1986

Ernest J. Miller v. John D. Archer and Elizabeth B. Archer : Reply Brief

Utah Court of Appeals

L. Brent Hoggan, Marlin J. Grant; Attorneys for Respondent.
E. Craig Smay; Attorney for Appellants.

BRIEF

SUPREME COURT OF UTAH

STATE OF UTAH

DOCKET NO. 860371-CA

ERNEST J. MILLER, Plaintiff and Respondent, vs. JOHN D. ARCHER and ELIZABETH B. ARCHER, both individually and as Trustees for the Elizabeth Daly Archer Trust, and HUBERT WOLFE, JUDY W. WOLFE, and ELLIOTT WOLFE, as Trustees for Elliott Wolfe Trust No. 701, Defendants and Appellants.	Supreme Court Docket Number 860428 Category No. 13b 86-0371-CA
JOHN D. ARCHER and ELIZABETH B. ARCHER, both individually and as Trustees for the Elizabeth Daly Archer Trust, and HUBERT WOLFE, JUDY W. WOLFE, and ELLIOTT WOLFE, as Trustees for Elliott Wolfe Trust No. 701, Third-Party Plaintiffs, vs. WILLIAM J. COLMAN, Third-Party Defendant.	**APPELLANTS' REPLY BRIEF**

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PARTIES TO THE ACTION

Plaintiff and Respondent:

Ernest J. Miller

Defendants and Appellants:

John D. Archer and Elizabeth B. Archer, both individually and as Trustees for the Elizabeth Daly Archer Trust, and Hubert Wolfe, Judy W. Wolfe, and Elliott Wolfe, as Trustees for Elliott Wolfe Trust No. 701

Third-Party Plaintiffs:

John D. Archer and Elizabeth B. Archer, both individually and as Trustees for the Elizabeth Daly Archer Trust, and Hubert Wolfe, Judy W. Wolfe, and Elliott Wolfe, as Trustees for Elliott Wolfe Trust No. 701

Third-Party Defendant:

William J. Colman

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The issues raised in this appeal of an action for specific performance of an option are whether parol evidence was admissible to show that the consideration stated in the option ("$5,000.00 and other good and valuable consideration") was not intended to be paid, and whether critical parts of this evidence were inadmissible on other grounds as well.

With regard to the parol evidence question, Respondent's Brief asserts, first, that the parol evidence rule does not prevent inquiry into the "real" consideration for an agreement which does not contain a contractual statement of consideration, and, second, that consideration for the option in this case may be found in the real estate contract and certificate of limited partnership with which it is "integrated". Respondent apparently disavows any claim that parol was admissible in this case to show that the real estate contract and option were intended to constitute a loan secured with realty, with a right to retrieve the security upon "repaying" the "loan", thus admitting that Respondent did not meet the evidentiary requirements of such a claim.

Apart from the parol evidence question, Respondent claims that the option was enforceable because, though the $5,000.00 was never paid, "other good and valuable consideration" was given, and, in any case, because the option contains an acknowledgment of receipt, appellants are promisorily estopped to assert a lack of consideration.

Respondent includes a highly partisan "Statement of Facts" which, it will be observed, is almost entirely unsupported by Respondents' citations to the record. It will also be observed that the bulk of these "facts" are parol matters, to which it is unnecessary to respond

absent some showing that parol was admissible to establish such "facts".

Finally, Respondent defends the District Court's reliance on certain "notes" and an appraisal.

Respondent's arguments on matters other than the parol evidence question can be addressed quickly before turning to the parol question and the particular evidentiary questions.

The Statement of Facts

Respondent has attempted to predispose reaction to its argument by prefacing it with a highly colored "Statement of Facts". The Court should be advised that a number of critical "facts" asserted there by Respondent are essentially unsupported by the included references to the record. Notable examples include the statements that appellants "advised Colman that they were only interested in advancing Colman $500,000.00 total for his salt project, and only on condition that the $500,000.00 be structured to appear by written record as (1) an investment of $250,000.00 in a limited partnership on the salt project... and (2) a payment of $250,000.00 as the purchase price for the Anderson Ranch, coupled with a one-year option in Colman" (p. 3, Respondent's Brief), that "Allen was advised by Archer, Wolfe and Colman that, although the primary purpose of the arrangement was to get $500,000.00 to Colman... they wanted the deal structured such that it would appear as three separate transactions (i.e., the limited partnership, the purchase of the ranch, and the option back to Colman on the ranch)" (pp. 3-4, Respondent's Brief); that Colman only agreed to the structure demanded by appellants "so long as he had an opportunity to reacquire the Anderson Ranch" (p. 4, Respondent's Brief),

that "Appellants intended that Colman and his attorney should rely on these representations and upon the sufficiency of the Option, as executed; and Colman did so rely and granted Appellants a deed to the Anderson Ranch" (p. 7, Respondent's Brief); and that "Allen consistently advised anyone who asked that the parties to the Option never intended for Colman to pay the $5,000.00" (p. 7, Respondent's Brief). Without multiplying examples, examination of Respondent's record citations in support of these propositions demonstrates that the vast majority of the material cited does not even reference the subject matter of the alleged "facts", and that actual references are few and where not equivocal are directly contradictory of the alleged "facts".

Appellants simply ask that the Court observe critically the relationship of the cited evidence to the recited "facts". As the illustrative examples noted above mirror actual findings by the District Court, examination of the supporting evidence cited by Respondent will provide the Court a thumbnail view of the quality of evidence supporting the District Court's Judgment.

The "Dual-Consideration" Argument

For the proposition that "other good and valuable consideration" will support enforcement of the option in this case even though the $5,000.00 was never paid, Respondent relies upon cases that hold that where two considerations are agreed upon, the fact that one is inadequate will not defeat the agreement if the other is adequate and legal. See Luther v. Nat'l Bank of Commerce, 98 P.2d 667 (Wash. 1940); U.S. v. Schaefer, 319 F.2d 907 (9 Cir. 1963).

The difficulty with these cases for Respondent is that they hold unequivocally that all legal considerations agreed upon must be de-

livered, however inadequate, to preserve the agreement. See Luther, supra, 98 P.2d at 673, citing Williston on Contracts. They do not support the proposition wished for by Respondent that where two considerations are agreed upon, delivery of one will suffice.

In any case, no witness in this matter intimated that there were two considerations for the subject option: one said the phrase "$5,000.00 and other good and valuable consideration" was "short-hand" for something else; three said it meant $5,000.00. No one claimed that $5,000.00 was an illegal or inadequate consideration.

The answer to Respondent's claim about "dual consideration", therefore, is that the option did not provide for a dual consideration; even if it had, the cases relied upon by Respondent would require the delivery of both, the $5,000.00 and whatever else might be thought to have been agreed upon.

The "Promissory Estoppel" Argument

The law of Utah is simply that an acknowledgment of receipt does not prevent a showing that, in fact, the consideration was not paid. Nielsen v. MFT Leasing, 656 P.2d 454, 456 (Utah, 1982); FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 329 (Utah, 1980). Such an acknowledgment is not a promise upon which an estoppel may be based.

Moreover, it is admitted in this case that there was no reliance on any such promise. Appellants admittedly warned Colman repeatedly from the date the $5,000.00 was first due up to the date for exercise of the option that the $5,000.00 had not been paid and that the option was considered invalid as a result. Respondent chose to rely upon a claim of Colman's lawyer that the $5,000.00 did not have to be paid. It is absurd to suggest that Respondent relied to his detriment on a

representation of appellants that the $5,000.00 had been paid.

The Parol Evidence Problem

The indisputable, and undisputed, facts in this case include:

1. the subject documents;

2. the fact that appellants required the transactions to be structured as shown by the documents, for legitimate and important tax reasons, and would not have entered into the transactions otherwise; specifically, that appellants refused to consumate the transactions as a secured loan; and

3. that the $5,000.00 recited as consideration for the option was never paid.

The subject documents show on their face that:

a) on October 15, 1981, appellants John Archer and Elliott Wolfe entered into a limited partnership agreement with Owanah Oil Company, represented by William Colman, in which Archer and Wolfe gave $250,000.00 in return for certain royalties and a promise to expend the money in a manner permitting tax credits;

b) on November 9, 1981, appellants John and Elizabeth Archer, the Elizabeth Daly Archer Trust, and the Elliott Wolfe Trust No. 701 agreed to purchase from Royalty Investment Company, represented by Colman, the Anderson Ranch for $250,000.00; and

c) as of "March __, 1982", Mr. and Mrs. Archer and Elliott Wolfe signed an option, for "$5,000.00 and other good and valuable consideration", to William Colman to purchase the Anderson Ranch for $650,000.00 on or before July 2, 1984.

Respondent, based upon the testimony of Frank Allen, claims that, despite the face of the documents, the "real" arrangement between

appellants and Colman was that appellants would provide Colman $500,000.00, Colman would give appellants a deed to the Anderson Ranch, and Colman, without further consideration, would obtain a right to get the ranch back after 1½ years by repaying appellants the $500,000.00 plus 20% interest. Notwithstanding Respondent's present denial, his claim throughout this matter has been nothing more or less than that the transaction between appellants and Colman was a loan secured by the Anderson Ranch, and that Colman had the right to redeem the security by repaying the loan.

The reason for Respondent's present denial of the claim announced in his opening statement and pursued throughout the trial is that, in post-trial memoranda, Respondent discovered that, as an exception to the parol evidence rule, the claim that documents on their face an absolute sale are in fact a secured loan must be proved by clear and convincing evidence, including evidence that both parties regarded the transaction as a loan. The record in this case is simply devoid of any evidence that appellants ever thought their arrangements with Colman a loan, or that they thought Colman had a right to retrieve the ranch without exercise of the Option, or that they indicated at any time that the $5,000.00 was not collectible, or that anyone in the course of the subject transactions ever suggested that "$5,000.00 and other good and valuable consideration" in the Option meant anything but $5,000.00. Realizing that the evidence in this case does not begin to meet the applicable standard, Respondent now denies that the basis of the ruling is a claim that the subject transaction was a secured loan. Respondent fails to note that the same evidentiary requirements would apply, whatever his theory, since this is an action for specific performance of an oral agreement.

Respondent now attempts instead to show that the District Court's reliance on parol evidence was justified as a search for the "real consideration" for the option.

"Real" Consideration

Where the consideration is not stated in an agreement - either because no mention is made of consideration or because the language used is a "mere receipt" - the law allows resort to parol to show that something of value which passes between the parties contemporaneously is the consideration. See Neilsen v. MFT Leasing, supra.; Wood v. Roberts, 586 P.2d 405 (Utah, 1978). Resort to parol to explain consideration, however, is not allowed where a contractual exchange of one thing for another is stated. E.g. Paccagnini v. Bort, 190 N.E. 2d 493 (Ill. App. 1963): Paloni v. Beebe, 110 P.2d 563 (Utah, 1941). In the latter case, neither side is permitted to claim that it should give less than is stated, or should receive more. Therefore, where a search for consideration outside the terms of a document is allowed, it may not be made among the terms of another document which states a simple contractual exchange of one thing for another.

The real estate purchase agreement and the limited partnership agreement in this case are simple contractual exchanges. Their terms as to consideration cannot be altered by resort to parol evidence. The District Court's reliance upon parol evidence in this case cannot be excused on the theory that it was appropriate to explain that the consideration for the real estate contract and certificate of limited partnership, despite their plain written terms, also included the option.

Respondent's glib claim that the option, the real estate con-

tract, and the certificate of limited partnership contain "mutual, overlapping considerations" improperly ignores the plain fact that the real estate contract and the limited partnership agreement consist of 1 for 1 contractual exchanges which are exclusive of other considerations and contain nothing extra which could "overlap".

Integration

Respondent claims that the real estate contract, limited partnership agreement, and option may be regarded as "integrated", and, therefore, that consideration for the option can be found in the real estate contract and the limited partnership agreement. Respondent neglects the fact that there is no basis in this record for "integrating" these documents except the theory argued throughout that, taken together, they constitute a secured loan.

A claim of "integration" in any case does not justify altering the legal effect of the documents or altering contractual provisions regarding consideration. It cannot be denied that unless the option in this case is regarded as separately bargained and paid for, as it appears on its face, and the limited partnership agreement is regarded as an exchange of funds for valuable royalties and controlled expenditures, as it appears on its face, the result is to undo the tax affects which all witnesses agree were the specific and exclusive basis on which appellants agreed to enter into the subject transactions.

Respondent also suggests a variant of the "integration' claim as a ground for a parol finding of consideration in this case, namely, that consideration can be found where the option is reserved as a condition of the sale of realty. In support of this claim, Respondent

cites statements in American Jurisprudence 2d and an Illinois case which indicate that where a buyer of land is promised by the seller that the seller will later repurchase the land at buyer's option, buyer can enforce the option (77 Am. Jur. 2d, Vendor and Purchaser, §48; Gerald Elbin v. Seegren, 378 N.E.2d 626 (Ill. 1978); and see Tilton v. Sterling Coal & Coke Co., 77 P.758 (Utah, 1904) for dicta regarding a lessee)), and a Nebraska case which finds that where there are ample separate payments not otherwise accounted for and it is shown that the land would not have been sold without the option, consideration may be found for the option. Commuter Development and Investment v. Granlich, 279 N.W.2d 394 (Neb. 1979).

Again, except for Respondent's assumption that the transactions were a loan, there simply is no evidence in this case that Colman would not have sold the land without an option back, or that appellants would have agreed to provide the option except for the promise of $5,000.00.

The "Notes"

Respondent's Brief does not contain an argument why the "notes", Exhibits "54", "55", and "56", should have been admitted under Rule 106, U.R.C.P., except that Respondent wanted them admitted and claimed he had nothing more than fragments to offer. Of course, it cannot be a response to the requirement of Rule 106 that whole texts be offered where necessary to make them clear and not misleading merely that the proponent claims he does not possess the whole text. Such a claim simply aborts the rule.

The fact is that the fragments offered by Respondent were incomplete in critical places, and essentially unintelligible. Respondents' Brief does not really seem to dispute this. Respondent attempt-

ed to draw from them, and attempts in his Brief again to draw from them, statements which they do not in any clear or complete fashion contain. The unreliable and misleading character of the documents could not be better demonstrated than by producing them. They are, accordingly, attached hereto as Exhibit "A".

The District Court clearly relied upon these documents for the sort of conclusions sought by Respondent, and used them to determine the credibility of a central witness, William Colman. This was clearly error, and as it clearly affected the outcome, clearly reversible.

The Appraisal

It was critical to Respondent's case to show that the Anderson Ranch had a value of $500,000.00 in Fall, 1981. The only evidence on this point offered by Respondent, and the evidence specifically relied upon by the District Court, was a 1971 appraisal which admittedly was based upon a fundamental misconception that the property was zoned permissively for development when it was, in fact, zoned restrictively against development.

Respondent now coyly attempts to explain away this difficulty by describing the appraisal as one "assuming zoning approval for development". There is nothing in the appraisal that suggests such a construction. It is simply in error about the zoning. There was no evidence that any zoning change had ever been sought, or was pending, or could be. The uncontradicted evidence was that the appraisal simply appraised the wrong property.

The Marcellus Palmer appraisal was not an appraisal of the Anderson Ranch which exists, but of a property which the District Court knew did not exist. Nevertheless, the District Court specifically

relied upon the appriasal as the basis for a finding critical to the judgment. This finding must be stricken, with the result that the judgment must be reversed.

The Evidentiary Requirement

This is an action for specific performance. The agreement to be specifically performed, however, is not that which appears from the documents in evidence, namely, that Colman, for $5,000.00, would have an option on the Anderson Ranch, but a different agreement, namely, that Colman should have the option without paying the $5,000.00. The latter agreement is merely oral, and is found in the "integration" of the real estate contract, the limited partnership agreement, and the option on the theory that they were really a secured loan. That is, exercise of the option was merely redemption of the security upon repayment of the loan, and borrower should not be required to pay separately for the right to redeem.

In an action for specific performance of an oral agreement, or on a claim that an outright conveyance is in fact security for a loan, plaintiff must prove his case by clear and convincing evidence which includes a clear and convincing showing that both parties to the transaction understood and agreed to the claimed terms. Corey v. Roberts, 25 P.2d 940, 942, 547 (Utah, 1933); Clark v. George, 234 P.2d 844 (Utah, 1951); Christensen v. Christensen, 339 P.2d 101 (Utah, 1959).

Respondent's present disavowal of his "loan" theory below effectively admits that the evidence below does not satisfy these requirements. Even setting aside the objections to parol, and indulging the District Court's conclusion that Colman was lying, the record is

devoid of any evidence that anyone but Colman or his attorney regarded the transactions as a loan, or thought the $5,000.00 for the option need not be paid. The evidence that Colman thought such things is merely negative, and Frank Allen's conclusions about the nature of the transactions are wholly unsupported by evidence that he heard or observed anything on the part of appellants inconsistent with their belief that the transactions were structured exactly as they appear on their face for real and serious tax purposes. Allen, in fact, made no other claim in the latter regard than that he didn't credit appellants' tax purposes because he didn't understand them.

Respondent asks the Court to read Allen's testimony carefully. Appellants heartily support this request. In addition to a remarkable tendency toward inuendo and to denominate what was obviously reconstruction and speculation with the phrase "recollection", the Court should observe that Mr. Allen admits that he was not privy to negotiation of the documents (Tr. Vol. 1, pp. 43, 93-95), admits that he made no effort to discern appellant's purposes (Tr. Vol. 1, pp. 94-95), admits that the "instructions" from which he drew his conclusions about the transactions came from Colman not from appellants (Tr. Vol. 1, pp. 44-45, 49, 63) (with the exception of fixing the closing date for the land sale and extending the operative date of the option, for purposes entirely consistent with appellants' testimony) (Tr. Vol. I, pp. 61-62), admits that he never discussed the $5,000.00 consideration for the option with anyone (Tr. Vol. II, pp. 154-155), and testified in direct contradiction of himself on the central issues of date of execution of the option (compare Tr. Vol. I, p. 137 with Tr. Vol. II, pp. 170-176), and independent value of the limited partnership interests (Tr. Vol. I, pp. 121-123).

When Allen's testimony is considered together with the facts that the District Court's rationale for disbelief of Colman was the inadmissible "notes", and its only evidence of a value of the Anderson Ranch consistent with Respondent's claims was an admittedly inaccurate appraisal, it seems obvious that the evidence in this case supporting the judgment is not clear and convincing, and does not include anything tending to indicate that appellants ever regarded the option as a free component of a loan.

Conclusion

The District Court apparently thought it unfortunate that, having paid $250,000.00 for a property now apparently worth in excess of $650,000.00, appellants should get to keep the land because of the "technicality" of failure to pay $5,000.00 for the option. The present judgment is the result.

Appellants may not be denied enforcement of the documents as written because a bargain eminently fair on its face when made should appear inequitable in changed economic circumstances years later. Had equities been in issue, much might have been presented by appellants on the inequity of now construing the documents in a manner which exposes appellants to loss of the tax benefits they bargained for.

No sound evidentiary basis was provided for the District Court's judgment declining to enforce the documents as written, and instead enforcing a bargain which all parties to it denied existed. The judgment below must be reversed.

Dated this 23rd day of April, 1987.

E. Craig Smay

CERTIFICATE OF MAILING

I hereby certify that I caused to be hand-delivered ten (10) true and correct copies of the foregoing Appellants' Reply Brief to the Clerk of the Utah Supreme Court, and that I mailed four (4) true and correct copies of the foregoing Appellants' Reply Brief to Respondent's attorney at:

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Postage pre-paid in Salt Lake City, Utah, this 24th day of April, 1987.

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