

1994

Larry R. Vonwald v. Kevin Plumb : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY R. VONWALD,
Plaintiff-Appellant,
V.

No. 940731-CA

KEVIN PLUMB,
Defendant-Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, HONORABLE GLENN K. IWASAKI, PRESIDING

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Marilyn M. Branch
Clerk of the Court

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JURISDICTION

The jurisdiction of the Court of Appeals is based on a transfer from the Supreme Court of Utah under Utah Code Ann. 1953, Sec. 78-2a-3(2)(k) (1992).

STATEMENT OF ISSUES

The following is included as supplementing the standard of appellate review part of paragraph 4. under the heading STATEMENT OF ISSUES as contained in appellant's opening brief, page 4. The question there presented relates to the trial court's failure to exercise its discretion in not considering or ruling upon appellant's URCivP 11 sanctions. The failure of the trial court to exercise its discretion, and whether or not it should have, presents a legal question subject to review for correctness. Crossland Savings v. Hatch, 877 P.2d 1241 (Utah App. 1994), citing

Garrett v. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987).

ARGUMENT AND AUTHORITY

1. Contract terms that are clear and unambiguous are interpreted according to their plain and ordinary meaning and extrinsic or parol evidence is generally not admissible to explain the intent of the parties. Equitable Life and Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah App. 1993).

Appellee Plumb contends that the provision "Buyer to pay for topographic study for property and obtaining approval of building plans by Salt Lake County within 30 days of seller providing evidence of clear and marketable title" preceded by "[s]pecial considerations and contingencies. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing:. . ." establishes that county approval of appellee Plumb's building plans is a condition precedent to closing. Appellee Plumb argues "[c]learly, obtaining approval of building plans by Salt Lake County was a condition

precedent to closing. Otherwise, it would not have been included in Section 7 which specifically listed "conditions and/or contingencies which must be satisfied prior to closing." [Brief of Appellee, p. 9] In doing so appellee Plumb fails to apply the plain and ordinary meaning rule. Thus, Section 7 is labeled or headed "special considerations and contingencies - this offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing," but what follows after the label or heading, interpreted according to its plain and ordinary meaning, gives Plumb the discretion to within 30 days of seller providing evidence of clear and marketable title, to pay for a topographic study and obtain county approval and possesses none of the characteristics or terminology of the condition appellee Plumb ascribes to it, does not implement the same, and therefore the corollary legal consequences of a condition precedent should not follow. The nature of the language used by appellee Plumb controls and not the form of the printed label or heading.

2. Appellee Plumb asserts in his brief that he supported his motion for summary judgment with affidavits that were unopposed by appellant VonWald; at the same time he asserts that the contractual provisions at issue are unambiguous in providing that county approval is a condition precedent to closing. If the contract is unambiguous "extrinsic or parol evidence is generally not admissible to explain the intent of the parties." Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187 (Utah App. 1993). Appellant VonWald agrees that the contract is unambiguous, but unambiguous and did not provide for a condition precedent as appellee claims.

Some of the factual assertions made in appellee's brief require comment. At page 5 it is stated that "Plumb submitted the site plan to William A. Marsh [], Section Manager, Salt Lake County Development Services Division, for approval []. Marsh disapproved the site plan because the slope of the driveway exceeded the county limits []. Without an approved site plan, Plumb could not

thereafter obtain an approved building plan. []" Whether the site plan was submitted to the county is questionable; submission to the county would have to be in accordance with existing regulations and there is no indication of what is required for a site plan to be submitted "to the county." It would seem though that in this instance where Marsh in his disapprov[al] of the driveway included in the site plan, stated that the "[r]emainder of site plan must be approved prior to issuance of a building permit" the site plan was not submitted to nor "rejected by the county." [Brief of Appellee, p. 5] In passing, it would appear that it would be impossible if not impracticable, for the county to give appropriate consideration or take action on a site plan without knowing something about the structure the site plan is designed to accommodate.

None of this is relevant [assuming the Court agrees that the contract is unambiguous] except as to appellee Plumb's good faith. Were the Court to find that Section 7 establishes the existence of the condition precedent [county approval of building plan] the inquiry does not end. Where the

performance of the contingency or condition is within the control of a party to the agreement, the party for whose benefit the condition precedent runs is required to use "reasonable efforts" to have it occur.

The failure to perform a condition precedent may be construed as a breach of contract. Hardin, Rodriguez & Boivin v. Paradigm Ins., 962 F.2d 628 (7th Cir. 1992); Restatement (Second) of Contracts Sec. 225(3).

The record is devoid of any facts showing that appellee Plumb used reasonable efforts to satisfy the requirements of the condition precedent he claims exists before he canceled the contract.

The doctrine of good faith performance as it relates to the covenant of fair dealing and good faith imposes a limitation on the exercise of discretion vested in one of the parties to a contract. In describing the nature of that limitation the courts of this state have held that a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily,

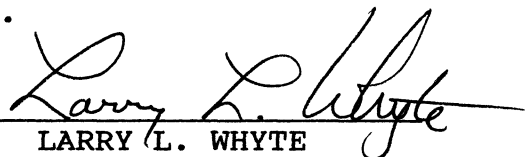
capriciously, or in a manner inconsistent with the reasonable expectations of the parties. S t . Benedicts Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991); Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991); Brown v. Weis, 871 P.2d 552 (Utah App. 1994).

Where county approval of building plans is necessary is it in the discretion of appellee Plumb to not make application for approval of building plans but do what he did here, and thereby render good faith performance? Appellee's own allegations raise an inference of bad faith.

CONCLUSION

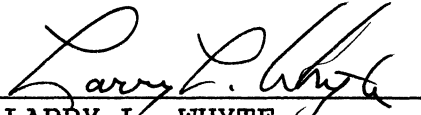
Appellant VonWald respectfully requests that the order here appealed be in all things reversed and the matter remanded for trial such remand be on the basis indicated in appellant's opening brief.

DATED December 19, 1994.


LARRY L. WHYTE

On December 19, 1994, two copies of the foregoing hand-delivered to Dennis K. Poole at 4543

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LARRY L. WHYTE