1983

Russell Acton, Andrew Acton And Carol E. Acton v. J. B. Deliran, A Utah Corporation; Gerald House; Era Realty Center; Daryl Yates And Marydon Yate : Cross-Appellants J. B. Deliran, A Utah Corp., And Geraidhouse's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON, and CAROL L. ACTON, Plaintiffs and Appellants, vs. J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife, Defendants-Respondents and Cross-Appellants.	Case No. 19300 Case No. 19327 Case No. 19367

CROSS-APPELLANTS J. B. DELIRAN, a Utah Corp., and GERALD HOUSE'S BRIEF

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Plaintiffs and Appellants,

vs.

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CROSS-APPELLANTS J. B. DELIRAN, a Utah Corp., and GERALD HOUSE'S BRIEF

STATEMENT OF THE CASE

This is a case for the recision of a real estate sale in which an earnest money agreement was used, followed by a deed and payment. This was based on fraud or mistake. No prayer was made for damages or for reformation of the contract. After the jury verdict, the trial judge refused to give attorney's fees and reformed a contract to the point that the jury verdict was worthless.

DISPOSITION IN THE LOWER COURT

The jury verdict was to enforce the contract with no recision. Then the trial judge changed the decision and took action enforcing the contract so that it amounted to a reformation

of the same, and refused to allow the prevailing parties' attorney fees for enforcing the contract. He refused to allow for dismissal as against the defendant House who had acted only as an agent for the corporation J. B. Deliran.

RELIEF SOUGHT ON APPEAL

The nature of the relief sought on appeal is to do away with the modification of the verdict by the trial judge and to award attorney's fees and court costs and expenses to the defendants and cross-appellants Deliran and House under the contract.

STATEMENT OF FACTS

That on or about the 12th day of November, 1980, the defendants Yates, upon whom jurisdiction was never obtained, made a customary sales-agency contract in listing the property which is the subject matter of this action with ERA Realty, which appears to have been a licensed real estate agency operating in the Cedar City, Iron County, State of Utah area at the time of this transaction. At the time of this listing, the property was located just outside the city limits of Cedar City, Utah, and the listing contained the statement, "water in building." The land was by a hard surface, gravel road that went down the northside of the property. During the period of this listing, the property was examined by the plaintiffs' it did not meet their needs and they did not see fit to buy it.

About April, 1981, J. B. Deliran, by House, its president, made an earnest money receipt and offer to purchase the property which culminated in a sale on or about the 21st

day of May, 1981. About this time, the property came into the city limits of Cedar City, Utah by an annexation. On the 15th day of November, 1981, J. B. Deliran listed the property again with ERA Realty; the listing agreement was blank as pertaining to culinary water. At the same time, there was actually water on the property brought down by the prior owners from the Smith property above. The property came into Cedar City, Utah when Cedar City had an ordinance requiring the extension of water, requiring the people who were extending the water to pay the bill and connection fees, and where pipes had to be extended, to pay the cost with the provision for repayment. Mrs. Lebbon of ERA Realty during this period showed the property to the Acton brothers. There was a tap on the property running water. On the 16th day of July, 1981, Russell Acton and Andrew R. Acton offered to purchase from J. B. Deliran the property at a reduced price. Mrs. Lebbon of ERA Realty called Mr. House of Deliran; the details were agreed to on a community-type telephone call conducted by Mrs. Lebbon, with Mr. Russell Acton and Mr. Andrew Acton being with Mrs. Lebbon. Mr. House, as president of Deliran, agreed to the terms of the earnest money receipt and offer to purchase. Russell and Andrew Acton employed ERA Realty and Mrs. Lebbon as their agent to make a counteroffer to J. B. Deliran. The contract between the Actons and Deliran was through Mrs. Lebbon. There is various testimony as to what the Actons were told by Mrs. Lebbon about water. They had actual knowledge that water and access were questionable; there seems to be no question that on August 1, 1981, one Jay Grimshaw entered the property to do

survey work for Russell and Andrew Acton. He and a Mr. Smith, a neighbor, informed the Acton brothers that they did not have what is considered a legal water hookup and would have to go to the city of Cedar City to get one and also that they had questionable access. Being under the date of August 1, 1981, the surveyor reiterated the warning about access in writing. The listing by ERA Realty for Deliran said "no water", it said nothing about access. The Yates' listing said that there was water in the building but said nothing about access. Actons claim that Mrs. Lebbon showed them the Yates' listing not the Deliran listing. On the 12th day of August, 1981, the Actons paid for the property and had the deed made in the name of Mrs. Carol E. Acton, the mother of the two Acton brothers. They paid Deliran out in full with cash and assumed the mortgage at First Interstate Bank. Plaintiffs' action was commenced late in 1981, and went to trial on the second amended complaint which was dated the 30th of March, 1982, with two causes of action. The first cause of action was based on fraud and decit, the second cause of action was based on mutual mistake and asked for cancellation and return of the money paid and for attorney fees paid under the earnest money agreement.

The defendant House filed a motion for dismissal on the basis that there was no cause of action against him and still contends this.

The matter went to jury trial on the 8th, 9th, and 10th of November, 1983, before the Honorable Christian Ronnow, Circuit Court Judge, sitting as a visiting designated judge in the above-

entitled matter. No objections were filed in any form as to the circuit court judge sitting.

The jury was given three forms of verdicts and returned form numbered three with the statement, "We, the jury, find the contract between the plaintiff and the defendant should not be rescinded, dated this 10th day of November, 1982, Michael W. Nelson, foreman." Thereafter, plaintiffs' counsel indicated that he was asking for a judgment not withstanding the verdict and said that he would submit the same within the next ten days. The attorney fees were kept from the jury by the court with the statement that if it was found that attorney fees were proper, the Court would award them.

At no time has there been any prayer by the plaintiff except for recision and attorney fees under the contract. At no time has there been a motion for reformation of the contract.

On the 12th day of January, 1983, a hearing was had on the attorney fee matter. ERA put in a claim for attorney fees under designation of Exhibit "D1A" and House and Deliran put in a claim for attorney fees under designation of Exhibit "D2A" in the total amount of $6,157.00 as of January 19, 1983. These were later denied by the trial judge on the basis that the only time the attorney fees were available was when money had not been paid and that this was not the case.

On the 20th day of June, 1983, the Honorable Christian Ronnow, the judge in this matter, gave a judgment in favor of the plaintiffs against J. B. Deliran and Jerald House for $16,450 for failure to furnish access.

ARGUMENT

POINT I

THE JUDGE SHOULD NOT HAVE ATTEMPTED TO MODIFY THE JURY VERDICT

Although there was a motion for judgment on the verdict and a judgment not withstanding the verdict made at the time the jury verdict came in, and later argued, the Court did not see fit to award either. The Court awarded judgment against Deliran and House, with the statement that this had to be done to see the contract enforced as the jury had told him to do and then signed the judgment on verdict as rendered denying recision. This reformation of the contract was never raised in any of the pleadings and has not been raised to this date and has not been asked for. The only question that was ever asked for was recision. The question of access as well as water was aired before the jury for three days. There is no question that the jury was convinced that before closing the transaction, the Acton brothers had absolute knowledge of both questions affecting the property, and that these items also affected the price of the property and was the reason why their low offer was accepted. While this is touched on in the transcripts in many spots, the Acton brothers had information as to these questions on the 1st day of August, 1981, by Mr. Smith and Mr. Grimshaw. Mr. Grimshaw was a surveyor hired by the Actons while they were investigating the property before closing to check the matter out. Mr. Smith was a property owner from whose connection came the line that had the water actually on the property, which had been termed an illegal

connection during the trial. The facts of this matter were that Russell Acton called on Mr. Grimshaw to do a survey and it was done on the 1st day of August, 1981. On August 1, 1981, Mr. Russell Acton and Mr. Grimshaw, while surveying the property, had contact with one Wayne Smith. Relying upon the testimony of Wayne Smith with regard to water, beginning on page 469, line 5, and continuing to page 472, line 7, of the transcript, Mr. Smith told Russell Acton that he had an easement down in front of the property that they were considering to purchase and put them on notice that they would have to make some arrangement there. This is found in the transcript beginning on page 474, at line 12 to line 20, and took place on the 1st day of August, 1981. These conversations were heard by the surveyor, Mr. Grimshaw, and can be found in his testimony pertaining to the water on page 487, line 7 of the transcript to line 21, where he also mentions the easement question. Russell Acton acknowledges this on page 495, line 17 of the transcript. Exhibit "P6", which was the surveyor's work, gave the date of August 1, 1981; this put the Actons on notice of the easement problem. There can be no question that these items were discussed before the jury for all of the three-day trial and that the witnesses Grimshaw and Smith, neither of which had an ax to grind in this type of a lawsuit, had no interest in the outcome. They were both heard by the jury on both questions of whether there was any question as to access or any question as to water. There can be no question that Actons closed the transaction knowing of the situation as to access and water and that Mr. House's statement that the price was down

because of these questions was given full effect to by the Actions. There can be no question that at the time of the jury verdict, both the water question and the access question were submitted to the jury and that their decision of no recision was based on the full disclosure of the two questions rather than one.

Under these conditions, the Judge was wrong in attempting to reform the agreement without a change in the prayer and without being requested to do so by the plaintiffs after the jury had rendered a verdict on the same evidence and on the same points. In the various hearings and motions since the jury verdict, there has been no attempt by the plaintiff to reform the agreement or to raise this question. The question is entirely the Court's own application.

The Supreme Court of the State of Utah has taken the position that a judge or court should not attempt to rewrite a contract to supply terms the parties omitted. In the case of Hal Taylor and Associates v. Union America, Inc., 657 P.2d 743, in points 11, 12, and 13 on page 749, "It is a long standing rule in Utah that persons dealing at arms length are entitled to contract on their own terms without the intervention of the court to relieve either party from the effects of a bad bargain."

POINT II

THE TRIAL JUDGE SHOULD HAVE AWARDED ATTORNEY FEES TO THE DEFENDANTS DELIRAN AND HOUSE

The Court had kept out the question of attorney fees, as no evidence was submitted to the jury on same, with the statement

that it would be taken care of at a later date. This hearing was conducted for this expressed purpose on the 12th day of January, 1983. Exhibit "D2A" was put in showing the costs and expenses of the attorneys to that date for the defendants and appellants Deliran and House, for a total of $6,157, with an estimated time of one hour for that particular date. This was put in on the basis of $90.00 per hour. The initial cost was reported to the penny and itemized, with the time being itemized. Exhibit "D2A" is the basis for this claim for attorney's fee and was the standard money receipt and offer to purchase used by the real estate business at that time. Line 47 through line 48 of this agreement states, "if either party so fails to do, he agrees to pay all expenses in enforcing this agreement or any right arising out of the breach thereof, including a reasonable attorney's fees."

The Judge's decision was to the effect that there was no proof of any payments not being current or that they were not going forward with the agreement and that the action for recision was not satisfactory to grant attorney fees incurred by these defendants.

It is the belief of the undersigned that in defending an action for recision of this agreement is a cost of enforcing the agreement and attorney fees should be awarded. The Supreme Court should award attorney fees set forth in the exhibit and should remand this matter back for an ascertainment of a proper attorney fee to be awarded for this Supreme Court action. These items

are all for enforcement of the sales contract. It has generally been held that attorney fees are applicable only where there is a statute or an agreement that allows for them. It is the contention of the undersigned that the trial judge's determination applied only if the money was not paid, and that type of enforcement is not properly being applied. In the question that the Supreme Court of Utah now has before it, the last phrases of Exhibit "D2A" should be broad enough to include the cost of attorney fees and other costs in defending an action to rescind that is not successful.

POINT III

THE TRIAL JUDGE SHOULD HAVE DISMISSED AS TO THE DEFENDANT HOUSE

In the early stages of the proceeding a motion for dismissal of the defendant House was denied; again in the last stages of the proceeding the same motion was presented and was again denied.

There is nothing in the case to keep the defendant House therein. This action with Yates was by Deliran, which Mr. House functioned as an officer of the corporation. The money receipt, Exhibit "P2" was from Yates to Deliran. The closing statement was to Deliran. The ERA listing by Deliran was by Deliran. Mr. House signed as a corporate officer. The earnest money receipt from Acton to Deliran was in the name of Deliran, and apparently in the press of business, Mr. House forgot to write Deliran by his signature and simply signed his own name. The language so that it was Deliran who was selling the property, and this was known by the buyers. There is no allegation and true that

Deliran was not good for any damages that might be brought about, nor is there any proof offered as to the financial condition of Deliran or the lack of it. House acted as a corporate officer in all instances in this matter. The complaint should not be against House.

Assuming the Court order recision, House cannot rescind; it is up to Deliran to participate in the recision, not House. Under those conditions, any judgment against these defendants should be limited to Deliran.

CONCLUSION

As and for a conclusion in this matter, it is quite apparent that the judgment for lack of access imposed by the trial judge after the jury verdict should be vacated by the Supreme Court against both parties; that the attorney fee and cost questions in the sum of $6,157 should be awarded against the plaintiffs and in favor of House and Deliran. In addition, the matter should be remanded back for further hearing for further attorney fees and costs for the costs and expenses of this appeal. The complaint should be dismissed as against House.

DATED this 14 day of December, 1983.

Respectfully submitted

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief to the following, postage prepaid:

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