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Ty Eldridge and Marina Eldridge v. James L. Farnsworth; David Farnsworth; Gregory Farnsworth : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs/Appellants, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants/Appellees.	)	Case No. 20060333-CA

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal from the Eighth Judicial District Court of Duchesne County
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ARGUMENT

THE REPC WAS NOT RESCINDED BUT RATHER NOT PERFORMED BY PLAINTIFFS, AND DEFENDANTS, HAVING SUCCESSFULLY DEFENDED AGAINST PLAINTIFFS' EFFORTS TO ENFORCE THE REPC, ARE ENTITLED TO REIMBURSEMENT OF THEIR FEES AND COSTS.

"'If provided for by contract, attorney fees are awarded in accordance with the terms of th[e] contract.'" Panos v. Olsen & Assoc. Constr., Inc., 123 P.3d 816, 822 (Utah Ct. App. 2005) (quoting Foster v. Montgomery, 82 P.3d 191, 194 (Utah Ct. App. 2003)). In the present controversy, the attorney fee provision of the contract states: "In the event of litigation . . . to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees." REPC ¶ 17, Br. of Appellees, Addendum I. Unquestionably, by the terms of the contract, Defendants, having prevailed,[1] are "entitled" to reimbursement.

To try to avert paying fees, Plaintiffs cite a succession of rescission cases, Pls.' Reply. Br. at 23, including BLT Investment

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[1] Though the Proposed Lease was the primary focus of Plaintiffs' lawsuit, Plaintiffs also sued Defendants to enforce the REPC under a fraud theory, Second Am. Compl. ¶¶ 32-38, R. 467-73, which was rejected by the trial court and which Plaintiffs do not address on appeal. Thus, Plaintiffs instituted litigation to enforce the REPC and Defendants prevailed. Following summary judgment, Plaintiffs sought to amend their complaint to allege new theories to support enforcement of the REPC. Again, Defendants were required to defend against these efforts and prevailed, as the trial court rejected Plaintiffs' post-judgment attempt to amend, R. 779, Br. of Appellees, Addendum F. Finally, while Plaintiffs did not bring their fraud theory before this Court, they continue to advance theories introduced post-summary judgment to support enforcement of the REPC, entitling Defendants to their fees before this Court. Panos, 123 P.3d at 822.

Co. v. Snow, 586 P.2d 456 (Utah 1978), Bilanzich v. Lonetti, 2005 UT App 522 (unpublished decision), and Chase v. Scott, 38 P.3d 1001 (Utah Ct. App. 2001). Those case are not applicable to this case, however, because the REPC was not rescinded in this case. It was not performed by Plaintiffs. The closing date passed without tender and the REPC expired by its terms.

More analogous to the instant case than the rescission authorities are Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct. App. 1989), and Lee v. Barnes, 977 P.2d 550 (Utah Ct. App. 1999), both of which were decided subsequent to Snow and its annunciation of the rescission rule.

As noted in Defendants' initial brief, there are many similarities between this case and Carr, including that the buyers in both cases sent belated letters to the sellers informing them of a willingness to tender without providing the actual funds and that the buyers in both instances "never actually obtained the loan[s] . . . necessary . . . to fulfill . . . [their] contractual obligation[s] and [to] enable [the]m to make a proper tender of . . . [their] performance." Carr, 781 P.2d at 1294.

Significantly, given these facts and the paucity of evidence that tender would not have been accepted if made in a timely manner, this Court concluded that "Carr's duty to tender was neither performed nor excused. . . . [and] that he was not entitled

to prevail in th[e] action." Id. at 1295. As to the issue of attorney fees, the Court advised:

> Smith took an entirely defensive posture. It was not enforcing any right arising under the agreement or arising from a breach thereof. On the contrary, its position at trial was that there was no viable contract left to enforce. While Smith would surely be entitled to attorney fees under the more typical provision awarding fees to the prevailing party, it is not entitled to attorney fees under the provision at issue.

Id. at 1296 (citations omitted) (emphasis added).

While Carr accords with the instant case in many ways, perhaps the one crucial distinction between the two cases is that the fee provision now at issue is indisputably "the . . . typical provision awarding fees to the prevailing party." Id. Hence, Carr indicates that Defendants are entitled to their fees.

This conclusion is also bolstered by Lee, 977 P.2d at 551, in which the Court upheld an award of attorney fees under circumstances resembling those at hand. The parties in the matter entered into a purchase contract for a parcel of property in Tremonton. Id. The contract set a "[s]ettlement [d]eadline . . . of 'April 30 - 97.'" Id. "April 30, 1997 passed, and the sale was not closed." Id. at 552. Nevertheless, in June of that year, the buyer scheduled a closing which the sellers did not attend. Id. Rather, the sellers argued that "the [c]ontract had expired," id., and later obtained summary judgment on the basis "that they had no obligation under the [c]ontract because the closing did not occur on or before April 30, 1997." Id.

Noting that "[t]he [c]ontract contain[ed] an integration clause," id., and that it could "[]not be changed except by written agreement," id., the Court "determined [that] the [c]ontract unambiguously required a closing date of April 30, 1997," id. at 553, and affirmed the lower court's ruling in favor of the sellers. (As noted in Defendants' initial brief, at 25, the REPC in this case also required any alteration of the contract to be in writing. REPC, ¶ 14, Br. of Appellees, Addendum I.) The Court then proceeded to the issue of attorney fees.

Citing an attorney fees provision identical to the one that is the subject of this litigation, Lee, 977 P.2d at 553, the sellers "assert[ed] that under the [c]ontract they [we]re entitled to fees for successfully defending." Id. This Court "agree[d]." Id. In short, the Court granted attorney fees on a "[c]ontract [that] had expired." Id. at 552. In the present case, Plaintiffs herein brought an action on an expired contract, requiring Defendants to defend.

Neither Defendants nor Plaintiffs (in this case) sought rescission, nor did the trial court order rescission.[2] In granting

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[2] In Snow, 586 P.2d at 458, the Utah Supreme Court relied on authority from the Oregon Supreme Court for the rescission rule. Though Oregon still adheres to the rule, Bennett v. Baugh, 329 Or. 282, 286 (1999) it is noteworthy that the Oregon Supreme Court upheld an award of fees where "[d]efendants raised . . . affirmative defenses . . . [of] estoppel, undue influence, and rescission," id. at 285, but where the "judgment[, though rendered in favor of the defendants,] d[id] not declare that the parties' contract was rescinded." Id. at 286. Distilling the decision, the

summary judgment, the court concluded "that the date for settlement under the REPC passed without full performance by either party," R. 508, January 11, 2006 Order at 3, Br. of Appellees, Addendum C, and that "[i]t appear[ed] that after Plaintiffs encountered difficulty obtaining . . . conventional financing . . ., the REPC was abandoned by both parties." Id. This case, therefore, is more akin to Carr and Lee than Snow. In Snow, "the trial court ordered rescission," 586 P.2d at 457, stating that "under the facts of th[e] case the execution of a mutually acceptable escrow agreement was essentially made a condition to the preliminary agreement." Id. at 458.

In contrast to the Snow parties, Plaintiffs and Defendants did come to a consensus, on all material issues, which they memorialized in the REPC. However, the purpose of the contract was not accomplished due to nonperformance by Plaintiffs. As in Lee, the settlement deadline passed without the submission of the purchase price. 977 P.2d at 551. Additionally, as in Carr, there was no timely tender of the purchase price, 781 P.2d at 1295-96, and "[n]o loan was ever approved [for the purchase]," id. at 1293, though obtaining a loan "was a condition precedent." Id.

Oregon Court of Appeals wrote: "[T]he Supreme Court held that defendants are entitled to attorney fees because, although the trial court entered judgment for defendants, the judgment did not expressly order rescission of the parties' contract." Bennett v. Baugh, 164 Or. App. 243, 246 (1999) (emphasis added).

In short, Plaintiffs attempted to enforce the REPC on the basis of a fraud theory, rejected on summary judgment and not contested on appeal. Plaintiffs then asserted other theories following the judgment, and they now invite this Court to overrule the trial's court's decision denying their endeavor to amend their complaint for a third time. Defendants implore the Court to award Defendants their attorney fees according to the terms of REPC, where Plaintiffs brought suit based in part on the contract and sought to enforce the expired REPC.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reverse the trial court's decision denying attorney fees to Defendants, and that the case be remanded with direction to award Defendants the attorney fees and costs incurred before the trial court and on appeal.

Dated this 24 day of January 2007.

ALLRED & McCLELLAN, P.C.
Attorneys for Appellees/
Cross-Appellants

By: _____
Clark B Allred

MAILING CERTIFICATE

I, Melinda Palmer, am employed by the office of ALLRED & McCLELLAN, P. C., attorneys for Defendants/Appellees/Cross-Appellants herein, and hereby certify that I served the attached REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS on counsel for Plaintiffs by placing a true and correct copy thereof in an envelope addressed to:

ALVIN R LUNDGREN
ALVIN R LUNDGREN L.C.
5105 W OLD HWY STE 200
MTN GREEN UT 84050

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Roosevelt, Utah, on the 24th day of January, 2007.

Melinda Palmer