1970

Brigham G Holbrook and Betty Holbrook v. William M. Hodson and Rose B. Hodson : Brief of Appellants

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
NATURE OF RELIEF SOUGHT ON APPEAL	2
STATEMENT OF MATERIAL FACTS	2
POINTS RELIED ON	8
For Reversal of the Trial Court and Dismissal	8
In Support of Motion for New Trial	8
ARGUMENT	8
1. The Earnest Money Receipt is so uncertain and indefinite as to be unenforceable	8
2. Plaintiffs made no tender in accordance with the Earnest Money Receipt	14
3. Defendants did not breach the Earnest Money Receipt Agreement	18
4. The damages awarded are not supported by the evidence	20
5. Defendants are not chargeable with loss of the washer and dryer	24
6. The initials on Exhibit P-14 are not the initials of defendant William M. Hodson	25
7. The brokers were the agents of plaintiffs contrary to Finding of Fact No. 7	27
8. Finding of Fact No. 8 is in error in finding that the plaintiffs submitted the required papers on January 19, 1967	28

TABLE OF CONTENTS—Continued

Page

9. Finding of Fact No. 9 is in error in finding that monthly profit from the apartment house was $800.00 29

SUMMARY 31

INDEX OF AUTHORITIES

48 ALR 12, supplemented at 68 ALR 137 23

48 ALR 72, supplemented at 68 ALR 152 22

4 ALR 3rd 224 28

17 Am. Jur. 2d, Contracts, p. 801 19

17 Am. Jur. 2d, Contracts, p. 901 19

17 Am. Jur. 2d, Contracts, Note 14, p. 901 19

22 Am. Jur. 2d, Damages, p. 425 30

22 Am. Jur. 2d, Damages, pp. 430-431 31

55 Am. Jur., Vendor and Purchaser, p. 950 22

55 Am. Jur., Vendor and Purchaser, p. 951 22

55 Am. Jur., Vendor and Purchaser, §555, p. 958 22

Arnold v. Smith (Mo. Supp. Ct. 1969), 436 S. W. 2d 719, 723 17

Banks v. Gregory, 16 Ill. 2d 227, 157 N. E. 2d 12 14

Bunnell v. Bills, 13 Utah 2d 83, 368 P. 2d 597 23

CJS, Bailment, 59, 28 §50, p. 527 24

CJS, Specific Performance, paragraph 31(a), pp. 480-483, and paragraph 31(b), pp. 486-487 13

CJS, Vendor and Purchaser, paragraph 571, p. 611 12

CJS, Vendor and Purchaser, paragraph 581(a), p. 624 16

TABLE OF CONTENTS—Continued

Page

Clark v. George, 120 Utah 350, 234 P. 2d 844 14

Conley v. Tate, 38 Cal. Rptr. 680 13

Didier v. McFadden Publications, Inc., 80 N. Y. S. 2d 409, affirmed 79 N. Y. S. 2d 521, affirmed 299 N. Y. 49, 84 N. E. 2d 612 19

General American Life Insurance Co. v. Natchitoches Oil Mill (Fifth Cir.), 160 F. 2d 140, 144 17

Gould v. Callan, 127 Cal. App. 2d 1, 273 Pac. 2d 93 13

Grooms v. Williams, 227 Md. 165, 175 A. 2d 575 14

Harwell v. Reininger, 123 Cal. App. 485, 11 Pac. 2d 421 11

House v. Lala (Ct. of App. 1960), 4 Cal. Rptr. 366 12

Howard v. Beavers, 128 Colo. 541, 264 P. 2d 858, 861.. 13

Kessler v. Sapp (Cal. Ct. of App. 1959), 338 Pac. 2d 34 10

Kusky v. Berger, 225 N. Y. Supp. 2d 797 14

Lightall v. McGuire, 20 App. Div. 248, 46 N. Y. S. 987 17

Magna Development Co. v. Reid (Ct. of App. 1964), 39 Cal. Rptr. 284, 288 13

Mueller v. Chandler (Ct. of App. 1963), 31 Cal. Rptr. 646 12

Nolon v. Grim, 67 Idaho 138, 173 P. 2d 74 14

Poetker v. Dyck, 83 Cal. App. 721, 257 11

Restatement of Contracts, §32 13

Restatement of Restitution, §53 12

Roven v. Miller (Cal. Ct. of App. 1959), 335 P. 2d 1035 13

Salisbury v. Tibbetts (CCA 10), 259 Fed. 2d 59 14

Schmidt v. Barr, 333 Ill. 494, 165 N. E. 131 16

TABLE OF CONTENTS—Continued

Page

Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 32 .. 19
Williston on Contracts, Rev. Ed., Vol. 5, p. 4133 (§1479) 12

Williston on Contracts, Rev. Ed., Vol. 6, pp. 5157, 5159 19

Williston on Contracts, 3rd Ed., Sec. 37 13

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BRIGHAM G. HOLBROOK and BETTY HOLBROOK, his wife,
Plaintiffs-Respondents,

vs.

WILLIAM M. HODSON and ROSE B. HODSON, his wife,
Defendants-Appellants.

Case No. 11767

BRIEF OF APPELLANTS

NATURE OF THE CASE

This was an action for specific performance of a contract for sale of apartment house and adjoining duplex in Salt Lake City, Utah, based on an Earnest Money Receipt and Agreement.

DISPOSITION IN LOWER COURT

The District Court held specific performance not appropriate and awarded damages in the form of return of earnest money deposit down payment from escrow, $800.00 per month for one year, value of washer-dryer, attorney's fees and interest.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the District Court that the contract was sufficiently certain to be enforceable, of the judgment that appellants were in default by refusal to perform and new trial in the calculation of damages and in denying the motion for new trial.

STATEMENT OF MATERIAL FACTS

Plaintiff, Brigham Holbrook, before December, 1966, was contacted by A. W. Collins, a real estate salesman, and engaged his assistance in locating an apartment house with vacant land which he could improve (R. 121, 166). Collins was acquainted with defendants' property known as the Scarsdale on Ninth East in Salt Lake City with adjoining property on which a duplex was constructed and sought a listing agreement from defendants (R. 141 & 164). William M. Hodson alone signed the listing agreement for a limited period to sell the Scarsdale and the adjoining duplex together at a price of $160,000.00 (Exhibits P-2 and 3). Collins worked out a tentative agreement on the Earnest Money Receipt form signed by the parties in December, 1966, (Exhibit D-15). Collins testified it was necessary to re-write this agreement because "Mr. Hodson wanted more security before he would subordinate" (R. 168).

Collins then prepared another earnest money agreement of which three differing copies were put in evidence as Exhibits P-14, D-13 and P-1. These were all part of a set with carbon copies (R. 199) and it appears that the

white is the original copy, the pink is the second copy which came from the possession of defendants (R. 150, 201) and the yellow is a copy which came from the possession of the plaintiffs (R. 90) of which copies were made and attached to the complaint and copies of the complaint (R. 90). The differences in the three copies are that in P-14 the initials "WMH" appear opposite Line 21 where there are deletions, which initials do not appear on D-13 or P-1. The deletion of a portion of Line 21 is the same on Exhibits P-14 and D-13 but simply has a line through that portion on Exhibit P-1. On P-14 and D-13 there is an insert above the words "The seller agrees to subordinate" with the insert indicated following the word "subordinate" which insert is then crossed out and on P-1 there is neither the insert, the indication of the insert nor the crossing out of the insert.

Exhibit D-15, as to the matter of subordination, provides at Line 50: "Seller agrees to subordinate to buyers when buyers show financial ability to build a minimum eighteen additional units." which has a line through it and also provides at Lines 21 and 22: "at time of subordination seller agrees to convey deed to duplex" from which there has been lined out "at time of subordination" and at Line 22 it is then provided "upon receipt of balance due against duplex."

In Exhibit P-1 at Line 21 it is provided: "The seller agrees to subordinate and in consideration the buyer agrees to give a first mortgage on a United States lease post office building located at 100 St. Joseph Boulevard, Trenton,

Michigan. Income on lease is approximately $6,600.00 a year which buyer will assign to be used only in case of default." with other provision in the lower part of the contract as to the mortgage on the Michigan property. On all three copies of this December 28, 1966 earnest money, the words: "When buyer wishes to build additional units" are crossed out in Line 21. The language of the insert above Line 21 has been made illegible on Exhibits D-13, P-14 and P-12. Mrs. Hodson testified that it related to building units on the duplex lot (R. 7 and 200).

Mr. Collins testified that the initials "W.M.H." at left of Line 21 of Exhibit P-14 were placed on the exhibit by Mr. Hodson (R. 160). Mr. and Mrs. Hodson both testified that those are not his initials and that Mr. Collins put them on after Mrs. Hodson had signed the earnest money agreements, following the signature by her husband (R. 142, 201, 202).

In other respects there isn't much controversy about the Earnest Money Receipt and Offer to Purchase. The buyers offered $147,000.00 with $17,000.00 down for the Scarsdale Apartments and the duplex to the south with appliances and furniture with reference to a first mortgage on the property in Trenton, Michigan. The sellers made a counter-offer providing for first mortgage on the building in Michigan with an assignment of lease and clear title in the Holbrooks and for release of the mortgage when the contract "is reduced to $100,000.00 on the apartment house at 125 South 9th East and the duplex at 135 South 9th

East Street, both located in Salt Lake City, Utah." raising the purchase price to $150,000.00 with $20,000.00 down.

The defendants then consulted an attorney who wrote a letter to the brokers on January 11, 1967 (Exhibit D-7) commenting on a "Real Estate Agreement" marked Exhibit D-6 and suggesting a number of additions to and changes in the proffered contracts.

The plaintiffs signed a "Real Estate Sale Agreement" dated January 19, 1967 (Exhibit P-4) which was submitted to defendants and their attorney along with the attached papers which are a copy of proposed mortgage from the Holbrooks to the Hodsons, a proposed seller's settlement statement, a proposed "Assignment of Leases and Rents," a commitment for title insurance on the Michigan property from Burton Abstract and Title Company, a copy of escrow instructions signed by the Holbrooks, a Warranty Deed signed by the Hodsons and not acknowledged and a proposed Bill of Sale for the Hodsons to execute covering furniture in the apartment house and the duplex.

In response to this submitted contract with attachments the defendants caused a letter to be written to the brokers January 21, 1967 (Exhibit D-9) purporting to point out several inconsistencies between the submitted Real Estate Contract and the Earnest Money Agreement and suggesting that the Earnest Money Receipt and Offer to Purchase is too indefinite to be enforceable and submitting a Uniform Real Estate Contract with "Addendum" from the Earnest Money Receipt signed by the defendants (Exhibit D-8).

This was followed by a letter from the buyers' attorney dated February 10, 1967 (Exhibit D-10), proposing a definition of "subordinate" and demanding closing of the transaction on that definition.

In response to this letter, attorneys for the defendants dispatched a letter dated February 16, 1967 (Exhibit D-11) and again proposing that Exhibit D-8, the Uniform Real Estate Contract with "Addendum," as submitted with the letter of January 21, be the basis for closing the transaction and offering to cooperate.

The plaintiffs went to Mexico for five weeks leaving the latter part of February (R. 109 and 137). In the latter part of March or the first part of April, the defendants proceeded to remove the duplex from the property and construct an additional apartment house on the lot where the duplex had been (R. 138 and 145), the progress of which was known to the plaintiffs (R. 138). The Earnest Money Receipt and Offer to Purchase was recorded by the brokers on August 8, 1967 (Exhibit P-14) and the complaint was filed December 13, 1967, seeking specific performance and damages or alternatively damages plus attorney's fees and attaching a copy of the Earnest Money Receipt and Offer to Purchase which appears to be in fact a copy of Exhibit P-1 (R. 16 to 18).

The answer of defendants pleads that the Earnest Money Receipt is too vague, uncertain and indefinite to be

capable of specific performance or to be the basis of any cause of action, pleading laches, denying breach of the agreement by the defendants or refusal to go forward and pleading that defendants offered to close the transaction in the exact wording of Exhibit A and that after a reasonable time, they had proceeded to remove the duplex and construct new units on that location (R. 19 to 21).

The case was tried before the Honorable Stewart M. Hanson on January 16 and 17, 1969 resulting in a memorandum decision dated January 20, 1969 (R. 22 and 23).

The memorandum decision finds the contract "absolutely clear and definite," that plaintiffs are not estopped but are entitled to damages for $20,000.00 paid on the contract, $444.00 for the washer and dryer installed, $160.30 closing expenses, damages of $9,600.00 being $800.00 per month for one year, together with interest on all of the said sums and a reasonable attorney's fee.

Findings of Fact, Conclusions of Law and Judgment were signed by the Court January 24, 1969, mailed out by the Clerk, January 27, 1969 (R. 25 to 30) with Motion for a New Trial being filed February 6, 1969 (R. 31) which attacked the Findings of Fact and Conclusions of Law.

The timeliness of the Motion for New Trial has been before the Court previously and will not be considered in this brief, although the cross-appeal of the plaintiffs challenges the timeliness as well as the sufficiency of the damages awarded (R. 49).

POINTS RELIED ON

For Reversal of the Trial Court

1. The Earnest Money Receipt is so uncertain and indefinite as to be unenforceable.

2. Plaintiffs made no tender in accordance with the Earnest Money Receipt.

3. Defendants did not breach the Earnest Money Receipt agreement.

In Support of Motion for New Trial

4. The damages awarded are not supported by the evidence.

5. Defendants are not chargeable with loss of the washer and dryer.

6. The initials on Exhibit P-14 are not the initials of defendant William M. Hodson.

7. The brokers were the agents of plaintiffs contrary to Finding of Fact No. 7.

8. Finding of Fact No. 8 is in error in finding that the plaintiffs submitted the required papers on January 19, 1967.

9. Finding of Fact No. 9 is in error in finding that monthly profit from the apartment house was $800.00.

ARGUMENT

1. *The earnest money receipt is so uncertain and indefinite as to be unenforceable.*

Defendants, being willing all the time to proceed with the transaction, endeavored to obtain a clarification of certain portions of the contract before concluding that the only possibility for closing was to close the contract in the language of the Earnest Money Receipt or else to accede to the plaintiffs' interpretations and changes contained in its offer which is Exhibit P-4.

In Exhibits D-7, D-9 and D-11 defendants raised questions as to uncertainty and indefiniteness. These were: If subordination were required would it be as to all of the property or the duplex only and on how much ground; what would be the use of the funds raised through the subordination provision; if improvements were to be made on the properties being sold, would the Hodsons have any right of objection to the plans; was any money to be raised for this transaction on the Michigan property; what would the terms of subordination be; was the Michigan mortgage to be recorded or placed in escrow; was it intended that the application of the term "subordinate" and "mortgage" as applied to this transaction would be worked out by the parties in a Uniform Real Estate Contract or be left for interpretation by a court?

It was plain from the testimony of the parties concerning the deletions and the change from Exhibit D-15 to Exhibit P-1, that the parties had discussed with the real estate agent the matters of what property was to be subordinated to other money, what the proceeds of the first lien were to be used for and how the Michigan property could be used as additional security in some manner. And

the Earnest Money Agreement contemplated that it would be superseded by a further contract. These further clarifications could presumably include the amount of money to be raised to which the Hodsons would subordinate, the terms of re-payment of that money, the use of the money to be raised and the type of improvements, if any, which were to be made on the property being sold, and how the security of the Michigan property was to relate to the payment of the original contract and to the payment of the debt to which there would be subordination. Mr. Hodson very appropriately negatived the notion that he would receive $11,000.00 on a $150,000.00 transaction and give a deed and then run the risk that further financing would jeopardize his $130,000.00 equity with no protection whatsoever as to how the money would be used, what it would do to his property, and whether he would end up with anything except a $50,000.00 property in Michigan to take the place of his $130,000.00 balance (R. 136).

These matters of uncertainty and indefiniteness were such that the contract was not specifically enforceable and plaintiffs' remedy was to seek relief for unjust enrichment of the defendants, if any.

In *Kessler* v. *Sapp* (Cal. Ct. of App. 1959) 338 Pac. 2d 34, 37, the Court ruled that a contract for the purchase of unimproved property for subdivision purposes was too indefinite to support an action for specific performance where the escrow instructions provided for subordination of a trust deed to a first trust to be obtained by purchasers, and only the amount was determinable from the contract.

The rate of interest, the amount of monthly payments and the period of debt were left to future agreement of the parties. As to the agreement to subordinate the deed of trust to a first trust deed for a construction loan, the Court stated:

> "The escrow instructions of January 20 provided for the subordination of a trust deed to a first trust deed to be obtained by the purchasers, only one term of the contemplated deed of trust was set out in the instructions, namely, that the amount of encumbrance was not to exceed $6.50 per square foot, 'exclusive of garages, stairways and porches,' * * * the rate of interset, the amount of monthly payments and the period of the debt were left to future agreement of the parties. This radical uncertainty as to a material feature of sales agreement not only rendered it incapable of specific performance (*Gould* v. *Callan*, 127 Cal. App. 2d, 1, 273 Pac. 2d 93) but also rendered unmaintainable an action for damages for its breach. *Burgess* v. *Rodom*, 12 Cal. App. 2d 71, 262 Pac. 2d 335."

The Court, however, found a claim had been stated for unjust enrichment and said that a purchaser who has paid a portion of the purchase price under contract for sale of real property, which is void for uncertainty, may recover his payments in accordance with assumpsit citing *Poetker* v. *Dyck*, 83 Cal. App. 771, 257 Pac. 185; *Harwell* v. *Reininger*, 123 Cal. App. 485, 11 Pac. 2d 421. The Court remarked that with respect to $4,000.00 spent by plaintiff in obtaining the approval of a subdivision plan, such expenditures were not recoverable. The Court remarked that as a general rule a purchaser who is entitled to restitution

may, in addition to the sum paid on a void contract, recover the reasonable value of any improvements made, or services rendered pursuant to the agreement which are a material benefit to the vendor. *Restatement of Restitution,* Section 53, *Williston on Contracts,* Revised Edition, Vol. 5, p. 4133 (Section 1479), 92 CJS Vendor and Purchaser, paragraph 571, p. 611. The Court said that services rendered by the vendee which did not benefit the vendor were not recoverable.

House v. *Lala* (Ct. of App. 1960), 4 Cal. Rptr. 366, involved a preliminary agreement providing for a second trust deed of $1,500.00. The Court said that uncertainty as to the terms and conditions of the trust deed, including absence of rate of interest, length of time it was to run, and terms of payment, are fatal to a claim for specific performance. The Court also observed that unsigned escrow instructions do not modify an agreement or make certain that which was hitherto uncertain.

In *Mueller* v. *Chandler* (Ct. of App. 1963), 31 Cal. Rptr. 646, the defendant appealed from a decree of specific performance of an alleged agreement to encumber property. The decree was reversed because the writing relied on was uncertain.

> "The writing fails to mention the nature of any additional document which is to be executed, whether it is a mortgage or trust deed or what any of the terms of the mortgage or trust deed may be; there is not even a statement that a mortgage or trust deed will be executed, but merely that the note 'may be recorded against my property.' "

The Court relied on 81 CJS Specific Performance, paragraph 31(a), pp. 480-483, and paragraph 31(b), pp. 486-487, from which it quoted.

Similar California cases denying specific performance for such uncertainty and indefiniteness as exists in the principal case are: *Magna Development Co.* v. *Reid* (Ct. of Appeals 1964), 39 Cal. Rptr. 284, 288; *Roven* v. *Miller* (Cal. Ct. of App. 1959), 335 P. 2d 1035, 1040; *Gould* v. *Callan,* 127 Cal. App. 2d, 4-5, 273 P. 2d 93; *Conley* v. *Tate,* 38 Cal. Rptr. 680.

Howard v. *Beavers,* 128 Colo. 541, 264 P. 2d 858, 861, involved a contract to exchange parcels of real estate with a mortgage to be given for the difference, the statement of terms and times of payment of the difference being incomplete, so that the mortgage was found so indefinite that the contract could not be specifically enforced, with this statement:

> "If there had been a mortgage prepared according to the terms of the contract, then it would have been a document silent as to the time and terms of payment, therefore there was nothing to this contract that could be carried into a mortgage as, if, and when it might have been given."

The Court cited *Restatement of Contracts,* Section 32, *Williston on Contracts,* Third Edition, Vol. 1, Section 37, in support of denial of specific performance and then found that there was a breach of contract because the defendant refused to perform and granted $36.00 damages incurred by the plaintiff in viewing the premises.

Nolon v. *Grim*, 67 Idaho 138, 173 P. 2d 74. A lease gave the lessee a purchase option by written instrument, requiring a $1,000.00 check as down payment on a total price of $35,000.00 "upon the execution of a deed conveying the place to me and the delivering of a mortgage to the sellers of $23,000.00". It was held unenforceable for uncertainty as to the mortgage.

In *Kusky* v. *Berger*, 225 N. Y. Supp. 2d 797, specific performance of a contract to lease was denied where the agreement obligated the lessee to subordinate the property to a first mortgage, but made no provision concerning the interest rate. It provided that a more formal agreement would be subsequently executed. The Court held that since a material element was omitted, in that there could be no implication that the mortgage was to be at the legal rate, the contract was not specifically enforceable.

See also *Grooms* v. *Williams*, 227 Md. 165, 175 A. 2d 575; *Salisbury* v. *Tibbetts* (CCA 10), 259 Fed. 2d 59; *Clark* v. *George*, 120 Utah 350, 234 P. 2d 844; *Banks* v. *Gregory*, 16 Ill. 2d 227, 157 N. E. 2d 12.

2. *Plaintiffs made no tender in accordance with the Earnest Money Receipt.*

The trial court found that the plaintiffs were ready, willing and able to proceed with the closing of the transaction (Conclusion of Law No. 3, R. 27). We submit that the gratuitous statement made in Court that plaintiff was "ready, willing and able" (R. 103) must be weighed in the light of performance. The only substantial evidence of

willingness to perform is contained in Exhibit P-4 dated January 19, 1967 and signed by the plaintiffs. Defendants responded to this promptly on January 21st by Exhibit D-9 which states that the Exhibit P-4 had just been received that day. Exhibit D-9 reaffirms that the defendants "would perform the terms of the preliminary Earnest Money Receipt and Offer to Purchase." Exhibit D-9 then points out the particulars in which Exhibit P-4 does not comply with Exhibit P-1, as follows: The mortgage on the Trenton, Wayne County, Michigan property had a faulty description; escrow fees are divided and not covered by the Earnest Money Agreement; the conditions of performance would have to be the conditions of the Uniform Real Estate Contract; bill of sale to the chattels is required by P-4 and not by the Earnest Money Receipt; Michigan title insurance was only a mortgage commitment for a $50,000.00 mortgage to an insurance company and not showing any value of $130,000.00 and no provision for recording the mortgage on the Michigan property to protect the defendants. Exhibit D-9 also points out that under the usual Uniform Real Estate Contract the buyer will commit no destruction upon the premises, the Earnest Money Receipt providing that when the balance is paid to $100,000.00 there will still be a "duplex" on the property. Page 3 of Exhibit P-4 contains a lengthy paragraph as to how the buyer intended the subordination provision to operate which refers to "construction of substantial improvements on the Salt Lake City property" and subordination to refinancing, the terms of which are not restricted in any manner and then provision that the promissory note of the buyer complying with

the terms of the Earnest Money Agreement, without relationship to the first lien, would have to be accepted by the sellers who would have to "execute such subordination agreement as shall be required to declare such priority."

Exhibit D-11 written in response to the demand of plaintiffs' attorney for performance invites the plaintiffs to abandon their demands not contemplated by the Earnest Money Receipt and close the transaction on a Uniform Real Estate Contract employing the language from Exhibit P-1 so as to avoid interpretation of that language.

In his Memorandum Decision the trial judge found that a tender had been made (R. 22). Presumably this was Exhibit P-4, the disparities of which are pointed out above.

> "It is a good defense * * * to show * * * that plaintiff has not performed or offered to perform his part of the contract; or, where a demand is necessary, that plaintiff has not made any demand; or that plaintiff's tender or offer of performance was coupled with conditions not authorized by the contract." C.J.S., Vendor and Purchaser, Paragraph 581(a), p. 624.

This was stated slightly differently in *Schmidt* v. *Barr*, 333 Ill. 494, 165 N. E. 131:

> "The contract must be enforced according to its terms or not at all. A court is without authority to compel a party to do something he did not contract to do. * * * A party seeking performance must show that he has complied with all of the terms of the contract at the time and in the manner therein provided."

In *Lightall* v. *McGuire,* 20 App. Div. 248, 46 N. Y. S. 987, the plaintiff purchaser required delivery of certain timber spars before proceeding with his contract to buy 2,300 acres of land, as to which the Court stated:

> "Upon this single issue to which we have adverted the jury found in favor of the defendant, which, of course, defeated the plaintiff's right to recover damages."

In *Arnold* v. *Smith* (Mo. Supp. Ct. 1969), 436 S. W. 2d 719, 723, the Court found that the defendant seller really did not want to perform his contract and observed that the Court will not rewrite the contract for the parties, saying:

> "It will require the performance of neither more nor less than that which the parties themselves have agreed to do * * * The party who seeks relief must show his performance or offer of performance of every essential obligation resting upon him before the other party may be compelled to perform."

In *General American Life Insurance Co.* v. *Natchitoches Oil Mill* (Fifth Cir.), 160 F. 2d 140, 144, the Court reversed a judgment of the district court denying specific performance, noting that defendant apparently had decided to try to buy the property "at a less price than it had agreed to pay" which attitude the Court said:

> "Cannot be heard as in refusing to accept the tender it sought to do, to question as unwise or injudicious the conditions it had agreed to and to refuse performance because it now thought they were."

The Court found it to be settled law that specific performance requires a contract that is clear and fair and completely performed by the parties seeking performance.

Plaintiffs, in view of these principles of law, were required to bring their offer of performance contained in P-4 in line with the Earnest Money Receipt, in response to the questions raised by the defendants as contained in Exhibits D-7 and D-9 and in response to defendants' final offer of performance made on January 21 (Exhibit D-9) and renewed on February 16, 1967 (Exhibit D-11).

3. *Defendants did not breach the Earnest Money Receipt Agreement.*

The factual basis of this argument as extracted from Exhibits D-7, D-9 and D-11 has already been stated under Point 2. There is not one word of testimony in this record to indicate that the defendants were not satisfied with the price for the Scarsdale and the adjoining duplex. They wanted the transaction to be closed but were fearful of losing a $130,000.00 "equity" through subordination and default of the principal obligation, ending up with a $50,000.00 post office in Michigan. They had endeavored in Exhibits D-7 and D-9 to outline a reasonable basis to insure that the improvements on the property would be real improvements, that financing obtained on the property would go into the property and that the first mortgage, the subordinated lien and the Michigan property would be utilized in a way to insure the defendants that they would receive their money from the sale contract.

Where a contract is accompanied by conflicting interpretations, it is a reasonable solution that one of the parties offer to perform in the language of the preliminary agreement. This was the purport of Exhibit D-9 dated January 21. Plaintiffs' then attorney then forwarded Exhibit D-10 on February 10, which fails to comment on D-9 and D-8 and insists on the plaintiffs' interpretations and claimed representations as to subordination. Exhibit D-11 was sent on February 16 in a further effort to resolve conflict over the meaning of the word "subordinate," offering to cooperate in working out a satisfactory subordination and suggesting that if the parties cannot agree, a Court can interpret the language.

> "But threatening to resort to the courts to establish one's rights should not be treated as a breach of contract in the absence of an expressed provision to that effect." 17 *Am. Jur.* 2d, Contracts, p. 901, citing *Didier* v. *McFadden Publications, Inc.*, 80 N. Y. S. 2d 409, affirmed 79 N. Y. S. 2d 521, affirmed 299 N. Y. 49, 85 N. E. 2d 612.

If it be considered that defendants requested a modification of the contract, then the request for modification is likewise not a breach of the contract and could not be so treated. *Turner* v. *McCormick,* 56 W. Va. 161, 49 S. E. 28, 32, noted in Note 14 in 17 *Am. Jur.* 2d, Contracts, p. 901.

And in any event, there should have been an explanation by the plaintiffs of why they regarded the offers of performance made by the defendants as being unsatisfactory (17 *Am. Jur.* 2d, Contracts, p. 801; *Williston on Contracts,* Rev. Ed. Vol. 6, pp. 5157, 5159) instead of going

to Mexico for five weeks at the end of February (R. 109, 137). Defendants interpreted the plaintiffs' silence and inaction as an abandonment of the contract and proceeded over a period of several months to remove the duplex and construct apartments on that ground, all with the knowledge of the plaintiffs (R. 138), who took no step until an undisclosed letter was written in June, 1967 (R. 94), and Exhibit P-1 was recorded August 7, 1967.

4. *The damages awarded are not supported by the evidence.*

This point and the subsequent points were raised in the motion for new trial and, if sound, would require a reversal of the denial of the motion for new trial with a consequent new trial. The preceding three points, it is submitted. require that the judgment of the District Court be reversed on the ground that the plaintiffs had not established their case.

Finding of Fact No. 9 (R. 26) is that the evidence shows a monthly profit of $800.00 from the operation of the Scarsdale and Conclusion No. 9 (R. 28) is that reasonable damages "for loss of bargain are assessed as profit from the apartment house at $800.00 per month for a period of one year, or $9,600.00."

This Finding and Conclusion are contrary to the evidence.

The Sales Agency contract, Exhibit P-3, lists income of the Scarsdale at $12,050.00 per year and expenses of $3,966.00 or $8,084.00 net income, which is $674.00 per

month, with nothing off for depreciation or obsolescence.

The defendants produced Exhibits D-17, D-18 and D-19 as being actual records of income and expenses for 1967 and 1968. These show that the total income for 1967 was $9,120.75 and the net income was $3,053.12 after allowing for depreciation and salaries and wages, as shown on Exhibit D-18. In examining Mrs. Hodson the plaintiffs established the fact that if depreciation and salaries and wages were not taken out, the net income would be higher (R. 207). That is obvious and would increase the net income to $5,521.95 or less than $500 per month. But that is illusory. By doing the work of the manager and a maintenance man, those expenses could be saved as out-of-pocket items and by ignoring obsolescence it could be pretended that the buildings were not getting older. The net profit would not thereby be increased, but the plaintiffs could have obtained a savings in the form of paper wages to themselves by doing that work.

Then the court permitted Mr. Holbrook to testify, over objection, what he though the apartments could have produced under his management (R. 104-108). He testified to $1,200.00 per month, which was more than actual income, and figured $400.00 per month expenses, which was less than actual expenses. He would have saved salaries by operating the Scarsdale himself (R. 108) and again he would ignore depreciation. His speculations cannot take the place of evidence of actual operations contained in Exhibits D-17, D-18 and D-19.

But this type of evidence does not establish the value of the property. (See 7 ALR 163.) There was no testimony by anyone that the properties were worth more or less than $150,000.00, the agreed price.

> "Where there is no evidence given showing any change in the situation, the agreed consideration will be taken as the correct value of the land." 55 *Am. Jur.*, Vendor and Purchaser, p. 951, citing 48 ALR 72 as supplemented at 68 ALR 152.
> "Only nominal damages are recoverable unless there is competent proof of the extent of damage, which would be the difference between the actual value and the agreed value." 55 *Am. Jur.*, Vendor and Purchaser, p. 950.

Recovery of loss of profits or of rents and profits during the period of time that property was withheld from the purchaser would be reasonable if specific performance were allowed, since otherwise there would be unjust enrichment from withholding of the property.

> "Where the breach consists in the failure of the vendor to convey at the time agreed upon and his continued wrongful detention of the possession from the purchaser, a conveyance having been afterward made and accepted, rents received by the vendor during the time the control of the property was so detained have been held to be recoverable." 55 *Am. Jur.*, Vendor and Purchaser, §555, p. 958.

But that rule is not applicable since specific performance was not granted. Plaintiffs were entitled to return of their money and to their damages, if any, which were unjust enrichment of the defendants, but for loss of bar-

gain would be compelled to show that the actual value of the property was greater than the contract price.

This Court applied the general rule of damages between vendor and vendee where vendor refuses to convey in *Bunnell* v. *Bills,* 13 Utah 2d 83, 368 P. 2d 597. In that action the buyers sought specific performance of a contract for purchase of a motor lodge or alternatively for damages for the breach. The trial court denied specific performance for grounds which are not made plain in the opinion. It then awarded $5,000.00 damages for breach of contract on the basis of evidence that the sale price between the parties was $175,000.00 and that the property was sold shortly thereafter for $180,000.00, making the difference of $5,000.00 as the damages. This Court held:

> "The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee." (p. 88.)

The Court went on:

> "Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact, and to recover damages plaintiff must prove not only that she has suffered a loss, but must also prove the extent and amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty."

A careful annotation at 48 ALR 12, supplemented at 68 ALR 137, discusses the elements of damage between vendor and vendee in a defaulted land sale contract. It is

plain, and Appellants concede, that if defendants breached the contract the amount paid down is recoverable together with interest, and the vendee is also entitled to the benefit of his bargain, which is the difference between the value of the property and the contract price.

5. *Defendants are not chargeable with loss of the washer and dryer.*

Brigham Holbrook testified that he placed a washer and dryer in the Scarsdale (R. 111). There is no evidence in the record of the cost or value of the washer and dryer or their present whereabouts.

There was testimony that the washer and dryer disappeared in the middle of the night (R. 204), which was stricken as being hearsay, with no other evidence as to what happened to the washer and dryer, and specifically no testimony that those appliances were not removed by the plaintiff or in his behalf.

The fact that the appliances were once on the defendants' property and then disappeared does not constitute a cause of action in behalf of the plaintiffs.

There is no proof of value; no proof of loss; no proof of why these appliances were put in the Scarsdale. This was a gratuitous bailment for the sole benefit of bailor. CJS Bailment, sec. 9. To hold defendants would require proof of gross negligence. CJS, Bailment, sec. 28, p. 418.

> "The bailee sufficiently exonerates himself when he shows that the cause of the loss was a mystery." CJS, Bailment, sec. 50, p. 527.

6. *The initials on Exhibit P-14 are not the initials of Defendant William M. Hodson.*

This issue was raised by Finding of Fact No. 5:

> "All deletions and changes to the agreement were made prior to signing by all parties on December 29, 1966" (R. 26).

The witness Collins did testify that the changes were made before signing by Mrs. Hodson in the presence of Mr. Hodson (R. 160 and 175-176) and that the initials "WMH" were placed to the left of line 21 of Exhibit P-14 by Mr. Hodson before signing the document (R. 160).

Mr. and Mrs. Hodson both testified that the initials were not those of Mr. Hodson and that they were put on by Mr. Collins at the Hodson home following the signatures by the Hodsons and without their approval (R. 143, 148, 150, 201, 202 and 203).

This raises an issue of fact with a finding supported by evidence. It is mentioned here because an examination of the initials on P-14 compared with D-15, which are admittedly the initials of Mr. Hodson, plainly shows that the initials are in a different style of handwriting.

The Court was puzzled by the fact that his copy of the Earnest Money Receipt did not have an indication for an insert above line 21 and following the word "subordinate" and did not have the initials at the left-hand margin of line 21 (R. 151-152). In presenting this to the Court counsel stated, "I realize that" (R. 152).

This is almost irrefutable proof that the facts were as testified by the Hodsons and that Collins was mistaken. The Earnest Money Receipt and Offer to Purchase comes in sets (R. 199). The top or white page was produced by Collins (R. 159) and was marked Exhibit P-14, the pink one (D-13) came from the Hodsons' possession (R. 150) and the orange one (Exhibit P-1) from the plaintiffs' (R. 90). Exhibit P-1 does not contain the insert above line 21 or the initials at the left. That is because, as the Hodsons testified, Collins obtained Mrs. Hodson's signature, which shows on all copies, as of December 29, 1966 and presented all copies to the Holbrooks, whose signatures appear again below the signatures of the Hodsons and are dated December 29, 1966. Only two copies (Exhibits D-13 and P-14) have the arrows, suggesting an insert, in line 21 after the word "subordinate", but only the white copy (Exhibit P-14) has the insert as crossed out, initialled at the left-hand margin. Mr. and Mrs. Hodson both testified that the initials were put there by Collins after Mrs. Hodson had signed (R. 142, 150, 176 and 201).

These circumstances confused the Court (R. 151 and 152) and justifiably so. It is plain that after Mrs. Hodson signed the set of papers and the Holbrooks had signed below the Hodsons, the orange copy (P-1) was detached. The front part of line 21 was crossed out again on the other two copies. (This was done differently on P-1 and on D-13 and P-14.) The insert was made above line 21; this was crossed out; the pink copy was given to the Hodsons (R. 201) and Collins then put Mr. Hodson's initials on Exhibit

P-14 only. The plaintiffs knew nothing about the inserts (R. 97, 124).

And the Court was in error in finding that:

> "5. All deletions and changes to the agreement were made prior to signing by all parties on December 29, 1966" (R. 26).

7. *The brokers were the agents of plaintiffs contrary to Finding of Fact No.* 7.

This finding reads:

> "7. On the 11th and 21st days of January, 1967, counsel for the Hodsons wrote the real estate broker reqesting the changes in the Earnest Money Agreement. There is no evidence that the Holbrooks saw these letters at that time, but real estate agent Collins did discuss some of the items with Mr. Holbrook" (R. 26).

It is implicit in this Finding of Fact that even though the parties had not met during all of the negotiations, the delivery to the agent of both parties was not equivalent to delivery to the buyers. The Court commented and thereby presumably ruled that the real estate broker and salesman were the agents of both parties (R. 154). From this it follows that when the defendants delivered Exhibits D-7 and D-9 to the real estate agents, the plaintiffs were charged with knowledge of the contents of those documents.

The plaintiffs saw the January 11 letter (Exhibit D-7) before signing Exhibit P-4 (R. 117), saw Exhibit D-8, which was submitted on January 20 (R. 117), and heard about problems connected with the Earnest Money Agree-

ment before January 19 when Exhibit P-4 was signed (R. 119). It is therefore fairly arguable that plaintiffs were informed as to the thinking of defendants and their attorney with reference to consummating the transaction.

But even if that were not so, the transmission of Exhibits D-7, D-8, D-9 and D-11 to the brokers imputed the contents of those documents to the plaintiffs, according to a careful annotation on the subject of notice to dual agents appearing in 4 ALR 3rd 224.

8. *Finding of Fact No.* 8 *is in error in finding that the plaintiffs submitted the required papers on January* 19, 1967.

Finding No. 8 is that the plaintiffs, among other things, "signed the closing papers" and "delivered the required papers on their Michigan property" (R. 26). This matter is covered generally by Point 2. But specifically, to refer to documents prepared in behalf of the plaintiffs as "the closing papers" is presumptive and inaccurate, inasmuch as the defendants at no time approved the form of those papers. Likewise the finding that "the required papers" on the Michigan property were delivered is palpably wrong. The mortgage which was delivered was unsigned and contains no sufficient description and the so-ctalled title insurance binder is in the amount of $50,000.00 and shows as mortgagee the Northwestern Mutual Life Insurance Company instead of the defendants, and shows county taxes for 1965 and 1966 and special assessments unpaid.

The Earnest Money Receipt and Offer to Purchase calls for "a first mortgage" on the Michigan property without specifying what the amount of that mortgage will be. The mortgage in the amount of $130,000.00 would suggest that the Scarsdale property was in effect being abandoned by the sellers and that the Michigan property was being accepted as full security, although the policy of title insurance indicates a value limited to $50,000.00, with no assurance of a first lien, and the income of the property at $6,600.00 a year suggests a value far less than $130,000.00 and closer to the $50,000.00 commitment for the Northwestern Mortgage.

9. *Finding of Fact No.* 9 *is in error in finding that monthly profit from the apartment house was* $800.00.

This finding reads:

> "9. Figures taken from the listing agreements, the testimony of Mr. Holbrook, and Mr. Hodson's books as to rentals and expenses show a monthly profit after expenses of operation, including taxes, from the apartment house property of $800.00."

This Finding of Fact is fundamental to the decision because that $9,600.00 was the chief item of damage. The Court's Memorandum Decision stated:

> "The Court is further of the opinion that the plaintiffs should be entitled to a judgment of $9,600.00, figured at the rate of $800.00 per month for one year * * *" (R. 22).

which became translated into Finding of Fact No. 9.

As pointed out under Point 4, the listing agreement and the books and records plainly show a net profit of far less than $800.00. The testimony of Mr. Holbrook was objected to when he offered to testify to what he thought the net profit would have been (R. 105 to 107). So far as representation of the sellers were concerned, that is to be found on the listing agreement (Exhibit P-3), which shows a maximum of $12,050.00 per year income and annual expenses of $3,966.25 or profit before depreciation of $673.50 per month.

Actual records of income and expenses were available in the form of Exhibits D-17, D-18 and D-19.

It was therefore error to receive the testimony of Mr. Holbrook and error to use that testimony as the basis of Finding of Fact No. 9 in the face of evidence properly received.

> "As a rule, evidence of the profits of a business conducted on land is inadmissible as evidence of the market value of the land." 22 *Am. Jur.* 2d, Damages, p. 425.
>
> "When lost profits are an element of recovery in an action for breach of contract, all facts relating to the subject matter of the contract and concerning the execution thereof known to both parties and all facts which would reasonably tend to make certain the amount of injury inflicted are admissible. This may include evidence as to receipts and disbursements for a reasonable period prior to the time of the injury or destruction of the business and a showing of sales made after a breach or injury, if such matters would aid in estimating prevented gains. Where a regularly established business is

> injured, the average profit that the business is then earning and has earned are competent proof as to the loss of profits. * * *
> "According to some courts, a witness cannot give his opinion as to the amount of profits that could have been made or that the profits lost were a specified sum * * *." 22 *Am. Jur.* 2d, Damages, pp. 430-431.

Defendants submit first, that if plaintiffs were entitled to any damages because of a breach by the defendants, those damages were the difference between the value of the property under contract and the contract price, plus expenditures made to the benefit of defendant, or reasonably made in preparation of performance. But if this Court should hold that loss of profits are recoverable then those profits would have to be based upon the experience of business and not the conjecture of plaintiffs, and, of course, the value of the plaintiffs' effort in managing the business, if different from the wages and salaries paid by the defendants during the prior period.

This actual evidence for the year 1967 was available, which was completely ignored by the trial judge in favor of the speculative testimony of the plaintiffs as to what might have been.

SUMMARY

The evidence is that the parties and a real estate salesman worked over two Earnest Money Receipts and Offers to Purchase with the help of interlineations and cross-outs as to which the copies delivered to the two parties were different. The defendants employed an attorney who at-

tempted to work out modifications of the agreement, which would make plain their different interpretations and satisfy both parties. This failed and the plaintiffs demanded performance according to their interpretations of the Earnest Money Receipt. The defendants proposed closing the transaction by using in a Uniform Real Estate Contract the language arrived at in the Earnest Money Receipt.

The contract made through the broker is indefinite and uncertain as to the following material matters:

What subordination was intended and to what kind of obligation;

What was the relationship of the Michigan property to the intended subordination;

What was the amount of the Michigan mortgage intended to be, and were plaintiffs required to show marketable title;

When was title to the chattels to pass?

The next genuine issue is which of the parties breached the agreement or refused to go forward? The burden of proof was with the plaintiffs and the defendants submit that the only reasonable procedure was to save the contract by closing in the language used in the Earnest Money Receipt, which was the proposal of the defendants made on Jannary 21 and again on February 16, 1967.

And if the agreement was definite and enforceable, and if the defendants were at fault in not acceding to the interpretations placed on the Earnest Money Receipt by the

plaintiffs, then what is the measure of plaintiffs' damage? There is no evidence of the value of the property and there is no evidence that plaintiffs made any expenditures in good faith in preparation of performance except the sum of $160.00 (part of which was not well spent as it did not produce evidence of marketable title) and the payment of $20,000.00 over to the real estate brokers. That deposit is recoverable by the plaintiffs in any event and with interest if the defendants were at fault.

If the trial court erred in finding that the contract was definite and enforceable, or that the defendants breached the contract, the District Court should be reversed and directed to dismiss the action.

If the contract were sufficiently definite to be enforced, and if the defendants breached the contract, then the District Court should be ordered to grant the new trial for a determination of plaintiffs' proper damages, with instructions as to the determination of damages.

Respectfully submitted,

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