1964

Ellis Lloyd v. First National Bank of Logan et al : Reply Brief of Appellants

Utah Supreme Court

Backman, Backman and Clark; Attorneys for Appellants;
Patterson, Foley & Phillips; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

ELLIS LLOYD,
Plaintiff-Respondent,

vs.

FIRST NATIONAL BANK OF LOGAN and MILO A. RUPP and MARY T. RUPP,
Defendants-Appellants.

Case No. 10194

REPLY BRIEF OF APPELLANTS MILO A. RUPP AND MARY T. RUPP

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In Respondent's statement under Point V (A) (page 13) he suggests that the Appellants acknowledge that a duplicate original of the mortgage was placed in escrow. Appellants object to this inference as the evidence shows that there was never a duplicate original filed, and that a copy only of the mortgage, with no signature even typed, was filed.

In Paragraph 5 of Point V (page 15) it is stated "Mr. Lloyd testified under oath that the note

and second mortgage was "out of his control." This is contrary to his statement, also under oath, that he recorded the second mortgage and that the recorded mortgage is in his possession and has never been delivered to the escrow agent. (Tr-64)

Respondent under Point III, A, 1, (page 18) states that Mr. Lloyd gave notice to the Escrow Agent of the default in writing and that the Notice was to go to the Bank and not to the Appellants. May we again call attention to the Escrow Agreement (Exp-3) page 2, under paragraph (b) where it specifically states that the grantee is to receive a *copy of such demand* and at the bottom of the escrow:

> Providing however if demand is made a statement showing amount due signed by grantor shall accompany said demand.

The evidence is clear that no copy of the demand and no statement showing amount due signed by grantor were served upon the Appellants.

Respondent further states that the Escrow Agent complied by sending notice to pay the due amount by the 22 day of January (Point III, 2, (page 19). Again referring to the Escrow Agreement (Exp-3)

> If, however, at any time prior to full payment of all principal and interest above specified, Grantor delivers to you at the office above specified, written demand for the delivery of

> such documents and property to him, specifying in detail as grounds therefore, either:
> (a) That all or any part of any payment of principal or interest above specified remain unpaid and *that the due date therefore has passed.*

May we emphasize that this notice from the Bank to the Appellants informing them that plaintiff had made demand was dated December 16, 1963, (Exp-10) and yet the notice served by Plaintiff on the Appellants is dated December 13, 1963 and gives the Defendants until January 22, 1964 to meet the demand. (Exp-9) Certainly under these conditions the due date had not passed and the Bank was premature in giving notice.

Let us make a further examination of the purported Demand Notice served by the Bank, the Escrow Agent, upon the Appellants: (Exp-10) It reads:

> Ellis Lloyd has made demand upon us to deliver to him the warranty deed now with us in escrow, together with the abstract and original of the agreement. . . . Unless payment is made on or before the 22nd day of January, 1964 . . . we will deliver Warranty Deed and original of said contract.

No notice was ever given to the Appellants of the demand for handing down of the complete escrow.

As a further argument in reference to said notice by Plaintiff to the Appellants dated December

13, 1963, such notice was not in conformity with the Uniform Real Estate Contract which is the basis of the transaction which specifically provides the alternative remedies open to the Seller in declaring a forfeiture of the contract (Exp-7) none of which have been adopted by the Seller.

The notice from the Plaintiff to the Appellants dated December 13, 1964 (Exp-9) is entitled "Notice of Intention to Declare Forfeiture" and clearly states:

> Unless the payment is made on or before the 22nd day of January, 1964, the Seller will elect to declare forfeiture and on such action, all your rights will cease and determine and you will be required to surrender possession.

No further notice was given to the Appellants on or after the 22nd day of January, 1964, and therefore to the time of suit there had been no notice that the Seller had elected to declare forefeiture and there had been no legal notice of forefeiture.

Respectfully submitted,

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