

1994

Gary Goldberg and Diana Meehan v. Jay Timmons and Associates : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCKET
K. J.
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J.

DOCKET NO.

940640

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

GARY GOLDBERG and DIANA
MEEHAN,

Plaintiff-Appellees,

vs.

JAY TIMMONS & ASSOCIATES, a
California general
partnership, and JAY TIMMONS
and MARSHALL McDANIEL,
individually and as partners,

Defendants-Appellants.

Civil No. 940640-CA

Priority No. 15

APPELLANTS PETITION FOR REHEARING

Appeal From A Final Judgment Of
The Third District Court Of Summit County
Judge David S. Young

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COURT OF APPEALS

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The Defendants/Appellants Jay Timmons & Associates, Jay Timmons, and Marshall McDaniel ("Defendants") submit the following petition for a rehearing.

ISSUE PRESENTED BY PETITION

Does this Court have discretion to deny the Defendants attorney's fees specifically provided for in the restrictive covenants at issue in this matter?

SUMMARY OF ARGUMENT

In footnote 6 concluding the opinion rendered in this matter, the Court indicated that because it was reversing the trial court's decision in favor of the Plaintiffs, it was also reversing the award of attorney's fees in Plaintiffs' favor. The Court indicated, however, that each side would bear its own litigation expenses. Defendants, who have prevailed in this matter, cannot escape the conclusion that the Court's ruling prevents the recovery of attorney's fees incurred by them both at trial and on appeal. Defendants respectfully submit that under Utah law, the Defendants are entitled as a matter of law to reasonable attorney's fees incurred in the trial court and on appeal. Accordingly, Defendants respectfully request that the Court revise footnote six to provide for the recovery of attorney's fees by the Defendants both in the trial court and on appeal, and remand to the trial court for a determination of what amount of fees is reasonable in this case.

FACTS

Plaintiffs sued the Defendants for alleged violations of the provisions of the recorded Evergreen Subdivision Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). The case was tried to a jury, and the jury returned a verdict in favor of the Defendants on every allegation. The judge subsequently determined that the jury verdict was advisory. While he agreed with the jury that the Defendants did not violate certain

provisions of the CC&R's, be concluded that other provisions of the CC&Rs were violated. Ultimately, the court ruled in favor of the Plaintiffs on certain allegations and awarded the Plaintiffs \$35,000.00 in attorney's fees.

On appeal, this Court concluded that the judge erred as a matter of law in deeming the jury verdict to be advisory and non-binding. The Court reversed and remanded for entry of a judgment consistent with the jury verdict. The Court's decision has the undisputed effect of making the Defendants the prevailing party on every issue. Notwithstanding, the Court ruled that the Defendants are not entitled to recover the reasonable attorney's fees incurred in this matter, despite the fact that the CC&R's at issue expressly provide that "[a]ny judgment rendered in any action or proceeding pursuant hereto shall include a sum for attorney's fees in an amount as the court shall deem reasonable, in favor of the prevailing party."

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO REASONABLE ATTORNEY'S FEES AS A MATTER OF LAW

While footnote 6 of the Court's opinion appears to conclude that this Court has discretion to refuse to award attorney's fees provided by contract to a prevailing party, the Defendants respectfully suggest that no such discretion exists when fees are provided for by contract rather than statute. Indeed, Utah case law establishes that the recovery of fees when provided for by contract is a matter of legal right.

Utah has adopted the view that attorney's fees provided for by contract, such as here, are recoverable as a matter of law and courts do not have discretion to deny such an award.¹ In *Saunders v. Sharp*, 840 P.2d 796, 809 (Utah App. 1992), this court declared:

While courts may, in some situations, award attorney fees on an **equitable** basis attorney's fees, when awarded as allowed by law, are **awarded** as a matter of legal right.

One such instance occurs when the right is contractual. In such cases, the court does not possess the same equitable discretion to deny attorney's fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees.

Id. at 809 (citations, quotations and footnote omitted). The *Saunders* court concluded that "provisions in written contracts providing for attorney's fees should ordinarily be honored by the courts." *Id.* at 809-810.

Similarly, the Utah Supreme Court has also held that if "reasonable fees are recoverable by contract", "it is a mistake of law to award less than that amount." *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988) (emphasis added). The *Dixie State Bank* court concluded that a trial court "commits legal error if it awards less than a reasonable fee to ... [a] successful litigant" when provided for by contract. *Id.* at 991. Undeniably, if failure to award less than reasonable attorney's fees constitutes a "mistake of law", it is certainly an even more egregious "mistake of law" to refuse to permit the recovery of attorney's fees altogether. In short, Defendants are entitled to their attorney's fees as a matter of law in Utah.

¹Courts have held that provisions in restrictive covenants providing for the recovery of attorneys fees are contractual in nature and have applied the rules applicable to contractual provisions. *See, e.g., Amoco Realty Company v. Montalbano*, 478 N.E.2d 860, 865-866 (Ill.App. 2d. 1985). Utah courts have held that restrictive covenants are contracts and should be interpreted and treated as such. *See Cecala v. Thorley*, 764 P.2d 643, 644 (Utah App. 1988).

In addition, the Court should allow Defendants to also recover their fees on appeal. The Utah Supreme Court has clearly declared:

We therefore adopt the rule of law that a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract, and overrule *Swain* and *Downey State Bank* insofar as they may be to the contrary.

Management Services, Inc. v. Development Associates, 617 P.2d 406, 409 (Utah 1980) (emphasis added); *see also, Cobabe v. Crawford*, 780 P.2d 834, 837 (Utah App. 1989).

Thus, it is clear that Defendants are entitled to recover not only reasonable attorney's fees incurred in the trial court, but also reasonable fees expended on appeal. In the words of this Court and the Utah Supreme Court, the Defendants are entitled to recover their attorney's fees in this case as a "matter of legal right" and to deny them fees in a reasonable amount constitutes a "mistake of law." Accordingly, this court should revise footnote 6 and remand this case to the trial court with direction to determine reasonable fees incurred by the Defendant at trial and on appeal.

II. NO EXTRAORDINARY CIRCUMSTANCES EXIST THAT WOULD JUSTIFY REFUSAL TO ENFORCE THE CLEAR PROVISION OF THE CC&R'S PROVIDING FOR RECOVERY OF ATTORNEY'S FEES

In *Cobabe*, this court noted in *dicta* that in "extraordinary circumstances" some courts have declined to award attorney's fees to a prevailing party in spite of an enforceable contractual provision. *Id.* at 836 n.3. Notwithstanding its footnote 3, the *Cobabe* court reversed the trial court's denial of fees based on a contractual provision. The court gave three examples of cases constituting extraordinary circumstances. The first, *Fullmer v. Blood*, 546 P.2d 606 (Utah 1976), the only Utah case Defendants have

located in which a court refused to award any fees despite an enforceable contractual provision, involved an instance in which the prevailing Plaintiff had already been awarded over \$12,000 as a forfeiture under a real estate purchase contract. *Id.* The court indicated that because of the forfeiture involved, it would uphold the trial court's determination to deny attorney's fees. Note, however, that the trial court was permitted to decide the issue in the first instance. Moreover, the *Fullmer* case has clearly been superseded by the *Saunders* and *Management Services* decisions, which clearly hold that attorney's fees provided for by contract are recoverable as a matter of legal right.

The second case mentioned by the *Cobabe* court is *Cable Marine, Inc. v. M/V Trust Me II*, 632 F.2d 1344 (5th Cir. 1980) which involves a situation where the Plaintiff prevailed but had rejected settlement offers substantially equal to the ultimate judgment. The third case, *United States v. Mountain States Constr. Co.*, 588 F.2d 259 (9th Cir. 1978) involved wrongdoing by both parties. Thus, the cases noted in *dicta* by the *Cobabe* court involved primarily refusals to allow Plaintiffs to recover fees because such a result would work a serious inequity to the Defendant and because conduct on the part of the Plaintiff indicated that the fees were unnecessarily incurred.

Here, by contrast, the facts compel the conclusion that the Defendants are entitled to their attorney's fees. The Defendants in this case did absolutely nothing that would justify denial of their right to attorney's fees. They were sued and forced to incur expenses to defend themselves against the Plaintiffs' attack. They ultimately prevailed on every issue, and should not be forced to bear their attorney's fees in this matter. It is one thing to deny a plaintiff who willfully files a suit the recovery of his fees. It is quite

another to deny prevailing defendants, forced to retain counsel to defend themselves, their fees, particularly when the CC&R's Plaintiffs sue under clearly provide that the prevailing party shall recover its attorney's fees in an action to enforce the CC&R's.

Article VI, Section 1(a) of the CC&R's provides:

Breach of any of the covenants contained in this Declaration and the continuation of any such breach may be enjoined, by the Declarant, any Owner or by the Architectural Committee. Any judgment rendered in any action or proceeding pursuant hereto shall include a sum for attorney's fees in an amount as the court shall deem reasonable, in favor of the prevailing party

It is beyond dispute that this action was one to enforce the CC&R's and that the Defendants were the prevailing party. Plaintiffs were well aware of the attorney's fees provision when they decided to file a lawsuit. Notwithstanding, they determined to press forward with litigation. Indeed, Plaintiffs made a request for and were awarded attorney's fees based on the provision in the by the trial court CC&R's. No extraordinary circumstances exist which justify a denial of the Appellant's attorney's fees in this case.²

CONCLUSION

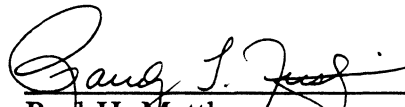
Because it is a mistake of law to refuse to award attorney's fees provided for by contract, this Court should revise footnote 6 of its opinion and remand to the trial court

² The only "extraordinary circumstance" in this case appears to be that it was a close case on the evidence. The jury decided the case one way, the judge another. However, close cases cannot constitute extraordinary circumstances. To so conclude would render contractual attorney's fees provisions a nullity in virtually all cases that go to trial. Virtually every case that proceeds to trial is a close case--otherwise it would have settled or been dismissed. Thus, the Court here should not deny Defendants' request because the case may have been close. The establishment of such a precedent will only encourage protracted battles over attorney's fees.

for a determination of reasonable fees incurred by the Defendants at trial and on appeal.

RESPECTFULLY SUBMITTED this 15th day of June, 1995.

KIRTON & McCONKIE



Paul H. Matthews
Randy T. Austin
Attorneys for Defendants-Appellants

MAILING CERTIFICATE

I hereby certify that on the 15th day of June, 1995, I caused to be delivered by the method indicated below a true and correct copy of the foregoing PETITION FOR REHEARING to the following:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ FAX TRANSMISSION

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