1984

Russell Acton, Andrew Acton And Carol E. Acton v. J. B. Deliran, A Utah Corporation; Gerald House; Era Realty Center; Daryl Yates And Marydon Yates : Responding Brief of Plaintiffs-Appellants And Cross-Respondents Russell Acton, Andrew Acton And Carol E. Acton

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON, Plaintiffs-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

RESPONDING BRIEF OF PLAINTIFFS-APPELLANTS AND CROSS-RESPONDENTS RUSSELL ACTON, ANDREW ACTON AND CAROL E. ACTON

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RESPONDING BRIEF OF PLAINTIFFS-APPELLANTS AND CROSS-RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Appellants and Cross-Respondents, Russell Acton, Andrew Acton and Carol E. Acton, (hereafter referred to as the "Actons") justifiably relied upon misrepresentations, made either mistakenly or recklessly, by defendant-respondent ERA prior to the Actons' purchase of a small building and surrounding property in Cedar City, Utah. The misrepresentations concerned the legality of a water hookup on the property. As a result of ERA's misrepresentations, the Actons purchased a building and property with no legal water hookup on it, and subsequently learned that it would cost the Actons

almost as much as the purchase price to acquire a legal water hookup. The Actons sought to have the real estate contract with defendants-respondents and cross-appellants J. B. Deliran and Gerald House rescinded and recover from them all payments the Actons have made on the property since they purchased it.

DISPOSITION IN LOWER COURT

Following a jury trial on the Actons' claims for rescission based upon fraudulent misrepresentations and mutual mistake, the jury found that the real estate contract between the Actons and J. B. Deliran and Gerald House should be upheld, and dismissed the Actons' claims against J. B. Deliran, House and ERA. The trial court denied the Actons' motions for a directed verdict and judgment notwithstanding the verdict, and entered a judgment in accordance with the jury verdict. Subsequently, the trial court awarded the Actons $16,450 in damages as a result of J. B. Deliran and House's failure to provide the Actons with access to the property at issue. The trial court had determined, as a matter of law, that access was part and parcel of the land sale contract between the Actons and J. B. Deliran and House.

STATEMENT OF FACTS

The Actons assert that the "Statement of Facts" set forth in their original brief filed in this appeal is a

succinct and objective recapitulation of the factual record in this case. However, pursuant to Rule 75(b)(2) of the Utah Rules of Civil Procedure, the Actons will respond to ERA's "Statement of Facts."

On pp. 3-4 of ERA's brief, ERA discusses the purchase of the Yates property by J. B. Deliran, and then states that while the Yates listing indicated that water was in the building on the property, the Deliran listing (which the Actons claimed at trial was never shown to them until after the closing on the property -- Trial Transcript ("Tr.") at 203-204, 287-288, 291-292) indicated that city water was not available. Then ERA states that Deliran and the Actons entered into an Earnest Money Receipt and Offer to Purchase Agreement. It is important for the Court to note that the Earnest Money Receipt and Offer to Purchase Agreement did not indicate if city water was or was not provided on the property (Tr. at 358-359).

In their next paragraph, on p. 4, ERA states that Andrew Acton saw the Yates listing the first time he saw the property, and then visited the property again in June of 1981, after the property had been purchased by J. B. Deliran. ERA neglects to mention that, at that second visit, even though the property had been purchased by J. B. Deliran and relisted by

J. B. Deliran with ERA, the ERA sales agent showed Mr. Acton the same Yates listing he had seen on his first visit to the property (Tr. at 184-185, 313, 344).

On p. 5 of their brief, ERA states that "[P]laintiffs claim there is some dispute as to what Behunin told Plaintiffs concerning the availability of water . . . ." The Actons have never claimed that there was any dispute as to what Behunin said. His deposition testimony, and his trial testimony, are very clear. ERA has pulled out selected portions of his trial testimony to give the impression that Behunin, the Cedar City building inspector, put the Actons on notice that there was some problem with the legality of the water flowing from the frost-free spigot on the property. In fact, Behunin's testimony clearly shows that Behunin and the Actons were merely talking about a water meter hookup, a device which measures water usage, and which would cost around $1,000 (Tr. at 240). They were not discussing the legality of a water pipeline that would bring water to the property (Tr. at 407-409). In particular, Behunin states that he doesn't recall saying anything to the Actons at the time of their meeting "other than they would have to get a meter" (Tr. at 409). ERA then quotes Behunin's testimony under cross-examination by ERA. Again, all Behunin says is that he told the Actons that they needed to get

a water meter, and to do that they would have to see Bud Bauer, the superintendent of the Cedar City Municipal Water System (Tr. at 420). It is important to note that Behunin reiterated that he did not tell the Actons that the water connection was illegal (Tr. at 422).

On p. 6 of their brief, ERA states that the survey prepared by David Grimshaw makes reference to a sewer connection location but "fails to indicate that a water meter was discovered during the course of the survey." Once again, even though this is a "Statement of Facts," ERA is arguing, by implication, that the Actons should have realized that there was a problem with the water because a water meter was not discovered during the course of the survey work. As Grimshaw clearly testified at trial, he was not being paid to look for a water meter, and therefore his survey failed to mention that a water meter was or was not discovered during the course of his survey (Tr. at 488, 492).

ERA then spends almost seven pages quoting or paraphrasing trial testimony. In effect, ERA has devoted most of its "Statement of Facts" to its argument.

With regard to Grimshaw's testimony, quoted on pp. 7-8 of ERA's brief, ERA argues that the Actons were on notice about a water problem prior to the closing of the property sale in

this case because Grimshaw testified that Wayne Smith told Russell Acton of a problem with the water on the day of the survey, mentioned above. Grimshaw's testimony is specifically and categorically disputed by Russell Acton's testimony at trial. Russell Acton recalls no discussion, at any time when he was standing with Wayne Smith and Grimshaw, about any water problems, or any water rights of Wayne Smith, notwithstanding the implication ERA tries to draw at pp. 10-11 of their brief. Russell testified that his discussion with Smith on the day of the survey solely concerned the boundary lines and the access problem on the property. Russell further testified that he spoke for only ten or fifteen minutes with Mr. Smith, out of the several hours Russell was involved in the survey. He also said that there were times when he was 25-30 feet away from Smith and Grimshaw when they were talking together, and he was not involved in, nor could hear, their conversation (Tr. at 496-497). Russell's testimony also serves to specifically and categorically repudiate the testimony of Smith, quoted by ERA in their brief at pp. 9-10. Smith also undercut his own credibility when he testified, in response to cross-examination, that he couldn't recall the exact times he talked with the Actons about the water problem, and that those times could have been after the closing date on the property (Tr. at 471, 473-474).

At pp. 11-13, ERA paraphrases, and then quotes, the testimony of Nancy Hale, another salesperson for ERA. They paraphrase her testimony about what she assumes Behunin told the Actons at their meeting at the property, discussed above. Such assumptions were proven false at trial by Behunin's specific testimony, previously cited herein. Her testimony about her "dialogue" with Russell Acton is quoted in order to imply to the Court that he didn't say anything in response to her questions about the illegal hookup because he agreed with her recapitulation of events. All of Russell's testimony prior to that in the trial, and subsequently in rebuttal, refute that implication.

All the testimony paraphrased or quoted by ERA in their "Statement of Facts" is disputed by the Actons. Not only does it differ from the Actons' "Statement of Facts," which is supported by references to the record, but the Actons' refutation of ERA's "Statement of Facts" is supported by references to the record.

ARGUMENT

I. The evidence does not support the jury verdict in the trial of this case which affirmed the contract between the Actons and J. B. Deliran and House, and the trial court should have granted the Actons' motion for a directed verdict or judgment notwithstanding the verdict.

ERA makes the same argument in § 1 of its Argument as in § 2 of its Argument. It claims that there was evidence at trial upon which the jury could base its decision to affirm the land sale contract between the Actons and J. B. Deliran and House, and therefore the trial court acted properly in refusing to grant the Actons' motions for a directed verdict or for a judgment notwithstanding the verdict. In response to this argument, and in the interests of judicial and financial economy, the Actons reargue and incorporate by reference herein their argument, supported by extensive references to the record, in their original brief in this appeal, at pp. 5-20. The Actons specifically note that, at pp. 18-19 of their original brief in this appeal, they discussed the case cited by ERA, Koer v. Mayfair Markets, 19 Ut.2d 339, 431 P.2d 566 (1967). The Actons reiterate that the Utah Supreme Court stated that the party against whom a motion for judgment notwithstanding the verdict is made is entitled only to "reasonable inferences" (emphasis added). Koer v. Mayfair Markets, 431 P.2d at 570.

As stated in the Actons' original brief in this appeal, the testimony of Wayne Smith, upon whom all defendants-respondents rely, is so vague and uncertain that it is incompetent. No reasonable inferences can be drawn from his

testimony. Also, the testimony of David Grimshaw, the surveyor upon whom all defendants-respondents also rely in their briefs, was not specific with regard to his recollections, and the Actons submit that reasonable inferences cannot be drawn from his testimony, either.

II. ERA was not a party to the Earnest Money Receipt and Offer to Purchase Agreement executed by the Actons and J. B. Deliran and House, and cannot seek attorney's fees under that Agreement.

ERA attempts to prove, by way of some novel arguments, that they were a party to the Earnest Money Receipt and Offer to Purchase Agreement executed by the Actons and J. B. Deliran and House, and because that contract was affirmed by the jury in the trial of this case, they are entitled to attorney's fees based upon the language in the Earnest Money Receipt and Offer to Purchase Agreement, as set forth in their brief at p. 17.

ERA's first point is that, in response to the Actons' Complaint to rescind the contract, and in order to retain the sales commission paid to them by J. B. Deliran and House, ERA had to come into Court to enforce the contract. However, ERA was not made a party in this lawsuit because they were a party to the Earnest Money Receipt and Offer to Purchase Agreement, but rather because their salesperson had made misrepresentations to the Actons concerning water on the property. The Actons brought ERA into the lawsuit on the

theories of fraudulent misrepresentation or mutual mistake, not breach of contract. See, Actons' Second Amended Complaint, March 30, 1982. Just because, during the course of their defense of the action, the posture of ERA was to enforce the contract does not make them privy to the contract. The hollow nature of Era's theory is shown by ERA's inability to cite any case law in support of their contention. Indeed, agency case law holds that, even though an agent's actions (for which he or she receives a commission) help bring about the execution of a sales contract, that agent is not a party to a lawsuit in which the principal seeks to enforce a contract. Loftis v. LaSalle, 434 P.2d 221, 225 (Okla. 1967); Mitten v. Weston, 615 P.2d 60,61 (Colo. App. 1980).

The next theory offered by ERA in support of their quest for attorney's fees, and one even more incredible than the first theory, boils down as follows. If ERA was an agent of J. B. Deliran, as the trial court found as a matter of law, it must have merged with J. B. Deliran, was "one in the same" (ERA's brief at p. 19) as J. B. Deliran, and therefore could claim the same legal rights as J. B. Deliran. Clearly, agents don't have the same legal rights as their principals. Yet ERA is now trying to claim the legal privileges that only accrue to the principal in an agency-principal relationship, even though

they argued throughout the trial that they were the agent of J. B. Deliran and could not be legally accountable for their actions undertaken within the scope of their employment by J.B. Deliran.

ERA then cites Usinger v. Campbell, 280 Or.751, 572 P.2d 1018 (1977), claiming that it supports ERA's position, though that position is hardly clear from ERA's brief. In the Usinger case, there was a dispute between the parties about the terms of the contract. The plaintiff brought suit seeking specific performance. The defendant claimed that plaintiff failed to live up to some of the terms of the contract, and therefore the defendant was released from its duty to perform under the contract. The court in Usinger found for the defendant and granted it attorney's fees. However, unlike in the instant case, the legal theories of both parties in the Usinger case were grounded upon the validity of the land sale contract at issue. Since both parties felt that the contract was valid, both parties were bound by the attorney's fee clause in that contract. Not so in the instant case. The Actons sought rescission of the contract. The Usinger case cannot be used to support ERA's argument for attorney's fees.

ERA bases its claim for attorney's fees upon the wording in the Earnest Money Receipt and Offer to Purchase Agreement at lines 47-48:

> If either party fails so to do, he agrees to pay all expenses of enforcing this Agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

(Brief of ERA at 17.) This argument assumes that ERA is a party to the Agreement, a claim disputed by the Actons and discussed earlier in this brief. The meaning of the cited clause is that if either party fails to carry out their obligations under the Earnest Money Receipt and Offer to Purchase Agreement, the other party has a right to collect attorney's fees for the enforcement of the Agreement. It is the position of the Actons, and this position was supported by the trial court in the post-trial hearings in this case (Tr. of March 3, 1983 hearing at 88-89), that none of the defendants-respondents were entitled to attorney's fees because their defense of the Actons' action for rescission of the contract or damages resulting from tortious misrepresentations was not an enforcement of the Earnest Money Receipt and Offer to Purchase Agreement required by some breach by the Actons. All payments were current on the sale of the property and the Actons had fulfilled all other obligations under the Agreement.

The Actons have been unable to find any cases, state or federal, with facts similar to the instant one; that is, where a party unsuccessfully sought to rescind a real property

sale (the property being purchased pursuant to an Earnest Money Agreement that included an attorney's fees clause) and the prevailing defendant claimed attorney's fees. The courts generally do not grant contractually-mandated attorney's fees in cases where the party seeking rescission, or a disaffirmance of the entire contract, prevails. BLT Investment v. Snow, 586 P.2d 456, 458 (Ut. 1978); Bodenhamer v. Patterson, 278 Or. 367, 563 P.2d 1212, 1218 (1977). Similarly, where a party brings an action to enforce a contract, e.g. specific performance or foreclosure, the courts have granted contractually-mandated attorney's fees. Stubbs v. Hemmert, 567 P.2d 168 (Ut. 1977); Anaheim Co. v. Elliot, 45 Or. App. 597, 609 P.2d 382 (1980).

In the instant case, however, the Actons initiated the litigation and sought rescission of the land sale contract, or damages for tortious misrepresentations. They did not pursue a remedy in the nature of enforcing the contract. They felt they had been defrauded, or at the very least, led to believe there was water on their newly-purchased property.

It seems manifestly unfair to allow any of the defendants-respondents attorney's fees for defending successfully against a rescission action when the Actons, as a matter of law, would not have received attorney's fees had they prevailed. Individuals who want to bring rescission suits

already face the prospect of their own attorney's fees and, of course, the usual risk of loss of the suit. The risk of paying a defendant's attorney's fees as well will have a chilling effect on these individuals' exercise of their rights to seek redress in the courts.

Other courts have acted to prevent such unilateral unfairness. In United States v. Peter Kiewit and Sons' Co., 235 F. Supp. 500 (D. Alaska 1964), an insurance company sued a contractor under a federal statute to recover premiums for worker's compensation insurance. The statute granted attorney's fees to prevailing plaintiffs, but not to defendants who defended successfully. The defendants argued that they should, as a matter of equity and fairness, be granted attorney's fees. The court agreed with their argument. While Peter Kiewit and Sons' Co. is the converse of the instant case, the principles of equity and justice underlying that court's decision are relevant and applicable. See also, Devore v. Bostrom, 632 P.2d 832, 836-837 (Ut. 1981) (Stewart, J., concurring and dissenting).

The Actons pursued a claim of rescission, knowing that they would not be granted attorney's fees if they won. They probably would not have brought this lawsuit if they knew they risked losing not only the difference monetarily between the

property with water on it and without water, and their own attorney's fees, but also defendants-respondents' attorney's fees. The issue of attorney's fees under the instant set of facts is one of first impression for this Court. With no precedent to guide it, the Court must look to a sense of justice and fairness in making its decision. The Actons submit that such a sense requires that ERA's appeal for attorney's fees be denied.

III. The trial court was correct in denying attorney's fees to ERA pursuant to § 78-27-56, Utah Code Ann. (1953, as amended).

ERA argues at p. 21 of their brief that the trial court should have awarded them attorney's fees on the basis of § 78-27-56, Utah Code Ann. (1953, as amended), the Utah Code provision providing statutory non-contractual rights to attorney's fees where a court determines that an action or defense to a law suit was without merit and was not brought or asserted in good faith. The gravamen of ERA's argument is that nothing in the prayer of the Actons' Second Amended Complaint could be effectively granted against ERA. ERA argues that, even if the jury in the trial of this matter had found for the Actons, the trial court could not have ordered ERA to rescind the land sale contract at issue, nor could it have assessed damages against ERA, because ERA was not a party to the

contract. By the way, it is significant that ERA goes back to this argument, when earlier in its brief it was claiming it was in fact party to the contract.

What ERA's argument misses is that the Actons, in their Second Amended Complaint, sought rescission or, in the alternative, damages. However, the damages sought by the Actons were not damages for breach of contract, but rather damages for tortious misrepresentations. An examination of all of the pleadings and of all the transcripts of the hearings in this case clearly shows that, by the time all the parties got to the trial in this matter, the main issues for the jury to decide were those of fraudulent misrepresentation or mutual mistake. At the pre-trial hearing in this case, held in Cedar City on August 19, 1982, one of the main discussions before the court was ERA's motion to dismiss itself from the Complaint. Throughout the discussion at the pre-trial hearing, ERA admitted that they had exposure under the Actons' fraudulent misrepresentation cause of action. The jury would have to decide whether any representations made by ERA's salesperson were within the scope of her employment by J. B. Deliran and House, or were outside the scope, thereby making ERA liable for any damages caused by those representations. (Tr. of August 19, 1982 pre-trial hearing at pp. 41-45, 66). As a result of

this discussion at the pre-trial hearing, the trial court at that time denied ERA's Motion to Dismiss. The jury could have found for the Actons against ERA and assessed damages against ERA for fraudulent misrepresentations. ERA's argument that the Actons' claims were therefore without merit and not brought in good faith must fail.

The other point made by ERA is that, since the trial court ruled as a matter of law that ERA was the agent of J. B. Deliran and House, any questions as to liability on the part of ERA were resolved and ERA never should have been a party in the case. What ERA fails to tell this court is that the trial court made that ruling during jury instructions arguments by all counsel at the end of the trial in this case. ERA's argument that it was determined to be an agent as a matter of law and therefore cannot be liable for any misrepresentations the jury might have found cannot support its theory that it is entitled to attorney's fees under § 78-27-56, Utah Code Ann. (1953, as amended).

With regard to Cady v. Johnson, 671 P.2d 149 (Ut. 1983), such case undermines ERA's argument that they are entitled to attorney's fees. In that case, this court vacated a trial court judgment of attorney's fees under § 78-27-56, Utah Code Ann. (1953, as amended) on the grounds that, while

plaintiffs' case was without merit, it was not brought in bad faith. In the instant case, this court need not even address the issue of bad faith, because, clearly, the Actons' case had merit. In the Cady v. Johnson case, both of plaintiffs' causes of action were dismissed before or at trial. In the instant case, none of the plaintiffs' claims were dismissed before or at trial. The claims had merit. Cady v. Johnson cannot support ERA's argument for attorney's fees.

CONCLUSION

It is the position of the Actons in this brief, as it has been in their original brief in this appeal, and their responding brief to defendants-respondents J. B. Deliran and House's appeal brief, that the evidence at the trial of this matter did not support the jury verdict, which affirmed the land sale contract between the Actons and J. B. Deliran and House. For the reasons set forth in those preceeding briefs, the Actons submit that the trial court erred in not granting the Actons' Motion for a Directed Verdict or Judgment Notwithstanding the Verdict.

The Actons further submit that ERA has not in any way proven that it is entitled to attorney's fees in this matter. They were not a party to the Earnest Money Receipt and Offer to Purchase Agreement executed by the Actons and J. B. Deliran and

House, so they cannot seek attorney's fees pursuant to that contractual provision. The lawsuit brought by the Actons culminated in a three-day jury trial. At no time before or during the trial were any of the Actons' causes of actions dismissed. Therefore, ERA cannot seek attorney's fees for this matter under the statutory provision of § 78-27-56, Utah Code Ann. (1953, as amended).

Respectfully submitted this 22nd day of March, 1984.

PRINCE, YEATES & GELDZAHLER

By _____
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MAILING CERTIFICATE

On this 23 day of March, 1984, I hereby certify that I caused to be mailed, postage prepaid, two true and correct copies of the foregoing RESPONDING BRIEF OF PLAITNIFFS-APPELLANTS AND CROSS-RESPONDENTS RUSSELL ACTON, ANDREW ACTON AND CAROL E. ACTON, to the following parties of record:

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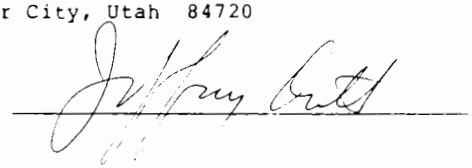

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