1965

John J. Sweeney v. Happy Valley, Inc., A Utah Corporation : Reply Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOHN J. SWEENEY,

Plaintiff and
Appellant,

vs.

Case No.

HAPPY VALLEY, INC.,
a Utah corporation,

Defendant and
Respondent.

REPLY BRIEF OF APPE

Appeal from a Judgment of
District Court for Salt
Honorable Merrill C.

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TABLE OF CONTENTS

AUTHORITIES

Cases Cited

TABLE OF CONTENTS - (Continued)

Statutes and Rules Cited

IN THE SUPREME COURT
OF THE STATE OF UTAH

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JOHN J. SWEENEY, :

Plaintiff and :
Appellant,

:

vs. Case No. 10259

:

HAPPY VALLEY, INC., :
a Utah corporation,

Defendant and :
Respondent.

:

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REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case, involving as it does a record of 1261 pages, is rather complicated as to the facts involved. A correct statement and understanding of the facts, as well as the authorities cited, is essential to a fair appraisal as to the respective rights and duties of the parties.

In its Brief, Respondent takes issue with the Statement of Facts as contained in Appellant's Brief and submits its own Statement of Facts (Resp. Br. p. 4). Rule 75(p)(2), Utah Rules of Civil

Procedure, directs that if Respondent controverts the Statement of Facts as set out in Appellant's Brief, ". . . he shall state wherein such statement is inconsistent with the facts. . ." Respondent, though levelling a general charge that Appellant made erroneous and misleading citations of fact, cited no specific instances where this was the case. In a careful reading of Appellant's Brief, it is difficult to find any statement inconsistent with the Record, or for that matter, inconsistent with the Statement of Facts made by Respondent.

To the contrary, however, the Statement of Facts set out by Respondent is replete with argument, supposition, conclusion and misquotes from the Record. This liberty with the Record introduces new material which we believe justifies a reply thereto. A reply is likewise justified, we feel, to the misapplication and misconstruction of case authority which likewise introduced new material for the Court's consideration.

Under Point I, we shall specifically indicate

wherein Respondent's Statement of Facts is inconsistant with the facts. Under Point II, we shall specifically indicate wherein we feel certain of the authorities cited by Respondent are not in point.

ARGUMENT

POINT I

IN ITS STATEMENT OF FACTS, THE RESPONDENT HAS MADE STATEMENTS INCONSISTENT WITH THE FACTS AND MISQUOTED THE RECORD.

1. At page 5 of its Brief, Respondent states,

> "The contract provided, inter alia, that that Happy Valley would purchase under contract from third parties the selected acreage. . . ." (Emphasis added)

We find no such provision in the contract as to future purchase of the selected acreage. To the contrary, the contract does say:

> "THAT WHEREAS, First Party (Happy Valley) is the owner of or is entitled to sell certain land situated in Salt Lake County, State of Utah, consisting of approximately three hundred and sixty-six (366) acres, hereinafter referred to as 'Entire Premises', and more particularly described in Exhibit A attached hereto and by reference made a part hereof; and . . ." (R. 137)

This invention of fact by Respondent is, of course, significant. When considered with other

misstatements as hereinafter set out, the pattern from which Respondent cuts the cloth of its case becomes obvious. They would have us believe that this transaction was a scheme, a land promotion, a development, and that the risk thereof should have been assumed by both parties. When it started to sour, as they claim, because of "unforeseen" and "unexpected" difficulties (Resp. Br., pp 6-7), then they were justified in self deals and other transactions not contemplated in the contract to save the day.

2. On page 6 of its Brief, Respondent states:

> "6. It was proposed under the 1957 contract that costs of acquiring the 366 acres as well as subdivision and development expenses of the residential properties were to be substantially financed through proceeds from property sales within the development."

We do not find where this was proposed under the 1957 contract. The proposal was that First Party would:

> ". . . develop said Entire Premises and to subdivide a portion thereof for residential building lots. . ." (R. 137)

It was represented by Respondent at the time it signed the contract that, ". . . it has the right to enter into a contract to sell said Entire Premises, or any part thereof. . ." (R. 129)

It may have been the undisclosed intent of Respondent that proceeds of sales would keep the payments current on real estate contracts and improvements (R. 367), but this was not proposed under the 1957 contract.

3. On page 6 of its Brief, Respondent refers to "unforeseen difficulties," "unforeseen events . . . unanticipated by the contract." It is the grossest type of supposition to tickle the imagination as to what was foreseen, unforeseen, anticipated or unanticipated under the contract. The contract speaks for itself.

4. On page 6 of its Brief, Respondent states:

> "(a) Sweeney, acting for Second Party, notified Happy Valley that Willow Creek Country Club required fee title to the property underlying the golf course facilities. This was not envisioned by the 1957 contract."

In the first place, it was not Mr. Sweeney,

acting for the Second Party, who requested fee title for the Country Club. The request was made by ". . . Club representatives, including Mr. Sweeney, . . ." (R. 534)

In the second place, it was envisioned by the 1957 contract that fee title would be given to the Willow Creek Country Club. On completion of payment, Respondent was to ". . . convey a marketable title to the Club Premises to the Willow Creek Country Club by good and sufficient warranty deed." (R. 139)

In the third place, payment in full and the request for fee title was made by the Country Club in 1959 (R. 1145), just a few months in advance of the date of final payment as provided in the contract. (R. 138)

5. The "unforeseen difficulties" (Resp. Br. p. 6) were not and should not have been unforeseen. At least as early as 1958 Respondent anticipated off-site improvements in the Willow Creek area. (R. 1131) Mr. Burton, one of the principals in Respondent Company, had engaged in the development and

promotion of a great number of subdivision properties prior to the Happy Valley development (R. 1137-1138). Development of lots was not held up by unforeseen difficulties with the County, but because of lack of funds (R. 530). And lack of funds is difficult to imagine since $150,000.00 had been received from the Country Club in 1958 and 1959 (R. 529). Improvements in Subdivisions 1, 2 and 3 were completed in the forepart of 1959 (R. 530).

6. As to the activity in the market during 1959 and 1960 (Resp. Br., p. 6), it would appear Respondent discharged its sales agent sometime in 1958 (R. 522), accused its sales agent of a premature sales program and didn't authorize the resumption of sales activity until January 12, 1960. (Exhibit 29-P)

7. On page 8 of Respondent's Brief, Respondent states:

> "Sweeney did not want to buy any lots at $3,000.00, and did not offer to buy after they were platted and available for sale."

This is a twisting of the Record. The testimony was that Sweeney had never been offered any lots for $3,000.00 and at the time of trial was not interested in buying any lots at that price (R. 1082, 1083). He attempted to purchase lots in 1958 and 1959 and was refused (R. 1085, 1086). He did not attempt a purchase after that time.

8. On page 8 of Respondent's Brief, it is stated that in January, 1962, Happy Valley sold to 25 Associates, Inc. and R. E. McConaughy, 31 acres for residential purposes in consideration for 50.9% of the Second Party interest, having a reasonable cash value of $42,908.00.

There is no testimony in the Record as to the proposed use contemplated by the Grantee, that there was any restriction on the sale, or that, in fact, the 31 acres would be used for residential purposes. Nor is the phrase "reasonable cash value" found in the testimony, this phrase later finding its way into the Findings of Fact by the Court.

The figure of $42,908.00 was arrived at by a

mathematical process contributed by Mr. Burton, a principal of Respondent Corporation. (R. 1152) The basis of this computation was a figure by which Mr. Safford, one of the Second Party, lost his interest in default of a sum of money owing and overdue from Mr. Safford to Mr. Graff, another principal of Respondent Corporation. (R. 519, 520) There is no evidence or testimony that the 25 Associates, Inc., and McConaughy ever talked in terms of $42,908.00 as the value of their interest. Since in May, 1960, the Second Party, as noted by Respondent (Resp. Br., p. 39), equated the value of 75 lots at $3,333.00 per lot and valued its total interest at $250,000.00 (R. 1095), it is hard to believe that 25 Associates, Inc. and McConaughy, representing 50.9% of Second Party, were willing to sell their interest in January, 1962, for $42,908.00. Fixing a figure of $42,908.00 as a "reasonable cash value" for the 50.9% interest, and then translating that figure as the "gross proceeds" realized from the sale of 31 acres for the purpose of an accounting to Mr. Sweeney, was possibly

the most patent error of the trial court.

9. Though perhaps of minor consequence, it is noted that on page 15 of Respondent's Brief the statement is made,

> "To begin with, not one count of Sweeney's Complaint, Amended Complaint, or Second Amended Complaint remotely suggests or raises an ex contractu claim."

If this is the case, then apparently there was a grave misunderstanding by Counsel for Respondent. In its "Memorandum In Support of Defendants' Motion," Respondent states:

> "This action was commenced by Plaintiff's original Complaint which appeared to be bottomed upon an alleged breach of a written agreement." (R. 111)

As to the Amended Complaint, Counsel for Respondent states:

> "In his alleged Second Cause of Action, plaintiff apparently contends that there had been a breach of the agreement, . . ." (R. 112)

And further refers to the Second Cause of Action as:

> "II. The Alleged Second Cause of Action (Breach of Contract)."

That Counsel for Appellant always considered the Second Cause of Action as one involving a breach

of contract is evidenced by his language in a Trial Memorandum. (R. 104)

10. On page 41 of its Brief, Respondent quotes from and refers to "Sweeney's Trial Brief." This Trial Brief is not in the record nor was it designated as a part of the record. Referral thereto would appear to be improper. As a matter of fact, there is no such thing as "Sweeney's Trial Brief." Mr. Sweeney did file an instrument entitled "Plaintiff's Opening Argument" in which the paragraph quoted by Respondent is stated. In reply to Respondent's suggestion of inconsistency and bad faith on the part of Sweeney in accepting the off-site improvement cost as "gross proceed" in relation to the transaction with Estates, Inc., we ask the Court to remember that, in fact, Sweeney had been put to the rack. Respondent had refused to account for said sale on the basis of the development of said two and one-half acres as residential lots, which would, of course, have been considerably more. In the spirit of compromise, Sweeney was willing, at that time, to pick up

any crumbs Respondent was willing to throw out. But accepting the $13,742.85 figure as the gross proceeds for the transfer does not mean that the manner in which said figure was determined was correct or that said accounting was consistent with the provisions of the contract.

POINT II

RESPONDENT HAS MISCONSTRUED, MISAPPLIED AND MISINTERPRETED CERTAIN AUTHORITIES AS CITED.

Apparently it is the position of the Respondent that though there were certain related questions of law involved, the nub of the suit was for an accounting and injunction. (Resp. Br., p. 14). Assuming the major issues to be equitable in nature, Respondent then quotes Norback vs. Board of Directors of Church Extension Soc., 84 Utah 506, 37 P. 2d 339 (1934) as final authority for the position that Appellant has no right to a jury trial. (Resp. Br., p. 20) With a flip of the hand they summarily dismiss the later case of Valley Mortuary v. Fairbanks, 119 Utah 204, 225 P. 2d 739 (1950) in which the Court

materially changed and expanded the Norback rule. (Resp. Br., p. 23)

Appellant, of course, takes the position that the main or primary issues involved were legal. Respondent recognized these legal issues to be the interpretation of the 1957 contract, the issue as to whether Sweeney was entitled to an accounting on "gross proceeds of sales" or "market value of the properties" or some other standard, the issue of good faith as to sales to the Directors. (Resp. Br., p. 14) These issues we suggest are the very guts of the case. ". . . The fact that equitable relief may be prayed for, to carry into effect the judgment based upon the legal issues is not sufficient to deprive either party of his rights to have the legal issues submitted to the jury." (State ex rel Hansen vs. Hart, 26 Utah, 220, 72 P. 938, as quoted in Norback v. Board of Directors, supra) The mistake made by the trial judge in this case was that he couldn't separate the right involved from the remedy sought. In proper perspective, Appellant's position

is perfectly consistent with the Norback rule.

But assuming, as Respondent contends, that the equitable issues were the nub of the suit, then what? In the case of Valley Mortuary v. Fairbanks, 119 U. 204, 225 P. 2d 739 (1950), the trial court refused a jury trial on the basis of the Norback rule regarding major, minor issues. (225 P. 2d, p. 750) The Supreme Court rejected the Norback rule, or at least materially altered the rule, by stating:

> "Appraised in light of the California rule, the Norback case is apparently correct in result, but the rule there laid down as to when litigants are entitled to a trial by jury, which we have quoted above, cannot be reconciled with the California rule which we have approved and adopted in this opinion. There may be certain types of cases, although none occur to us now, in which the issues of fact in the legal cause of action are so intertwined with the issues of fact in the equitable cause of action that they cannot be separated for the purpose of trial by jury. Only then would it seem that the court should determine whether the major issue or issued are legal or equitable and grant or deny a jury trial accordingly. Othersise the parties should be entitled to a jury trial on the issues of fact in the legal cause of action." (225 P. 2d p. 750)

We would submit, therefore, that the Norback rule, relied upon by Respondent, is not the rule as

as to the right to a jury trial where mixed legal and equitable issues are involved in the same proceeding. Regardless of the paramount object of Plaintiff's action, the primary relief sought, either party is entitled to a jury trial on the issues of fact in the legal cause of action.

In passing, we refer to the opinion of Justice Wade concurring and dissenting in part in the Valley Mortuary case. Justice Wade refers to Section 78-21-1, U.C.A. 1953, which provides:

> "In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived." (225 P. 2d, p. 752)

Justice Wade then states:

> "This section fixes the right of a jury trial on all issues of fact involved in determining whether any of the kinds of relief therein specified should be granted and if so the amount and extent thereof. Under its provisions the right to such trial does not depend on whether the issues presented are legal or equitable, nor on whether that kind of action would have been maintainable in a law court under the dual court system. The test under this statute is whether the kind of relief specified

> therein is sought in the action. If such relief is sought, then a jury trial is granted on all issues of fact involving such relief but it does not require a jury trial on issues of fact involved in the granting of other kinds of relief which is sought in the same action. . ." (225 P. 2d p. 752) (Emphasis added)

Justice Wade then suggests that if we would follow the statute the problem of determining when a jury trial should be granted would be greatly simplified and notes the confusion perpetrated by the law-equity distinction, especially under the New Rules of Procedure with law and equity administered in one Court. (225 P. 2d, p. 753)

The whole gist and basic purpose of this action has been to recover money claimed as due upon contract. Applying the thinking of Justice Wade, it would appear that Appellant is entitled to a jury trial on the issues of fact involved.

Respondent, in its Brief at page 23, also makes fleeting reference to the case of Dairy Queen v. Wood, 369 U.S. 469, 8 L. Ed 2d 44 (1962) as quoted by Appellant. It is not claimed that the Dairy Queen case is stare decisis or binding upon this Court.

It is claimed that the rule of that case is precedent where both legal and equitable issues are involved in the same proceeding and that the rationale of the case is very persuasive. Respondent goes on to suggest that in any event Utah has established a different constituional precedent in regard to jury trial and cites the cases of West v. West, 16 U. 2d 411, 403 P. 2d 22 (1965), Lane v. Peterson, 68 U. 585, 251 Pac. 374 (1926), and Kimball v. McCormack, 70 U. 189, 259 Pac. 331 (1926) as establishing said precedent. Interestingly enough, the issue of a jury trial was not raised in any one of those cases. It is difficult to see where those cases establish any precedent whatever in relation to the problem treated in the Dairy Queen v. Wood case, to-wit: the right to treat by jury where legal issues are incidental to equitable issues.

CONCLUSION

It appears to us that the case never really got off the ground. Court and Counsel became mired in collateral issues. To state the facts accurately

has been difficult. Basically, the question of the case is whether Defendant-Respondent performed as it was obligated to do under a written contract. Errors made in the trial court prevented Plaintiff-Appellant from an adequate presentation of its case.

It goes without argument that the right to a jury trial as guaranteed by our Constitution and provided by statute should be jealously guarded. Particularly would this seem to be so in consideration of the very nature of the instant case. Personalities were involved and the plausibility of their statements is of vital importance. Voluminous testimony as to property evaluation and the reasonableness thereof was involved. Such circumstance would tax the composite thinking of eight men, let alone one man, regardless of the cut of his robe or the wisdom of his judgment. Appellant is entitled to a jury trial of the legal issues of fact involved. The judgment of the trial court

should be reversed and a new trial granted.

Respectfully submitted,

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