

1969

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Hatch, McRae & Richardson; Attorneys for Respondents

Recommended Citation

Brief of Respondent, *Holbrook v. Hodson*, No. 11767 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/4874

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

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

vs.

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

Case No.

11767

BRIEF OF RESPONDENTS

APPEAL FROM THIRD DISTRICT COURT OF
SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, PRESIDING

HATCH, McRAE &
RICHARDSON
Attorneys for Plaintiffs-
Respondents
707 Boston Building
Salt Lake City, Utah 84111

RICHARDS & WATKINS
Attorneys fr Defendants-
Appellants
720 Newhouse Building
Salt Lake City, Utah 84111

FILED

NOV 10 1969

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
NATURE OF RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF ADDITIONAL FACTS.....	2
ARGUMENT:	
POINT I: The Earnest Money Receipt Is Definite and Certain and Constitutes a Binding Contract Between the Parties	3
POINT II: The Damages Awarded Are Supported by the Evidence, Except that the Award of Profits Should Have Extended to the Time of the Judgment.....	7
POINT III: The Appeal Should Be Dismissed as Not Timely Filed.	14
SUMMARY	16

INDEX

CASES CITED

	Page
Bunnell vs. Bills, 13 U.2d 83, 363 P.2d 597.....	3
Johnson vs. Jones, 109 U.92, 164 P.2d 893	3
Even Odds, Inc. vs. Nielsen, 22 U.2d 49, 448 P.2d 709.....	10, 12
Brereton xs. Dixon, 20 U.2d 64, 433 P.2d 3.....	10
In re Bundy's Estate, 241 P.2d 462.....	15

TEXTS

17 AmJur. 2d Contracts, §172, page 196.....	8
49 AmJur. Specific Performance, §172, page 196.....	8
22 AmJur. 2d, Damages, §46 and 47, pages 72 through 75.....	8
11 ALR. 3d 719, Vendor and Purchaser: Recovery for Loss of Profits from Contemplated Sale of Use of Land, Where Vendor Fails or Refuses to Convey.....	8
55 AmJur. Vendor and Purchaser, §564, page 957.....	8
55 AmJur. Vendor and Purchaser, §565, page 957.....	9
22 AmJur. 2d Damages, §23, page 24.....	9
55 AmJur. Vendor and Purchaser, §565, page 959.....	13
55 AmJur. Vendor and Purchaser, §565, page 958.....	13

IN THE SUPREME COURT

of the

STATE OF UTAH

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

vs.

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

Case No.

11767

BRIEF OF RESPONDENTS

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, attorneys fees and interest.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondents seeks dismissal of the appeal as not timely filed and a recomputation of damages awarded to include the period to the date of judgment, or, in the alternative, that the judgment be sustained except for the foregoing recomputation.

STATEMENT OF ADDITIONAL FACTS

Commencing January 1, 1967, Mr. Holbrook attempted to occupy the properties, posted rental signs, purchased a washer and dryer for the apartment house, and attempted to assist in the collection of rent, but occupancy of the premises was refused. (R. 98, 99, 111, 113) A complete down payment of \$20,000.00 was made and was still in escrow at time of trial and had never been tendered back to the Plaintiffs. (R. 103 and 108) Mr. Holbrook discussed his plans for the use of the property with Mr. Collins (R. 109), and Mr. Collins discussed these plans with Mr. Hodson. (R. 162, 163) Mr. Hodson denied that he had a conversation with Mr. Collins with regard to Mr. Holbrook's plans to move the duplex and build apartments, but did state that he did inquire what

Mr. Holbrook was going to do with the property. (R. 148, 149) He further stated that he didn't require Mr. Holbrook to set forth what he was going to do with the property and didn't require a breakdown of the subordination at the time he signed the earnest money receipt, though he had read the said earnest money receipt before he had signed it. (R. 145, 147) Further, Mrs. Hodson stated that Mr. Collins told her that Mr. Holbrook intended to build units on the duplex lot in discussing the meaning of subordination with her at the time of her signing of the earnest money receipt. (R. 200)

ARGUMENT

POINT I

THE EARNEST MONEY RECEIPT IS DEFINITE AND CERTAIN AND CONSTITUTES A BINDING CONTRACT BETWEEN THE PARTIES.

Even a cursory reading of the Earnest Money Receipt and Offer to Purchase (Exhibit P-1 and P-14) amply supports the trial court's conclusion in his Memorandum Decision:

"That the contract . . . was not too indefinite but to the Court is absolutely clear and definite."
(R. 22)

That such an Earnest Money Receipt and Offer of Purchase can constitute a binding contract has been repeatedly recognized by this Court. *Bunnell vs. Bills*, 13 U.2d 83, 363 P.2d 597. Also see *Johnson vs. Jones*, 109

U. 92, 164 P.2d 893 for a discussion of a "preliminary agreement" for the sale of real estate which was found sufficiently definite to be enforceable.

The problem here is not that the Earnest Money Receipt and Offer to Purchase is indefinite or ambiguous, but, as revealed by a review of the entire course of conduct of the Defendants after having signed said contract, is a patent attempt to avoid compliance. Examples of such conduct are the refusal to give occupancy of the premises to the Plaintiff as required by the agreement and the continual submission of counter proposals, such as those contained in Exhibit D-7 wherein Defendants proposed such things as subordination of the duplex only after payment of \$15,000.00 on that property, the right to approve any of the plans for improvements, and the amount of construction mortgage, etc. Further examples are contained in Exhibit D-9 and the Uniform Real Estate Contract and Addendum, Exhibit D-8, wherein, though the Defendant pays lip service to his willingness to perform the terms of the Earnest Money Receipt and Offer to Purchase, he again insists upon additional provisions such as, ". . . that the Buyer will not commit any destruction upon the premises and according to the Uniform Real Estate contract when the balance is down to \$100,000.00 we will still have a 'duplex' on the property." and "The Hodsons are willing to subordinate any time to a first mortgage at 6%, the proceeds of which will be paid over to them on account." (Exhibit D-8 and D-9)

The same attitude is continued to be expressed in Exhibit D-11, by the manner in which the removal of the duplex and construction of the apartment building was commenced during the time when the Plaintiffs were away on a trip and by the failure to ever forthrightly inform the Plaintiff, either in person or by his agents, that he was rescinding the contract or the tendering back of the downpayment or release of the Michigan property. (R. 103, 108, 109.) Enlightening in this connection is the testimony of Mr. Collins, elicited by the Defendants' attorney, covering indications of Defendants' refusal to perform. (R. 184, 187)

As evidence of the weight to be given to Mr. Hodson's testimony in this matter and for further light upon his course of conduct, it is interesting to look in the record at the extensive testimony on the question of whether his initials appear on line 21 of Exhibit P-14. Mr. Hodson has categorically denied initialling this deletion, while Mr. Collins testified that he did so initial. Mrs. Hodson testified that she did not see her husband initial it and that the initials were not his. (R. 160, 142, 158, 203) However, his testimony on this matter, as elicited by his counsel at R. 150 is worthy of quoting.

"Well, when Mr. Collins brought this to our place for us to sign, this wasn't crossed out, and just before he left, as if he remembered something, he picked up the paper, and he says, 'Oh, I forgot something,' and he crossed it out. And I says, 'Tell us what you crossed out?'

And he says, 'Well, I think it is to your advantage that I cross it out.'

And I said, 'What?' I said, 'I noticed down here I agreed to purchase price if it is \$150,000.00 That is what I have been telling you is the only thing I am interested in, that I get \$150,000.00 out of this place, and I don't think you have worded this thing properly. Shouldn't I initial that?'

And he said, 'If you want to.' And he said 'Would you like to initial anything up here?'

And I said I wouldn't initial anything. I don't know what had been crossed out. And I said, 'As long as that has been crossed out I won't initial this other thing down here either.'"

In remembering that Mr. Holbrook is a man of property and business experience (R. 125), said actions in this regard become completely unbelievable. He did not demand a return of the papers he had signed from the agent Mr. Collins, nor did he inform Mr. Collins' employers of their employee's unauthorized act, nor did he inform the Plaintiff that there had been unauthorized changes in the document he had signed, nor did he ever question the change until the time of trial, even going so far as to include the provisions of the Earnest Money Receipt and Offer to Purchase with the deletion in the addendum to the proposed Uniform Real Estate Contract, Exhibit D-8.

The only reasonable conclusion from the foregoing

is that the Defendants, shortly after signing the Earnest Money Receipt and Offer to Purchase, decided not to comply with the terms thereof, but instead to adopt the plans for the use of the property originated by Mr. Holbrook and, thus, turn the matter to their advantage.

On the other hand, Plaintiff not only paid the down payment and attempted to go into possession, but, as concluded by the trial court, was ready, willing and able to perform his part of the agreement. See 17 *AmJur.2d Contracts*, §359, page 800, where in discussing the manner and sufficiency of tender, it is stated:

“ . . . it means only a readiness and willingness accompanied with an ability on the part of one of the parties to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do. . . ”

POINT II

THE DAMAGES AWARDED ARE SUPPORTED BY THE EVIDENCE, EXCEPT THAT THE AWARD OF PROFITS SHOULD HAVE EXTENDED TO THE TIME OF THE JUDGMENT.

The Plaintiffs were denied specific performance of the contract because Sellers, after breaching the agreement by refusing to close the transaction and refusing to deliver possession to the Buyers, materially changed the property by moving the duplex and erecting thereon a

new 24-unit apartment house. As stated in 49 *AmJur*, *Specific Performance*, §172, page 196:

“Damages may be awarded to the plaintiff where the court, in the exercise of its discretion, refuses specific performance because of the great hardship of that relief to the defendant . . . A special equity for relief by an award of damages may also be shown to exist where the defendant has acted inequitably in trying to avoid a decree of specific performance.”

There appears to be little question that the Plaintiff suffered substantial damages from Defendant's breach. In addition to losing the property, his \$20,000.00 down payment remained in escrow until the time of trial and thus, together with the property in Michigan which he had agreed to mortgage, was not available for other ventures. The general rule in an action for breach of contract is that the Plaintiff is normally entitled to recover his damages in an amount which will place him as nearly as possible in the same position he would have occupied if Defendant had performed his contract obligations; and these damages include the loss of gains he reasonably expected to make from the contract, that is, the benefit of his bargain. See 22 *AmJur.2d*, *Damages*, §46 and 47, pages 72 through 75. See also 11 *ALR.-3d* 719, *Vendor and Purchaser: Recovery for Loss of Profits from Contemplated Sale of Use of Land, Where Vendor Fails or Refuses to Convey*. See also 55 *AmJur*, *Vendor and Purchaser*, §564, page 957:

“It is universally recognized that a vendor who wilfully, and for purposes of his own, refuses to perform his contract for the sale of real estate may be held liable to the vendee for the loss of his bargain . . . Irrespective of whether the court follows the rule limiting the liability of the vendor where he acts in good faith, the vendor is ordinarily liable to compensate the vendee for loss of the bargain where the executory contract fails because the vendor, subsequently to the execution of the contract, disabled himself from performing the contract.”

And, further, at 55 AmJur, Vendor and Purchaser, §565, page 957 :

“If a vendor in default acts in bad faith, the vendee may recover all the damages he has sustained by reason of the breach.”

It is granted that a general rule of damages between vendor and vendee, where the vendor refuses to convey, is the market value of the property at the time of the breach less the contract price to the vendee. However, in the instant case, through the willful misconduct of the Defendant, he so changed the nature of the property that an attempt to apply this rule would, for all practical purposes, be impossible; and to allow the Plaintiff to recover only nominal damages would not only be unjust to the Plaintiff, but would be permitting the Defendant to not only prevent specific performance of his contract, but also to escape payment of damages because of his own wrong and to profit thereby. 22AmJur. 2d Damages, §23, page 24 :

“One whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by a plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. And some cases have further held that when the . . . contract breaker has caused the uncertainty, he will not be allowed to complain that the damages cannot be measured with exactness.”

In *Even Odds, Inc. vs. Nelson*, 22 U.2d 49, 448 P.2d 709, where the net value of the ore taken was held to be a proper measure of damages rather than to evaluate the entire mine before and after the wrongful taking of the ore, this court, at page 52, states :

“Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed.”

Again in *Brereton vs. Dixon*, 20 U.2d 64, 433 P.2d 3, the court, in discussing the contention that the only proper measure of damages was the difference in the value of the land before and after the destruction of trees, states :

“We are aware that in appropriate circumstances this method of assessing damages has been approved in numerous cases. But we do not agree that it should be the sole and exclusive method of assessing such damages in all circumstances. When property has been damaged or destroyed by a wrongful act, the desired objective is to ascertain as accurately as possible the

amount of money that will fairly and adequately compensate the owner for his loss. Reflection will reveal that a rigid adherence in all cases to the rule of the value of the realty before and after the injury would not always serve that objective . . . In such a case application of the rule of value of the realty before and after the injury would penalize the owner by giving him less than his true damage and confer an unjustified advantage on the wrongdoer by permitting him to pay less than the actual damage he caused."

Faced with this problem, it was well within the trial court's discretion to arrive at an alternate method of computing Plaintiff's damages as he did in this case; and the method selected, that of utilizing the "rental value" of a portion of the property would appear to be a reasonable alternative and one about which the Defendant should have no complaint when compared to the granting of specific performance with its great hardship on Defendant.

With regard to Defendant's contention that the monthly amount determined by the trial court is not supported by the evidence, suffice it to say that the trial court apparently adopted the figures as testified to by Mr. Holbrook (R. 107), though he well might have come up with a higher figure had he totaled the amounts for both the apartment and the duplex on the listing agreements (P-2 and P-3) or a lower amount had he accepted the figures on Exhibits D-17, 18 and 19. In connection with these latter exhibits, it is interesting to note the testimony of Mrs. Hodson, wherein she admitted that

these records were not here and that she was unable to explain the meaning of the figures or their source. (R. 197)

This court in *Eren Odds, Inc. vs. Nielson, supra*, states:

“We have no disagreement with the proposition that the fact-trier should not be permitted to arbitrarily ignore competent, credible and uncontradicted evidence. Nevertheless, he is not bound to slavishly follow the evidence and the figures given by any particular witness. Within the limits of reason it is his prerogative to place his own appraisal upon the evidence which impresses him as credible and to draw conclusions therefrom in accordance with his own best judgment.”

Certainly then, the trial court was well within its discretion in the method used in determining damages. However, it is contended that, in computing the total amount to be awarded the Plaintiff for his “loss of bargain,” the period should have continued to the time of the rendition of the trial court’s judgment. This would appear logical, since up to this time Plaintiff’s \$20,000.00 deposit remained in escrow and he was unable to use it or the Michigan property for other purposes. This was necessary since, even though he might feel it unlikely that a court would award him specific performance in view of the major changes made by the Defendant on the property, still the Defendant had never notified him that the contract was rescinded, released him from his

obligations thereunder, or tendered a release of his down payment in escrow. Consequently, it was necessary that Plaintiff maintain himself in a position to perform the contract if called upon to do so; and, thus, his damages continued to the time of the judgment. 55 *AmJur. Vendor and Purchaser*, §565, page 959:

“ . . . damages arising subsequent to action brought, or even to the date of verdict, may be taken into consideration when they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action.”

The award of \$160.30 that Plaintiff expended in preparation is supported by the testimony of Mr. Holbrook at R. 111 and is a proper award, as is the award of \$440.00, as set forth in the trial judge's Memorandum Decision, for the washer and dryer placed in the Scarsdale. As to Defendant's contention with regard to the mysterious disappearance of the washer and dryer, there is no such evidence in the record, the self-serving hearsay report having been stricken. 55 *AmJur, Vendor and Purchaser*, §565, page 958:

“Also, where the vendee in good faith is at expense for investigating the title, or for attorneys fees, or other similar expense, and the contract of sale fails, due to the fault of the vendor, such expenditures of the vendee may be recovered for, in addition to the general damages.”

POINT III

THE APPEAL SHOULD BE DISMISSED AS
NOT TIMELY FILED.

This matter was originally before this court in civil No. 11597, wherein Defendants' original appeal was dismissed. The matter was again raised by Plaintiffs petition for an extra-ordinary writ No. 11713 and on Plaintiff's motion to dismiss appeal, civil No. 11767, both of which were denied without opinion and apparently for the reason of prematurity, in that the matter could be and was raised in Plaintiffs' cross-appeal. Consequently, rather than go into the matter at great length in this brief, the court is requested to refer to and to incorporate herein the statement of facts contained in Plaintiff's motion to dismiss appeal, civil No. 11767, together with the memorandum of authorities filed therewith.

Briefly, however, Defendant failed to file his motion for a new trial within the time allowed, which, thus, did not terminate the running of the time for appeal. He, thereafter, failed to notice up said motion for a new trial, and the issue was raised some months later by the Plaintiffs' motion to strike the motion for a new trial. The trial court denied the motion to strike, denied the motion for a new trial, but did, after the original appeal was dismissed, grant Defendants' motion for relief from late filing. Thereafter, the trial court again denied Defendants' motion for a new trial, and this appeal resulted.

In view of the authorities previously submitted to this court, it is doubted that the trial court had any jurisdiction to grant relief as was done here purportedly under URC'P 60(b) (1), even though there is dicta to the effect that such relief could be granted in a proper case in *In re Bundy's Estate* 241 P.2d 462.

However, even if the District Court had authority and jurisdiction to grant relief from late filing, granting such relief where the only grounds are stated as the, "mistake and excuseable neglect of the clerk," which consisted of the clerk not having mailed a copy of the judgment to the Defendants until three days after the judgment was signed and entered and the "inadvertence and excuseable neglect of counsel," which, briefly stated, consisted of being overworked and too busy would be an abuse of the court's discretion and would completely nullify the purposes of the rules specifying times within which motions for new trial and appeals can be taken.

Regardless of the names given to the various motions involved herein, the practical effect of upholding the District Court's action in this matter is to grant to the District Court unlimited discretion to extend the time within which appeals may be filed. If this is to be the law, then the rules should be changed to set forth clearly that the trial court has complete discretion to extend the time for appeals, both before and after the normal appeal time has run, a most undesirable result.

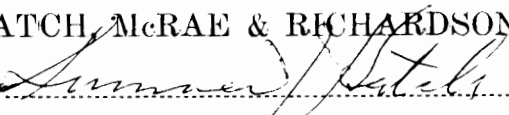
SUMMARY

Defendants' appeal should be dismissed as not timely filed, and thus give meaning and effect to the rules covering appeals; and Plaintiffs, on their cross appeal, should be granted additional damages computed to the date of the judgment.

However, if this appeal is not so dismissed, then, when viewing the evidence in the light most favorable to the prevailing parties, it is clear there is substantial evidence to support the Findings and Conclusions and Judgment of the trial court, except that the period of time used in computing the amount of damages to which Plaintiffs are entitled should have been extended to the date of judgment; and, with this change, the judgment should be upheld.

Respectfully submitted,

HATCH, McRAE & RICHARDSON

By  Hatch

*Attorneys for Plaintiffs
and Respondents*

707 Boston Building

Salt Lake City, Utah 84111