

1964

J. Lamar Richards and Lynn P. Richards v. John Vatsis : Brief of Plaintiffs-Respondents

Utah Supreme Court

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JUN 30 1964

IN THE SUPREME COURT
of the
STATE OF UTAH

APR 2 - 1964

J. LAMAR RICHARDS and
LYNNE P. RICHARDS,

Plaintiffs-Respondents,

vs.

JOHN VATSIS,

Defendant-Appellant.

Case No.
10049

BRIEF OF PLAINTIFFS-RESPONDENTS

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable Aldon J. Anderson, Judge

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J. LAMAR RICHARDS and
LYNNE P. RICHARDS,
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vs.

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Defendant-Appellant.

Case No.
10049

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

The action in the lower court was brought by a seller of real estate for damages arising from the buyer's breach of the earnest money agreement.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable Aldon J. Anderson presiding, gave judgment against the defendant.

RELIEF SOUGHT ON APPEAL

The Appellant-defendant seeks complete rever-

sal of the judgment against him or a modification of the damages awarded to Respondents.

STATEMENT OF FACTS

Respondents offer additional facts that were omitted from Appellant's Statement of Facts because there were two earnest money agreements between the Respondents and the Appellant in this case, and it is necessary to set forth the circumstances surrounding both agreements, even though the action was brought only under the second agreement.

On August 7, 1962, the Appellant, John Vatsis, entered into an earnest money agreement with Respondents whereby Appellant paid \$100.00 to the real estate agent as earnest money on the sale of Respondents' home which was priced at \$31,000.00 (Exhibits R-144). As a part of this agreement Appellant traded his equity in his home to the Respondents (Exhibits R-144). Appellant represented to and contracted with Respondents that there was no lien on the home he was trading to them (R-141). However, Appellant breached his agreement with Respondents as there was a prior \$4,000.00 judgment against Appellant constituting a lien against the trade-in house of Appellant. Appellant had not disclosed to Respondents the existence of the lien (R-141). Respondents asked Appellant to remove the lien to conform to the agreement. Appellant did not remove the lien and, therefore, the Respondents, several times prior to October 9, 1962, asked Appellant to move from the Respondents' home (R-141).

Because of the judgment lien, both Appellant and Respondents considered the first earnest money agreement terminated. (Vatsis Deposition pp. 35, 38. R-138-139). Other than the \$100.00 earnest money and \$120.00 rent from a third party which Respondents received from the trade-in house, no money was paid by Appellant to Respondents under this agreement of August 7, 1962 (R-139, 142), although by its terms larger payments were required. (Exhibits R-144).

After Respondents had several times requested Appellant to move because Appellant had breached the first earnest money agreement, the Appellant and the real estate agent made a new earnest money agreement (Exhibits R-144) which was to be presented for Respondents' approval to enable Appellant to stay in the Respondents' house (R-105, Vatsis Deposition p. 35). This second earnest money agreement was dated October 9, 1962, and contained a recital that \$350.00 was paid as earnest money. The agreement does not indicate how the earnest money was to be paid or how it had been paid (Exhibits R-144). The Appellant made out a check to Respondents for \$250.00 and the real estate agent apparently agreed to credit Appellant with \$100.00 because Appellant had previously paid \$100.00 under the first agreement. Respondents never authorized such an arrangement and the earnest money agreement does not show it (R-67, Exhibits R-144). This second earnest money agreement set the price of Respondents' house at \$27,750.00 which was \$1,250.00 less than the original agreement.

Appellant stopped payment on the \$250.00 check (R-98), and moved out of Respondents' home on November 2nd or 3rd, 1962, without making any other payment to Respondents under the second agreement. (Appellant was unaware that his wife had moved out of the home until some time later as he was out of town (R-104-105)). After Appellant moved from the house, Respondents made extensive efforts to sell the home (R-64, 65, 86), and finally sold it to a third party for \$27,000.00 (Exhibits, R-144), which was \$2,750.00 less than the price set in the second earnest money agreement.

Respondents brought an action against Appellant for breach of contract and the lower court awarded damages to Respondents, finding that the \$100.00 was paid under the first agreement and belonged wholly to the Respondents inasmuch as there was a clear breach of the first agreement (R-47). As a result of the stop payment order of the \$250.00 check, no earnest money was paid under the second agreement and consequently, the Respondents could not be put to an election of remedies and could not be required to tender back earnest monies they had not received.

ARGUMENT

POINT I.

RESPONDENTS COULD NOT HAVE ELECTED TO KEEP ANY EARNEST MONEY PAID UNDER THE AGREEMENT SUED UPON BECAUSE RESPONDENTS RECEIVED NOTHING FROM APPELLANT.

Appellant relies on the rule of *Andreason v.*

Hansen, 8 Utah 2d. 370, 335, P.2d. 404 (1959) and followed in subsequent cases, that a seller of real estate who does not tender return of or return earnest money paid has elected to keep such payments as liquidated damages and is barred from suing for damages under the agreement. It is submitted that the present situation is factually different from the *Andreason* case because the Respondents did not receive any earnest money or consideration from Appellants under the earnest money agreement sued upon. The earnest money agreement of October 9, 1962 sued upon (Exhibits, R-144) states in line 3 that the sum of \$350.00 was deposited as earnest money, whereas in fact, the Appellant deposited only a check in the amount of \$250.00 (R-84-85) and payment on the said check was stopped. (R-98).

In *Andreason v. Hansen*, supra, Seller was definitely paid the earnest money recited in the agreement. In the instant action, no earnest money whatsoever was paid under the earnest money agreement sued upon. Thus, a ruling by the court as urged by the Appellant that the instant case is governed by *Andreason v. Hansen* would be in effect a ruling that a recitation in an earnest money agreement is binding upon the seller despite the fact that no consideration whatsoever was paid. There is no indication of such a rule in *Andreason v. Hansen* or in *McMullin v. Shimmin*, 10 U.2d 142, 349 P.2d 720, or in *Close v. Blumenthal*, 11 U.2d 51, 354 P.2d 856. Indeed, such a rule as urged by Appellant

would be contrary to the rule heretofore laid down by this court in *Afton Livestock Company v. Peterson*, 62 Utah 437, 220 Pac. 710 (1932), wherein the court indicated that showing the true amount of consideration paid is permissible. See also *Paloni v. Beebe*, 100 Utah 115, 110 P.2d 563 (1940) and *Last Chance Ranch Co. v. Erickson*, 82 Utah 475, 25 P.2d 952 (1933).

The language of the earnest money agreement sued upon (Line 34) explicitly states that the amounts paid may "at the option of the seller be retained as liquidated and agreed damages." By stopping payment on the \$250.00 check given as earnest money, the Appellant has not lived up to the agreement and has removed the option right to any election of remedies that was available to Respondents. As stated in *McKown v. Driver*, 54 Wash. 2d. 46, 337 P.2d 1068, 1073 (1959), "One is bound by an election of remedies when all of three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them."

By stopping payment on the \$250.00 check given pursuant to the earnest money agreement, the Appellant eliminated any election of remedies that was available to Respondents and rendered it impossible for Respondents to comply with the rule laid down by this court in *Andreason v. Hansen* and cases thereunder because there was nothing to re-

turn. Appellant, however, seeks to bring the instant action back within the rule of *Andreason v. Hansen* by asserting that because Appellant and Respondents entered into a completely separate and prior earnest money agreement whereby Appellant paid to Respondents the sum of \$100.00, the Respondents were obligated to return the said \$100.00 prior to filing suit on the earnest money agreement actually sued upon. Because of this contention by Appellant, the trial court was forced to consider the ownership of the subject \$100.00 and of the agreement upon which it was predicated. (R-97). The trial court concluded that the \$100.00 was Respondents' money under a separate and prior agreement and the crediting of this amount to Appellant by the real estate agent involved operated only to reduce the earnest money under the agreement sued upon from \$350.00 to \$250.00 (R-48-49). There is ample evidence in the record to support this finding of the court. In reviewing the evidence relied upon by the trial court, it is noted that this court has consistently held that on appeal from a judgment for the plaintiffs, the evidence will be construed in a light most favorable to the plaintiffs. *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah 483, 123 Pac. 97.

The record discloses that Appellant obviously understood that he had violated the earnest money agreement of August 7, 1962, under which the \$100.00 was paid and that he had been requested to move from Respondents' home. (R-141). Appel-

lant further admitted that he understood the first earnest money agreement to have been terminated as a result of his breach of this agreement (Vatsis Deposition, pp. 35, 38). It is further noted that the Appellant offered no evidence whatsoever that the \$100.00 belonged to him whereas the Respondents at all times claimed ownership of the \$100.00 (R-69, 138-139). The trial court thus correctly held that the \$100.00 paid under the August 7, 1962 earnest money agreement was the property of Respondents and, therefore, the only effect of the real estate agent crediting this amount to Appellant was to reduce the amount of the earnest money deposit required under the earnest money agreement that was sued upon.

POINT II

THE TRIAL COURT CORRECTLY ASSESSED DAMAGES AGAINST APPELLANT INASMUCH AS RESPONDENTS COULD NOT HAVE MADE AN ELECTION AND CONSEQUENTLY THE DAMAGES WOULD THEN BE THE DIFFERENCE BETWEEN THE OFFER AND THE ACTUAL MARKET VALUE OF THE PROPERTY.

Because no earnest money was paid under the earnest money agreement sued upon, Respondents are not bound by any liquidated damage clause in that agreement and therefore the measure of damages is as stated in *Cole v. Parker*, 5 Utah 2d 263, 300 P.2d 623:

“Thus, in the absence of fraud, the seller is entitled to be credited, in the computation of damage sustained because of the breach of

the contract, the difference between the contract price and the price for which he can sell the forfeited property . . .”

Andreason v. Hansen, 8 Utah 2d 370, 335 P.2d 404 (1959) states that the measure of damages is the difference between the purchaser's offer and the actual market value of the property. In *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446, the court again stated that the measure of damages is the advantageous bargain lost by the plaintiff, together with damages for the fair rental value of the property during the period of occupancy.

It is without contradiction that Respondents had to sell the property for \$2,750.00 less than the Appellant had agreed to pay (Exhibits R-144); that Respondents incurred substantial expenses because of Appellant's breach (R-66, 74-75); that the subsequent buyers were bona fide purchasers of the home (R-87); and that Respondents were diligent in their efforts to sell the property (R-86).

Thus, the measure of damages assessed by the trial court was proper and consistent with the rule for ascertaining damages set forth by this court in the *Cole*, *Andreason* and *Perkins* decisions cited above.

CONCLUSION

The findings of the trial court that Respondents never received any earnest money under the agreement sued upon are correct, and the measure of damages assessed against Appellant are proper.

Respectfully submitted,

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