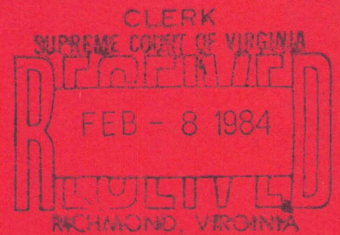


23/VA119



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 830585

CURTIS W. DRAKE,

Appellant,

v.

A. W. LIVESAY
and
MYRTLE M. LIVESAY,

Appellees.

JOINT APPENDIX

Richard E. Railey, Jr.
RAILEY AND RAILEY
Post Office Box 46
Courtland, Virginia 23837

Counsel for Appellant

F. Bruce Stewart
STEWART AND STEWART
Franklin, Virginia 23851

Counsel for Appellees

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MOTION FOR JUDGMENT

Comes now the plaintiff, Curtis W. Drake, by counsel and moves for judgment against defendants, A. W. Livesay and Myrtle M. Livesay, on the grounds and in the amount as hereinafter set forth:

BREACH OF CONTRACT

1. On or about April 6, 1982, defendants, A. W. Livesay and Myrtle M. Livesay, acquired and were conveyed for the sum of \$35,000.00 the following described real estate situated in Southampton County, Virginia:

"All that certain lot or parcel of land lying, being and situate in Newsoms Magisterial District, Southampton County, Virginia, on the west side of Virginia State Route 674, containing 2.002 acres as shown on plat entitled "Plat Showing Property for Emmett Dunlow and Ethel B. Dunlow Newsoms Magis. District Southampton Co., Virginia Scale 1" = 50' May 4, 1981 Survey by S. V. Camp, III and Associates C.L.S. Courtland, Va. Total Area = 2.002 Acres Plat Revised July 13, 1981" of record in the Clerk's Office of the Circuit Court of Southampton County, Virginia in Plat Book 13, page 119, which plat contains a metes and bounds description of the aforesaid lot and to which reference is hereby made for further particulars.

It being the same property conveyed to Emmett Dunlow and Ethel B. Dunlow by correction and boundary line deed dated July 21, 1981 from Howard L. Ellis and Bernice W. Ellis, his wife, of record in the aforesaid clerk's office in Deed Book 257, page 664, the original deed purporting to convey the said property to Emmett Dunlow alone on January 10, 1950 from B. F. Ellis and Ethel Ellis, his wife, predecessors in title to Howard L. Ellis and Bernice W. Ellis, being of record in the aforesaid clerk's office in Deed Book 97, page 598."

2. At all times relevant to the transaction herein, defendant, A. W. Livesay was a licensed real estate broker and agent, and in his capacity as a licensed real estate broker and agent, and in his capacity as an owner of said property commenced advertising and attempting to sell said property subsequent to April 6, 1982.

3. On or about May 17, 1982, defendant, A. W. Livesay, individually, and as agent for defendant, Myrtle M. Livesay, entered into a firm contract with plaintiff,

Curtis W. Drake for the sale by defendants and the purchase by plaintiff of the real estate described in paragraph 1 above for the contract sale price of \$36,500.00 cash.

4. Defendants and plaintiff agreed to execute a written memorandum evidencing said contract of May 17, 1982 on May 18, 1982, but defendants breached their oral contract with plaintiff by refusing to execute a written memorandum of said oral contract of May 17, 1982.

5. Defendants, A. W. Livesay and Myrtle M. Livesay, also materially breached their contract of May 17, 1982 with plaintiff by entering into a contract with Lawrence Craig Turner and Louise R. Turner for the sale and conveyance of said property described in paragraph 1 above by defendants and for the purchase of said property by the said Lawrence Craig Turner and Louise R. Turner for \$38,500.00.

6. Pursuant to said contract by and between defendants, A. W. Livesay and Myrtle M. Livesay and the said Lawrence Craig Turner and Louise R. Turner, the said property was conveyed to the said Lawrence Craig Turner and Louise R. Turner on or about May 26, 1982 by deed dated May 21, 1982 for the consideration of \$38,500.00.

7. By letter dated May 20, 1982 signed and executed by defendant A. W. Livesay, individually, and as agent for defendant, Myrtle M. Livesay, to plaintiff, Curtis W. Drake, defendants executed a written memorandum evidencing said contract with plaintiff of May 17, 1982.

8. Pursuant to the terms of said May 17, 1982 contract, plaintiff has performed all of his obligations and has satisfactorily complied in all respects with each and every term of said contract and/or plaintiff stands ready, willing, and able to perform all of his obligations and responsibilities pursuant to said contract. Subsequent to entering into said contract of May 17, 1982, plaintiff immediately took all steps necessary in preparation for his anticipated performance of said contract, all at much trouble and expense to himself.

9. The fair market value of said property described in paragraph 1 above which is the subject of this Motion for Judgment is in excess of \$55,000.00.

10. As a direct result of defendants breaches of the aforesaid contract, plaintiff has been damaged to the extent of \$25,000.00.

VIOLATION OF VIRGINIA CONSUMER PROTECTION ACT OF 1977

11. Defendants are "suppliers" under the Virginia Consumer Protection Act of 1977, defined at Section 59.1-198 (c) as "a seller . . . who advertised, solicits or engages in consumer transactions . . ."

12. The transaction in question was a "consumer transaction" under the Virginia Consumer Protection Act of 1977, defined at Section 59.1-198 (a) as "the advertisement, sale, . . . or offering for sale . . . of goods or services to be used primarily for personal, family or household purposes".

13. By their conduct with respect to the transaction in question, defendants, acting jointly and/or independently, have committed the following prohibited practices, or fraudulent acts and practices, declared unlawful by Section 59.1-200 of the Virginia Consumer Protection Act of 1977:

- N. Using any other deception, fraud, false pretense, false promise or misrepresentation in connection with a consumer transaction.

14. Pursuant to provisions of Section 59.1-204 of the Virginia Consumer Protection Act of 1977, the plaintiff is entitled to recover actual damages, reasonable attorney's fees, and Court costs.

15. On May 17, 1982, as a direct result of the misrepresentations of defendants, plaintiff, Curtis W. Drake, was induced to enter into a certain contract for the purchase of the real estate described in paragraph 1 hereinabove for the consideration of \$36,500.00.

16. At the time and place of the aforesaid contract, defendants intentionally misrepresented material facts, which included their intentions at the time said contract was negotiated and entered into, with the intention that plaintiff, Curtis W. Drake, rely on said material facts as follows:

- A. Defendants represented that they had agreed to sell the subject property to plaintiff for the sum of \$36,500.00;
- B. Defendants represented that they would execute a written memorandum of said May 17, 1982 contract on May 18, 1982; and

C. Defendants represented to plaintiff that within a reasonable time subsequent to said May 17, 1982 contract that they would convey said property by good and sufficient deed of General Warranty with English Covenants of title, to plaintiff.

17. Plaintiff relied to his detriment on each and every misrepresentation of defendants as enumerated above.

18. Notwithstanding the misrepresentations of defendants, as enumerated above, which plaintiff relied upon to his detriment, defendants at no time intended to reduce said oral contract of May 17, 1982 to writing and at no time intended on conveying said property to plaintiff.

19. Prior to said May 17, 1982 contract, contemporaneously with the execution of said contract, and subsequent to the execution of said contract, defendants used deception, fraud, false pretenses, and/or misrepresentation in connection with this consumer transaction in order to defraud plaintiff.

20. As a direct result of the conduct of the defendants involving deception, fraud, false pretenses, false promises, and/or misrepresentations in connection with this consumer transaction, all of said conduct having been relied upon by plaintiff to his detriment, plaintiff was damaged in the amount of \$25,000.00.

WHEREFORE, plaintiff, Curtis W. Drake, prays for judgment against defendants, A. W. Livesay and Myrtle M. Livesay, and each of them jointly and severally, with interest thereon at the rate of 10 percent per annum from May 17, 1982 until paid and his costs in this behalf expended.

CURTIS W. DRAKE

By _____
Richard E. Railey, Jr., Of Counsel

Richard E. Railey, Jr.
Railey and Railey
Attorneys at Law
Post Office Box 46
Courtland, Virginia 23837

DEMURRER

Come now the defendants, A. W. Livesay and Myrtle M. Livesay, by counsel, and demur to the two parts of the Motion for Judgment filed herein and say that it is not sufficient in law and ought not to be prosecuted on the following grounds:

1. The Motion for Judgment based on breach of contract is unsufficient as a matter of law, assuming but not admitting the truth of all the allegations in the bill of complaint, because the written memorandum dated May 20, 1982 evidencing the alleged contract between the parties does not satisfy the requirements of Virginia Code §11-2.

2. The Motion for Judgment based on the Virginia Consumer Protection Act of 1977 is insufficient as a matter of law, assuming but not admitting the truth of all the allegations in the bill of complaint, because the said Act does not apply to a contract for the sale of real estate which is not evidenced by a written memorandum sufficient under the provisions of Virginia Code §11-2 since no action may be brought without the said written memorandum.

A. W. LIVESAY AND MYRTLE M. LIVESAY

BY: _____

Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on July 14, 1982 prior to filing this Demurrer I mailed a copy thereof to Richard E. Railey, Jr., counsel of record for the plaintiff herein, at his office in Courtland, Virginia.

F. Bruce Stewart

FROM THE DESK OF
A.W. LIVESAY

May 20, 1982

Curtis Drake
Continental Telephone Co.
Ivor, Virginia 23866

Dear Curtis:

We, Holt and I did today sell to the Turners of
Portsmouth the Emmett and Ethel Dunlow's property.
They had proposed to pay us \$38,500.00 for this same
property that I had told you we would sell to you but,
as I told you on the phone I , after discussing this
with Holt had no other alternative but, to sell to the
same people that had approached you about buying and
after finding that you did not own came to proposition
me.

Curtis, They will rent to your father as Emmitt did as
they don't want to run the store only want to live there
after selling their Portsmouth property.

For your sake I am sorry but, for my sake as much time
and effort as I had put into working with Emmitt in the
sale of the Franklin property and buying his property

I think I am entitled to this increase in price.

Sincerely,

A. W. Livesay

Commonwealth of Virginia



JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

CITIES OF
SUFFOLK
FRANKLIN

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

December 15, 1982

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

E. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Mr. Richard E. Railey, Jr.
Attorney at Law
Main Street
Courtland, Virginia 23837

Mr. F. Bruce Stewart
Attorney at Law
103 E. Second Avenue
Franklin, Virginia 23851

Re: Curtis W. Drake
v.
A. W. Livesay and Myrtle M. Livesay

Gentlemen:

Thank you for your memoranda in the above captioned case. Upon a review of the memoranda and the letter from A. W. Livesay to Curtis Drake I do not feel that the letter is sufficient as a memorandum for the sale of real estate under the Statute of Frauds.

Based on this belief I sustain the defendant's Demurrer and I request that Mr. Stewart prepare the appropriate order and circulate it to Mr. Railey.

Yours very truly,


Benjamin A. Williams, Jr.

ORDER

This cause came this day to be heard on plaintiff's motion for judgment, defendants' grounds of defense and defendants' demurrer to the motion for judgment filed herein; and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court finds that plaintiff's motion for judgment is insufficient in law in that the written memorandum dated May 20, 1982 evidencing an alleged contract between the parties does not satisfy the requirements of the Statute of Frauds, Virginia Code §11-2, which is a valid defense to the whole of plaintiff's cause of action as set forth in his motion for judgment filed herein, it is accordingly

ORDERED that defendants' demurrer be, and it is hereby, sustained; and it is further

ORDERED that this action be, and it is hereby, dismissed, to which action of the Court the plaintiff by counsel duly excepted.

ENTER this 12th day of January 1983, _____.

Benjamin A. Williams, Jr.

JUDGE

I ASK FOR THIS:

F. B. [Signature] (Lawyer), p.d.

SEEN AND OBJECTED TO:

[Signature], p.q.

A Copy

Teste: _____ Clerk

By: _____ D.C.

ASSIGNMENTS OF ERROR

1. The trial Court erred in sustaining the defendants-in-error's Demurrer to the plaintiff-in-error's Motion for Judgment and in dismissing plaintiff-in-error's action on the ground that plaintiff-in-error's Motion for Judgment is insufficient in law in that the written Memorandum dated May 20, 1982, evidencing an alleged contract between the parties, does not satisfy the requirements of the Statute of Frauds, Section 11-2 of the 1950 Code of Virginia, as amended.