1995

Wayne Takashi Satsuda and Seon Sil Satsuda, his wife v. Hasin Oh and Hyung Ja Oh, his wife : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

WAYNE TAKASHI SATSUDA and SEON SIL SATSUDA, his wife, Plaintiffs, Appellants & Cross Appellees, V. HASIN OH and HYUNG JA OH, his wife, Defendants and Appellees, HASIN OH and MYUNG JA OH, his wife, Third Party Plaintiffs & Appellees, V. KEE HONG UM and SHI JA UM, his wife, Third Party Defendants, Appellees & Cross Appellants	REPLY BRIEF OF WAYNE TAKASHI SATSUDA & SEON SIL SATSUDA, APPELLANTS & CROSS-APPELLEES, Court of Appeals No. 950569-CA Priority Classification 15

Appeal from the Third Judicial District Court, In and For Salt Lake County, State of Utah
Honorable J. Dennis Frederick

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TABLE OF CONTENTS

ARGUMENT

TABLE OF AUTHORITIES

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REPLY BRIEF OF APPELLANTS
WAYNE TAKASHI SATSUDA AND SEON SIL SATSUDA

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ARGUMENT

STATEMENT OF THE CASE

The statement of the case is fully set forth in Appellants' opening brief, page 3.

STATEMENT OF THE ISSUES

The statement of the issue is fully set forth in Appellants' opening brief, page 4 - 7.

STATEMENT OF FACTS

The statement of facts are set forth in appellant's opening brief. Additional facts will be stated as appropriate in the argument.

The Appellants shall be referred as "Satsudas", the Appellees as "Ohs" and Third Party Defendants as "Ums".

ARGUMENT

The appellants, Satsudas, responds to appellees, Ohs, brief in the same order as raised in the appellees brief.

ATTORNEY'S FEES AWARD TO APPELLEES'

The Ohs state that there is a sufficient bases in contract to support the Trial Court's award of attorney's fees. At the outset, it should be emphasized that the only subject matter contract was the Earnest Money Agreement between Satsudas and Ohs. The other contracts were incidental and submitted only to illustrate the interconnecting relationship of the properties.

The Ohs methodically refer to each document executed between the Satsudas and Ohs, and the Ohs and Ums to convince this Court that a contractual bases exists as a matter of law.

Whether there exists a contractual basis for an award of attorney's fees is a legal question and the standard for review is one of correctness and no particular difference given to the Trial Court in ruling on questions of law. *Provo River Water Users vs. Morgan,* 857 P2d 927 (Utah 1993).

On this issue, the difficulty arises because the Trial Court failed to articulate the contractual basis for the award of attorney's fees. The Trial Court states "that an adequate basis in contract exists for such an award". First Amended Order of Dismissal of Complaint and Third Party Complaint and judgment in favor of defendants Ohs against plaintiffs Satsudas for attorney's fees. Addendum 12 and 13 of Appellants' Opening Brief.

Without a specific finding as to events which would trigger the entitlement of attorney's fees under any of the contracts existing between the parties, this Court is unable to determine what contract the Trial Court used.

For that reason alone, the matter should be remanded to the Trial Court for entry of finding.

Saunders v. Sharp, 818 P2d 574 (UT. App. 1991), cited in appellants opening brief at page 29, mandates the Trial Court to announce the basis of the evidence and articulate the Findings of Facts and reversal of an award of attorney's fees is appropriate when the Trial Court failed to make appropriate findings and conclusion of law. *Cabrerra vs. Cabrerra,* 694 P2d 622 (UT 1985), cited on page 29 of appellants' opening brief.

DEED OF TRUST

The Deed of Trust, June 5, 1990, does not support the Trial Court's decision as a "contractual basis" as the appellees contend.

The precise language of the Deed of Trust, paragraphs 4 and 7 does not serve as a legal basis for the award of attorney's fees.

Paragraph 4 deals specifically with the defense of "any action or proceeding purporting to affect the security thereof, the title to said property, or rights and powers of trustee (Ohs).."

Whereas, the appellees assert that the main action by the Satsudas somehow relates to the security of the subject party, the assertion is without substance and rings hollow. The subject property was sold by Satsudas for $860,000, a sum $240,000 greater than the price Satsudas paid. Appellees' Brief, page 12, paragraph 44.

Reliance upon paragraph 7 of the Deed of Trust is similarly over stated. The triggering event invoking paragraph 7 requires that the Satsudas "fail to. . .do any act as herein provided. . ." Emphasis mine.

There was no allegation or fact produced at trial to establish that Satsudas failed to perform what was required to be done, i.e., make the monthly payments on a timely basis. Equally important is the fact that the Trial Court did not enter any finding regarding the Deef of Trust and default thereof.

The thrust of Satsudas' case is simple.

Satsudas did not receive what they bargained for. They expended to restore subject property to conform with what they purchased. They sought reimbursement for their out-of-pocket expense.

There was no abandonment of the contractual terms or challenge to the security interest held by the Ohs as claimed by the appellees.

ASSIGNMENT OF CONTRACT

The second line of defense used by the appellees is the Assignment of Contract, June 5, 1990, between Satsudas and Ohs.

Paragraph 3(b) of the Assignment of Interest does not support the Trial Court's award of attorney's fees.

The Assignment of Contract itself does not contain any languages regarding attorney's fees, thus, the assignment does not give the Ohs any independent contractual claim for attorney's fees.

Paragraph 3 (b) read with the entire assignment means:

1. That Satsudas will keep, observe, and perform all the terms, conditions and provisions of said agreement (Real Estate Contract) that are to be kept, observed and performed by the Ohs.

2. If Satsudas failed to so perform, Satsudas will hold harmless the Ohs from any actions, costs, damages, claims, and demands. . . arising out of an act or omission by Satsudas.

Contrary to the Appellees claim that the above language should be expanded to any "acts" by Satsudas, the clear reading and plain unequivocal language mandates that the "act or omission" relates directly to what duties and obligations are required to be performed under the real estate contract.

Satsudas did not fail to perform on a timely basis any of the term and condition of the real estate contract; nor was any "act or omissions" proven at trial.

Clearly, the Trial Court made no such finding and to make such finding would not have been supported by the evidence.

REAL ESTATE CONTRACT

Initially, it should be noted Ohs were never in default on the terms of the real estate contract between the Ohs and Ums, dated May, 1987.

The real estate contract required that Ohs pay Ums $4,728.65 per month, principal and interest on or before June 1, 1987 and a like sum on the first date of each month thereafter until the principal balance, together with accrued interest, has been paid in full. Stipulated Trial Exhibits #1; Addendum #2 of appellees' brief.

Additionally a balloon payment was to be paid on or before May 1, 1991, Id.

Other affirmative acts were imposed on Ohs, such as payment of taxes for 1987 and thereafter (paragraph 9), covenants against liens (paragraph 10) and insurance (paragraph 11) no waste, (paragraph 14).

These affirmative acts by Ohs were the affirmative acts assigned to Satsudas under the Assignment of Contract dated January 5, 1990.

No default had occurred or alleged to have occurred by the Ums against Ohs. All of the terms and conditions were performed by Ohs under the real estate contract up to the sale of the motel to Satsudas on January 5, 1990.

After January 5, 1990 the Satsudas fully performed the terms and conditions of the real estate contract, i.e.; payments of $4,728.65 per month to Ums on or before the first day of the month; balloon payment of $50,000.00 on May 1, 1991; payment of general property taxes, insurance, covenants against liens and no waste.

No evidence was submitted nor was it intended by any of the parties that the Ohs were in default or that Satsudas were in default.

Neither did any party submit any evidence or even suggest that the instant complaint by Satsudas and the third party complaint was an enforcement, termination or obtaining possession of the subject property.

Ohs entitlement to attorney's fees against the Satsudas is no greater than that of Ums entitlement to attorney's fees against the Ohs.

In either case, attorney fees entitlement cannot be bottomed in paragraph 15 of the real estate contract.

Certainly, the Trial Court failed to enter findings that the real estate contract was a legal basis for the award of attorney's fees for the Ohs against the Satsudas.

The amended Findings of Fact were prepared by the Ohs. They failed to be explicit as to which contracts upon which they relied at the trial level. They choose to leave the award of attorney's fees ambiguously based "upon contract", presumably so as to forego a submission of evidence which would trigger the entitlement and upon which contract or contracts and presumably to permit the scatter gun approach on appeal.

This approach is evident when the appellees urge this Court to sustain the attorney's fees award on any basis even if the Trial Court did not consider them. Appellees' brief, page 14.

Ohs did not attempt to convince this Court that their attorney's fees award is based upon the real estate contract, but only claim that the real estate contract is a sufficient basis for Ums attorney's fees against the Satsudas.

By osmosis, Um's attorney's fees filters to Satsudas, by passing Ohs, by virtue of the Assignment of Contract.

This approach is incredulous. It was not Satsudas act or conduct that brought the Ums into the lawsuit. It was Ohs act or conduct that brought upon themselves Ums participation as a third party defendant.

Whereas, it may be speculated that Satsudas may be liable if they had joined Ums as party defendants because then their conduct caused the wrath of Ums' attorney's fees upon them, it is too far reaching to hold that Ohs conduct in commencing the third party complaint against Ums is directly or directly attributable to Satsudas' conduct. It was Ohs choice to either use Ums as witnesses or parties, just as it was Satsudas'' choice.

Satsudas, having talked to Ums before commencement of the action, knew that the Ums would be witnesses presumably favorable to Satsudas' position, Stipulated Facts Page 14, Appellants' Brief, Addendum #3.

The Trial Court, early in the case, ruled that Ums were not indispensable parties.

UMS' ATTORNEY'S FEES AWARDED DIRECTLY AGAINST SATSUDAS

The appellees rely upon the "pass through theory" in an attempt to justify Ums' attorney's fees to be assessed directly to the Satsudas.

The "pass through theory" was not mentioned in the Supplemental Findings of Fact and Conclusions of Law. Appellants Brief, Addendum #19; rather the finding was that Ums' attorney's fees were necessarily and reasonably incurred to defend defendants third party action as "costs, claims and demands" under paragraph 3(b) of the Assignment of Contract. Id, paragraph 4-5.

This issue was addressed in the prior argument.

Nevertheless, the appellants will address the "forseeability" concept claim by the Ohs, i.e.; because of Satsudas litigation it was a foreseeable consequence that Ums would be made a party.

This foreseeable argument is without substance and is certainly negated by the Satsudas making inquiry with the Ums before the lawsuit was commenced.

Ums reported that they had advised Ohs that the rooms were constructed without proper building permits. Stipulated Facts #14. Appellants Brief, Addendum #3. Moreover, the *South Sanpitch vs. Pack* case and *Collier vs. Heinz* cited in Appellees Brief, page 23, must be restricted in their facts.

South Sanpitch case was a negligence case.

Collier vs. Heinz dealt with a breach of contract, i.e., breach of a settlement agreement.

REASONABLENESS OF OHS' ATTORNEY'S FEES

The reasonableness of Ohs' attorney's fees and the failure to allocate attorney's fees incurred from defending Satsudas and prosecuting the Third Party complaint is addressed in Appellants' Brief, page 17-22.

SATSUDAS CLAIM OF FRAUD

This issue is fully addressed in Appellants' Brief page 36-42.

A correction must be made.

Appellants stated that the Earnest Money Agreement contained no "as is" clause. Appellants' Brief, page 39. This statement is incorrect. Paragraph B of the Earnest Money Agreement does contain an "as is" clause.

However, the Appellants contend that the "as is" clause does not abrogate the express warranties in paragraph C of the same document.

BREACH OF EARNEST MONEY AGREEMENT

The only subject matter document brought into the instant case was the Earnest Money Agreement, dated November 16, 1989 between Satsudas and Ohs.

The principle defense to Satsudas claim for breach of the express warranties contained in paragraph C of the Earnest Money Agreement lies upon the doctrine of merger. Appellees' Brief, page 35-39.

Thus, it would appear that if the merger doctrine does not or should not apply, the breach of the Earnest Money Agreement is established.

The Appellants agree that the *Schafer vs. Harrigan* case and *Secor vs. Knight* case cited in Appellee's Brief on page 30 applied merger doctrine to eliminating the buyer's claim for breach of warranty.

In the Schafer case and *Secor vs. Knight* cited in pages 34 and 35 of Appellees' Brief, the Appellate Court relied upon express language of the abrogation clause in each case.

The abrogation clause in the instant case differs. There is an express reservation to eliminating the abrogation clause from express warranties:

> "Paragraph O, Abrogation: Except for express warranties under this agreement, the execution and delivery of the final closing documents shall abrogate this agreement."

Thus, as stated in Appellants' Opening Brief, page 30, and for emphasis now, the merger doctrine does not apply and the Trial Court erred in its application.

In effect, the Trial Court reformed the Earnest Money Agreement beyond the written terms and the intent of the parties, i.e., the sale and purchase of a 40-unit motel with all units in operable condition.

Paragraph C(c) is worthy of recalling:

> "The plumbing, heating, air conditioning and ventilation systems, electrical systems and appliances shall be in sound and satisfactory working order."

Appellants' Opening Brief, page 30-33, addresses the deficiency noted and need not be repeated.

Should this Court sustain the Trial Court on the application of the merger doctrine and that none of the exceptions to merger doctrine apply, i.e., existence of collateral rights or fraud, the Earnest Money Agreement would fall and with it, any claims by Satsudas, Ohs and Ums would also fall.

Should the Court reverse the Trial Court in the application of the merger doctrine, it would follow that, at the very least, the Satsudas would be entitled to cost of restoring the defective rooms, $37,381.00 loss of profits, and attorney's fees.

SALE OF MOTEL AT PROFIT

The sale of motel at profit does not preclude Satsudas' claim for special damages.

The Appellees claim that Satsudas lost their claim for special damages when the Trial Court entered a suumary judgment against the Satsudas on the "Benefit of the Bargain" damages.

Appellees further claim that the issue was not preserved for appeal.

The Appellees position is incorrect for the following reasons:

1. The Plaintiff's complaint alleges damages in form of the Benefit of the Bargain, paragraph 22 of Plaintiff's complaint, Appellants Opening Brief, Addendum 1, and special damages, paragraph 23 Id.

2. The Appellants, during oral argument, stressed to the Court that elimination of the Benefit of Bargain claim does not rule out special damages and Satsudas objection to order granting Ohs motion for summary judgment. ROA, _____.

The issue of special damages surviving elimination of the "Benefit of Bargain" claim is briefed in Appellants' Brief, page 34-35.

CONCLUSION

Satsudas purchased a 40-unit motel. It was to be a turn key operation. Ohs sold a 40-unit motel representing that it was a turn key operation. It was not. Satsudas suffered out-of-pocket expenses to bring the motel up to code.

Appellants specifically request:

1. That the award of attorney's fees for Ohs and Ums be reversed as not based upon subject matter contracts, as opposed to exhibits submitted merely to show the relationship between the parties.

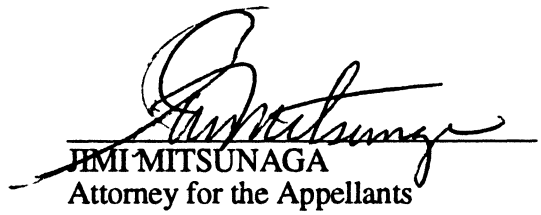
2. In the alternative that the issue of attorney's fees for Ohs and Ums be remanded to the Trial Court for adequate findings and conclusions, as to the contractual basis for the award of attorney's fees.

3. Reverse the Trial Court's decision in the application of the merger doctrine and enter a judgment in favor of the Satsudas against Ohs for out-of-pocket expenses or remand the issue of special damages to the Trial Court for entry of judgment in special damages, including attorney's fees at trial.

4. Reverse the Trial Court's order for summary judgment on the "Benefit of Bargain" claim for damages and enter a judgment for Satsudas' special damages or remand the case for entry of judgment on special damages.

5. Award the Plaintiff's attorney's fee for the appeal and remand the case for ruling on reasonable attorney's fees.

DATED this 3rd day of July, 1996.



JIMI MITSUNAGA
Attorney for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 1996, I served a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS WAYNE TAKASHI SATSUDA AND SEON SIL SATSUDA,** by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

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