1976

Don S. Smith And Brigham H. Smith v. R.L. War v. J.H. Ehlers, Evelyn P. Boyce. Lois P. Connell : Brief of Respondents Boyce And Connell

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON S. SMITH and BRIGHAM H. SMITH,

Plaintiffs,

-vs-

J. H. EHLERS, EVELYN P. BOYCE, and LOIS P. CONNELL,

Defendants, Cross-defendants, and Respondents,

vs.

R. L. WARR,

Defendant, Cross-complainant, and Appellant.

CASE NO. 14565.

BRIEF OF RESPONDENTS, BOYCE AND CONNELL.

ON APPEAL FROM A JUDGMENT AGAINST CROSS-DEFENDANTS BOYCE, AND CONNELL, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY STATE OF UTAH, HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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CASES AND AUTHORITIES CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH.

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DON S. SMITH and BRIGHAM H. SMITH,

Plaintiffs,

vs.

R. L. Warr

Defendant, Cross-complainant, and Apellant,

vs.

J. H. EHLERS, EVELYN P. BOYCE, and LOIS P. CONNELL,

Defendants, Cross-defendants, and Respondents.

: CASE NO.

14,565.

- -

BRIEF OF RESPONDENTS, BOYCE and CONNELL.

- -

STATEMENT OF THE NATURE OF THE CASE.

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Appellant appeals from a judgment denying him loss of benefit damages, but, granting him out of pocket damages, based on alleged breach of real estate sales contract, where seller was unable to pass title through no fault of their own, under contract to convey by special warranty deed only.

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DISPOSITION OF THE CASE IN THE LOWER COURT:

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At the trial of the cross-complainant's case, on January 16th, 1976, to the Court, Honorable James S. Sawaya, sitting without a jury, judgment was rendered against appellant on claim of

damages for loss-of-bargain amounts, and, against cross-complainants claim for attorneys' fee allowance, and costs; but, was awarded out-of-pocket damages for amounts paid under the contract.

STATEMENT OF FACTS:

Supplementing appellant's statement of facts /pages 2-4/, appellant's brief, there are some items affecting these respondents and their position in the matter, not stated by appellant, or, where incorrect conclusions of testimony are taken. Respondents, Boyce and Connell entered into a conditional real estate contract for the sale of their interests in the real estate herein involved, said property being situate in Salt Lake County, Utah, under date of August 20th, 1973. Warr, the purchaser, had seen the property before buying, and was cognizant of its condition /Tr. 53, Rec. 9/. The contract with these respondents /Exhibit 38/ as sellers, provided among other things, that upon full payment title was to be passed by a special warranty deed. Prior to the signing of the contract, a title opinion showing good title in the respondents /Exhibit 41/, was obtained. Respondents nor their representative were not shown to have visited the property or inspected the same at any time. Several months after the signing of the contracts, an action to quiet title against respondents-defendants in this action was instituted by the plaintiffs. Trial upon the issues relating to the title was had, and title quieted against the defendants-respondents herein. No demand was ever made by cross-complaint Warr upon the respondents and cross-defendants Boyce and Connell to undertake defense action for Warr, /Rec. 278, 275, Tr. 55 and 52/, but only upon Mr. Milton Backman. Trial on cross-complaint resulted in finding for these respondents on the matter of damages, except for requirement of refunding amounts paid on the contract prior to quiet title

title action determination herein, the damages allowed being on the out of pocket rule or basis, rather than on the loss-of-bargain rule contended for by cross-complainant.

POINT I -- COVENANT OF SPECIAL WARRANTY COVENANTS (A) ONLY AGAINST CLAIMS ARISING UNDER, BY, OR THROUGH ACTS OF SELLER OR GRANTOR, AND DOES NOT WARRANT GENERALLY AGAINST ACTS OF ALL PERSONS, and (B) PUTS VENDEE ON NOTICE OR UPON INQUIRY AS TO ADVERSE CLAIMS.

(A) Since here, the respondents Boyce and Connell, covenanted to convey, upon full payment, by special warranty deed, they were not liable for any damages on the loss of benefit or bargain theory, when their inability to convey was taken from them from or by a superior title holder, (See section 53, Covenants, 20 Am. Jur. 2nd, page 624, where it is stated:

> "A covenant of special warranty is one the operation of which is restricted to certain persons or claims. As a general rule, where a vendee receives a special warranty, or quitclaim conveyance, he takes the estate subject to all the disadvantages that it was liable to in the hands of the vendor. . . . . and hence protects the grantee against a claim under a title from, but not against a claim under a title against, or superior to, his grantor."

See also, Whayne v. McBirney, 257 Pac. 2nd 151, 195 Oklahoma 269, and Central Life Assurance Co. vs Impelmans, 126 Pacific 2nd 757, 13 Wash. 2nd 631.

(B) Vendee is put on notice of possible claims by the existence or inclusion of the special warranty clause in his deed or contract, see 20 Am. Jur. 2nd, page 624, Section 55, Covenants, which states:

> "The fact that a vendor refuses to make a full and complete assurance of title is said to be sufficient to excite suspicion and put the [other] party upon inquiry."

See also, Jones vs Arthur, 244 S. W. 2nd 469 (Ky.) at page 471, Burton vs Price, 141 Southern 728 (Florida), McAboy vs Packer, 187 S. W. 2nd 207 (Mo.), Kentucky River Coal Corp. vs Swift Coal and Timber Co., 299 S. W. 201 (Ky.);

Where, as here, the purchaser was put on notice of possible defects in the title and thus cannot, especially as stated, thereupon

claim the benefits of the rule of damages on the loss of benfits basis, due to the limitations on vendors liability.

POINT II -- NEGLIGENCE AS A BASIS FOR FINDING OF "BAD FAITH" IS NOT A PROPER RULE OF LAW JUSTIFYING AN AWARD OF DAMAGE ON LOSS OF BENEFIT THEORY.

Appellant cites and quotes from a lone case of Shaw vs. Union Escrow & Realty Company, 53 Cal. App. 66, 200 Pac. 78, 78, as a basis for justifying loss of benefits damages, by assuming that negligence equates with bad faith, and thus, whichever rule of damages is determined to prevail in Utah, makes respondents here liable for loss of benefits. The case in question was appealed to the California Supreme Court, which awarded and affirmed the damages on a bad faith basis, but which commented on the Court of Appeals reliance on negligence as equaling bad faith, as follows:

"OPINION OF SUPREME COURT IN BANK, DENYING HEARING"
/200 Pacific (Cal.) p. 27/

"PER CURIAM. /4/ The application for a hearing in this Court after decision by the District Court of Appeal of the Second District, Division 1, is denied.

"We are not prepared to accede to the unqualified statement that gross negligence is the equivalent of bad faith as used in Section 3306 of the Civil Code. In this case, however, the court below made a finding:

'That the defendant acted in bad faith in refusing to carry out its contract with plaintiff and to convey said property to plaintiff on August 14, 1919, and in having conveyed said property to R. M. Goodman on June 21, 1919, without making in said conveyance provisions for the protection of plaintiff's rights in said property secured to him under the contract of June 5, 1919.'

Upon looking into the evidence in the case we are satisfied that there was sufficient therein to justify the trial court in finding that the conduct of the defendants in so refusing to perform its contract with plaintiff amounted to bad faith within the meaning of that term as used in said section 3306."

It would appear that the portion of the case quoted and relied upon by appellant here, and unsupported by any other authority, is probably mere dicta, and lacks any basis for such theory bases on the ruling of the higher Supreme Court's decision.

Ironically, the same case quoted and relied upon above, quotes Section 3306 of the California Civil Code, which adopts the same rule of out-of-pocket expenses or damages being recoverable (rather than loss-of-bargain damages) where good faith exists when vendor's inability to convey occurs, viz.:

> "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title andpreparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the amount agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Id. page 26.

POINT III -- UTAH CASES DECIDED ON BREACH OF CONTRACT TO CONVEY REALTY ARE CONSISTENT WITH THE RULE THAT BAD FAITH BREACHES ALLOW RECOVERABLE DAMAGES ON BASIS OF LOSS OF BARGAIN RULE.

Utah cases involving breach of contract to convey realty situations are consistent with the rule that where bad faith is the cause of the breach by vendor, that the loss-of-bargain rule of damages applies. From Dunshee vs. Geoghegan, 7 Utah 112, where the measure of damages was based on the fact that seller had no- title whatsoever at the sale date, and thus used the difference between the contract price and the value at the time set for conveyance was the measure of damages; McBride vs. Stewart, 249 Pac. 114 (Utah) where buyer sued for and was allowed to recover his payments, Brown vs. Cleverly, 70 Pacific 2nd 882, where buyer was allowed to rescind and recover his payments, McKellar R. E. & I. Co. vs Paxton, 62 Utah 97, where the buyer was given right to recover damages for failure of vendor to complete a building contracted for, and Bunnell vs. Bills, 13 Utah 2nd83, 368 Pac. 2nd 597, where the underhandness of the seller in selling to a second buyer without regard to the rights of a prior buyer, likewise involves a bad faith situation, and the rule an-

nounced therein by the Court, while correct on that basis, does not go in to the question of "good" and "bad" faith situations.

POINT IV -- UTAH STATUTE PROVIDING FOR ADOPTION OF COMMON LAW ENCOMPASSED ADOPTION OF SO-CALLED "ENGLISH RULE" RELATING TO MEASURE OF DAMAGES IN GOOD AND BAD FAITH SITUATIONS.

Section 68-3-1, Utah Code Annot'd, 1953, reads as follows: "The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted and shall be made the rule of decision in this state."

Statutorily regulated matters are impliedly excluded, Rio Grande Western Ry. Co. vs Salt Lake Inveetment Co., 35 Utah 528, 101 Pacific 586. This section does not adopt rigor or harshness of the common law, but only so much as was and had been generally recognized in this country, and as is and was, suitable to our conditions, Hatch vs. Hatch, 46 Utah 116, 148 Pac. 1096, Canoon vs. Pelton, 9 Utah 2nd 224, 342 Pac. 2nd 94.

As far back as 1843, Sugden on Vendors, Volume 2, Page 532, (6th American from 10th London Edition) stated the fact to be that:

". . even if he [vendee] affirms the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost where the vendor is without fraud, incapable of making a title."

While there is some diversity among the American States in the matter, we feel the rule cited in Section 522, Am. Jur. 651, Title Vendor and Purchaser Volume 77, 2nd series, should prevail, and be thus included in our law, to-wit:

"Section 522. Effect of Vendor's Good Faith.

"In many jurisdictions, when the vendor is unable to

convey, a distinction is made regarding the general damages recoverable by the purchaser under a land contract, between cases where the vendor acts in good faith in entering into the contract, and those in which good faith is wanting. While it is generally recognized that the purchaseer is entitled to recover the difference between the value of the land and the agreed price, to recover for the loss of his bargain, where the vendor cannot be said to have acted in good faith, it is held by many courts, in cases where the vendor does act in good faith, that the measure of damages is the amount of the purchase money paid, with interest, thereby denying the purchaser any recovery for the loss of his bargain. The situation is analagous to one where a recovery is sought for breach of a covenant of warranty orfor quiet enjoyment in a conveyance and should be governed by the same rule. . . . . ."

Since, in effect Utah has been following the rule to the extent of allowing "bad-faith" vendors to be penalized, it should recognize the fact that a good faith vendor should only have to respond by returning any amounts paid, or costs directly relating to the making of the contract.

POINT V -- AMOUNT OF PURCHASE PRICE REFUNDABLE WHILE ERRONEOUS WAS DUE TO MISINFORMATION FURNISHED BY COUNSEL FOR APPELLANT TO COUNSEL FOR RESPONDENTS.

In putting final touches on the proposed judgment, later signed into effect by the Court, Mr. David Boyce requested payment figures on amounts paid these respondents on the contract of sale. and the telphonic response made to a secretary in his office was as follows:

"David--Mr. Westerby's office called. Total of checks from Ron Warr to L. A. Boyce, was $3,807.25. Didnot include checks toEhlers." 3-17-'76 (9:45 A.M.

This amount was therefore inserted in the judgment, and, became fixed upon the signing of the same by the Court. Such principal amount was fully paid to Ron Warr and Joseph C. Rust by check dated May 4, 1976, and duly accepted and cleared through the banks. Since appellant is asserting that interest from payment of his installments to date of judgment should be at the rate of 8% instead of the statutorily rate of 6% to judgment and 8% thereafter settlement of the balance has not been accomplished, but these respondents as previously

indicated have been willing to pay or repay the difference between the face of the judgment and the actual total of the appellant's payments on the contract.

POINT VI -- APPELLANT NOT ENTITLED TO ATTORNEY'S FEES OR COSTS IN LOWER COURT.

Appellant Warr seeks counsel fees from respondents, but does not make any allocation as between the various respondents. Further appellant assumes because the Court below permitted or directed return of payments made by the appellant, that he was the prevailing party. The opposite view that respondents prevailed, because no loss-of-bargain damages were awarded by the Court below, is just as tenable, and, respondents here /Record /Tr. 6, Rec. 229/, acknowledged return of the money was in order. Further, no demand on either of these respondents for defense of appellants position was ever made /Rec. 275, 278, Tr. 52, 57/

Likewise, costs were discretionary with the Court, and, as the respondents generally prevailed as to the issues, its action in not awarding any, unless clearly unwarranted, which is not the case here should not be, as to lower court items, disturbed.

POINT VII -- APPELLANT'S APPRAISAL OF PROPERTY VALUES NOT IN PROXIMITY TO ALLEGED BREACH, and APPRAISER NOT BASING COMPARABLES TO APPROXIMATELY SAME PROPERTY.

The distance of the allegedly comparable tracts used by appellant witness, Mr. Osgood were all a mile to two miles away from the tract involved in this litigation, and, Mr. Osgood, while having some experience was not a licensed appraiser with the expertise that goes with qualifications required for official licensing. The appraisal figures given by respondent's witness were several thousand dollars per acre less than Mr. Osgood's figure /Tr. 64/Rec. 287/

C O N C L U S I O N

In view of all the facts, here, the special warranty clause, both limiting the respondents' liability and putting appellant on inquiry or notice of possible defects, of the title opinion rendered, and the law as to damages, and the lower Court's interpretation thereof, the good faith of the vendors, their agreement to refund payments, even though their erroneous amounts was based on information furnished to counsel herein by appellant's counsel, and, the nature of the evicence regarding lack of demand for providing a defense for the appellant's position, all warrant the general affirmance of the lower Court's findings and conclusions, and, except for the amount of the payments made by appellant, should be upheld.

WHEREFOR respondents pray for affirmance of the judgment, decree, and findings, except for adjustment of the amount to be refunded on appellant's purchase money payments.

Dated this 9th day of August, A. D. 1976.

Respectfully submitted.

(Robert C. Cummings), Attorney for respondents Boyce and Connell.

(Richard S. Johnson) Attorney for respondents Boyce and Connell.

Received two copies of the foregoing Brief of Respondents Boyce and Connell, on this day of August, A. D. 1976.

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