

1964

J. Lamar Richards and Lynn P. Richards v. John Vatsis : Brief of Defendant and Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

FILED

MAR 12 1964

J. LAMAR RICHARDS and
LYNN P. RICHARDS,

Clark, Supreme Court, Utah

Plaintiffs and Respondents

vs.

Case No.

10049

UNIVERSITY OF UTAH

JOHN VATSIS,

JUN 30 1964

Defendant and Appellant

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BRIEF OF DEFENDANT AND APPELLANT

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Aldon J. Anderson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. LAMAR RICHARDS and
LYNN P. RICHARDS,

Plaintiffs and Respondents

vs.

JOHN VATSIS,

Defendant and Appellant

Case No.
10049

STATEMENT OF THE KIND OF CASE

This is an action for damages arising from Defendant's breach of contract, entered into between Plaintiffs and Defendant, for the sale of Plaintiffs' home to Defendant.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment for the Plaintiffs, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and judgment in his favor as a matter of law, or that failing

a modification as to the measure and amount of damages awarded to Plaintiffs.

STATEMENT OF THE CASE

For the purpose of convenience and clarity the parties will be referred to as they appeared in trial and reference to the record will be designated by (R-1).

On October 9th, 1962, Plaintiffs, J. LAMAR RICHARDS and LYNN P. RICHARDS, entered into an earnest money agreement with JOHN VATSIS, Defendant, for the sale of Plaintiffs' home to the Defendant. The earnest money agreement recited the total sale price of Twenty-nine Thousand Seven Hundred Fifty Dollars (\$29,750), and a Deposit of Three Hundred Fifty Dollars (\$350), the receipt of which sum was acknowledged by the Plaintiffs. Prior to the date of October 9th, 1962, the date of the contract in question, the Plaintiffs and Defendant had entered into a prior earnest money agreement for the sale and purchase of the Plaintiffs' home, but the prior contract was not acted upon and the second contract, which is in issue, was entered into.

The Defendant, however, paid to Plaintiffs, through their agent, the Mt. Olympus Realty, the sum of One Hundred Dollars (\$100) on the first contract. When the second contract, dated October 9th, 1962, was entered into, Plaintiffs, through their agent, Mt. Olympus Realty, agreed to credit the One Hundred Dollars (\$100) paid by Defendant on the prior contract towards the earnest money on the second contract, and Defendant thereby issued a check in the amount of Two Hundred Fifty

Dollars (\$250), making the total amount deposited Three Hundred Fifty Dollars (\$350), as indicated on the earnest money agreement. Thereafter, due to dissatisfaction, the Defendant placed a stop-payment order on the check for Two Hundred Fifty Dollars (\$250) issued to Plaintiffs. The amount of One Hundred Dollars (\$100) credited to Defendant as partial payment of the earnest money agreement sued upon, was never returned or tendered to the Defendant prior to the initiation of this action. Plaintiffs brought action for damages for breach of contract. The Defendant at the time of pre-trial raised as an additional defense the fact that no return or tender of return had been made of the One Hundred Dollars (\$100) credited as payment by Defendant and retained by the Plaintiffs and the Plaintiffs thereby exercised their right under the liquidated damage provision of the contract and were barred from suing for damages (R-22). The only real issues for determination at trial were whether the Defendant in fact paid anything on the second earnest money agreement and if so, whether Plaintiffs were obligated to return or tender the return of such sums paid by Defendant before initiating suit.

At trial, Russell Pugh, salesman for the Mt. Olympus Realty, testified that he in fact, credited the Defendant with payment of One Hundred Dollars (\$100) towards the total amount of Three Hundred Fifty Dollars (\$350), earnest money, and accepted the check of Two Hundred Fifty Dollars (\$250), making a total of Three Hundred Fifty Dollars (\$350) paid by the Defendant (R-91-92).

The trial court found, *inter alia*, that the Defendant paid nothing on the earnest money agreement sued upon,

and the court consequently rendered judgment for the Plaintiffs in the amount of Two Thousand Dollars (\$2,000), which represents the difference between the contract price and the price of the subsequent sale of Plaintiffs' home to a third party.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN FINDING THAT ONE HUNDRED DOLLARS (\$100) WAS NOT PAID BY THE DEFENDANT ON THE EARNST MONEY AGREEMENT OF OCTOBER 9, 1962.

Paragraph Three of the Court's finding of Fact, (R-47) reads:

"That the defendant was to pay the Plaintiffs Three hundred fifty Dollars (\$350) as earnest money under the terms of the October 9th, 1962, agreement but instead of making the Three Hundred Fifty Dollar (\$350) payment Defendant issued, or caused to be issued, a check for only Two Hundred Fifty Dollars (\$250) and requested the real estate agent to credit to the Defendant One Hundred Dollars (\$100) which Defendant had paid to Plaintiff under a separate and prior agreement, and which One Hundred Dollars (\$100) the Defendant admitted was the Plaintiffs', due to Defendant's admitted breach of the prior, separate agreement."

The most careful scrutiny of the records and the transcript of trial does not support the Court's findings as indicated above but, in fact, contradicts this ruling. The

record is devoid of any indications which would lead one to believe that Defendant admitted that the One Hundred Dollars (\$100) in question was the Plaintiffs', due on the breach of the prior contract. On the contrary, the Defendant, throughout the trial, insisted and proved that the One Hundred Dollars (\$100) in question was to be applied as partial payment of the initial deposit on the second contract.

As the record clearly shows, the Mt. Olympus Realty Company was engaged by the Plaintiffs to sell Plaintiffs' home. Russell Pugh was an employee of the Mt. Olympus Realty Company. At trial, he testified that he received from Defendant the amount of One Hundred Dollars (\$100) on a prior contract between the parties and placed that amount in the trust account of his company. The prior contract was not acted upon by either parties. (R-91-93) Mr. Pugh further testified that in negotiating the terms of the second earnest money contract, the One hundred Dollars (\$100) received from the Defendant and deposited in the company's trust account was to be credited towards the Three Hundred Fifty Dollars (\$350) earnest money agreed upon and that he specifically advised the Defendant that this was being done. Mr. Pugh testified as follows:

- Q. You testified that there was One Hundred Dollars (\$100) in a trust account with your company belonging to this Defendant, is that correct?
- A. To the best of my knowledge, I turned in One Hundred Dollars (\$100) to the company, and I assume it went in the trust account.

- Q. What was your understanding of the disposition of the One Hundred Dollars (\$100)?
- A. I really had no understanding to the disposition; it had to remain in the trust account, to the best of my knowledge.
- Q. What I meant, Mr. Pugh, what did you understand was to be done with this One Hundred Dollars (\$100)?
- A. At what time?
- Q. At the time of the execution of the October 9th contract.
- A. On that day, I, in fact, credited that amount and included it with the Two Hundred Fifty (\$250) Mr. Vatsis had given me at that time to make the total down payment of Three Hundred Fifty Dollars (\$350).
- Q. Did you indicate that to Mr. Vatsis?
- A. Yes. (R-91-92).

Nothing in the record and nothing at trial rebuts the fact that One Hundred Dollars (\$100) was credited to the Defendant as payment towards the initial deposit of Three Hundred Fifty Dollars (\$350) on the earnest money agreement. Yet the trial court found that nothing was paid as down payment on the contract of October 9th, 1962. In fact nothing was paid or credited towards payment on the second contract, the check which was issued by Defendant would have been Three Hundred Fifty Dollars (\$350) instead of Two Hundred Fifty Dollars (\$250).

The evidence clearly indicates that One Hundred Dollars (\$100) was, in fact, credited as payment from

Defendant to Plaintiffs' agent, Mt. Olympus Realty and the trial court erred in finding otherwise.

POINT II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFFS.

The primary question at this juncture is whether or not the Plaintiffs may sue for damages on the earnest money contract of October 9th, notwithstanding the fact that One Hundred Dollars (\$100) of the down payment on the contract was never returned or tendered by the Plaintiffs prior to their initiating suit for damages. The defendant contends that the Plaintiffs, by retaining the One Hundred Dollars (\$100) in question, exercised their right under the liquidated damage clause of the earnest money contract and are therefore, barred from suing on the contract for other damages.

In *Andreason vs. Hansen*, 8 Utah 2d 370, 355 P. 2d 404, *McMullin vs. Shimmin* 10 U 2d 142, 349 P. 2d 720, *Close vs. Blumenthal* 11 U 2d 51, 354 P 2d 856, the Supreme Court of Utah established a simple but precise rule; a party may not sue for damages under an earnest money agreement and offer to purchase unless prior to the initiation of any such action, such party tenders return or actually returns all amounts which he has received pursuant to the contract in question. This rule is simply the application of the long-established rule in the field of damages; namely, that a party may not sue for other damages where the contract provides for liquidated damages and where the evidence indicates that complainant has elected to exercise his right under the liquidated damages provision.

However, in the case at bar the facts differ slightly from the facts in the cases cited in that the entire amount of the down payment was not paid by the Defendant but only One Hundred Dollars (\$100) of the total amount of Three Hundred Fifty Dollars (\$350) was paid to the Plaintiffs and retained by them. The Plaintiffs, at trial, urged that the One Hundred Dollars (\$100) paid by the Defendant to the Mt. Olympus Realty Company was in fact payment on a prior contract which was not at issue and therefore, such amount could not be considered as payment of the contract in question, or in the alternative, that the One Hundred Dollars (\$100) credited to the Defendant was in fact a gift by the Plaintiffs to the Defendant. The Plaintiffs further contended that irrespective of whether Defendant was credited with the One Hundred Dollars (\$100) payment on the second contract, the entire amount of down payment was not paid and therefore, the Plaintiffs are not barred from initiating a suit for damages for loss of profit notwithstanding the fact that the One Hundred Dollars (\$100) was retained by the Plaintiffs.

To determine the validity of Plaintiffs' contention, let us suppose that the amount paid by the Defendant had been in excess of the Plaintiffs' actual loss. Would the Defendant be entitled to a refund of all amounts in excess of the actual damages arising from the breach of contract? Certainly the Plaintiffs would take a different position from the one they now take and argue that *whatever* amount paid, if any amount was in fact paid, would be controlled by the liquidated damages provision of the contract, and they would therefore be entitled to retain the same.

Here it is convenient to refer to the hypothetical problem so aptly stated by Justice Crockett in *Andreason vs. Hansen*, where he *states*:

“We are led to wonder: Suppose the earnest money had been a sum far in excess of the actual cost; the buyer failed as here; the seller simply retained the money; and another sale was made without loss to the seller. Can it be reasonably supposed that the seller would look up the first buyer and say: ‘Here is the earnest money deposit which I had the option to keep as liquidated damages, but as I suffered no loss I now elect to return it to you.’ This is so inconsistent with the normal pattern of conduct that it is not to be expected. “And should the first buyer ask for his money back it seems a foregone conclusion that he would be met with: ‘Your earnest money was forfeited as liquidated damages as provided in the receipt. I didn’t need to tell you, keeping the money manifests my election to forfeit.’”

By this statement it is obvious that the precedents stand for the proposition that *any amount* paid under the liquidated damages provision of a contract such as ours must be returned or at least tendered to the Defendant before suit is initiated and if the Plaintiff fails to do so, he will be barred from seeking additional damages in the Courts. Moreover it is obvious that upon refusal of the bank to honor the Defendant’s check of Two Hundred Fifty Dollars (\$250) which was presented for payment by Plaintiffs or their agent, the Mt. Olympus Real Estate Company, Plaintiffs knew or should have known that the liquidated damages had been reduced to One Hundred Dollars (\$100). Notwithstanding this fact, they elected

to retain the lesser amount and thereafter filed suit against the Defendant for damages. Had the Palintiffs been dissatisfied with this remedy, they could have easily nullified any intention of making such election by simply returning the One Hundred Dollars (\$100) prior to the initiation of the law suit for damages.

Too, the pertinent language of these contracts and the contract presented in evidence in the case at bar, read, “(T)he *amounts paid* hereon shall, at the option of the seller be retained as liquidated and agreed damages” (line 34 and 35 of agreement). The agreement does not limit the clause to amounts paid only as earnest money but rather uses the broad term “amounts”, which would seem to imply that *any amount* paid would make the provision applicable and enforceable. The wording certainly substantiates the argument that the rule as laid down by our Supreme Court is not limited to cases where the exact amount of the earnest money is paid but applies to contracts where any amount is paid, so long as it is paid as “earnest money.”

Thus it would seem, and the Defendant argues, that the facts in the case at bar does not warrant or justify a deviation from the rules set out in the *Andreason vs. Hansen* case and the subsequent two cases to which reference has been heretofore made.

POINT III. COURT ERRED IN THE MEASURE OF DAMAGES AWARDED PLAINTIFFS.

If in fact the Plaintiffs are not barred from recovering additional damages on the contract sued upon, the

amount of damages to be awarded them is nevertheless governed by the liquidated damages clause of the contract, and at most, the Plaintiffs are entitled to the balance of the down payment.

Here it should be emphasized that the Plaintiffs' retention of the One Hundred Dollars (\$100), paid to them by the defendant is clear and unequivocal manifestation that the Plaintiffs exercised their right under the liquidated damage clause of the earnest money agreement. Thus, the Plaintiffs have in essence, agreed to substitute the liquidated damages for any and all actual damages which they may have suffered. It is stated, in *McCormick on Damages*, section 152:

“If the Court finds that the clause in question is one which properly provides for liquidated damages, it fixes any recovery for damages for the breach at that amount. The injured party, though his actual damages may exceed the agreed sum, can recover no more, and his recovery cannot be diminished by showing his actual loss was less.

This rule of law is substantiated in *15 Am Jur. 264. Damages* p. 697 where it states:

“The effect of a clause for stipulated damages in a contract is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of the contract, and thereby prevent a controversy between the parties as to the amount of damages. If a provision is construed to be one for liquidated damages, the amount named forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount. No other or greater damages can be

awarded, even though the actual loss may be greater or less.”

This rule of law is the rule upon which *Andreason vs. Hansen*, *McMullin vs. Shimmin* and *Close vs. Blumenthal*, supra, were decided. This proposition is reaffirmed by Justice Henroid in his separate concurring opinion in *Andreason vs. Hansen*, where he states:

“It was agreed that the sellers at their option could retain the amount advanced as liquidated damages if the buyers broke their promise. The buyers broke their promise and the sellers retained the amount advanced. In my opinion such retention constituted the exercise of the option and precluded the sellers from pursuing any other remedy. It is not consistent for the sellers to insist on holding the buyers to the terms of the contract and at the same time, retain the money that they agreed would be the measure of damages upon breach, if they retained it. Such inconsistency must be resolved against the sellers who not only furnished the printed contract but who had the power of election.”

Also, in *Close vs. Blumenthal*, Justice Crockett stated:

“In regard to earnest money receipts of this character it is pertinent to observe that the attempt to enforce this clause of the contract is almost invariably against a purchaser who has been induced to sign it and deposited money under the impression that its forfeiture will be the extent of his loss if he decides not to buy the property. And the suit is by a seller who wants to be sure to keep the money in hand and also seek additional relief. This clause is for the benefit of the seller. He will obviously choose the option to his advantage,

and to the disadvantage of the buyer. Under those circumstances the clause should be strictly applied against the seller, and he should be held to meet its requirements with exactness.”

In each of these cases, the Supreme Court of Utah, in effect, found that the Plaintiffs had exercised their right under the stipulated damage clause in the respective contracts, and the Plaintiffs had consequently agreed to substitute the stipulated damages for any actual damages. Upon this basis, our Supreme Court ruled that the Plaintiffs in these cases were not entitled to sue for other damages.

In our case, however, it may be that the Plaintiffs are entitled to the balance of the down payment of Three Hundred Fifty Dollars (\$350). Yet, prior to the commencement of the case at bar, Plaintiffs knew that payment on the Defendant's check for Two Hundred Fifty Dollars (\$250) had been stopped; but Plaintiffs nevertheless elected to retain the remaining One Hundred Dollars (\$100). The Plaintiffs obviously agreed to accept the One Hundred Dollars (\$100) as liquidated damages. The Defendant therefore submits that the Trial Court erred in its determination of damages and the Plaintiffs are not entitled to additional damages.

CONCLUSION

The Defendant-Appellant urges that the evidence and testimonies presented at trial clearly indicate that One Hundred Dollars (\$100) was, in fact, credited to him as payment on the earnest money agreement sued upon and

that this amount was retained by Plaintiffs-Respondents as liquidated damages. Therefore, the Plaintiffs-Respondents were barred from recovering damages in excess of the amount recited as stipulated damages.

Respectfully submitted,

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