1994

Larry R. Vonwald v. Kevin Plumb : Petition for Rehearing

Utah Court of Appeals

Dennis K. Poole; Attorney for Appellee.
Larry L. Whyte; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

LARRY R. VONWALD,

Plaintiff and Appellant,

V. No. 940731-CA

KEVIN PLUMB,

Defendant and Appellee.

PETITION FOR REHEARING

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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Category (15)

IN THE UTAH COURT OF APPEALS

Larry R. VonWald

Plaintiff and Appellant,

v. Case No. 940731-CA

Kevin Plumb,

Defendant and Appellee.

PETITION FOR REHEARING

Plaintiff-appellant [VonWald] herewith makes and files his petition for rehearing pursuant to Rule 35, Utah Rules of Appellate Procedure, as to the memorandum decision of the Court dated and filed May 25, 1995, as follows:

Points of law or fact the Court overlooked or misapprehended:

Without referencing the particular language and without subjecting that language to appropriate analysis, the Court of Appeals in its memorandum decision "conclude[s] that **it** [paragraph 7 of the parties' Earnest Money Sales Agreement] creates a condition precedent which failed due to Plumb's inability to gain county

approval of his plans."

The Court's conclusion violates the "plain and ordinary meaning" rule of interpretation of contract terms [Equitable Life and Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah App. 1993)] when taken with the explicit and operative terms of the part of paragraph 7 upon which the Court and defendant relies to establish a condition precedent; i.e., Buyer to pay for topographic study for property and obtaining approval of building plans by Salt Lake County with 30 days of seller providing evidence of clear and marketable title immediately followed by [c]losing shall be within 30 days of seller providing buyer evidence of satisfaction of liens and providing clear and marketable title.

Of course it is necessary that appellee Plumb pay, or that he agrees to pay, the expenses for topographic studies and for building plans because these are lienable by those engineers or architects providing those services and this is all that paragraph 7 of the contract requires according to the plain and ordinary meaning of the terms employed by the parties, i.e., that Plumb "pay for a topographic study and [for] county approval of building

plans within thirty days of seller providing evidence of clear and marketable title." A contract is read in accordance with its express terms and the plain meaning thereof. C. Sanchez and Son, Inc. v. U.S., 6 F.3rd 1539 (Fed. Cir 1993).

The Court's interpretation of the provision in question establishing the obtaining of county approval of building plans as a "condition precedent" to appellee Plumb's liability should therefore, in the absence of additional language which clearly shows obtaining county approval of building plans is a "condition precedent", be reheard and vacated. The subject contractual provisions are not ambiguous and do not create a condition precedent. "As a general rule conditions precedent are not favored and the courts are not inclined to construe a contractual provision as a condition precedent unless such construction is plainly and unambiguously required by the language of the contract. See Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968), cert. denied 397 U.S. 1036, 90 S.Ct. 1357, 25 L.Ed.2d 647 (1970); Restatement of Contracts Sec. 261 (1932); Watson Const. Co. v. Reppel Steel & Supply, 598 P.2d 116 (Ariz.App.

1985).

The Court's further conclusion as to "Plumb's inability to gain county approval of his plans" is without evidentiary support and a genuine issue of material fact, precluding summary judgment, existed as to whether Plumb acted reasonably in not submitting "building plans" which the contract requires, for county approval to the appropriate county agency even if a condition precedent is found.

Here, only a drawing, labelled "site plan," [not a building plan] was submitted to a county functionary who, by reference to county regulations, rejected the driveway which was indicated on the drawing submitted by Plumb because of gradation stages claimed to be out of line with regulations. The contract provision is as to "county approval of building plans" which were never submitted; had they been, approval might have been forthcoming from the appropriate county agency, even with the indicated driveway gradation which showed an insubstantial variation from those prescribed by county regulation. "A genuine issue of material fact precluding summary judgment arises when the nonmovant presents

presents sufficient evidence upon which a reasonable fact finder, drawing requisite inferences and applying applicable evidentiary standard, could decide an issue in favor of nonmovant." C. Sanchez and Son, Inc. v. U.S., 6 F.3rd 1539 (Fed.Cir. 1993). The evidence of the nonmoving party is to be believed, and all reasonable factual inferences are to be drawn in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1970).

The contract specified "obtaining approval of building plans by Salt Lake County." No such approval was sought by Plumb "and Plumb's inability to gain county approval of his [building] plans," as the Court has concluded, is nowhere shown; thusly, no failure of condition precedent, even if there is one, is established. The record contains facts tending to show that Plumb acted arbitrarily or unreasonably. The burden of establishing the non-occurrence of the condition, if it existed, was upon Plumb. Plumb has not presented facts which, if established, would support Plumb's entitlement to cancel the contract for failure of condition under paragraph 7(A).

When this matter was decided on motion for summary judgment, the nonmovant's version of the underlying facts must be believed, and judgment can not be sustained in favor of the movant unless there is no version of the facts that could support a contract interpretation in favor of nonmovant. See Liberty Lobby, 477 U.S. at 250, 106 S.Ct. at 2511. There is only one meaning that is reasonably consistent with the contract language; i.e., that ascribed above, to-wit, within 30 days of VonWald providing evidence of clear and marketable title, Plumb is to pay for a topographic study and for county approval of building plans.

The well-settled rule of contract interpretation is that conditions are disfavored and will not be found in the absence of unambiguous language indicating the intention to create a conditional obligation. In re Bubble Up Delaware, Inc., 684 F.2d 1259, 1264 (9th Cir. 1982); Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 93 (S.D.N.Y.1974); see Prager's, Inc., v. Bullitt, 1 Wash.App. 575, 463 P.2d 217, 222 (1969); 3A A. Corbin, Corbin on Contracts Sec. 635 (1960); 5 S. Williston, A Treatise on the Law of Contracts Sec. 665 (W. Jaeger 3d

ed. 1961).

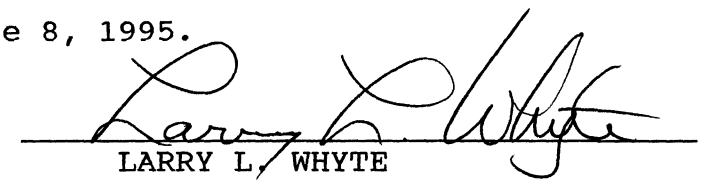
It would not have been difficult for Plumb to have inserted appropriate language. A provision that county approval of Plumb's site plan would be necessary or required might signal such a contingency, as might the inclusion of a formal mechanism for obtaining the approval. Instead, paragraph 7 indicates that "Buyer to pay for topographic study for property and obtaining approval of building plans by Salt Lake County with 30 days of seller providing evidence of clear and marketable title" and "closing . . . within 30 days of seller providing buyer evidence of satisfaction of liens and providing clear and marketable title" [paragraph 7(B) and 8] whether county approval of building plans had been obtained or not.

This Court, and the trial court, under the facts and the law, erred in regard to their construction and application of paragraph 7 of the Earnest Money Sale Agreement.

WHEREFORE, appellant VonWald prays that rehearing be granted after which the Memorandum Decision of May 25, 1995, be ordered vacated and set aside. The undersigned

certifies that this petition is presented in good faith and not for delay.

DATED June 8, 1995.



LARRY L. WHYTE

On June 8, 1995, two copies of the foregoing PETITION FOR REHEARING mailed as follows:

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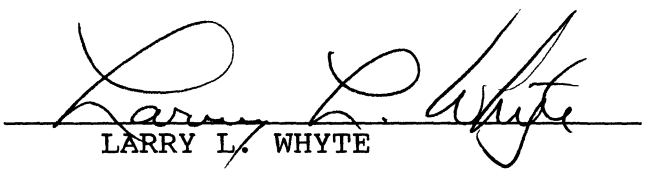

LARRY L. WHYTE