Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1984

Richard M. Johnston, Shauna M. Johnston, Thomas W. Mcdonald, and Lois S. Mcdonald v. Lloyd H. Austin, Virginia Ann Austin, Income Realty And Mortgage, Inc., A Utah Corporation, Boyd E. Nelson I Barbara L. Nelson, John Franks, David J. Isbell And Ruth Ann Isbell : Respondents' Brief

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.Mortensen & Neider; Attorneys for Respondents

Recommended Citation
Brief of Respondent, *Johnston v. Austin*, No. 19401 (1984).
https://digitalcommons.law.byu.edu/uofu_sc2/5174

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

RICHARD M. JOHNSTON, SHAUNA M. JOHNSTON, THOMAS W. McDONALD, and LOIS S. McDONALD,	)	
Plaintiffs/Appellants,	)	
vs.	)	Case No. 19401
LLOYD H. AUSTIN, VIRGINIA ANN AUSTIN, INCOME REALTY AND MORTGAGE, INC., a Utah corporation, BOYD E. NELSON, BARBARA L. NELSON, JOHN FRANKS, DAVID J. ISBELL, and RUTH ANN ISBELL,	)	
Defendants/Respondents.	)	

RESPONDENTS' BRIEF

AN APPEAL FROM AN ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

THE HONORABLE DOUGLAS L. CORNABY, PRESIDING

JAMES T. DUNN
MORTENSEN & NEIDER
Suite 315
1225 East Fort Union Blvd.
Midvale, Utah 84047
Telephone: (801) 566-3688
Attorney for Boyd E. Nelson and Barbara L. Nelson

FRANK J. GUSTIN
DAVID W. OVERHOLT
GUSTIN, ADAMS, KASTING & LIAPIS
Third Floor, New York Building
Salt Lake City, Utah 84111
Telephone: (801) 352-6996
Attorneys for Appellants

LLOYD H. AND VIRGINIA AUSTIN
831 West 3900 South
Bountiful, Utah 84010
Telephone: (801)292-6686

INCOME REALTY AND MORTAGE, INC.
Secretary of State
Heber M. Wells Building
Salt Lake City, Utah 84111
Telephone: (801) 530-6003

DAVID J. AND RUTH ANN ISBELL
692 North 700 East
Centerville, Utah 84014
Telephone: (801) 295-8465

KIM R. WILSON
SNOW CHRISTENSEN & MARTINEAU
1100 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-9000
Attorneys for John Franks

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD M. JOHNSTON, SHAUNA M. JOHNSTON, THOMAS W. McDONALD, and LOIS S. McDONALD,	)	
Plaintiffs/Appellants,	)	
vs.	)	Case No. 19401
LLOYD H. AUSTIN, VIRGINIA ANN AUSTIN, INCOME REALTY AND MORTGAGE, INC., a Utah corporation, BOYD E. NELSON, BARBARA L. NELSON, JOHN FRANKS, DAVID J. ISBELL, and RUTH ANN ISBELL,	)	
Defendants/Respondents.	)	

RESPONDENTS' BRIEF

AN APPEAL FROM AN ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

THE HONORABLE DOUGLAS L. CORNABY, PRESIDING

JAMES T. DUNN
MORTENSEN & NEIDER
Suite 315
1225 East Fort Union Blvd.
Midvale, Utah 84047
Telephone: (801) 566-3688
Attorney for Boyd E. Nelson and Barbara L. Nelson

FRANK J. GUSTIN
DAVID W. OVERHOLT
GUSTIN, ADAMS, KASTING & LIAPIS
Third Floor, New York Building
Salt Lake City, Utah 84111
Telephone: (801) 352-6996
Attorneys for Appellants

LLOYD H. AND VIRGINIA AUSTIN
831 West 3900 South
Bountiful, Utah 84010
Telephone: (801)292-6686

INCOME REALTY AND MORTAGE, INC.
Secretary of State
Heber M. Wells Building
Salt Lake City, Utah 84111
Telephone: (801) 530-6003

DAVID J. AND RUTH ANN ISBELL
692 North 700 East
Centerville, Utah 84014
Telephone: (801) 295-8465

KIM R. WILSON
SNOW CHRISTENSEN & MARTINEAU
1100 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-9000
Attorneys for John Franks

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD M. JOHNSTON, SHAUNA M. JOHNSTON, THOMAS W. McDONALD, and LOIS S. McDONALD, Plaintiffs/Appellants, vs. LLOYD H. AUSTIN, VIRGINIA ANN AUSTIN, INCOME REALTY AND MORTGAGE, INC., a Utah corporation, BOYD E. NELSON, BARBARA L. NELSON, JOHN FRANKS, DAVID J. ISBELL, and RUTH ANN ISBELL, Defendants/Respondents.	)	RESPONDENTS' BRIEF Civil No. 19401

NATURE OF THE CASE

This is Plaintiffs' appeal of an Order entered by the Honorable Douglas L. Cornaby on August 19, 1983, denying Plaintiffs' Motion for Summary Judgment, dismissing their Complaint with prejudice, and granting Defendants, Nelsons', Motion for Summary Judgment.

DISPOSITION IN THE LOWER COURT

This is a case dealing with a sellers' remedies under a Uniform Real Estate Contract. On September 15, 1982, Appellants, the sellers, filed a Complaint in Davis County, Utah, seeking to foreclose as a mortgage Respondents' (Austins) interest in certain real property because of a failure by Austins to timely pay amounts due under the Contract. The

Trial Court denied Appellants' Motion for Summary Judgment seeking an order of foreclosure and granted Respondents, Nelsons', Motion for Partial Summary Judgment which resulted in the dismissal of Appellants' Complaint.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the Trial Court's Orders dismissing Plaintiffs' Complaint and granting Respondents, Nelsons', Motion for Partial Summary Judgment. Appellants also seek an Order granting Appellants' Motion for Summary Judgment allowing Appellants to foreclose the Respondents' interest in the subject property, pursuant to the terms of the original Uniform Real Estate Contract executed between Appellants and Respondents, Austins.

Respondents seek an affirmance of the Trial Court's Orders dismissing Plaintiffs' Complaint and granting Respondents, Nelsons', Motion for Partial Summary Judgment. Respondents also seek their attorney's fees on the grounds that this action is without merit and is not brought in good faith.

STATEMENT OF FACTS

For purposes of this appeal, the Respondents, Nelsons, agree with the Statement of Facts as they are outlined in Appellants' Brief with the following minor changes:

With respect to the Escrow Agreement made reference to on page 3 of Appellants' Brief, it is clear from the facts that the Appellants acquiesced to the Escrow Agreement and accepted payments from the Escrow Company for a period of almost two years (R 185, 203, 221, 222, and 242 at page 10).

It should also be noted that the first definite written notice that any of the defendants received with respect to the default came on July 19, 1982 and no prior written notice was given to any of the defendants. (R 9, 93, 100, 144, 174, 185, 198, 203, 222, and 242 at pages 6, 7, 12, 13, and 16).

Respondents, Nelsons, agree with Appellants' Statement of the Facts with the aforementioned additions.

ARGUMENT

POINT I

THE DEMAND FOR CURE RECEIVED BY THE BUYERS AND NOTICE OF ACCELERATION WERE INSUFFICIENT TO PERMIT THE SELLERS OF THE PROPERTY TO FORECLOSE BUYERS' INTEREST IN THE PROPERTY.

It is clear from the record that the buyers of the real property tendered the June 15, 1982 and the July 15, 1982 payments to Escrow Services, Inc. (R 23, 24, 63, 99, 197, 203, and 222). The June 15, 1982 payment was forwarded by Escrow Services, Inc. on their corporate account and the check was returned due to insufficient funds. The Austins

were contacted by the buyers concerning the failure to receive the June and July, 1982 payments in a timely manner and verbal notice of the default was given to Austins with respect to the default. At no time, however, did sellers send a written notice to Austins or any other party defendant stating what was necessary to cure the default and the action required by Defendants.

After the 30 day period called for in the contract, sellers first gave written notice of the default and exercised their option under the contract to accelerate the total balance due and treat the contract as a note and a mortgage.

Twenty-seven days after Austins first received written notice of the default, tender was made of the delinquent amounts due to Appellants. Appellants refused to accept the tender and indicated that they would pursue remedies under paragraph 16c of the contract. The Trial Court ruled as a Conclusion of Law that the tender on August 16, 1982 was timely with respect to the delinquencies and defaulted payments since that tender occurred less than 30 days after the first written notice of default was submitted to Austins. The Trial Court also ruled that written notice and demand must be given before the sellers could exercise their option to declare the contract as a note and mortgage. This ruling required two notices, one of default and another electing sellers' remedy and exercising that remedy.

This Court has had ample opportunity in the past to review the default provisions found in real estate contracts. Consistently, the Court has held that said default provisions are not self-executing and that written notice must be given to the defaulting party stating what is necessary to cure the default and giving to the defaulting party a reasonable opportunity to cure the default. In LaMont v. Evjen, 29 Utah 2d 266, 508 P.2d. 532 (Utah 1973), issues similar to those before the Court on this appeal were presented. In that case, the buyers under a Uniform Real Estate Contract had missed a payment in December, 1970. A written notice was sent to the buyers asking them to bring the contract payments current. That written notice was sent on February 2, 1972. On February 29, 1972, sellers' attorney wrote a letter which was delivered to buyers on March 6, 1972 directing them to bring all past due payments current. Later that same month, sellers mailed a certified letter to buyers stating that they were electing to treat the Uniform Real Estate Contract as a note and a mortgage and foreclose upon the property immediately with the entire unpaid balance becoming due and payable. This letter was received by buyers on April 3, 1972 and on that same day all past due installments were tendered. This Court held:

> Before a seller of land under a Uniform Real Estate Contract can exercise any of the options given him because of a failure on the

> part of a purchaser to pay an installment as promised he must give the purchaser notice of the default and a reasonable time in which to bring the contract current . . . . This is so because the debt does not become due on the mere default in payment, but by affirmative action by which the creditor makes it known to the debtor that he intends to declare the whole debt due. Id. at 534. (Emphasis added).

The rule enunciated in LaMont v. Evjen is dispositive of the issues before the Court in this appeal. In the instant action, no written notice of default was ever served upon the original buyers, the Austins, or any of the subsequent purchasers of the property. The only written notice that was ever received was the notice of foreclosure sent by Appellants on July 19, 1982.

The Court in LaMont v. Evjen was dealing with the foreclosure provisions of paragraph 16c as is the Court in the instant action. Buyers tender of all of the delinquent installments due 27 days after the notice of acceleration was served was a reasonable tender in light of the circumstances and the bankruptcy of Escrow Services, Inc.

The contract itself calls for a 30 day grace period and this Court in Call v. Timber Lakes Corporation, 567 P.2d 1108 (Utah 1977) found that 22 days was not an unreasonable time for a defendant to tender performance after notice of default. It should be noted that in Timber Lakes, the defaulting party was given notice in writing with respect to

the arrearages. In the real estate contract cases which have come before this Court, without exception, the sellers seeking to enforce the provisions of the contract had given written notice of their intention to exercise their remedies under the contract. See Beneficial Life Insurance Company v.Dennet, 24 Utah 2d 310, 470 P.2d 406 (Utah 1970).

In the case at bar, the Austins were given verbal notice that the payments had not been received. The record is unclear as to the content of those verbal notices, but it appears clear that said notices did not inform buyers of sellers' election of remedies or what was necessary to cure the default. The first and only written notice received by buyers was the notice of acceleration and at that point in time there was nothing more which could be done to cure the default other than tender the entire balance due. This Court in Hansen v. Christensen, 545 P.2d 1152 (Utah 1976) held that the provisions of a real estate contract, though not a Uniform Real Estate Contract are not self-executing and that some affirmative act on the part of the seller is required. The Court stated:

> The contractual relations between seller and buyer are in existence until such time as the seller chooses to notify the defaulting buyer of its election to proceed under one or all of its options. In so doing, seller must give the defaulting buyer a reasonable time within which to cure the default. Without this notice, the defaulting buyer would not know what to do. Id. at 1154.

In the instant action, the verbal notice to buyers was ineffective because said notice did not notify the defaulting party what was necessary to cure the default. In addition, a reasonable time within which to cure the default was not given in light of all of the circumstances. As the record shows, payments for June and July, 1982 were tendered to Escrow Services, Inc. which filed for bankruptcy. Within 30 days after their first written notice of default, buyers tendered the total delinquent amounts due to sellers.

In Appellants' Brief, they cite to the case of American Savings & Loan Association v. Blomquist, 21 Utah 2d 289, 445 P.2d 1 (Utah 1968) for the proposition that foreclosure is appropriate in the case at bar. It should be noted from the Blomquist case, however, that the defaulting party was consistently late in making monthly payments and the defaulting party did not increase the monthly payments to correspond with increased insurance and tax reserves. Written notices and demands for payment were sent to the defaulting party notifying them of the default. Said notices also included sufficient information to put the defaulting party on notice as to what was necessary to cure the default.

Appellants also cite the court to KIXX, Inc. v. Stallion Music, Inc., 610 P.2d 1385 (Utah 1980) for the proposition that they properly accelerated payment under the terms of the real estate contract. In KIXX, Inc. v. Stallion

Music, Supra., the Court was dealing with a promissory note rather than a real estate contract, but the principal of law is applicable. In that case, this Court held:

> It is clear that the notice required is notice of default and plaintiff's option is exercisable only if defendants fail to remedy that default within 30 days after such notice. Plaintiff's exercise of its option was therefore premature as it did not allow defendants the 30 days to remedy the default.

In Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah 1980) the sellers sent several written notices to the defaulting purchasers. The Court, citing to previous authority stated:

> This court has consistently held that in order to forfeit a purchaser's interest under a uniform real estate contract, the seller must comply strictly with the notice provisions of the contract . . . . The provisions in the uniform real estate contract are not self-executing and to enforce them, it requires some affirmative act on the part of the seller to notify the buyer of what specific provision in the contract the seller is proceeding under and state what the buyer must do to bring the contract current. Fuhriman v. Bissegger, 13 Utah 2d 379, 375 P.2d 27 (Utah 1962), Leone v. Zuniga, 84 Utah 417, 34 P.2d 699 (Utah 1934).

This Court requires certain, definite, and specific notice of the performance required. In First Security Bank of Utah N.A. v. Maxwell, 659 P.2d 1078 (Utah 1983), the default provisions of a real estate contract were again at issue. The buyers had become delinquent on several occasions

and sellers had accepted late payments on occasion. This court stated:

> We think forfeiture should be refused when the notice given to the delinquent buyer is indefinite or uncertain as to the amount he is to pay or the performance demanded of him. Id. at 1081.

In the case at bar, we have no written notice which can be scrutinized to determine if sufficient notice was given to the buyers. The record only indicates that buyers were informed that the payments had not been paid and should be.

POINT II

WRITTEN NOTICE OF DEFAULT MUST BE GIVEN TO THOSE PARTIES WITH WHOM THE SELLER IS IN PRIVITY OF CONTRACT.

Respondents, Nelsons, do not dispute the issue raised in POINT II of Appellants' Brief that notice of default need only be given to those with whom the seller is in privity of contract. However, Respondents assert that written notice of default should have been given to the purchasers, Austins, who were in privity, as has been previously indicated in POINT I herein.

For purposes of this appeal, the question of whether notice of default should have been given to any of the subpurchasers simply is not relevant because inadequate notice was given to the Austins with whom Appellants were in privity of contract.

POINT III

TENDER TO THE ESCROW COMPANY CONSTITUTED TENDER TO THE APPELLANTS.

It is clear from the record that the Appellants received payments from the escrow company for a period of almost two years. This was done without any objection, except for those checks which were returned due to insufficient funds. Having accepted payment from Escrow Services, Inc. for that period of time, Appellants waived any objection that they may have had to receiving payment from Escrow Services, Inc.

Respondents do not dispute that the burden was upon the Austins to see that payment was properly tendered from Escrow Services to Appellants. Upon the failure of Escrow Services to make the June and July, 1982 payments as agreed between the escrow company and Austins, Austins were notified verbally by Appellants that payment had not been received. At that time, Defendants began collectively to obtain sufficient funds to make good the June and July, 1982 payments. Those payments were tendered to Appellants within 27 days of the first written notice of default in performance.

In any event, though the Trial Court ruled that payment by Austins to Escrow Services constituted payment to Appellants, it does not constitute error sufficient to reverse the judgment of the Trial Court. The issue of whether payment

to the escrow company constituted payment to Appellants is only relevant should this Court find that Appellants gave sufficient notice to Austins with respect to the default in performance of the Uniform Real Estate Contract. The question of sufficient notice and reasonableness of the time to cure are the threshold questions which this Court must address.

POINT IV

THE APPELLANTS ARE NOT ENTITLED TO FORECLOSE THE PROPERTY AS A MATTER OF LAW.

Though it is undisputed that Appellants did not receive the June and July, 1982 payments when they were due and Appellants gave verbal notice to Austins of the default and the default was not remedied within 30 days, it is also undisputed that payments for June and July, 1982 were made to the escrow company which went bankrupt taking Respondents' money with it and that the verbal notices of default were indefinite, uncertain, and not specific as to what was required of the Austins to cure the default.

In addition, in light of the circumstances and the July 19, 1982 notice being the first written notice of default received by any of the Respondents, the tender 27 days after written notice was a sufficient tender.

As previously stated in POINT I herein, this Court has consistently determined that with respect to the default provisions of a real estate contract, the same are

not self-executing and require some affirmative act on the part of the seller. The seller must give written notice of the default. Although that is not specifically stated in the cases cited in POINT I, an analysis of those cases indicates that written notices of default were sent prior to a notice of election. In the case at bar, the only written notice received by any of the Respondents was the notice sent to the Austins exercising their option and electing to foreclose the contract as a note and a mortgage.

Prior to that time, it is unclear from the record what demand was made of Respondents and the content of the verbal notices given with respect to the default.

POINT V

HAVING ACCEPTED LATE PAYMENTS IN THE PAST, APPELLANTS CANNOT REQUIRE STRICT PERFORMANCE.

By Appellants own admission, late payments have been tendered to them throughout the period of the contract (R 78, 177). Having accepted late payments before, the Appellants cannot require strict, timely performance without giving the buyers fair warning to that effect. Paul v. Kitt, 544 P.2d 886 (Utah 1975).

Without said demand for strict performance with respect to the time for payment, Appellants are estopped from insisting on timely payments. Assuming that the tender on August 16, 1982, 27 days after the first written notice of

July 19, 1982, was late under the circumstances and facts before the Court, Appellants are nevertheless precluded from seeking strict performance having waived that right by accepting late payments in the past.

CONCLUSION

The Trial Court did not err in denying Appellants' Motion for Summary Judgment and granting Respondent's Motion for Partial Summary Judgment. The default provisions of a real estate contract are not self-executing and in order to enforce the remedies therein, written notice of default and a demand for cure is required before a party can proceed with its remedies under the contract. In addition to written notice of default and a demand for cure, a reasonable time to cure the default, in light of all the circumstances, must be given the defaulting party.

Having failed to give certain, specific, and definite written notice of the default and what was necessary to cure, Appellants are precluded from foreclosing the property. The Trial Court judgment should be affirmed and Respondents should be awarded their attorney's fees.

RESPECTFULLY SUBMITTED this 27th day of December, 1983.

MORTENSEN & NEIDER

By 
James T Dunn

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Respondents' Brief, postage prepaid, this 27th day of December, 1983 to the following:

Frank J. Gustin
Third Floor, New York Building
Salt Lake City, Utah 84111

Mr. and Mrs. Lloyd H. Austin
831 West 3900 South
Bountiful, Utah 84010

Income Realty and Mortgage, Inc.
Secretary of State
Heber M. Wells Building
Salt Lake City, Utah 84111

Mr. and Mrs. David J. Isbell
692 North 700 East
Centerville, Utah 84014

Mr. Kim R. Wilson
1100 Newhouse Building
Salt Lake City, Utah 84111