1974

Cecil O. Eckard, And Marilyn J. Eckard v. Gale G. Smith, And Joy T. Smith : Brief of Plaintiffs-Respondents

IN THE

SUPREME COU

OF THE

STATE OF

CECIL O. ECKARD
MARILYN J. ECK
Plaintiffs

vs.

ALE G. SMITH
DY T. SMITH, his
Defendants

BRIEF OF PLAINT

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FOR
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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CECIL O. ECKARD, and
MARILYN J. ECKARD, his wife,
Plaintiffs-Respondents,

vs.

GALE G. SMITH, and
JOY T. SMITH, his wife,
Defendants-Appellants.

Case No.
13567

BRIEF OF PLAINTIFFS-RESPONDENTS

STATEMENT OF KIND OF CASE

Plaintiffs-Respondents brought an action for specific performance of a written option to purchase real property.

Defendants-Appellants counterclaimed for damages for rent and unlawful detainer.

DISPOSITION IN LOWER COURT

The Trial Court, the Honorable Bryant H. Croft presiding, entered judgment of specific performance and damages in favor of Plaintiffs-Respondents, and

judgment of dismissal of Defendants-Appellants' counterclaim.

RELIEF SOUGHT ON APPEAL

Respondents desire that this Court affirm the judgment of the trial court.

STATEMENT OF FACTS

1. In June, 1971, Defendant-Appellant Gale G. Smith, a general contractor doing business as Gale G. Smith Construction Co., and who had engaged in the business of building and selling homes for over 20 years, undertook to sell Plaintiff-Appellants, Cecil O. Eckard and his wife, Marilyn J. Eckard, a home. (R-100). The Eckards had previously purchased a home from Smith. (R-118).

2. After showing the Eckards two homes constructed by his business, Smith showed them a duplex which he was constructing and urged them to lease one unit of the duplex, 2446 Wilshire Drive, Salt Lake City, for one year with an option to buy the duplex, single unit or both, if the Eckards would prepay one year's rent of $4500 and told them they would receive credit on the purchase price for the amount of the prepayment (R-100, 101). At that time another party was interested in the other unit. (R-101).

3. Based upon Smith's representations, the Eckards then signed a "Residential Rental Agreement" (Exhibit 1-P) for a one-year term on one unit, with

an option to buy their unit or both at the end of the rental period with a credit for the money paid in advance. (R-100, 101) (Findings No. 2, 3, R-25).

4. The agreement was prepared by Mr. Smith, with the knowledge and assent of his wife, Joy T. Smith, who discussed the lease and option with her husband prior to its execution, was very pleased with it, but did not know if she typed it. (R-127, 128) (Findings No. 8, R-25).

5. Mr. Smith also drafted the added covenants on the second page of the Agreement (Exhibit 1-P) which are the subject of this appeal. (R-137). The agreement was signed by Mr. Smith, and the Eckards, but not by Mrs. Smith. (Exhibit 1-P).

6. The Eckards then prepaid $4,500 in rent and $100 cleaning deposit pursuant to the agreement. (R-101) (Finding No. 3, R-25).

7. Mrs. Smith knew of the $4,500 prepayment, and it was treated by both Defendant-Appellants as ordinary income on their joint income tax return. (R-128). The $4,500 was placed in the business account, to which Mrs. Smith had complete access, and which was used for personal as well as business expenses. (R-127, 128).

8. Subsequent to the execution of the Agreement, the Eckards took possession of their unit, which was still only partially finished. (R-102).

9. Smith thefeafter added drapes, carpets, land-

scaping in an amount of $4,649.52 as found by the Trial Court. (Finding No. 9, R-26). (*See also* Exhibits 10-D, 11-D.)

10. In April, 1972, three months prior to the expiration of the lease, the Eckards notified Mr. Smith and his wife of their intention to buy the unit they were living in, 2446 Wilshire Drive. (R-112, 128, 129, 148, 149) (Finding No. 4, R-26).

11. Mr. Smith then assisted the Eckards in the arrangement of a loan for the purchase price of their unit by having loan application forms sent to the Eckards from his lending institution. (R-104, 151) (Finding No. 6, R-26).

12. Thereafter Defendants refused to honor the option unless the Eckards agreed to other conditions and also refused to give the plaintiffs any credit on the purchase price for the prepaid amount of $4,500.00. (R-180) (Finding No. 5, R-26).

13. Prior to the refusal of the Smiths to perform pursuant to the option, the Eckards received a loan commitment from Prudential Federal Savings and Loan at a favorable interest rate of 7½%, of which Mrs. Smith was aware. (R-130, R-104, 105, R-119-126) (Exhibit 3-P). As a result of this refusal to perform, the later interest rate available for the same loan was 8¾% for the same financing commitment. (R-121) (Finding No. 6, R-26).

14. Mrs. Smith testified that until sometime in

August, 1972, she fully intended to sell the Eckards their unit. (R-129).

15. Mrs. Smith also testified that her husband conducts all of the business, and that she does whatever he asks in regard to the business. (R-133) (Finding No. 7, R-26). She further testified that what he did in regard to the Eckard contract was okay with her, even though the land used for construction purposes was also in her name. (R-133)

16. Subsequent to trial, and prior to filing notice of appeal, in accordance with the judgment of the lower court, defendants-appellants conveyed the subject unit to plaintiffs by warranty deed in return for a cashier's check for $37,744.02 which they both endorsed. In addition, the Smiths have since sold the other unit to another party.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THE OPTION TO PURCHASE SPECIFICALLY ENFORCEABLE AGAINST DEFENDANTS.

Any ambiguity in a written instrument is resolved against the persons who drew it. *Wingets, Inc. v. Bitters,* 28 Utah 2d 231, 500 P.2d 1007 (1972); *Skousen v. Smith,* 27 Utah 2d 169, 493 P.2d 1003 (1972); *Williston on Contracts,* § 621 (3d Ed. 1961); *Corbin on*

Contracts § 559 (1963). It is undisputed that Mr. Smith wrote the option in this case. The trial court found that the intent of the parties, by their acts and in the light of the entire instrument taken as a whole, was to grant an option to purchase for a sum certain, at a definite time, and for specific property--the duplex, one unit, or both if available. (Finding Nos. 2, 9; R-25, 26). In return for the option, plaintiffs prepaid $4,500.00. (R-101).

The parties here did more than simply agree to agree as is argued by defendants on appeal; they reached an assent on all necessary terms which were specifically enforced by the trial court. Defendants argue that the word "first option to buy" should be given a technical meaning to defeat the $4,500.00 prepayment for an option which spells out all necessary conditions for a binding contract. The trial court found that Mr. Smith authorized the option and that the intent of the parties was that the $4,500.00 prepaid was a "down payment" for a home and which prepayment was intended to be a part of the purchase price if the option were exercised. (R-185). To isolate the word "first option to buy" under these circumstances is contrary to the general rule that isolated words and clauses "will not be allowed to prevail over the general language utilized in the instrument". *Steen v. Rustad,* 313 P.2d 1014, 1018 (Mont. 1957).

In the *Steen* case, the Montana Supreme Court refused to adopt the technical meaning advanced by

defendants where "first option to buy" was used in a similar lease with option to buy. The Court stated that the other language in the agreement " . . . tends toward only one interpretation; that the plaintiff was given an exclusive option to buy . . ." *Id.* Similarly, the Washington Supreme Court refused to give the technical meaning to "first option to purchase" in light of the other language in the contract and gave the plaintiffs an exclusive option to purchase the land in question. ***Roth v. Snider,*** 25 Wash. 2d 514, 171 P.2d 819, 821 (1946). *See also, Stevens v. Fanning,* 59 Ill. App. 2d 285, 207 N.E. 2d 136, 20 A.L.R. 3d 769 (1965).

Appellants argue that the trial court also misinterpreted two other phrases, "if available" and "said duplex". It is clear from the evidence and Findings of the trial court that the Eckards were interested in one half of a duplex, the half they leased and were living in. They made a down payment of $4,500.00 for the year in advance for an option to buy their unit at the end of the lease period with the $4,500.00 credited towards the purchase price.

Appellants argue that the Eckards could only buy the unit they were living in if it was "available". The contract reads: "first option to buy said duplex, single unit or both if available". The trial court found this phrase "if available" to mean *if the other half was available.* (Conclusions of Laws, R-27). To apply the phrase "if available" to the unit the Eckards were living in rather than to both units if the *other* unit was available

would be a strained interpretation and contrary to the evidence.

Next, appellants argue that "duplex" only means two units or the structure as a whole, seeking to reverse the trial court's crediting of the prepaid amount to the purchase price of Eckards unit. (brief at 11). The disputed language is as follows: "The entire year's lease payment will be credited to sale price if lessee purchases *said duplex*". (Emphasis supplied) (Exhibit 1-P paragraph 6, typed portion). "Said" is a referrent. "Duplex" is earlier used twice in the Agreement: "said duplex, single unit or both" in paragraph 4, typewritten portion (Exhibit 1-P), and in the habendum clause. Since the referrent "said" is also used in paragraph 4, the definition of "duplex" in the habundem clause is controlling. The habundem clause states:

> Lessor does hereby lease and rent unto Lessee, and Lessee does hereby take as tenant under Lessor, the dwelling accomodations known as "COUNTRY CLUB DUPLEX" situated at 2446 Wilshire Drive, County of Salt Lake, State of Utah . . . .

If the word "duplex" in the above habendum clause was intended by the drafter to control the meaning of the document and mean the entire duplex or both sides as Appellants argue, the address should read "2446-2448 Wilshire Drive."

As to all the ambiguities in the document there

was conflicting testimony, the credibility of which was weighed and applied properly by the trial court. (R-100, 101, 179, 180).

Another minor point raised by Appellant disputes the computation of the additional charges for carpets, drapes and landscaping made by the trial court. Said determination is supported by the evidence and should be upheld. (R-142--148, 149, 150, 156--171, 183--184) (Finding No. 9, R-26).

POINT II

THE TRIAL COURT PROPERLY HELD THAT DEFENDANT JOY T. SMITH WAS ESTOPPED TO DENY THE OPTION TO PURCHASE BECAUSE SHE ENJOYED THE FRUITS OF PLAINTIFFS' PERFORMANCE AND CHANGE IN POSITION, AND KNEW THAT HER HUSBAND WAS ACTING IN ALL RESPECTS AS HER AGENT.

Parties are estopped to plead the Statute of Frauds where they have accepted significant payments in part performance under the contract being enforced. *Adams v. Taylor,* 15 Utah 2d 296, 391 P.2d 837 (1964). *Utah Code Ann.* Section 25-5-3 (1974).

Mrs. Smith should not be allowed to seek refuge behind the Statute of Frauds where she has been the beneficiary of the prepaid $4,600 for the option to buy

and the promise that the $4,600 would be credited to the purchase price.

In the *Adams* case above, this Court held a property owner who had not signed a lease with an option to purchase was estopped from asserting the Statute of Frauds where he had, through his wife, accepted monthly payments for two years of the five-year lease. "Acceptance of monthly payments for two years seems to be sufficient part performance to take the case out of the Statute of Frauds, . . ." *Id.,* at 837. *Accord, LeGrand Johnson Corp. v. Peterson,* 26 Utah 2d 158, 468 P.2d 1940 (1971) (Statute of Frauds not applicable where $44,000 was advanced for development of mining claim).

Appellant relies upon *Coombs v. Ouzounian,* 24 Utah 2d 39, 465 P.2d 356 (1970), and *Obanion v. Paradise,* 393 P.2d 682, 39 Cal. Rptr. 370 (1964) (cited by *Coombs*), for the proposition that a wife's interest in real property cannot be divested without her signature. Neither case, however, is applicable in the case at bar because of widely differing facts. The case which applies to the present case is *Adams, supra.*

(1) In *Coombs,* the party seeking to enforce the unsigned instrument was an attorney. *Supra* at 358. In the present case, the party seeking to avoid the enforcement was an experienced contractor. (R-153, 156).

(2) The *Coombs* trial court found that the Seller's wife made no representation nor

did she agree or consent to the option sought to be enforced. *Id.* In this case, the trial court found that the seller's wife knew of the lease and option, allowed her husband to conduct all business affairs and received the benefits of the prepaid $4,600. (Findings Nos. 7, 8; R-26).

(3) The consideration in *Coombs* was only $100.00; in the present case the seller and his wife received $4,600.00.

(4) In *Coombs* the Seller's wife was silent; in this case, Seller's wife was actively engaged in the discussions.

(5) The wife in *Coombs* did not want to sell the property; the wife in this case actively favored the sale. (R-128).

(6) There was no detrimental reliance in *Coombs* resulting in an estoppel. In the present case there were changed positions (R-100, 101) coming within the language of this Court in *Coombs*:

> The instant action is clearly distinguishable from a fact situation, wherein the principal has retained and enjoyed the benefits of a bargain and is therefore held to have ratified his agent's unauthorized acts so as to take the contract out of the Statute of Frauds. Footnote omitted).
> *Id.* at 359.

Obanion v. Paradiso, supra, is equally inapplicable:

(1) In *Obanion* the seller's wife, who

> had not signed the option, knowing of her husband's agreement, was not estopped because she conveyed her interest to a third party prior to the time the option was to be exercised. Defendant Joy T. Smith made no such conveyance--her only conveyance was when she conveyed the property to the Eckards at the conclusion of the trial below.
>
> (2) The Seller in *Obanion* received no part performance, only an offer of part performance; Mrs. Smith received the benefit of the $4,600.00 prepayment.

Other courts have also held that a wife or husband can be considered an agent for the other regardless of written authority under certain circumstances.

The Washington Court of Appeals sustained a judgment for specific performance against a contention that a seller's wife failed to sign the contract, stating:

> As early as *Konnerup v. Frandsen,* 8 Wash. 551, 36 P. 493 (1894), the Washington Supreme Court recognized that a wife may be estopped from nullifying the sale of real property made by her husband. The wife's knowledge of the sale and acceptance of its fruits are sufficient facts to constitute estoppel. See *Sanders v. Wells,* 71 Wash. 2d 25, 426 P.2d 481 (1967).

Louron Industries, Inc. v. Holmes, 7 Wash App. 834, 502 P.2d 1216, 1219 (Wash. App. 1973). The facts in *Louron Industries* parallel this case:

> In the instant case Mrs. Schlichtig (seller's wife) acquiesced in her husband's handling of and management of their real estate. She said that what he did with it was all right with her. She had actual knowledge of the offer to sell to respondent, was agreeable to its terms, and left the arrangement in the hands of her husband . . .

Id. In addition to these facts, the buyer in *Louron* also paid $1,000.00 earnest money and made some improvements in the property.

The Idaho Supreme Court also refused to overturn a decree of specific performance where there was a lack of the wife's signature where the evidence disclosed that the seller's wife "was either aware of the contract to convey 'Poplar Farm' or actually participated and benefitted from the contract during its duration. The trial court properly held her estopped to invoke the protective provisions of I. C. § 32-912 [Statute of Frauds]." *Brown v. Burnside,* 94 Idaho 363, 487 P.2d 957, 962 (1971). *Accord, Young v. Neill,* 190 Ore. 161, 220 P.2d 89 (1950).

CONCLUSION

The decision of the trial court below is supported by the evidence, and should be affirmed. The thrust of this case is the fact that the plaintiffs were induced to enter into a contract drafted by an experienced builder who acted in every way as agent for his business and for his wife. The defendants should not now be permitted

to escape the effects of those inducing promises. The trial court correctly found the Eckards prepaid a down payment to the Smiths.

In this case, appellants conveyed the subject unit by warranty deed to the Eckards on January 4, 1974. Appellants filed their notice of appeal on January 10, 1974. If appellants had desired to prevent specific performance and preserve their alleged claims on appeal, they could have done so without conveying the property. Since they did not reserve their claims and conveyed the property, their contentions are moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three copies of the foregoing brief on defendants by mailing the same, postage prepaid, to Richard W. Perkins, attorney for Defendants-Appellants, at 2525 South Main Street, Suite 14, Salt Lake City, Utah, this _____ day of June, 1974.
