

1964

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Wallace v. Build, Inc.*, No. 10140 (Utah Supreme Court, 1964).

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH C. WALLACE and ADA
B. WALLACE, his wife, —

Clerk, Supreme

Court, Utah

Plaintiffs and Respondents,

vs.

BUILD, INC., a Utah Corporation,

Defendant and Appellant.

1964

No.
10140

BRIEF OF APPELLANTS

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

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APR 29 1965

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BRIEF OF APPELLANTS

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 the 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

Plaintiff 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 FACT

On the 5th day of February, 1962, the parties herein met in the office of the plaintiffs' Attorney and formed a real estate transaction involving: 1st, the purchase from the plaintiffs of property at about 32 West 7th South Street, for the balance of which the defendant paid to the plaintiffs and others the approximate sum of \$42,000.00; 2nd, the mortgage of the plaintiff herein being foreclosed; and 3rd a contract to form a corporation for the purpose of building and owning an apartment house at 4th Avenue and J Street; all in Salt Lake City and County, State of Utah.

As part of the purchase sale agreement the plaintiffs promised and even pretended to give to the defendant good marketable title, the transaction being evidenced by a series of deeds, one a warranty deed (T. 42-8). The defendant, however, has been unable to obtain either the possession of or the rentals from the northern portion of the property, a strip 40 by 77 feet (T. 41-18 to 30), and the defendant evidences by the testimony of its president that it will cost \$12,500.00 to obtain good title to the strip (T. 18-7) and that it will suffer a loss of approximately \$20,000.00 unless the title to the property can be obtained (T. 48-20).

The giving of the note and mortgage by the plaintiff sued upon was not only a part of the transaction for the purchase of the property, but also of an agreement in writing between the parties providing for the construction of an apartment house at 4th and J Street (T. 8-14), which would not only strengthen the financial position of the defendant but would make it possible for the defendant to absorb the mortgage debt sued on by the plaintiffs.

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.

In the first place, these three agreements, to give the defendant good title to the property on Seventh South, to give the plaintiffs a mortgage on the said property, and finally to form a corporation are all made at the same time, between the same parties and all relate to the same subject matter, and they should be construed together. 12 Am. Jur., page 781, par. 246:

“Several instruments constituting part of the same transaction must be interpreted together.” Partmar Corp. v Paramount, 347 U.S. 89. To the same effect is Rekas v. Dopkavich, 66 A 2nd 230; Strike v. White, 91 Utah 170, 63 P. 2nd 600; Strike v. Floor, 97 Utah 265, 92 P 2nd 867.

In the second place, the plaintiffs seeking to enforce the equitable powers of the Court must "come in with clean hands." "He who seeks equity must do equity." 19 Am. Jur., page 319, par. 363:

"One of the most frequently invoked maxims of equity declares that he who seeks equity must do equity. The principle thus expressed governs the courts in administering any kind of equitable relief in any controversy where its application may be necessary to work out complete justice."

It is undisputed in this case that the plaintiff stands to lose \$12,500.00, because of the failure of the plaintiffs to furnish good title to the property as agreed.

Q. In other words, have you learned how much it would cost you, how much to clear the title to that property?

A. Yes.

Q. How much?

A. \$12,500.00.

Q. And is it essential—state what relationship it has to the apartment house property.

A. The property down there is without parking space. This space to the rear of the building is very vital for parking and the continuing use of the property. (T. 18-2 to 17).

Here then are plaintiffs seeking the exercise of the equitable powers of the court, who have by their violation of the very same contract of which their mortgage is a part, caused the defendant damage in an amount

twice as large as that amount sought to be recovered by the foreclosure of their mortgage.

Also, in this regard, consider the following testimony by the defendant through its president, Richard J. Stromness:

Q. Do you say the \$42,000.00 includes the note you are being sued on herein?

A. No. The note I am being sued upon is outside of the \$42,000.00.

Q. Is in addition to that?

A. Yes, in addition to that.

Q. The \$8,000.00 you paid Mr. Wallace, that was secured by a mortgage on the 4th Avenue property, is that in addition to the \$42,000.00?

A. Yes.

Q. And the \$4,000.00 you signed with Mr. and Mrs. Williams, is that also in addition to the \$42,000.00?

A. Yes.

Q. And would you have obligated yourself to have paid, or would you have owed any of these amounts, had you not understood you would not have the title to the property at the north of the apartment house?

A. No.

POINT 2.

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

The record is silent as to attorneys fees. There is no evidence at all as to any amount that is reasonable for attorneys' fees.

CONCLUSION

Should the plaintiffs be permitted to foreclose their mortgage against the defendant without first giving the defendant good title to the property mortgaged, they would not only be failing to do equity, but they would be causing great injustice to be suffered by the defendant. The judgment of the lower court should be reformed so as to allow judgment for the defendant for the sum of \$12,500.00, and to delete the item on attorneys fees.

Respectfully submitted,

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