judgment roll.

Defendants, upon receiving this order granting plaintiffs motion for summary judgment, then filed their motion for a rehearing which motion is dated October 24, 1966, and filed October 26, 1966. This motion for rehearing appears at page 19 of the judgment roll. On March 21, 1967, Judge Keller rendered a memorandum decision denying defendants motion for rehearing and signed an order to that effect on March 24, 1967. This order denying defendants motion for rehearing is page 20 of the judgment roll. His memorandum decision appears as part of the judgment roll, but the pages are not numbered.

Of importance is the provision in Judge Keller's memorandum decision dated August 25, 1966 and in his order granting plaintiffs motion for summary judgment dated October 18, 1966, wherein he states:

"Plaintiffs motion for summary judgment is granted provided, however, that the relief sought by plaintiffs complaint shall not be effective under this order for their summary judgment until a determination of the issues can be made on defendants counterclaim because of claimed breaches of the supplemental agreement therein referred to."

There are written interrogatories and answers following this order granting summary judgment to the plaintiff as discovery on this counterclaim for claimed damages under the supplemental agreement.

On December 9, 1966, plaintiff took defendants deposition which depositions are in the file and have never been published and are still sealed. These written interrogatories and the answers to them and the depositions were all subsequent to the motion for summary judgment and are not before the court and were not considered by the court in granting summary judgment to the plaintiffs; therefore, all statements in defendants brief relating to the deposition and to answers to written interrogatories are not before the court and should not have been included or mentioned in defendants brief.

The issue before the court on plaintiffs motion for summary judgment relate to the construction and legal effect of paragraph three of the uniform real estate contract relating to the schedule of payments and paragraph 16 of said contract relating to the remedies in case of non payment. Any damages that defendants may be entitled to under the supplemental agreement which is attached to defendants answer as Exhibit A-1, was not determined or included in the order granting summary judgment to plaintiff, but was reserved for trial of the issues raised by this supplemental agreement and for a determination of claimed damages, if any, in favor of the defendant.

## ANSWER TO DEFENDANTS POINT I -

### PROMISSORY NOTE WAS A DOWNPAYMENT

Defendants, in their argument, make a general statement that the promissory note was part of the downpayment under the Uniform Real Estate Contract. Neither the contract nor the note support this conclusion. They were executed on the same day and the second mortgage given the date to secure the promissory note. When the payment schedule and the note is compared with the payment schedule in the contract, it appears that the note payment schedule is the same as the first portion of the second line in paragraph three of the contract which states:

"In addition, buyers are to pay \$3,500 on or before September 1, 1963, \$4,000 on or before December 20, 1964, \$4,000 December 20, 1965, and \$4,000 on or before December 20, 1966;..."

Had the promissory note been intended as a downpayment, the contract would have so recited. The contract makes no mention of the promissory note and only recites that \$500 was paid with the signing of the agreement.

The question of law involved and one raised by the motion for summary judgment, is whether or not the Uniform Real Estate Contract is clear and certain as to the terms and conditions of payment, or whether or not this portion is uncertain and ambiguous so that the parol evidence

would be received to explain the ambiguity. We submit that the contract is clear and certain on the terms and conditions of payment and that parol evidence could not be received to modify the terms and conditions set forth in the contract.

An analysis of this proposition is very ably stated by Judge Keller in his memorandum decision of August 25, 1966, in making the following observations and conclusions:

"The defendants advance the claim that this promissory note is to be considered as a down payment. In order to prevail on this claim, the defendants have the burden of showing that the contract of sale is susceptible of an interpretation that the obligation created by the promissory note was to be considered as a down payment or that the contract is so ambiguous as to permit the consideration of parol evidence to show that the promissory note is to be considered as a down payment. I conclude that there is not upon the face of the contract any provision from which I am able to conclude that the \$15,500.00 note was to be considered as a down payment or that there is any ambiguity authorizing the Court to consider parol evidence to support a conclusion that the \$15,500.00 note was a down payment.

As I examine the face of this contract I note that the property to which it refers is subject to an obligation to the Equitable Life Assurance Society of the U. S. for the sum of \$35,000.00 and that this is the same

amount that is to be paid by the plaintiffs as is expressed in the first sentence fixing installment payments of \$4,000.00 on or before the 20th day of December 1963, and on or before the same date in each and every year thereafter until \$35,000.00 has been paid. It is not an unreasonable conclusion from what is stated in the second sentence of Par. 3 and the provisions of the note and the security given to pay the note that the defendants had in mind making sure that they received something above the indebtedness on the property sold rather than a down payment."

ANSWER TO DEFENDANTS POINT II -

THE CONTRACT IS SEPARATE AND APART FROM  
THE NOTE AND MORTGAGE

The argument presented in plaintiffs Point I also applies here.

Defendants, in their brief, state at page seven that there can be no question but what the parties were planning for the payment of the promissory note outside the terms of the real estate contract and that the installment payments on the contract can be easily distinguishable from the payments due on the promissory note. We question this conclusion. On the contrary, the payments of the promissory note are the same as a portion of the payments in the contract.

Defendants, at pages 8 and 9 of their brief refer to the deposition of the defendants. This is improper and should not even be referred to in the brief. As mentioned in our statement of facts, the depositions were taken many months

after the motion for summary judgment was made and was argued to the court and the court rendered its decision granting plaintiffs motion for summary judgment. The file contains the deposition and it is still sealed and has never been published. It was not filed with the trial court until June 27, 1967, after this appeal was filed.

The proper conclusion to be drawn from the reading of the contract, promissory note and the second mortgages is that they are separate documents, but they refer to the same schedule of payments. The contract was dated May 10, 1963, and the first payment was due September 1, 1963, over three months from the day of the contract and the \$500 downpayment.

ANSWER TO DEFENDANTS POINT III -  
DOCUMENTS CONSTRUED TOGETHER

We find no fault with the defendants claim that these documents that were executed the same day pertaining to the transaction should be construed together. This was done and these documents taken into consideration by Judge Keller in reaching his decision as indicated in his memorandum decision dated March 21, 1967, wherein he stated:

"I have examined the authorities cited and have no difference with the general principles of law stated in the cases cited by counsel for the defendants. In other words, I concede it to be the law that instruments relating to the same transaction contemporaneously executed are to be construed together, and that where the terms of the note and

mortgage are in conflict the terms of the note must prevail.

The installment payments listed in the promissory note were part of the purchase price specified in the conditional sales contract. As pointed out in my original memorandum, the conditional sales contract gives to the defendants an election of remedies. That election was exercised when the defendants chose to repossess the real property to which it relates upon the plaintiffs' failure to pay the first installment specified in the promissory note as well as in the conditional sales contract. The defendants could have elected to declare the entire indebtedness due and sue upon the note as well as the contract. In stating this conclusion I am in effect reconciling the provisions of the note with the provisions of the conditional sales contract in compliance with the rule of law relied upon by the defendants to the effect that where two instruments relating to the same subject matter executed contemporaneously are to be construed together."

ANSWER TO DEFENDANTS POINT IV -  
RECOVERY OF THE DOWNPAYMENT IS NOT UNCONSCION-  
ABLE OR UNREASONABLE

In defendants argument at pages 11, 12, and 13 defendants quote from Answers to Interrogatories made by the defendants. These interrogatories and the answers are in the same category as the deposition. They were submitted and answered some months after the summary judgment was granted and they are not part of the record and the judgment roll to be considered by the court. It is improper for the defendants to refer to these answers to written interrogatories. As plaintiffs

view this matter whether or not the recovery of the downpayment is unconscionable or unreasonable is not an issue in this matter on the motion for summary judgment. This is a question of an election of remedies under paragraph 16 of the Uniform Real Estate Contract. When the plaintiffs defaulted in the September 1st payment of \$3,500, the defendants had a choice of three remedies under paragraph 16. They could exercise a forfeiture and terminate the contract and take possession of the property and retain all monies theretofore paid as liquidated damages, or they could have brought suit for the delinquent installment payments, or the third remedy, declare the full amount due and foreclose as under a real estate mortgage. These options are set forth clearly and with particularity in the contract. Defendants made their election and chose to terminate the contract and retain all monies that had been paid as liquidated damages as evidenced by defendants notice to the plaintiffs dated October 1, 1963, which appears as Exhibit "C" to plaintiffs complaint and is on pages 8 and 9 of the judgment roll. The notice itself mentions the three alternate remedies and states that they choose the remedy to terminate the contract.

Subparagraph A which sets forth the remedy chosen by the defendants has particular language on what shall be forfeited as liquidated damages for the nonperformance of the contract and states as follows:



"Seller shall have the right, upon failure of the Buyer to remedy the default within five days after the written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non performance of the contract, ..."

This paragraph does not refer to the down payment as forfeited as liquidated damages, but states all sums that have been theretofore paid. Defendants, in their entire brief place great emphasis upon the language and the claim that the promissory note is a down payment and infer that the down payment is what is forfeited as liquidated damages. The language of the contract does not support the defendants in this claim. Since \$500 was the amount that had previously been paid, this is the amount of cash that was forfeited as liquidated damages and claimed by the defendants under their election of remedies.

Another factor that enters in is that the defendants received more than the \$500 paid at the time the agreement was signed. The supplemental agreement referred to provides that the plaintiffs should furnish pasture for 100 head of adult cattle and 50 head of calves for a total of 150 head of cattle for the three months during the summer growing season. This is a substantial consideration in and of itself and

it is in addition to the \$500 cash.

Judge Keller, in his memorandum decision dated March 21, 1967, takes this proposition into consideration in reaching his decision as follows:

"This is one of those causes in which the Court adopts the views of the defendants he is compelled to conclude that breach of the contract to sell the defendants' ranch to the plaintiffs is far more desirable from the standpoint of the defendants and definitely more profitable than performance. Five Hundred dollars in cash was paid on the purchase price at the time of the execution of the contract. Simoultaneously with the execution of the contract, the plaintiffs executed promissory notes for the sum of fifteen thousand five hundred dollars and secured these notes by three separate real estate mortgages. If the defendants are permitted to recover on the notes for fifteen thousand five hundred dollars, their recovery for the breach will amount to sixteen thousand dollars; namely, one-third of the amount that the plaintiffs agreed to pay for the ranch -- But this is not all. After the execution of the contract the plaintiffs signed a supplemental agreement that according to its terms deprived the plaintiffs from the right to use the proceeds from the crops grown in the first year of the contract to meet the obligations of operating the ranch, deprived them of the opportunity to plow any of the lands in the ranch planted to grass and hay, and permitted the defendants to pasture one hundred head of adult cattle and fifty head of suckling calves for a period of three months during 1963."

The Utah Supreme Court has repeatedly held that under Uniform Real Estate Contracts and likewise, under Earnest Money Receipt Contracts, where there is an option and a choice of remedies that if the seller exercises the remedy to terminate the contract and retains the monies that have been theretofore paid as liquidated damages, his election is final and the vendor cannot thereafter recover additional sums or damages for the breach of the contract or specific performance. See *Andreasen vs. Hansen* (1959), 8 Utah 2d 370, 335 P 2d 404; *Close vs. Blumenthall* (1960), 11 Utah 2d 51, 354 P 2d 856; *McMullin vs. Shimmin* (1960), 10 Utah 2d 142, 349 P 2d 720.

#### CONCLUSION

The trial court properly granted plaintiffs motion for summary judgment which precludes any further payments under the contract and promissory note, but leaves open for trial the issue of whether or not defendants sustained any damage under the supplemental agreement. The trial court decision should be affirmed.

Respectfully submitted,  
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