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Rex L. George and Margaret A. George, His Wife v. Stanley C. Mann and Louise S. Mann, His Wife : Appellant's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

REX L. GEORGE and MARGARET
A. GEORGE, his wife,

Plaintiffs and Appellants,

—vs.—

Case No.
11109

STANLEY C. MANN and LOUISE
S. MANN, his wife,

Defendants and Respondents.

APPELLANTS' BRIEF

Appeal from a Judgment of the Second Judicial District
Court in and for Davis County, Honorable Thornley
K. Swan, District Judge

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FILED

State Supreme Court Utah

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—vs.—

STANLEY C. MANN and LOUISE
S. MANN, his wife,

Defendants and Respondents.

Case No.
11109

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for a sum claimed to be owing pursuant to a contract of sale of real property located in Davis County, Utah.

DISPOSITION IN LOWER COURT

The case was tried to the Court. All facts and pertinent documents were submitted as exhibits to the Court

on stipulation of the parties, and the Court received written memoranda and oral arguments of counsel. From a judgment in favor of the defendants, no cause of action, plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment and judgment in their favor in the amount of \$3,600.84 together with interest and costs.

STATEMENT OF FACTS

The facts were stipulated by the parties hereto (R. 21-23), and are set out below for the convenience of this Court:

1. On the 29th day of October, 1959, the Defendants entered into an agreement styled "Option and Contract to Purchase Real Property" with the mother of the Defendant, NELLIE C. MANN, concerning real property located at Woods Cross, Davis County, Utah. A copy of this agreement is attached hereto as Exhibit "A" and made a part hereof as though set out herein verbatim.

2. The said option and contract to purchase provided, among other things, that Defendants were to pay to the said NELLIE C. MANN the sum of \$100.00 on

November 10th of each year until the option was exercised or until it expired; that the option had to be exercised on or before the 1st day of November, 1963, at 12:00 Noon.

3. That in September of 1961, Plaintiffs and Defendants began negotiations for the purchase of the property by the Plaintiffs from the Defendants which is the subject of the option (Exhibit "A"). The negotiations were handled mainly through a real estate agency in Bountiful, Davis County, Utah, who had been employed by the Defendants to secure a buyer for the property.

4. That the parties entered into and signed a document entitled "Earnest Money Receipt and Offer to Purchase," prepared by the real estate agent, which is attached hereto as Exhibit "B" and made a part hereof as though set out herein verbatim.

5. That this "Earnest Money Receipt and Offer to Purchase" provided that the total purchase price of the property was to be \$33,000.00; and provided, further, that the purchase price was to be paid as follows: \$100.00 as a deposit at the time the "Earnest Money Receipt and Offer to Purchase" was signed, \$600.00 when the seller approved the sale, and \$6,000.00 on delivery of the deed or final contract of sale which was to be on or before the 1st day of November 1961, and \$100.00 per year commencing November, 1962 until November, 1964, at no interest;

thereafter \$2,000.00 per year plus 5 % interest on the balance which "would amount to the assignment of option on said property." It further provided that "this offer contingent upon buyer being able to sell home at 1100 South 8th West, Woods Cross, Utah, to net him \$6,000.00 before November 1, 1961."

6. That the Defendants signed, in duplicate, a document dated the 1st day of November, 1961, and titled and styled, "Assignment of Contract"; the original of which was signed by STANLEY C. MANN and LOUISE S. MANN, the Defendants, and is attached hereto as Exhibit "C" and made a part hereof as though set out herein verbatim and the carbon copy signed by the same individuals and is attached hereto as Exhibit "D" and made a part hereof as though set out herein verbatim. The carbon copy was retained by the Defendants.

7. That the said documents contain the handwritten provision in ink: "Subject to conditions on Earnest Money Receipt."

8. That the original of said document was received by the Plaintiffs from the real estate agency and the carbon copy was retained by the Defendants; that the provision "subject to condition on Earnest Money Receipt," was on the original when it was received by the Plaintiffs (Exhibit "C") and also appears on the Defendants' copy (Exhibit "D"), but Defendant, STANLEY C. MANN, denies that he wrote it on the documents.

9. That on or about the 22nd day of December, 1961, a document entitled "Real Estate Contract," was signed by Nellie C. Mann, the mother of the Defendant STANLEY C. MANN, who was residing with the Defendants in the State of California at the time and the Plaintiffs, as buyers of the property which is the subject of the case. This document is attached hereto as (Exhibit "E") and made a part hereof as though set out herein verbatim.

10. That Exhibit "E" provides for the sale of the property by NELLIE C. MANN directly to the Plaintiffs.

11. Pursuant to the terms of the "Earnest Money Receipt and Offer to Purchase," Plaintiffs paid the sum of \$100.00 as a deposit the sum of \$600.00 when the seller approved the sale and the sum of \$6,000.00 subsequent to or at the time of the signing of Exhibit "E."

12. That in December, 1961, an "Assignment of Option and Contract to Purchase Real Property," a copy of which is attached hereto as Exhibit "F," and incorporated herein by reference, was prepared. A copy of said contract was forwarded to Defendants in California with the signatures of the Plaintiffs affixed as Second Parties. As to whether or not this document was signed by the Defendants and returned, the parties do not recall.

13. Exhibit "E," heretofore referred to was prepared by Attorney GEORGE K. FADEL, copies were

mailed to NELLIE C. MANN in California, who signed the same and returned the copies.

14. That Plaintiffs had paid to NELLIE C. MANN, or heirs, the sum of \$3,600.84 in interest for the period running from the 22nd day of December, 1961, to the 1st day of November, 1964, pursuant to Exhibit "E."

The original of the stipulation and its exhibits have been lost, but copies have been substituted. All exhibits mentioned in the Stipulation are in the record (R. 24-35), and should be carefully examined by the Court in connection with a review of the facts and consideration of the argument.

ARGUMENT

POINT I

IT WAS THE INTENTION OF THE PARTIES THAT THE PLAINTIFFS WERE TO PURCHASE THE PROPERTY FROM THE DEFENDANTS AND NOT MERELY TO TAKE DEFENDANTS' OPTION TO PURCHASE THE PROPERTY.

In examining the contract between the parties the Court should be guided by the principle that the intention of the parties must be determined and followed. *Western Development Company v. Nell*, 4 Utah 2nd 112; 288 P.2d 452 (1955).

At the time negotiations began, defendants had no interest in the property, but held only an option to purchase Exhibit "A" (R. 24-26). No Utah case on this point has been located but there are respectable authorities from other jurisdictions which hold that one having a mere option to purchase real property has not, before the exercise of the option, any interest in real estate. *Vigars v. Hucius*, 169 N.W. 119 (Iowa). See also the California case of *Hicks v. Christensen*, 164 Pac. 395, which defines an option as a mere right to purchase property, and not as an interest in property itself. The "Earnest Money Receipt and Offer to Purchase," Exhibit B (R. 27), which was the initial document entered into by the parties herein, indicates clearly that this was a sale of real property and not a mere assignment or sale of the option, since Exhibit B states that the payments were to be made "... on delivery of deed or final contract of sale" (lines 14 and 15, Exhibit B, R. 27), also at line 37 of Exhibit B (R. 27) "... final conveyance by warranty deed" is mentioned, and in the body of this same document the defendant, Stanley C. Mann, has written that "Release of 1 acre frontage of 100 feet is contingent upon completion of sale." (R. 27) This all shows that the parties herein did not intend that the plaintiffs were to receive a mere assignment of the option. Because the contract was for a sale of real property rather than for the assignment of the option, it would have been necessary for the defendants to exercise the option with Nellie C. Mann, Exhibit A (R. 24-26), and then make a sale of the property to the plaintiffs; or in the alternative, they could have allowed

the plaintiffs to enter into a direct contract with the owner of the property, Mrs. Nellie C. Mann, for the purchase of the property, and then fulfill their other contractual obligations separately. They did allow the plaintiffs to enter into a contract with Nellie C. Mann for the purchase of the property (See Exhibit E R. 30-34), but they have refused to fulfill the remainder of their obligations—notably to reimburse plaintiffs for interest charged in connection with the sale before November 1, 1964.

The effect of Exhibit A, the option to purchase the property from Nellie C. Mann, which was in force at the time was such that the plaintiffs could not have entered into a contract with Nellie C. Mann to purchase without the acquiescence and knowledge of the defendants. The defendants did have full knowledge of the particulars here since Nellie C. Mann is the mother of the defendant, Stanley C. Mann, and she was residing with the defendants in California at the time and received the contract of sale for her signature at the same time that the defendants received their final payment on their contract with the plaintiffs, Stipulation No. 9 (R. 22).

The “Earnest Money Receipt and Offer to Purchase”, Exhibit B (R. 27), provides that the transaction was to be closed on or before November 1, 1961, but Exhibits “C” and “D” (R. 28 and 29) show that the parties intended to waive this provision as to the date of closing

since these instruments are dated November 1, 1961, and incorporate by reference the provisions of the Earnest Money Receipt and Offer to Purchase, Exhibit B (R. 27). Since the provisions were incorporated by reference it is clear that the parties intended to have the closing of the sale extended beyond November 1, 1961. One of the provisions of the contract of sale was to the effect that the plaintiffs would not be required to pay interest on the amount to be paid for the purchase of the property until after November 1, 1964.

If there is any ambiguity present in this contract it is elementary that the writing should be construed against the party drawing same, i.e., the defendants. *Seal v. Tayco, Inc.*, 16 Utah 2nd 323 400 P.2d 503 (1965).

POINT II

PLAINTIFFS' ENTERING INTO A CONTRACT TO PURCHASE THE PROPERTY FROM NELLIE C. MANN, THE OWNER OF SAME, WAS WITHIN THE DEFENDANTS' KNOWLEDGE AND ACQUIESCENCE AND AMOUNTED ONLY TO THE EXERCISE OF THE OPTION HAD IT BEEN ASSIGNED TO THE PLAINTIFFS BY THE DEFENDANTS AND THEREFORE SATISFIED ONLY A PART OF THE DEFENDANTS' CONTRACTUAL OBLIGATION TO THE PLAINTIFFS.

It is true that the plaintiffs entered into a direct contract of sale with Nellie C. Mann for the purchase of the property, Exhibit E, Stipulation 10 (R. 22), but they did this *in spite of* defendant's option to purchase the real property in question, and it was done with the knowledge of the defendants and their acquiescence, since Nellie C. Mann was residing with them in California at the time she signed the agreement and at the same time that the defendants received their final payment. (R. 22).

The contract of the plaintiffs with Nellie C. Mann, Exhibit (R. 30-34) of necessity had to follow the provisions of the option, Exhibit A, (R. 24-26), and the plaintiffs were not able to receive any more favorable contract directly with Mrs. Nellie Mann than the defendants could have done in exercising their option. Therefore the defendants are responsible to the plaintiffs for any additional benefits they contracted to deliver to the plaintiffs over and above those which could be satisfied by exercise or the assignment of the option.

Under the option and the contract which grew out of the exercise of the option it was necessary to pay the interest to Nellie C. Mann from the 22nd day of December, 1961, to the 1st day of November, 1964, but the contract between the parties provided explicitly that if the plaintiffs purchased the property they would not be required to pay interest until after November 1, 1964, Exhibit B (R. 27). Since it is undisputed that the plaintiffs paid

the sum of \$3,600.84 between the 22nd day of December 1961 and the 1st day of November, 1964, Stipulation 14 (R. 23), they are entitled to judgment for this amount together with interest, since this was clearly the intention of the parties herein.

CONCLUSION

The stipulation and exhibits of the parties on file herein show that the intention of the parties was to the effect that the defendants were to sell real property to the plaintiffs. One of the provisions in the contract of sale was to the effect that the plaintiffs would not be required to pay any interest on the unpaid balance of the sale price until after November 1, 1964. This they were required to do, not because of any contract which they entered into, but rather because of a contractual obligation of the defendants to Nellie C. Mann.

The intention of the parties at the time they entered into the contract dictates that the judgment of the District Court in favor of the defendants should be reversed and judgment entered in favor of the plaintiffs in the amount of \$3,600.84 together with interest and costs.

Respectfully submitted,

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