

1995

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 9505169-CA

WAYNE TAKASHI SATSUDA and)
SEON SIL SATSUDA, his wife,)
Plaintiffs & Appellants,)
v.)
HASIN OH and HYUNG JA OH,)
his wife,)
Defendants and Appellees,)
HASIN OH and MYUNG JA OH,)
his wife,)
Third Party Plaintiffs and)
Appellees,)
KEE HONG UM and SHI JA UM,)
his wife,)
v.)
Third Party Defendants,)
Appellees & Cross Appellants.)

APPELLANTS REPLY BRIEF
OF CROSS APPELLANTS/
APPELLEES, KEE HONG UM
AND SHI JA UM

Case No. 950569 - CA

Priority Classification 15

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

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COURT OF APPEALS

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal and cross-appeal of Ums to which Satsuda reply is proper under Utah Code Annotated, Sec. 78-2a-3 (2) (j). On September 7, 1995 the Utah Supreme Court ordered this appeal passed over to the Utah Court of Appeals.

STATEMENT OF THE CASE

The proceedings arose out of a January 1990 sale of the Capitol Motel by the defendants and Appellees, Hasin Oh and Myung Ja Oh (“Ohs”) to the plaintiff and appellants, Wayne Takashi Satsuda and Seon Sil Satsuda (“Satsudas”).

An Earnest Money Sales Agreement was entered into by the Satsudas as buyers and Ohs as Sellers on November 16, 1989.

The final documents consisting of a Trust Deed Note, Trust Deed, and Assignment of Contracts were entered into on January 5, 1990.

Satsudas filed a complaint against the Ohs on March 15, 1991 alleging three causes of action: (1) Breach of Warranties contained in the Earnest Money Agreement, (2) Intentional Misrepresentation and Failure to Disclose and (3) Fraud.

The Ohs filed a third party complaint against the Ums who had sold the subject property to the Ohs through a Real Estate Contract dated May 1, 1989. The third party complaint largely followed the Satsudas cause of action and added another cause for indemnity.

On May 2, 1995, Judge J. Dennis Frederick signed an order of dismissal of the complaint and third party complaint and judgment in favor of defendant Ohs against the plaintiff Satsudas for attorney’s fees.

Judge J. Dennis Frederick also found that the fees requested are reasonable and necessary and that an adequate basis in contract exists for such an award.

The third party defendants application for attorney's fees was denied without prejudice subject to further proceedings concerning that application.

On June 9, 1995 Judge J. Dennis Frederick awarded the third party defendant reasonable attorney's fees at that time subject to further proceedings concerning the amount to be awarded which shall be subject to further order and judgment.

On July 7, 1995 the Judge executed the supplemental judgment. Specifically, paragraph 3b of the Assignment of the Uniform Real Estate Contract obligates the plaintiff, as assignees, to hold harmless the defendants as assignors from "any and all actions, suits, costs, damages, claims and demands whatsoever by reason of an act or an omission of the assignees. (Appellant's Addendum 18, paragraph 4). The third party defendant's costs and attorneys fees necessarily and reasonably incurred to defend the defendant 's third party acts were costs, claims and demands arising by reason of an act or omission of the plaintiffs, to-wit: "this action was initiated by the plaintiff and requiring commencement of the third party action" (Appellant's addendum, 18, paragraph 5)

The cross-appellees, Ums, are not appealing their judgment for attorney's fees against the Satsudas for \$56,126.77. "Ums are seeking judgment against Ohs jointly and severally with the Satsudas. Brief of cross-appellant's/appellees Kee Um and Shi Ja Um.

Satsudas are not cross-appellees.

STATEMENT OF FACTS

The statement of facts are fully set forth in appellants opening brief.

Additional facts, if deemed necessary, will be set forth in the argument.

STATEMENT OF ISSUES

1. Whether UCA 78-27-56.5 is applicable against the plaintiff and third party defendant where the plaintiff did not commence or maintain the legal proceeding against the third party defendant.

2. Whether the Ums were “prevailing parties” under UCA 78-27-56.5 where there was no litigation between the Satsudas and Ums.

3. Whether the findings that attorney’s fees were costs, claims or demands in defense of Ohs’ third party complaint is supported by the evidence.

4. Whether *Maynard v. Wharton* should prevail to deny attorney’s fees for Ums against the Satsudas.

STANDARD OF REVIEW

Appellate standard for review is one of correctness on the issue of contractual or statutory entitlement for attorney’s fees. *Schafer v. Harrigan*, 849 P2d 1384 (Utah App. 1984).

The reasonableness of the attorney’s fees is in the sound discretion of the trial court and will not be overturned in the absence of showing of clear abuse. *Dixie State Bank v. Bracken*, 764 P2d 985 (Utah 1988).

SUMMARY OF ARGUMENT

1. UCA 78-27-56.5 is not applicable against Satsudas or Ums' claim for joint and severally liability in Ums' attorney's fees. Satsudas did not commence any legal action against Ums as would classify Ums as the prevailing party.

2. UCA 78-27-56.5, if applicable, between Ohs and Ums, would not be applicable as against Satsudas (plaintiffs) and Ums (third party defendants).

3. *Maynard v. Wharton* is the controlling case whereby Ums are precluded from claiming attorney's fees against Satsudas under any Real Estate Contract or assignment of contract where there is no default alleged or as shown on the part of Satsudas.

ARGUMENTS

1. UCA 78-27-56.5 does not provide a basis for Ums' attorney's fees against Satsudas.

The trial court makes it clear that attorney's fees were to be awarded pursuant to contract (R.O.A. Judge's Ruling, TR-7, L23, TR 8, L 1-7) Addendum 5, Appellants' Opening Brief.

Award of attorney's fees under contract differs from a statutory award of contract.

Ums, in preparation of the Supplemental Findings of Fact, makes no reference to any statutory basis for the award of their attorney's fees against Satsudas or Ohs.

Thus, Ums should be precluded now from raising any new grounds for attorney's fees when they did not assert the grounds at the trial level. *Gill v. Timm*, 720 P2d 1352 (Utah 1986).

2. Ums is not the "prevailing party" as against Satsudas. Satsudas initiated the action against Ohs for the sale of the 40-unit motel.

Satsudas discussed with Ums the defects that were discovered by Satsudas and Ums advised Ohs that some of the units were constructed without building permits and that the motel had 40 rentable units.

Based upon the information provided by Ums, Satsudas did not join Ums as a party-defendant. Rather, Ums were deemed to be favorable witnesses whose testimony would assist Satsudas in their case against Ohs.

The trial court ruled early on in the case that Ums were not a necessary or indispensable party under Rule 19 (R.O.A., V1, P100046, Order Denying Defendant's Motion to Dismiss).

3. *Maynard v. Wharton* is the controlling case precluding Ums and Ohs from any award of attorney's fees against Satsudas under the Earnest Money Agreement between Ohs and Ums and Ohs and Satsudas.

Maynard v. Wharton is more fully set for in Appellants' Opening Brief, page 16.

Ums did not claim or purport to claim that Satsudas were, in any way, in default of the provision contained in the Real Estate Contract between Ohs and Ums which was assigned to Satsudas.

Satsudas made the payments as required under the Real Estate Contract and otherwise performed the affirmative obligations placed upon them.

Satsudas made the payments as required under the Real Estate Contract and otherwise performed the affirmative obligations placed upon them.

Ums claim that the *Maynard vs. Wharton* was improperly decided (Appellees' Brief, page 12).

The *Maynard* case states, "In sum, attorney's fees may be awarded under the instant contract only when one party even shows that the other party has defaulted on an explicit covenant or agreement contained in the Earnest Money agreement. Sellers did not establish that the Buyers defaulted on any covenant or agreement and thus, have no basis for an award of attorney's fees," *Id*, page 38 (Utah Advance Report).

This decision is consistent with the language in UCA 78-27-56.5 which refers to "either party that prevails." There is no prevailing party where no default is established. Award of attorney's fees is not bottomed upon who brings the law suit, but who prevails.

Similarly, neither Ohs nor Ums can be deemed prevailing parties.

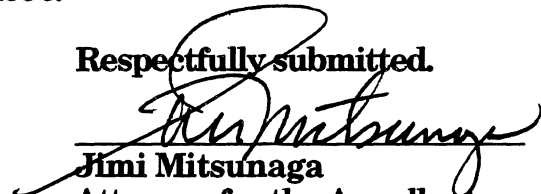
CONCLUSION

The Ums seek to establish joint and severally liability for their attorney's fees against Satsudas and Ohs. They seek to have their attorney's fees deemed "costs, claims or demands" against Ohs for the defense of Ohs' claim, none of which arose from any breach, default, or failure in the Ohs' performance or Satsudas performance under the Real Estate Contract. Ums seek to characterize their attorney's fees as costs, where the only act complained of was Satsudas initiation of the action and no factual basis for requirement that the third party action was necessary.

The appellants seek attorney's fees against Ohs and Ums for the appeal.

Dated this 4th day of December, 1996.

Respectfully submitted.


Jimi Mitsunaga
Attorney for the Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the forergoing Appellant's Reply Brief of Cross Appellants/Appellees, Kee Hong Um and Shi Ja Um this 4th day of December, 1996 by first class mail, postage prepaid to the following:

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