

1964

Keith C. Wallace and Ada B. Wallace v. Build, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH C. WALLACE and ADA
B. WALLACE, his wife,
Plaintiffs and Respondent,

vs.

BUILD, INC., a Utah Corporation,
Defendant and Appellant.

F I L E D

JG2 0 1964

Supreme Court, Utah

No.
10140

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable Stewart M. Hanson, District Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	4
ARGUMENT	6
POINT I. THE COURT ERRED IN PER- MITTING THE PLAINTIFFS TO RE- COVER ON THE MORTGAGE WITHOUT FIRST DIRECTING A FULL PERFORM- ANCE OF THE ENTIRE AGREEMENT.....	6
POINT II. THE COURT ERRED IN AL- LOWING THE PLAINTIFFS AN AMOUNT OF \$1,056.00 OR ANY AMOUNT FOR AT- TORNEYS FEES.	13
CONCLUSION	16

CASES CITED

Gibbons & Reed Co. v. Guthrie, 256 P.2d 706, 123 Ut. 2d 172	8
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No.
10140

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This action was brought by the plaintiffs to foreclose a real estate mortgage on property that had been sold by the plaintiffs to the defendant. The defendant counterclaims asking for specific performance of a contract and for damages.

DISPOSITION IN LOWER COURT

The case was heard on the 17th day of February, 1964. All of the issues were resolved in favor of the

plaintiffs and the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reformation of the judgment and for an order deleting the item of attorneys fees and allowing the defendant \$12,500.00 on its counterclaim.

STATEMENT OF FACTS

This appeal concerns two apartment houses—one located at 32 West 7th South, known as the Bonnie Brae, and another located at 627-634 Fourth Avenue, known as the Cliff de Villa.

The Defendant was purchasing the Bonnie Brae Apartment House under contract from the Plaintiffs. In the early part of 1962, Defendant made application for a loan to refinance the Bonnie Brae Apartment House and pay off the Plaintiffs and other existing lien claimants. During the course of the refinancing, it became apparent that Defendant would be short approximately \$20,000.00, to pay off all of the obligations and, therefore, Mr. and Mrs. John T. Williams accepted a Second Deed of Trust, in the amount of \$4,008.78 (Exhibit D 7) and the Plaintiffs accepted a Promissory Note for \$6,068.38 (R 5), secured by a Third Deed of Trust, covering the Bonnie Brae Apartment House real property (Exhibit D 1) and a Promissory Note for \$8,000.00, secured by a Mortgage on the Fourth Avenue property (R 34). (The Fourth Avenue prop-

erty, at that time, had only two small houses located upon it. Construction of the Cliff de Villa was commenced in November, 1962.) At the same time, the parties agreed to form a corporation for the purpose of constructing and owning a new apartment house to be built on the Fourth Avenue property (Exhibit S 2).

The parties made some attempts to get financing for construction of the new apartment house, together (T 32) but finally, Richard Stromness, President of Defendant Corporation, decided to obtain financing of his own and applied for a loan with Western Savings & Loan and was granted a commitment of \$120,000.00, which was approximately \$20,000.00 more than both of the parties had hoped to obtain previously (T 31). The Defendant then made arrangements to pay off the \$8,000.00 note and mortgage on the Fourth Avenue property, through an intermediary title company (T 29), and the loan at Western Savings & Loan was closed in September, 1962. Immediately thereafter, the Defendant commenced construction of the Cliff de Villa apartment house located on the Fourth Avenue property, without ever consulting with the Plaintiffs or notifying them of the loan with Western Savings & Loan or of the fact that construction had been commenced (T 35). Prior to the obtaining of the loan and the commencement of construction, the Defendant did not approach the Plaintiffs and suggest that they form the new corporation to build and own the apartment house.

In late January or February, 1963, three months after construction of the apartment house had been commenced, Plaintiff, Keith C. Wallace, happened to drive by the apartment site and noticed that the construction had started, then, on a Sunday afternoon, telephoned Richard Stromness to find out what had happened. At this time, Richard Stromness asked the Plaintiff if he was willing to go ahead with the arrangements on the apartment house, but the Plaintiff declined since the Defendant had already obtained the financing and had started construction and the Plaintiff was not aware or acquainted with the Defendant's plans for financing the complete project. Thereafter, since no payments had been made on the note and mortgage on the Bonnie Brae Apartment House, these foreclosure proceedings were commenced.

ARGUMENT

POINT I. THE COURT ERRED IN PERMITTING THE PLAINTIFFS TO RECOVER ON THE MORTGAGE WITHOUT FIRST DIRECTING A FULL PERFORMANCE OF THE ENTIRE AGREEMENT.

The Plaintiff disagrees with the Defendant's Point I in the following particulars:

1. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT THE DEFENDANT BREACHED THE CONTRACT

TO FORM A NEW CORPORATION TO OWN AND OPERATE AN APARTMENT HOUSE.

2. DEFENDANT HAS SHOWN NO OBLIGATION ON THE PART OF THE PLAINTIFFS TO CONVEY TITLE TO THE MORTGAGED PREMISES NOR DID DEFENDANT INTRODUCE ANY EVIDENCE THAT THE TITLE WAS NOT MARKETABLE.

3. DEFENDANT DID NOT INTRODUCE ANY EVIDENCE OF DAMAGES RESULTING FROM THE ALLEGED BREACH OF CONTRACT.

We will discuss each of these under the above headings:

1. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT THE DEFENDANT BREACHED THE CONTRACT TO FORM A NEW CORPORATION TO OWN AND OPERATE AN APARTMENT HOUSE.

Defendant has admitted the execution and delivery of the Promissory Note and Mortgage sued upon by the Plaintiffs, and that no payments have been made on the Note. No defenses were raised to the mortgage foreclosure action (Pretrial Order R 17). The only issue remaining to be considered in this appeal is whether the agreement to form a new corporation (Exhibit D 2) was breached, and, if so, by whom?

This Court has consistently found that the Findings of Fact of the lower Court will not be disturbed, if there is sufficient evidence to sustain the Judgment—Gibbons & Reed Co. v. Guthrie, 256 P.2d 706, 123 Utah 2d 172.

The agreement (Exhibit D 2) provided for the formation of a corporation for the construction and ownership of an apartment house. The Court found that Defendant breached this agreement by obtaining a loan, using the property as security and commencing construction of the building without prior notice to Plaintiffs and without consent of Plaintiffs.

There was ample evidence to support this finding.

Richard Stromness, President of Defendant Corporation, testified as follows:

Q. Prior to the time you paid Mr. Wallace the \$8,000.00 he had never indicated to you he was not ready to proceed on this agreement?

A. On the contrary, he told me he was attempting to raise financing. He says, "I believe I have got an arrangement to make. I am working on it and I hope we can get it settled so that we can go ahead."

Q. In other words, he had stated that he was ready, willing and able to go ahead?

A. Yes, he had. He gave me that assurance he would come into the project as soon as the financing could be arranged.

Q. And he didn't know, I suppose, you had arranged this financing?

A. Yes, I told him I had arranged this financing.
(T. 32-28, 33-1 to 11).

This last statement is corrected by Mr. Stromness
later on:

Q. I believe you testified that you had a conversation with Mr. Wallace over the telephone on a Sunday afternoon in which he told you he wasn't willing to go forward, is that right?

A. Yes.

Q. That was the first time that he had told you this?

A. Yes.

Q. Now when was this?

A. This was in February of 1963.

Q. *So this would be almost a year after the agreement was entered into?*

A. *Yes.*

Q. *And your building over there was under construction at that time?*

A. *Yes.*

Q. *And you had got your loan with Western Savings & Loan?*

A. *Yes. (Italics supplied) .*

Q. I think you also told me you told Mr. Wallace of this financing with Western Savings & Loan before you actually got the mortgage, or before you actually signed the mortgage payments, is that right?

A. I beg your pardon, sir. What was your question?

Q. Did I understand you on direct examination to say that you had discussed the loan at Western Savings & Loan with Mr. Wallace before you signed the mortgage papers?

A. That is not true, no.

Q. What are the facts then? Did you discuss the Western Savings & Loan mortgage with him before you actually got it?

A. The loan? Did I discuss the loan with Mr. Wallace?

Q. Yes.

A. No, I did not discuss the loan with Mr. Wallace before I obtained it. I did tell him I was attempting to borrow money and he in turn advised me that he was also working on it and attempting to get a loan. (T. 35-10, to 36-13).

These statements were confirmed by Mr. Wallace:

Q. During the time it was executed on the 5th day of February, 1962, and until sometime in February of 1963, did you, at any time, disaffirm that agreement?

A. No, sir, I did not.

Q. Did you have any conversation with Mr. Stromness concerning that agreement?

A. In reference to, now—

Q. In reference to proceeding to accept the amendments set forth in that agreement?

A. Yes, sir; we did.

Q. What happened on or about the 9th day of March—9th day of November, 1963.

A. Prior to that date—

THE COURT: November 9th.

Q. (By Mr. Bettilyon) 1962.

A. November 9, 1962?

Q. 1962.

A. Prior to that date, Mr. Bettilyon, my office received a telephone call from Mr. Lund stating that he had the money to pay off the mortgage on this property that we have discussed on the avenues. On the 9th of November, 1962, I went over to his office and he issued to check to me for the \$8,000.00 in question, Mr. Lund.

Q. That was to pay off the note and mortgage on the—

THE COURT: Fourth Avenue property?

A. Yes, sir.

Q. (By Mr. Bettilyon) Do you recall sometime in February of 1963, having a telephone conversation with Mr. Stromness?

A. Yes, sir, I do. May I just question that date?

Q. Yes.

A. In my recollection, in my memory, it was not in February, It was earlier than that date, but after November.

Q. Do you recall having the telephone conversation with Mr. Stromness?

A. Yes, sir.

Q. On Sunday afternoon. Who made the call?
Who started the call?

A. I called Mr. Stromness myself.

Q. And will you repeat what was said at that time?

A. Yes, sir. I was waiting for Mr. Stromness to call me. After receiving this money I felt that he certainly would have the courtesy to call me and explain to me what he was doing. So Mrs. Wallace and I drove up around and property and found he was building and working on the property.

Q. Is this the first time you discovered that?

A. Yes, sir; it was.

Q. Go ahead.

A. So I called him, because of the nature of our agreement, and asked him over the phone why he had broken the agreement.

Q. What did he say?

A. He told me that as near as I can recall, he said, "Because of the pressing emergency of getting the money," and he had to do this similar to what he testified here yesterday, that he had gone ahead on his own and approached the Western Mortgage Company and borrowed the money and had gone ahead on the project. He also inferred to me that he assumed I wasn't interested actually in going ahead with our agreement. Then he asked me if I was still interested in coming into the building, and I told him I had no interest whatsoever in his project because he had not reviewed with me the conditions on

which he received the money, what he was going to do with it, or anything pertaining to the building at that time, and that is when I did tell him I had other interests." (T. 57-22 to 58-24).

From this testimony, it is clear that it was the Defendant who breached the contract. Richard Stromness arranged a special loan through Zion's First National Bank to pay off the \$8,000.00 note and mortgage (T 28 and 29). He arranged to pay it off through an intermediary—a title insurance company; apparently, so he could avoid direct conversation with the Plaintiffs. He then closed the loan with Western Savings & Loan for \$120,000.00 and then commenced construction of the apartment house before Plaintiffs were informed or knew anything had occurred.

Thereafter, financial difficulties developed, but it was not until Plaintiffs commenced foreclosure proceedings on the 32 Eighth West property, that the Defendant raised a question about proceeding under the agreement to form a corporation.

2. DEFENDANT HAS SHOWN NO OBLIGATION ON THE PART OF THE PLAINTIFFS TO CONVEY TITLE TO THE MORTGAGED PREMISES NOR DID DEFENDANT INTRODUCE ANY EVIDENCE THAT THE TITLE WAS NOT MARKETABLE.

Defendant has alleged that part of the title to the mortgaged property on the Eighth West property was

not marketable. This question is not material or relevant to a mortgage foreclosure proceeding.

But apart from its relevancy in this action, it is now immaterial, for the following reasons: First, Defendant did not offer into evidence anything to indicate the obligation on the part of Plaintiffs to convey title to real property; and, second, not a scintilla of evidence was offered that the title to Defendant's property was not good and marketable. In fact, we do not even know from the transcript which parcel he claims is defective.

Defendant introduced a Quit Claim Deed with Plaintiffs, as Grantors, and Defendant, as Grantee (Exhibit D 5), but this does not obligate the Grantors to warrant title.

If Defendant was attempting to show some obligation on Plaintiff's part to convey good title, he should have introduced the real estate contract or other agreement which placed such a burden on Plaintiffs. He did not and so not only is there no obligation shown to convey good title, and no evidence of bad title.

The only evidence offered, regarding title, was given by Richard Stromness, President of Defendant Corporation, and quoted in Defendant's Brief. Defendant testified that he had been informed that it would cost \$12,500.00 to clear the title. This evidence was objected to by the Plaintiffs (T 10 and T 17); it was hearsay and opinion evidence and should have been excluded by the Court. Defendant was not quali-

tioned to give an opinion as to the status of the title and no one else was called to do so. In addition, no evidence of title was introduced, such as abstract or preliminary title report or title opinion.

The question regarding title of the property was clearly outside the pretrial order. If Defendant was dissatisfied with the pretrial order, he had ample time to raise an objection to the order prior to the trial, but it was clearly improper to go beyond the scope of the pretrial order in the trial.

3. DEFENDANT DID NOT INTRODUCE ANY EVIDENCE OF DAMAGES RESULTING FROM THE ALLEGED BREACH OF CONTRACT.

Defendant talked about alleged damages that he had sustained, but nowhere in the evidence is it possible to determine in what way the alleged damages relate to, or result from, the alleged breach of the contract by the Plaintiffs.

POINT II. THE COURT ERRED IN ALLOWING THE PLAINTIFFS AN AMOUNT OF \$1,056.00 OR ANY AMOUNT FOR ATTORNEYS FEES.

The Note and Third Deed of Trust (R 6 & 7) both provide for the payment of attorney fees.

Since the acceptance of the Utah State Recommended Fee Schedule, the Courts in Utah have uni-

formly allowed attorney fees on mortgage foreclosure actions, in the amount recommended by the fee schedule without the introduction of evidence, as to reasonableness of the fee. The Plaintiffs, in their Complaint, set out the matter of attorney fees and in the prayer of the Complaint, prayed that attorney fees be allowed. The court, in the pretrial order, granted Judgment on the foreclosure matter.

Since, in the trial of the case, the only issue was the breach of contract (Exhibit D 2), no evidence was offered on the foreclosure action, Plaintiffs were willing to accept attorney fees recommended in the fee schedule, therefore no evidence as to reasonableness of the fee was required.

CONCLUSION

The findings of the lower court should be affirmed.

Respectfully submitted,

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