1970

# Fred G. Jensen And Miriam D. Jensen v. Ray L. Nielsen And Mabel W. Nielsen : Respondent's Brief

# IN THE SUPREME COURT OF THE STATE OF UTAH

FRED G. JENSEN and
MIRIAM D. JENSEN,
*Plaintiffs and Appellants*

VS.

RAY L. NIELSEN and
MABEL W. NIELSEN,
*Defendants and Respondents*

## RESPONDENTS' BRIEF

On Appeal from the Judgment of No Cause
Sixth Judicial District Court for Garfield
Honorable Ferdinand Erickson

DON V. TIBBS
TIBBS & TERVORT
50 North Main Street
Manti, Utah 84642

Attorneys for Respondents

K. L. McIFF
MATTSSON, JACKSON & McIFF
151 North Main Street
Richfield, Utah 84701

Attorneys for Appellants

TABLE OF CONTENTS

## INDEX OF CASES CITED



## AUTHORITIES CITED

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

| | |
|---|---|
| FRED G. JENSEN and MIRIAM D. JENSEN, *Plaintiffs and Appellants* | Case |
| VS. | No. |
| RAY L. NIELSEN and MABEL W. NIELSEN, *Defendants and Respondents.* | 12160 |

---

# RESPONDENTS' BRIEF

---

## NATURE OF THE CASE

This is an action by buyers to recover funds paid on a real estate installment contract under the theory of unjust enrichment.

## DISPOSITION OF THE LOWER COURT

The case was tried to the Court and a judgment of no cause of action was entered against the plaintiffs. A motion for a new trial was denied and this appeal was taken.

## RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment of the District Court, or a remand for supplemental findings.

## STATEMENT OF FACTS

The Appellants brought an action in February, 1965, in the District Court for Garfield County, seeking restitution based on Respondents alleged unjust enrichment.

The Respondents sold to the Appellants for $35,000.00 on installment contract their family unit motel property located in Panguitch, Utah, known as Nelson's Motor Court. The contract was signed July 1, 1958. The Appellants paid $10,150.00 down, and took possession. The required $200.00 monthly payments were to be applied against accrued interest and the balance on the principal. The Contract did not provide for reduction of interest on advance payment (P. 101), the Sellers being older folks and desiring to use the monthly payments for living expenses in their retirement years. The Buyers made payments (sometimes delinquent) on the contract until December 1, 1961, but they failed to pay the property taxes or assessments as they became due.

The Appellants stayed in possession of the property for a period of six months after default in the payments, when the Respondents, under the provisions of the contract (July, 1962), rescinded the same and removed the contract documents from escrow.

The Appellants then vacated the premises and the Respondents did not hear from them again until two and one-half years later (1965) when they brought suit against Sellers for $15,071.00. Respondents filed an Answer and the various proceedings began.

Numerous attorneys represented the Respondents for various periods of time with changes of counsel coming about primarily because of Respondents age and inability to understand legal proceedings. There was an interlocutory appeal, which was dismissed by this Court. The case was ultimately tried and Judgment was entered by the District Court, holding that there was no unjust enrichment and this appeal was taken.

Appellants seek to recover a return of their payments and cost of alleged improvements less the reasonable rental which Appellants testified is $200.00 per month.

It will be noted that Appellants were in possession for 48 months, but made only 34 monthly payments.

The sales contract contains the following provision:

> "This contract shall be in default on the part of the Buyers if they fail to make payments within 5 days after the dates herein specified, or upon failure to do or perform any other covenant and agreement herein

contained. In the event of such default, the sellers can demand possession of said property and re-enter said premises and remove the purchasers and all other persons therefrom, and any payments made by the buyers up to the time of such breach shall be retained by the sellers as compensation for the use and occupation by the buyers of the said premises."

The gravamen of Appellants case is that if the Respondents (sellers) are permitted to retain the money paid on the contract, the Respondents will be unjustly enriched.

The Respondent, Mrs. Nielsen, testified that before the Contract was solemnized, Buyers asked Sellers concerning the income from this Motel in the previous five years. She testified that the Motel yielded the following gross amounts: 1953 — $4,721.75; 1954 — $6,727.00; 1955 — $4,509.00; 1956 — $6,327.50; and in 1957 — $8,909.50.

The testimony of Buyer, Mr. Jensen, was that during their four-year occupancy the motel yielded the first year $9,000.00; second year $8,000.00; third year $7,000.00 and the fourth and last year, until he quit operating, it yielded $6,500.00. It appears, therefore, that Buyer received income during his four years occupancy a total of $30,500.00. There is no evidence in the record to indicate what the net income would be in any year.

The Motor Court was a family business (p. 220). It did not have television, a swimming pool or air conditioning. Prior to the sale, the Sellers operated it themselves, did their own labor and made their living by renting motel units for family occupancy. During

the time the Buyers were in possession, they did the same, until Mr. Jensen left to work away from Panguitch and left his wife to operate the Motel.

During the Buyers' occupancy of the Motel, Mr. Jensen testified that some funds were expended by him for improvments of the property. This proof was disputed by the Sellers and the Court by its memorandum decision was unable to determine whether or not these expenditures would be deemed improvements or maintenance. After objection to proposed findings the court in its findings held improvement of $2,977.00.

The motel consisted of 12 units, each separate from the other. Each is essentially intended for housekeeping purposes. Its attraction to the traveling public would, therefore, be somewhat limited. It was not adorned as some glittering motels are, and was essentially the type of place you would expect to find a husband and wife operating.

## POINT I

## THE JUDGMENT OF THE TRIAL COURT THAT THERE WAS NO UNJUST ENRICHMENT IS SUPPORTED BY THE EVIDENCE.

On the $35,000.00 motel contract for sale, the Buyers (Appellants) paid $10,150.00 down, and $200.00 monthly payments (until they became in default) of $6,800.00. Appellants also paid out certain sums that they called improvements, which Respondents called maintenance. The only item determined as an improvemet was for outside wall siding, $2,977.20. Respondents note that it was not deemed an improvement in the Court's Memorandum Decision or in the proposed Findings, but only after objections to Findings were filed.

Buyer, Fred Jensen, on direct examination, testified that $200.00 per month would be reasonable as rental for the use of the premises. Buyers had used the premises for four years or 48 months, which at $200 per month, totals $9,600.00. This amount subtracted from the $16,950.00 (total cash paid), and improvements of $2,977.00, totals $19,927.00, leaves a balance of $10,327.00. Buyer testified that he had been engaged in selling real estate and had sold properties in Panguitch immediately prior to his terminating this contract (p. 93). He testified that he tried to sell the motel, but the best offer was $30,000.00, received in November or December, of 1961, the approximate time the Buyers defaulted and refused to further perform the contract or make any further payments. He testified that he did not think that was enough money for the property, but he was never able to get any higher offers, even though he had it listed for $35,000.00. Mrs. Nielsen testified (p. 199) that in her opinion the value of the Motel when it was taken back on July 1, 1962 was $20,000. Applying this $5,000.00 depreciation of the property or loss of bargain, it reduces the $10,327.00 to $5,327.00.

The Appellant, Fred G. Jensen, (p. 95) testified that $2,500.00 was paid by the Respondents as a real estate commission to the brother of the Appellant, which amount should likewise be deducted, leaving a balance of $2,827.00. The Buyer and Sellers stated that there were also back unpaid taxes of $437.00 and unpaid Street Assessments of $817.00 when the property was taken back by the Sellers (p. 120-121). These sums the Buyers were obligated to pay under the contract. The Respondents, upon their retaking possession, were required to pay these amounts. After deducting same from the $2,827.00, it leaves a balance of $1,573.00. Appellants testimony also was that they

had not made any replacements as to beds or rugs for at least two years prior to the default. The Respondent, Mrs. Nielsen, testified it was necessary for Sellers after retaking possession to buy twelve mattresses for an estimated cost of $1,200.00. When we apply this figure and the other miscellaneous items in the record against the $1,573.00, it leaves a nominal figure for Appellants to get back under the case theory in Perkins vs. Spencer.

The evidence was also to the effect that in 1957, the year prior to the Buyers going into possession, the motel with twelve units grossed approximately $8,70000. The Buyer testified on rebuttal that it was his recollection that in the year 1958 he grossed $9,000.00; the year 1959, $8,000.00; the year 1960, $7,000.00; the year 1961, $6,500.00, which indicates that while he had possession he was gradually losing business.

The Respondent Seller, Mrs. Nielsen, testified that when they went back into possession, for the year 1963, they grossed $6,989.50; 1964, $6,208.00; 1965, $6,135.00. These grosses are based on the same motel rates she had during the year 1957 before selling the motel to the Appellants. It is her testimony that the lower business was primarily caused by the Buyers' failure to maintain the motel as a going business or to properly operate it. It was recognized by the testimony of both parties that there were many different factors that could affect the business grosses, including other motels in the area. In any event, the testimony was that the business changed between the time that the Sellers delivered possession to the Buyers in 1958 and when they took it back in 1962, and the effect of Appellants' operation is that there was a loss of over $2,000.00 per year, through 1965, in comparative grosses (p. 195).

The Buyers contended that they should be entitled to consideration for the alleged improvements made, and then relied primarily on a composition stucco siding that they put on the premises. When the Respondents delivered the premises to the Appellants in 1958, the Buyers acknowledged the property was in good condition and repair. The Buyers also testified that nine months later he put on the composition brick sidewall for looks. Respondent Mrs. Nielsen testified the composition wall was not an improvement to the motel, and had the adverse effect of drawing heat out of the units. The nails also damaged the plaster on the inside walls.

It is also interesting to note that the Appellants' brother-in-law, Buzz Jensen, (p. 182), received the real estate commission from Sellers when he brought Buyers and Sellers together on this transaction, also turned out to be the salesman to Appellants of the composition siding that went on the walls. Whether or not this siding was an improvement was questioned, and there was testimony to the effect that it was not an improvement, but a detriment.

The other items that the Appellants rely on as improvements are inconsequential and appear to be only items of maintenance, and not worthy of consideration in this brief.

It is fundamental that a person going into equity should do equity, and should come into court with clean hands. As the court pointed out during the trial, an action for unjust enrichment is not made for the purpose of rewarding a Buyer who (in his opinion) has made a bad bargain, and then refuses to go forward with the transaction. The Buyers (Appellants) took in over $30,000.00 over a four year possession period

(p. 200). The Court held this also was a factor that shouldn't be overlooked. The court in essence stated that to return to Buyers the forfeited sums under these circumstances would not be fair.

Our Supreme Court in the case of Perkins vs. Spencer, 121 U. 468, 243 $P^2$ 446 (a landlord tenant situation) set forth the doctrine of unjust enrichment, and indicated factors to be considered.

1. Loss of an advantageous bargain.

2. Any damage to or depreciation of the property.

3. Any decline in value due to change in market value of the property not allowed for in items numbers 1 and 2, and

4. For the fair rental value of the property during the period of occupancy.

The total of such sums are to be deducted from the total amount paid in, plus any improvements for which it would be fair to allow recovery. Under the Perkins vs. Spencer case there is no amount that should be returned to Appellants.

The Respondents primarily rely in their defense on our Supreme Court's decision in Jacobson vs. Swan, 2 Utah 2d 59, 278 Pac. 2d 294.

> "Parties to contract to purchase real estate have right to contract that in event of default, all payments which have been made will be forfeited as liquidated damages, and such right should not be lightly interfered with, and it is only when forfeiture would be so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock conscience,

that court of equity will refuse to enforce provision."

When a trial judge has made such a determination, our Supreme Court will regard it as prima facie correct and will not disturb it unless it is plainly erroneous. Burton vs. Zions Co-op Mercantile Institute, 122 Utah, 360 249 P.2d 514.

In Carlson vs. Hamilton, 8 Utah 2d 272 332 P.2d 989, the Court stated that where one side or the other is to be penalized by enforcement of the contract so unconscionable that no fair-minded person would view the ensuing result with a profound sense of injustice that equity will deny the use of its jurisdiction in enforcement of all such unconscionability. It is not the function of the Court to renegotiate the contract of the parties.

In our case it was the acts of the Appellants that brought about the contract termination. Buyers decided they didn't like the bargain they had made and wanted to get out of it, so they failed to give the motel proper care and maintenance, and finally, for all practical effects, abandoned it. The Buyer, Mr. Jensen, had obtained employment elsewhere and was not residing on the property. He did, however, have his wife and children there when the agreement was terminated. They lived in the home, without adequate furniture, even using the outdoor picnic table for their indoor use (p. 103, 119). Is it any wonder that the business deteriorated? They claim as an excuse for their refusal to continue with the agreement that the Respondents wanted to be paid in full in conformity with the terms of the contract. Appellants state that because sellers wouldn't agree with changing the contract terms or reducing their security through refinancing, they are excused from performing and should get their pay-

ments back. When the contract was entered into it was provided there was to be no prepayment on installments. The Respondents are elderly people, and according to their testimony, they were retiring from business and were relying upon these payments for their living expenses (p. 101). When they insisted that they be paid according to the contract with the interest, and refused to renegotiate or subordinate the property, then Appllants defaulted, refused to make the payments, and made the election to give up the agreement.

The Respondents do not dispute the legal authorities cited by the Appellants and in fact agree with them. When the rules are applied to the fact situation in this case, however, there is no unjust enrichment. The forfeiture did not shock the conscience of the trial court.

POINT II

THE TRIAL COURT CORRECTLY APPLIED THE LAW OF FORFEITURE UNDER A REAL ESTATE INSTALLMENT CONTRACT BY RECOGNIZING THE RIGHT OF THE PARTIES TO CONTRACT FOR THE FORFEITURE OF PAYMENTS MADE ON A CONTRACT AS LIQUIDATED DAMAGES ON BUYERS DEFAULT IN MAKING THE PAYMENTS.

THE TRIAL COURT CORRECTLY HELD THAT THE RIGHT OF FORFEITURE SHOULD NOT BE INTERFERED WITH WHEN THE FORFEITURE WAS NOT EXCESSIVE AND DID NOT SHOCK THE CONSCIENCE OF THE COURT UNDER THE FACTS OF THE CASE.

The crux of Appellants appeal is based upon pulling out snatches of dialogue between Court and

Counsel during the trial and then attempting to reason that the Judge didn't understand the doctrine of unjust enrichment as set forth by our Supreme Court in the cases cited.

The Court stated on Page 4 of its Memorandum Decision:

> "This Court joins in the sentiment expressed in a concurring opinion by Justice Worthen in the Perkins v. Spencer, when he said: 'I am in general agreement with the doctrine that equity should give protection to a defaulting purchaser, whose default is neither wilful nor deliberate, against a grasping vendor who is waiting to spring the moment the vendee defaults in the slightest manner, and who seeks not the purchase money due him, but the property sold plus enormous amounts in addition."

> "As the court has hereinabove pointed out, equity is not a sanctuary where one who has made a bad bargain may find security and shelter."

The trial court further concluded that the evidence in this case did not shock the conscience of the Court.

The property was not in as good condition when Respondents were required to take it back as when it was sold (p. 186).

There was no longer a going business (p. 135). There had been no improvements between the summer of 1959 and November of 1961, when it was closed down (Jensen p. 102). The taxes were delinquent. Improvement assessments had not been paid. The motel needed immediate repair. Furniture (beds-mattresses

(p. 188), the most important item in a motel) had to be replaced (p. 227).

It is clear as the Lower Court held, that there was no unconscionable benefit to Sellers. In fact, there is still a loss and the evidence was that even after the premises were retaken, the Respondents held the matter open for over a year for the buyers to return and go forward on the agreement.

(P. 203):

Mrs. R. Nielsen, the seller, testifying:

"Q. Were you present during any conversation with the Jensens in the spring or in June or July of 1962, when they left indicating they were welcome to come back if they would like to carry on with their contract?"

"A. We told Mr. and Mrs. Jensen that we would keep the property in their name for one year and give them a chance to redeem it. We saved their Sign for two years and held it open for two years. There never was a move made to redeem."

The Trial Court relied upon all of the following cases:

Malmberg v. Baugh, 62 Utah 331, stated:

> "On purchaser's default in making payments on the purchase price of land and vendor's election to terminate the contract and re-enter, the vendor's measure of damages is the difference between the contract price with interest and the value of the land at the time of re-entry, plus the rental value of the property from the time the contract was terminated until re-entry, less any payments made on the contract; and, where the payments made on the contract exceed

such damages such excess may be recovered by the purchaser."

Croft v. Jensen, 86 Utah 13, stated:

"Use of term 'penalty' or 'liquidated damages' by parties to contract is not controlling in construction thereof, but whether provision is to be construed as agreement for liquidated damages or for penalty is to be determined by consideration of circumstances surrounding parties at time of its execution."

"In equity suit, reviewing court is required to pass upon weight of evidence, though in doubtful cases finding of trial court should not be disturbed."

Perkins v. Spencer, 121 Utah 468, stated:

"The construction of a forfeiture provision in a contract, in order to determine whether it is a provision for liquidated damages and valid or whether it is for a penalty, and not enforceable, depends on an interpretation of the whole contract in the light of all the circumstances surrounding the transaction."

"Where purchasers breached contract for purchase of realty, vendors were entitled to recover as damages for the breach the loss of an advantageous bargain, any injury to or depreciation of the realty, any decline in value due to change in market value of the property, not otherwise allowed under first two items, and fair rental value of realty during period of occupancy."

Jacobsen v. Swan, 3 Utah 2 59, stated:

> "Parties to contract to purchase real estate have right to contract that in event of default, all payments which have been made will be forfeited as liquidated damages, and such right should not be lightly interfered with, and it is only when forfeiture would be so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock conscience, that court of equity will refuse to enforce provision."

> "Trial judge's decision that forfeiture of payments on contract to purchase real estate, brought about by default in payment, constitutes penalty and not liquidated damages, will be regarded as prima facie correct and will not be disturbed unless plainly erroneous."

Cole v. Parker, 5 Utah 2 263, stated:

> "In the absence of fraud or imposition, parties to a contract are bound by the price or measure of value that they have agreed on, and such price must be paid notwithstanding it may be excessive."

> "Where purchaser refused to fulfill contract for purchase of real estate on grounds of vendor's fraud, but court determined no fraud had been practiced on purchaser by vendors, vendors were entitled to be credited, in computation of damage sustained because of breach of contract, with difference between contract

price and price forfeited property could be sold for and, in view of fact such amount exceeded amount paid on contract by purchaser further inquiry as to whether or not forfeiture provision of contract properly assessed actual damages suffered by vendors was foreclosed."

Strand v. Mayne, 14 Ut 2d 355 stated:

The court after discussing the Jacobson vs. Swan decision applied to the fact situation stated:

> "This clearly shows that the amount they have lost under the forfeitive provision is not unconscionable or disproportionate to what the parties contemplated in making the contract."

Consequently the Court looked at all the elements of damage in order to determine the propriety of the forfeiture. The Perkins case established damage critera to be applied after the Court found the forfeiture would be inequitable.

See the article by Ralph L. Jarman, Recent Utah Developments on Forfeiturs in Real Estate Contracts, 7 Utah Law Review, p. 95, Forfeiture Under Real Estate Installment Contracts in Utah, 3 Utah L. Rev. 30, 1952. Bodenheimer.

The Trial Court's decision was to the effect there was no unconscionability, hence there should be no restitution and that Equity should not aid one breaching an agreement to profit from his own wrong.

## CONCLUSION

Appellant argues that the Trial Court did not understand the law of unjust enrichment and was in

error in not specifically applying the rules laid down in the case of Perkins vs. Spencer.

Appellants overlook the fact that the numerous cases since Perkins vs. Spencer recognize the right of the parties to contract and that it is only when the forfeiture is grossly excessive as to be entirely disproportionate to any loss suffered that the Court of Equity should refuse to enforce the provision.

This Trial Court, after hearing the evidence, considering the payments made, the condition of the premises retaken and the income taken out of the business during the four years occupancy, didn't feel any shock by reason of the forfeiture clause.

The Trial Court held "He who seeks equity must do equity" and "that equity is not a sanctuary where one who has made a bad bargain may find security and shelter." This did not mean the Court did not consider the factors involved but instead the Trial Court, after hearing the evidence, did not consider there was an unconscionable benefit to the sellers by reason of this forfeiture provision.

The Lower Court's decision should be affirmed.

*Respectfully submitted,*

DON V. TIBBS
Attorney at Law
50 North Main Street
Manti, Utah 84642