

1983

Jon D. Warner, aka John D. Warner And Leora Larene Warner, His Wife v. Robert J. Rasmussen And Kathy Lee Rasmussen, His Wife : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JON D. WARNER aka JOHN D. WARNER :
and LEORA LARENE WARNER, his wife, :

Plaintiffs and
Appellants, :

CASE NO. 19,079

-vs- :

ROBERT J. RASMUSSEN and :
KATHY LEE RASMUSSEN, his wife, :

Defendants and
Respondents. :

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BRIEF OF RESPONDENTS

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Appeal from Judgment of Fourth Judicial District Court, Utah County,
State of Utah, Honorable George E. Ballif, District Judge.

---0000000---

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JON D. WARNER aka JOHN D. WARNER :
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Plaintiffs and :
Appellants, : BRIEF OF RESPONDENTS

-vs-

ROBERT J. RASMUSSEN and :
KATHY LEE RASMUSSEN, his wife, : CASE NO. 19,079
Defendants and :
Respondents. :

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STATEMENT OF NATURE OF CASE

Appellants filed an action on December 3, 1981, against Respondents in the Fourth Judicial District Court of Utah County, seeking an equitable determination that the liquidated damage clause in Paragraph 16A of the Uniform Real Estate Contract between the parties was, under the particular circumstances, a penalty and thus unenforceable and for equitable reimbursement of sums overpaid to the Respondents thereunder prior to Appellants' breach thereon. The case was tried before the Honorable George E. Ballif, without jury, on January 12, 1983.

DISPOSITION IN LOWER COURT

After trial, the Court found, given the equities involved, the liquidated damages clause in Paragraph 16A of the Uniform Real Estate Contract of the parties was not a penalty but rather enforceable. The Court dismissed the Appellants' Complaint with prejudice and awarded Respondents their costs of \$19.61. Judgment was signed and entered on February 24, 1983.

RELIEF SOUGHT ON APPEAL

Respondents seek no relief on appeal. Respondents request this Court affirm decision of the Court below.

STATEMENT OF FACTS

On August 16, 1979, Appellants entered into a Uniform Real Estate Contract for the purchase of a home located at 263 East 740 North, Orem, Utah, from the Respondents for \$57,500.00. (D Exhibit EX 9)

Appellants defaulted on the monthly payments and returned the home to the Respondents on July 31, 1981. (R 87; T 24: 13-17; T 94: 15-16)

Appellants occupied the home for a total of 23 1/2 months. (R 87)

During Appellants' occupancy, they paid \$13,994.25 on the contract. (R 86-87) Of this amount, which includes the Appellants' down payment of \$2,850.00 (D Exhibit EX 9) only \$5,039.35 was applied to reduce the principal and the balance was attributable to interest. (D Exhibit EX 10)

Appellants filed their Complaint on December 3, 1981, seeking equitable reimbursement from Respondents. (R 3)

A pre-trial conference was held on October 8, 1982. (R 69)

At the pre-trial conference, the Court indicated its equitable determination would be based upon the guidelines provided by the Utah Supreme Court in the case of Perkins vs. Spencer, 243 P2d 416 (Utah 1953) and subsequent cases in Utah interpreting said decision. (R 86; PT 2: 17-25; PT 3: 1-3)

On January 12, 1983, trial was held before the Honorable George E. Ballif, without a jury. (R 81)

Appellants were present with counsel and Respondent, Robert J. Rasmussen, was present with Respondents' counsel. (R 81)

Appellants, two expert witnesses, Respondent, Robert J. Rasmussen, and three other witnesses testified at the request of Appellants. Respondent, Robert J. Rasmussen, testified for the Respondents. (R 81)

On February 4, 1983, in its written decision, the Court found the liquidated damages clause in Paragraph 16A of the parties' Uniform Real Estate Contract was not a penalty and therefore enforceable. (R 145-148) The Court based its conclusion on the following facts:

- 1) Appellants abandoned the property when they could not meet the payment schedule, gave notice and peacefully surrendered possession after 23 1/2 months of occupancy from August 1979 to July of 1981. (R 146);
- 2) It required a total of 51 days after Appellants vacated before Respondents were able to re-rent the premises at the rate of \$450.00 a month giving an option to the renter to purchase for \$56,000.00, with credit for \$100.00 of each month's rent against the purchase price at the time the option was exercised. (R 146);
- 3) Appellants were not entitled to credits for claimed improvements made because
 - a) evidence was conflicting as to the value,
 - b) evidence was conflicting as to the extent, and
 - c) no new space was added to the home. (R 146);
- 4) Respondents were not entitled to an amount for their claim of waste as they failed to persuade the Court they were entitled to it. (R 146);
- 5) Respondents could show damages using Appellants' "reasonable rental value" of \$325.00 a month in the sum of \$7,637.00. (R 146-147) However, under the case law of the State of Utah, Respondents were entitled to the amount of interest received under the contract as an item of damages upon termination; and, in this respect, Respondents were entitled to an item of damages in excess of \$10,575.00 for loss of interest under the contract. For this proposition, the Court cited Johnson vs. Carman, 572 P2d 371 (Utah 1977). (R 147);
- 6) In addition to the amount of \$10,575.00, the Court stated Respondents were entitled to the sum of \$594.00 damages for Appellants' breach. The amount was computed upon the Court's finding it required Respondents 51 days to rent the home after Appellants' breach and that the reasonable rental value during this time was \$350.00 a month. (R 147);

- 7) The Court found the value of the home did not advance over the purchase price of \$57,500.00 during the Appellants' term of occupancy and remained approximately the same. (R 147); and
- 8) In addition to the actual damages sustained by the Respondent due to the Appellants' breach, \$11,169.00, the Court found the attorney's fees which Respondents incurred in defending this action and the expense of re-renting or re-selling the property which may ultimately require a real estate commission of over \$2,500.00 are real and undeterminable additional damages which have a reasonable probability of occurring. (R 147-148)

The Appellants, in their Statement of Facts, indicate and would have this Court believe the balance of the equities involved weigh in their favor. This is not the fact however:

- 1) Appellants did not improve the property during their occupancy in any appreciable way. Appellants' witness testified of no real change in value of the home during their occupancy. (T 10: 32-25, T 11: 1-25, T 12: 1-4; T 12: 17-25, T 13: 1-19) Appellants' witness testified the quality of the Appellants' alleged improvements were of an "unfinished" nature. (T 64: 3-18) Appellants' witness testified the quality of some of the Appellants' alleged improvements were of "poor" quality. (T 6: 6-17) Many of the Appellants' alleged improvements were merely a matter of personal preference. (T 84: 1-9; T 85: 3-9; T 10: 10-25, T 86: 1-7; T 86: 8-20; T 86: 21-25, T 87: 1-8; T 88: 18-25, T 89: 1-3; T 89: 4-15)
- 2) If Appellants repaired and maintained the property during their occupancy, said repairs and maintenance were nothing more than nominal in nature. (T 21: 16-19, T 89: 16-25, T 90: 1-4)
- 3) Upon surrendering the premises, Appellants failed to properly clean the carpet in the subject property. (T 80: 13-22)

ARGUMENT

POINT I

THERE WERE NO IMPROPRIETIES IN THE DISPOSITION OF THIS CASE IN THE COURT BELOW AS IT RELATED TO THE PRE-TRIAL AND PRE-TRIAL ORDER.

At the pre-trial conference and in the Pre-Trial Order which was a part of the pre-trial, the Court indicated its equitable determination would be

based upon the guidelines provided by the Utah Supreme Court in the case of Perkins vs. Spencer, Supra, and subsequent cases in Utah interpreting said decision. (R 86; PT 2: 7-25; PT 3: 1-3)

Due to the fact the issue in Perkins vs. Spencer, Supra, as well as in the case now before the Court involve an equitable determination, there are no "hard and fast" rules of application for resolution. Instead, each case must be considered upon its own merits to achieve equitable resolution. It is for this reason, there are many cases in this jurisdiction interpreting and modifying Perkins vs. Spencer, Supra. The Appellants' brief has done a fine job in bringing the volume of cases to the attention of the Court.

It cannot fairly be said then that the Court below erred in any way by not following its Pre-Trial Order. In fact, the Court below did follow its stated intention that its equitable determination would be based upon the guidelines provided by the Utah Supreme Court in the case of Perkins vs. Spencer, Supra, and subsequent cases in Utah interpreting said decision.

POINT II

THE COURT BELOW DID NOT ERR IN FINDING, UNDER THE CIRCUMSTANCES OF THIS CASE, THE LIQUIDATED DAMAGES CLAUSE IN PARAGRAPH 16A OF THE UNIFORM REAL ESTATE CONTRACT OF THE PARTIES WAS NOT A PENALTY BUT RATHER ENFORCEABLE.

The Court below, based upon the evidence presented at trial, and within its discretion, properly found the liquidated damages clause in Paragraph 16A of the parties' Uniform Real Estate Contract was not an unenforceable penalty. In speaking of the guidelines provided by Perkins vs. Spencer, Supra, the Utah Supreme Court stated: ". . . these are reasonable factors to determine damages, [but] they were not meant to be a rigid formula to be applied

mechanically in every case. In determining equitable damages, the trial court may use whatever factors it finds most appropriate to achieve justice." Johnson vs. Carman, Supra, at 374. (Underscoring supplied for emphasis.)

It is now for the Utah Supreme Court to determine whether or not the Court below abused its discretion in any way amounting to a reversible error.

The Court below properly found it required a total of 51 days after Appellants vacated before Respondents were able to re-rent the premises. Appellants assert Respondents allowed the house to remain vacant for 51 days before they made any attempts to either resell or rent it. This is clearly not supported by the record. Respondent, Robert J. Rasmussen, did testify approximately one month and a half past from the time the Appellants surrendered the house until attempts were made. (T 93: 5-19) The trial Court was clearly within its discretion to find that this was not an unreasonably long time for the Respondents to prepare the house for resale or rental and to make whatever decisions were necessary regarding use of the home.

The Court below properly found Appellants were not entitled to credit for claimed improvements made because the evidence was conflicting as to their value and their extent. Appellants' witness testified no real change in value accrued to the home during Appellants' occupancy. (T 10: 23-25; T 11: 1-25, T 12: 1-4; T 12: 17-25, T 13: 1-19) Appellants' witness testified the quality of the Appellants' alleged improvements were of an "unfinished" nature. (T 64: 3-18) Appellants' witness testified the quality of some of the Appellants' alleged improvements was of "poor" quality. (T 66: 6-17) Respondent testified that if there were any improvements to the home made by Appellants, the value of same was approximately \$300,000. (T 90: 18-21) Respondent testified many of the Appellants' alleged improvements

ments were merely a matter of personal preference. (T 84: 1-9; T 85: 3-19; T 85: 10-25, T 86: 1-7; T 86: 8-20; T 86: 21-25, T 87: 1-8; T 88: 18-25, T 89: 1-3; T 89: 4-15) The trial Court was again clearly within its discretion to find Appellants were not entitled to credits for claimed improvements made.

The Court below properly found that Respondents had sustained actual damages in the total sum of \$11,169.00. Using Appellants' "reasonable rental value" of \$325.00 a month (T 54: 24-5, T 55: 1-5) the trial Court found Respondents were entitled to the sum of \$594.00 damages for the 51 days in which the Respondents' house stood vacant after Appellants' surrender. It should be noted in passing, that Appellants own expert as well as Respondent, Robert J. Rasumssen, testified the reasonable rental value of Respondents' home at the time of Appellants' surrender was \$350.00 a month. (T 56: 6-9; T 95: 5-18) Nonetheless, the trial Court did not abuse discretion in finding damages in the amount of \$594.00 on this particular point.

The trial Court also did not err in finding the Respondents were entitled to the sum of \$10,575.00 for loss of interest or rent under the contract. Under the terms of the parties' Uniform Real Estate Contract, Respondents were entitled to annual interest at the rate of 10 1/2%. Rent and interest are, in reality, one in the same and, therefore, cannot and should not both be included in the measure of damages; fair rental value necessarily represents, however, a reasonable return (interest) on investment. Biesinger vs. Behunin, 584 P2d 801 (Utah 1978). The trial Court was completely within its discretion to use the interest figure rather than the fair rental value in computing Respondents' damages if it felt it was the more equitable factor.

The Court below properly found the value of the home did not advance over the purchase price of \$57,500.00 during the Appellants' occupancy and remained approximately the same. Appellants' expert witness, Lynn Leifson testified it was his expert opinion the value of the home, "if anything, stayed the same" during the Appellants' occupancy. (T 11: 13-15; T 13: 7-19; T 14: 9-14) Appellants' expert witness, Richard Rawson, testified it was his opinion the value of the home at the time of Appellants' surrender was pursuant to the market date approach \$58,000.00 (T 50: 2-5), pursuant to the income approach \$57,750.00 (T 51: 2-3), and pursuant to the market value approach \$58,000.00 (T 52: 11-15). [The trial Court did not abuse its discretion in finding the value of the home did not advance during Appellants' occupancy.

The Court below properly found in addition to the Respondents' actual damages of \$11,169.00, resulting from Appellants' breach, Respondents incurred attorney's fees in defending this action and the expense of renting or reselling the property, which may ultimately require a real estate commission of over \$2,500.00, all of which are real but undeterminable additional damages which have a reasonable probability of occurring.

Appellants in their brief raise the concern, that for the Court to consider attorney's fees for defending as an element of damage, it grants Respondents double recovery. This would only be true if the trial Court had awarded Respondents their reasonable attorney's fees. It did not and, therefore, it is a proper element for consideration in the determination of the enforceability of the liquidated damages clause of Paragraph 16A. Biesinger vs. Behunin, id.

The Utah Supreme Court has held many times a liquidated damages clause is voidable and unenforceable if penal in nature rather than a reasonable estimation of actual and contemplated damages. This proposition is well supported by citation in Appellants' brief Pages 12 and 13 and therefore will not be cited here. In 1982, the Supreme Court stated:

. . . The damages recoverable for a breach are those which arise naturally from the breach and which reasonably may be supposed to have been within the contemplation of the parties or are reasonably foreseeable. Robbins vs. Finlay, 645 P2d 623, 625 (Utah 1982).

Attorney's fees and other miscellaneous contemplated expenses associated with renting and re-selling property surrendered under breach of the buyers naturally arise out of said breach and should have been reasonably contemplated by the parties or reasonably foreseeable by the parties at the time of executing the Uniform Real Estate Contract.

Attorney's fees as well as such miscellaneous contemplated expenses are by their very nature, as are as well, actual damages, speculative in nature and void of exact computation when parties execute their agreements. It is not until a breach occurs by the buyer, as here, that actual damages begin to focus and become clear. Still, at this point, there may well be certain damages which, in the words of the trial Court, are additional expenses which a non-breaching party may incur which at time of trial can only be estimated but are, nonetheless, real undeterminable additional damages which have a reasonable probability of occurring as a result of the breaching party's conduct. The trial Court should not and cannot ignore these contemplated damages -- attorney's fees and miscellaneous expenses associated with renting or reselling surrendered property. Attorney's fees, even if awarded, are somewhat speculative due to the fact a party never knows what it will take

to collect judgment and whether an appeal will be filed. The trial Court must consider them in order to do justice to all parties and in order to determine an equitable resolution. If the present renters of the home in question do not exercise their option to purchase, Respondents may very well be faced with a real estate commission in excess of \$2,500.00 that they would not have had "but for" Appellants' breach. Respondents have incurred attorney's fees and continue to do so, the total of which has not yet been determined.

In the instant case, the trial Court did not abuse its discretion in considering in its determination of an equitable resolution, additional expenses which the Respondents incurred as a result of Appellants' breach for which no exact amount could be set at time of trial.

Based on the equities involved in this case, the payments made by Appellants and the damages of the Respondents are as follows:

Payments by Appellants:	\$13,994.25
Respondents' actual damages as determined by the trial Court:	<u>11,169.00</u>
	\$ 2,825.25
Respondents' contemplated real but, as yet, undeterminable additional damages which have a reasonable probability of occurring:	<u>2,500.00</u>

CONCLUSION

The Court below did not commit irreversible error. Its decision was supported by evidence properly admitted at trial. The Appellants have failed on every front to show the trial Court disregarded the evidence or abused its discretion in any way. Appellants are not entitled to the relief they seek. Respondents ask this Court to affirm the trial Court's decision.

RESPECTFULLY SUBMITTED this 27th day of September, 1983.



GARY J. CHRYSER

Attorney for Defendants and Respondents

MAILING CERTIFICATE

I hereby certify that I served the foregoing Brief of Respondents by mailing a true and correct copy thereof, postage prepaid, to:

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DATED this 27th day of September, 1983.


