1966

Midvale Motors, Inc., A Utah Corporation v. Melvin J. Saunders, Wanda Talbot Saunders, His Wife, et al. : Brief of Appellant

IN THE SUPREME COURT

of the

STATE OF UTAH

MIDVALE MOTORS, INC.,
a Utah Corporation,
Plaintiff-Appellant,

- vs. -

MELVIN J. SAUNDERS, WANDA TALBOT SAUNDERS, his wife, et al.,
Defendants-Respondents.

BRIEF OF APPELLANT

Appeal from the Judgment of the 3rd Dist
for Salt Lake County
Hon. Stewart M. Hanson, J

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MELVIN J. SAUNDERS, WANDA TALBOT SAUNDERS, his wife, et al.,
Defendants-Respondents.

Case No. 10626

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

Appellant brought an action on a uniform real estate contract in the District Court of Salt Lake County, and from an adverse ruling and judgment rendered thereon

that plaintiff had elected irrevocably one of two inconsistent remedies contained in the complaint by bringing suit, appellant herewith appeals to this court.

DISPOSITION IN LOWER COURT

Appellant commenced an action in the District Court of Salt Lake County, State of Utah, alleging that Melvin J. Saunders, Wanda Talbot Saunders, his wife, and Thomas J. Ivester, respondents herein, contracted in writing in a standard uniform real estate contract for the purchase of certain real property situate in Salt Lake County, State of Utah, and further, that said parties were in default under the terms of said contract. In the complaint plaintiff-appellant herein, sought to recover delinquent monthly payments and, as an inconsistent remedy, also requested an order of the court delivering possession of the property to plaintiff.

An answer was filed by respondents denying default of the payments but tendering only possession insofar as they had a right to do so back to plaintiff, and in the same answer, a third party complaint was commenced against third party defendants, Robert C. Donihue and Jessie Mae Donihue, his wife, making allegations of fraud and misrepresentation, seeking damages and reimbursement for any loss or expenses incurred by respondents as a result of appellant's civil action. Ultimately, the default of the Donihues was entered and the portions of the proceedings against the Donihues are not in issue here. The trial court ruled that in pleading two inconsistent remedies and respondents ac-

cepting one of them, appellant was barred from striking that remedy.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's judgment canceling the subject matter uniform real estate contract between appellant and respondents.

STATEMENT OF FACTS

On or about May 1, 1963, Midvale Motors, Inc., entered into a standard uniform real estate contract with Melvin J. Saunders, Wanda Talbot Saunders, his wife, and Thomas J. Ivester, wherein Midvale was the seller and the latter parties were the purchasers of certain real property situate in Salt Lake County, State of Utah. (R. 42) The last payment made on the subject matter contract was the payment for the month of December, 1964, (R. 43) and no payments were made since that date to and including the commencement of the action, which would be eight consecutive monthly payments, the action having been filed August 18, 1965. (R. 2)

On or about April 8, 1965, Saunders and Ivester entered into a property transaction with the Donihues where the Donihues traded with respondents herein certain real property equities. The Donihues were apparently to assume respondents position as the purchasers of appellant's property. Details of the claims and dis-

pute between respondents and the Donihues are not material to this appeal and will not be discussed.

In the complaint filed on behalf of plaintiff, appellant sued respondents for the eight delinquent payments at the rate of $100.00, and made a claim for late charges which claim was stricken by the court at pretrial, though not contained in the pretrial order and no issue is made in this appeal of that ruling. In addition to praying judgment for the eight payments, a second remedy was also set forth, that being the seeking of possession of the subject matter realty and seeking a court order delivering possession to the plaintiff. In answering this complaint, respondents deny the default in payments (R. 3) but admit the existence of the contractual provision permitting a contract seller to have possession returned in the event of default and allege ". . . defendants, as far as they have a right to do so, herewith tender to plaintiff possession of said residence in accordance with the election made by plaintiff under the terms of the contract to receive possession." (R. 4) In a third party complaint, respondents sued the Donihues seeking cancellation of their property trade in order to revest title of the subject matter property in them so as to give possession to appellant and made other allegations against the Donihues, including a claim over for the delinquent payments. (R. 7)

Ten days after respondents filed their answer and third party complaint, plaintiff moved the court for permission to strike paragraph 7 of the complaint on the

basis that it constituted an inconsistent remedy and stated an election to proceed against respondents for past due installments. (R. 20) This motion, together with a motion for summary judgment for the installments based upon requests for admissions of fact, was heard November 16, 1965, and denied without prejudice. (R. 31) The pretrial court referred the question of irrevocable election of inconsistent remedies to the trial court for argument at the time of receiving evidence in behalf of respondents' case against the Donihues. (R. 38)

The matter was heard and argued on the law before the Honorable Stewart M. Hanson on March 23, 1966, and from an adverse ruling on the legal question involved, to wit: "that plaintiff is barred from striking the election from the pleadings for the reason that defendant accepted the election prior to plaintiff's motion to strike." (R. 41) Midvale Motors, Inc., appeals.

POINT ON APPEAL

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECIDING THAT AN IRREVOCABLE ELECTION OF REMEDIES EXISTED IN THE FOLLOWING RESPECTS:

(A) NO VALID ELECTION HAD BEEN MADE BY APPELLANT, AND

(B) PLAINTIFF WAS ENTITLED TO TIMELY AMEND ITS PLEADINGS AND STRIKE THE INCONSISTENT THEORY OF RECOVERY.

ARGUMENT

(A) NO VALID ELECTION HAD BEEN MADE BY APPELLANT

Paragraph 16 of standard uniform real estate contracts, the provisions of which have been before this court numerous times, provides in essence, in the event of default by the purchaser, the following alternative remedies:

(1) To serve a notice upon the purchaser to remedy any default within five days or the seller may re-enter, take possession, and retain all payments as liquidated damages and proceed under the unlawful detainer statute if necessary.

(2) To bring an action against the purchaser for past due installments.

(3) To consider the contract a note and mortgage, and proceed to foreclose the same in accordance with law.

Nowhere in the record is there any indication that appellant complied with or ever made any attempt to comply with the provisions of 78-36-3, Utah Code Annotated 1953; without adhering to the unlawful detainer statutes, it is submitted that no election could have been made.

This court has emphatically held in *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446, at page 449:

> ". . . unlawful detainer, being a summary procedure, the statute must be strictly complied with in order to enforce the obligations imposed by it."

In accordance with the foregoing rule of law in Utah is *Van Zyverden v. Farrar*, 15 Utah 2d 367, 393 P.2d 468, wherein this court stated:

> "It is uniformly held that the unlawful detainer statute provides a severe remedy and must be strictly complied with *before* the cause of action thereon may be maintained." (Emphasis ours)

It is interesting to note in these standard contracts the exercising of the alternative remedies exist in the seller and, therefore logically, if an error is made pleading inconsistently, no one should be prejudiced by a timely correction of the pleadings. In reviewing the remedy elections in the subject matter complaint on appeal, appellant merely sought to take possession of the subject matter real property and did not seek cancellation of the real estate contract. Since no attempt had been made to comply with the law in the state of Utah in forfeiting the purchaser's equity, it seems only reasonable to permit a plaintiff to delete immaterial pleadings and proceed upon a proper cause of action.

Appellant further contends that respondents are not in a position to claim a valid election of remedies since they were not in a position to tender possession, much less title, of the property. By their own pleadings, more particularly set forth in their answer and third party

complaint (R. 4), a May 15, 1965, property transaction is alleged to have taken place between themselves and third persons. Until the outcome of the third party litigation was finalized, no unequivocable right of respondents to deliver to appellant good title existed. Therefore, with appellant having failed to adhere to the law of the State of Utah and strictly complying with the unlawful detainer statute, and since it timely moved the lower court to strike superfluous pleadings, and with respondents not being in a position to make a good tender of possession or title, the trial court erred in concluding a valid election of remedies had been made.

(B) PLAINTIFF WAS ENTITLED TO TIMELY AMEND ITS PLEADINGS AND STRIKE THE INCONSISTENT THEORY OF RECOVERY.

The law in Utah seems clear from our earliest cases through the most recent decisions that a party may prepare pleadings either in the alternative or allege inconsistent remedies or defenses, but may, of course, only prevail on one of these remedies.

Two of the most cited cases in the annotated works are *Utah Bond & Share Co. v. Chappel, Utah* (1926), 251 P.2d 354, and *Cook v. Covey-Ballard Motor Co., Utah* (1927), 253 P. 196. In Utah Bond & Share Co., this court relied upon *Register v. Carmichael,* 169 Ala. 588, 53 So. 799, 34 LRA 309, and quoted from the LRA annotation at page 311:

"the theory of the appeal is that plaintiff is es-

> topped to sue on the cause of action alleged, because she had elected by her bill in chancery to assert an antagonistic right. But an election, to be conclusive must be efficacious to some extent, at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election."

This rule was elaborated on in *Cook v. Covey-Ballard Motor Co.*, supra, in which case the plaintiff had commenced an action in conversion. The case was tried, a new trial granted, and plaintiff was granted leave to amend his complaint to proceed on a different theory, which leave was granted by the court. On appeal, this court stated at page 199:

> "It is well settled that one who is induced to make a sale or trade by the deceit of a vendee has the choice of two remedies upon his discovery of the fraud; he may affirm the contract and sue for his damages or he may rescind and sue for the property he has sold, and for what he has paid out on the contract. The former remedy counts upon the affirmance of validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other because the sale cannot be valid and void at the same time."
>
> "There is some conflict in the authorities as to when an election of a remedy is conclusive. There are authorities to the effect that an election, being in the nature of an estoppel in pais or estoppel by record, to be conclusive, must to some

> extent, be efficacious, and the party against whom the estoppel is urged must have received some benefit by his election, or have caused some detriment to the other party." (Citing Register v. Carmichael, supra)
>
> "The rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must by actually bringing an action or by some other decisive act with a knowledge of the facts indicate his choice between these inconsistent remedies." (Citing *20 CJ 19 through 37, cases cited therein.*)

In *Morgan v. Hidden Splendor Mining Co.*, 155 F. Supp. 257, (Utah, 1957), after acknowledging the rule of *Cook v. Covey-Ballard Motor Co.*, supra, at page 260, the United States District Court stated:

> "A fruitless attempt to recover on an unavailing remedy does not constitute an election which will deprive one of a right properly recoverable by a different and appropriate remedy; to constitute an election, the remedy at least to some extent must be efficacious. (Citing *Southern Pacific Co. v. Bogert,* 250 US 483, 39 Sup Ct 533, 63 LE 2069; *The Commercial Bank of Spanish Fork v. Spanish Fork Southern Irrigation Company,* 107 Utah 279, 153 P.2d 547; *Welsh, Driscoll and Buck v. Buck,* 64 Utah 579, 232 P. 911; *Detroit Heating and Lighting Co. v. Stevens,* 20 Utah 241, 58 P. 193; *Utah Bond & Share Co. v. Chappell,* supra. Also citing *Johnson v. Darnell,* 98 Utah 487, 93 P.2d 914.)

Further at page 262, the decision held:

> "It may be that defendant can show at the trial that on the strength of the notice it changed its position so that some estoppel could be invoked. Though such showing has been made, it would be improper to terminate plaintiff's action on the mere supposition that it could be."

Then stated further:

> "The filing of a petition seeking two inconsistent remedies does not constitute an election to proceed through either of them."

The United States Court of Appeals of the Tenth Circuit in *State Counseling Service, Inc., v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 1962, 303 F.2d 527, reiterated its version of the Utah law by stating at page 530:

> "A fruitless attempt to recover on an unavailing remedy does not constitute an election which will deprive a person of rights which are unavailing by a different and appropriate remedy; the remedy must at least be to some extent efficacious in order to constitute an election."

This court in *Rosander v. Larsen*, 14 Utah 2d 1, 376 P.2d 146, in a brief decision again acknowledged the permissiveness of alternative or inconsistent pleadings.

Therefore, in view of the clear weight of the authority permitting inconsistent pleading, the explicit test

in the Cook case supra, must be applied to the facts of this case.

The record in this case is completely void of any evidence whatsoever showing detrimental reliance or damage to respondents because of pleading of the inconsistent remedy sought to be stricken. Nowhere from the testimony adduced at the time of trial, have any of the respnodents produced one word of testimony which would sustain the invoking of equitable estoppel. With the record being void, it is unreasonable to conclude any irrevocable election of a remedy was made, and further to conclude from the proceedings and pleadings that appellant had at any time desired to terminate the uniform real estate contract. Since the record is void of any fact warranting a conclusion by Judge Hanson of detrimental reliance by respondents based upon the pleadings filed in this case, it seems unreasonable to conclude an irrevocable election of remedies was made, and especially to conclude in fact that any election to proceed in terminating the uniform real estate contract existed.

CONCLUSION

Appellant respectfully submits that the trial court erred as a matter of law in failing to permit plaintiff to timely delineate from its pleadings the inconsistent remedy seeking possession of the real property by concluding respondents had accepted that remedy especially in view of the inconsistent alternative remedies having been

led in appellant's complaint.

Appellant requests this Court reverse the lower ourt, remanding the case with instructions to render udgment on behalf of appellant and against respond- nts for the accrued delinquent installments and costs f this case.

Respectfully submitted,

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