

Russell v Borders

***Writ
Of
Habeas Corpus***

General Case Overview

I.

GENERAL CASE OVERVIEW

The naked facts in this case point to a contract dispute between forty-nine (49) customers of RON RUSSELL PROPERTIES LLC. and owner/operator, then sixty-nine (69) year defendant Ronald Russell. The dispute, essentially about refunding an upfront fee paid to Mr. Russell for services, could have been and should have been resolved in small claims court. Prior to the allegations and subsequent conviction of forty-nine (49) counts of grand theft by fraud (P.C. §487(b)), Defendant Russell was a semi-retired, modestly successful California real estate broker with roughly four (4) decades of experience, a devoted family man and respected member of the community with no criminal history.

Each of the state's alleged victims were at some time California home owners adversely affected by the 2008-2009 California housing market melt-down. Some of these home owners had previously financed their home using non-traditional mortgages with variable interest rates. When their mortgage interest rates rose, they found themselves strapped with monthly mortgage payments which exceeded what they could afford. At the same time their variable interest rate was rising, home values plummeted leaving them "upside down" in their mortgage. (i.e. They owed more on their mortgage than their home's present value.)

Other "alleged victims" financed their home with non-conventional "interest only" mortgages require a "balloon payment" (payment of the entire principle amount) as the final

1 mortgage payment. They too discovered they owed a "balloon
2 payment" far exceeding the present value of their home. They
3 faced default, foreclosure and eviction; or were already trapped
4 by the "default foreclose eviction cycle." Both groups of home
5 owners had lost any equity they may have once had in their home.
6 If these home owners had already defaulted or their property was
7 already foreclose; their credit rating also took a big hit
8 adversely affecting their credit worthiness. These facts taken
9 together made it near impossible for them to refinance existing
10 mortgages, secure further loans or purchase other homes.

11 Mr. Russell learned about a real estate operation in the San
12 Francisco Bay area assisting persons mired in these
13 circumstances to "walk away" from their financially distressed
14 residential property, rent a suitable home while they improved
15 their credit score and eventually purchase the home they were
16 renting. The operator obtained lists of foreclosed/vacant
17 residential properties from HUD's Neighborhood Revitalization
18 Program in conjunction with a local nonprofit, purchased
19 suitable properties using private investor funds, rented the
20 property to the prospective new owner and eventually; when the
21 renter's credit score improved, sold the property to the
22 prospective new owner. Mr. Russell concluded this approach
23 would work well in the Sacramento area and incorporated the
24 operation's ideas into what he called a Rent to Own project.

25 He provided significant input to the application filed by
26 nonprofit **Haven of Hope** (See "Exhibit A.") to HUD's Neighborhood
27 Revitalization program to receive the lists of foreclosed,
28

1 vacant properties. (See "Exhibit B.") He contacted and
2 received encouragement and political support from then
3 California Senator Lungren, (See "Exhibit C.", drafted a
4 business plan which included locating the "Rent to Own" program
5 in his existing Sacramento area real estate office, (See
6 "Exhibit D."); began his search for private investors, (See
7 "Exhibit E."), created a customer contract, (See "Exhibit F.")
8 reviewed by his attorney Harold John Gentner, (See "Exhibit G.")
9 and began advertising for customers.

10 The contract Mr. Russell signed with each customer (See
11 "Exhibit F.") was essentially a **contract for services** providing
12 that; for consideration of an upfront refundable fee of \$2,900.
13 he would provide the knowledge/expertise/services, in other
14 words help/enable the customer to limit the financial loss and
15 burden arising from their financially distressed residential
16 property. (To the extent possible by law.) He would locate a
17 suitable property (from the HUD or MSL lists) and purchase it
18 using private investor funds. The customer would agree to "rent
19 to own" the house until the customer improved their credit score
20 sufficiently to qualify for a conventional mortgage. There was
21 no "sunset clause" in the contract such that Mr. Russell had a
22 duty to perform the services he offered by a specific date.

23 Mr. Russell's purpose behind the \$2,900. upfront refundable
24 fee (refundable if the customer changed their mind) was to
25 ensure each customer had an earnest intent to participate in the
26 program and not lose interest or drop out at a critical stage of
27 this home acquisition process. Any experienced real estate with

28 (Ronald Russell, Habeas Corpus Petition, General Case Overview, page 5.)

1 Mr. Russell's experience can recall a number of times in their
2 career when at the very last moment, either the buyer or the
3 seller backed out of a really good deal the broker had worked
4 long and hard to arrange. But Mr. Russell also included a
5 provision in the contract permitting the \$2,900 to be used
6 either as a rental deposit on the home the customer would rent;
7 or, part of the down payment toward the purchase price when the
8 customer was ready to purchase the property, or as a credit
9 toward moving expenses. In the meantime, Mr. Russell intended
10 to utilize these up-front fees to cover operational expenses of
11 the Rent to Own project.

12 The contract further contained a provision for resolving
13 disputes through mediation and Small Claims Court. None of the
14 disgruntled customers (the state's "alleged victims") attempted
15 exercise the provision to to resolve their refund dispute with
16 Mr. Russell. Had they done so, they would have been directed to
17 the Department of Real Estate (DRE) and received their refund
18 years before the state took Mr. Russell to trial.

19 The four or five customers seeking a refund using the Small
20 Claims Court procedure all received a full refund which was no
21 greater or less than the refund received by the "alleged
22 victims" who the state's complaining witnesses. Both groups
23 received their refunds from the DRE Recovery Fund. The refunds
24 obtained through this fund did not come out of public monies.
25 The fund's account balance is maintained through contributions
26 made by every licensed real estate broker based on a percentage
27 of every commission the broker was paid. (See "Exhibit J.")
28

1 The prosecution's basic underlying premise was the \$2,900.
2 upfront fee was a rent deposit and Mr. Russell was required to
3 place these upfront fees in a trust account, escrow account or
4 other special account. This premise was fundamentally flawed
5 for at least three (3) reasons: The terms of the contract
6 provided the upfront fee was not in itself either a rental
7 deposit or a down payment on the home the customer would
8 eventually rent and purchase, but could be applied to such at
9 the appropriate time. There was no lease or rental agreement in
10 effect that stated the monthly rent, security deposit and
11 duration of the lease on the rental. Nor had the customer
12 entered into a contract to buy a specific property at a specific
13 price. Even if a court of law was to determine the \$2,900
14 upfront fee paid by each customer was a rental security deposit;
15 under California law:

16 "There are no restrictions on what the
17 landlord can do with the deposit during the
18 term of the rental agreement, except for
19 what is required by local ordinance or by
20 the rental agreement or lease. In other
21 words; there is no state-wide requirement
22 that the security deposit be placed in an
 interest bearing account. However, several
 local rent control ordinances do require
 that the security deposit be kept in an
 interest bearing account for the benefit of
 the tenant."² NOTE: There are no such
 ordinances in Sacramento.

23 The prosecution's second underlying premise was: Mr. Russell
24 was operating a "Ponzi scheme" and intended to "pocket" the
25 \$2,900. fee from each customer for his own personal use.

26 ² SOURCE: California Association of Realtors website
27 (www.car.org) and CIV. §§ 1950.5(b), 1950.7(c).

28 (Ronald Russell, Habeas Corpus Petition, General Case Overview, page 7.)

1 Further, the defendant never intended to purchase distressed
2 properties for these customers using private investor funds; nor
3 rent these homes to these customers; nor eventually sell each
4 home to the customers when they qualified for a conventional
5 mortgage. Essentially, the prosecutions second premise: Mr.
6 Russell intended to defraud these customers. This premise is
7 ludicrous and categorically flawed on it's face. The "Ponzi
8 scheme" and "intent to defraud" will be examined further in the
9 Grounds for Habeas Corpus petition. For our purposes of general
10 overview here, the first obvious flaw is **Real Estate Brokers are**
11 **paid a commission by the property seller** based on a percentage
12 of the property's selling price. The average commission (5% -
13 6%) on a single family dwelling would exceed five (5) times the
14 \$2,900 upfront fee customers paid to Mr. Russell. Hence, Mr.
15 Russell had a greater incentive to buy/sell homes to customers
16 than cheat them out of their \$2,900. upfront fee. There are
17 several other seriously flawed assumptions in the prosecution's
18 case related to the notion of a "Ponzi scheme" and "intent to
19 defraud" neither supported by the evidence or state law.

20 Mr. Russell however, underestimated the pervasive nature of
21 "Murphy's Law" also known as "What can go wrong will go wrong."
22 For example, like a large number of professions in the real
23 estate industry, he believed the California residential housing
24 market had bottomed out by 2010. (i.e. The value of existing
25 homes would not continue to decline.) That was not the case
26 however because at the time, no one really knew how many
27 mortgages were on the brink of default and foreclosure. The
28 rising number of mortgage defaults drove up the number of
(Ronald Russell, Habeas Corpus Petition, General Case Overview, page 8.)

1 foreclosures and eviction with the unintended effect of further
2 driving down the value of homes in the entire state. This
3 phenomena created a second tidal wave of declining home values
4 making prospective buys skittish and lenders extremely wary ...
5 Lenders don't make loans from their own money - it is the money
6 of investors whose attraction to opportunities in the California
7 residential real estate market continued to wane because the
8 "opportunities" looked more and more like losing propositions.
9 But Russell desperately needed real estate investors if his Rent
10 to Own project was to succeed.

11 Russell reasoned, in this scenario, banks and other lenders
12 holding mortgages will be less quick to pursue eviction as their
13 general policy because each additional eviction created more
14 vacant property further driving down the value of surrounding
15 homes. Essentially, they were cutting their own throats with
16 each eviction. This insight, a product of his decades of market
17 experience, he concluded he could put to use to the benefit of
18 his customers. As it turned out, Mr. Russell reasoning was
19 sound, allowing 45 - 50 customers who were either facing or
20 already in the "default foreclosure eviction cycle" to remain in
21 their present home several months without paying any further
22 mortgage payments. The amount saved (\$10,000. or more) well
23 exceeded the upfront fee they paid to Mr. Russell. Mr. Russell
24 showed customers how to get "Cash for Keys" (\$3,000 to \$6,000 in
25 most cases). Mr. Russell's knowledge and expertise permitted
26 customers to walk away with as much as \$16,000. or more AND THE
27 REFUND of the \$2,900 upfront fee they paid to Mr. Russell. Just

28 (Ronald Russell, Habeas Corpus Petition, General Case Overview, page 9.)

1 how disgruntled could a customer be in such an enviable
2 position?

3 Mr. Russell underestimated the period of time required by
4 HUD's application approval process, never dreaming it would drag
5 on for months and months. Meanwhile, he continued to get
6 favorable feedback and moral support from Senator Lungren and
7 the HUD representative. He honestly believed it was just a
8 matter of time before the HUD application would be approved.
9 But the news wasn't all bad: Considering the real estate market
10 conditions, investor confidence in the market, non-availability
11 of investor of funds couple with a general apathy about real
12 estate investment; Mr. Russell had found a private investor who
13 pledged five (5) million dollars contingent upon Mr. Russell's
14 receipt of HUD's list of foreclosed properties. Mr. Russell's
15 decades of experience said "SIT TIGHT AND WAIT!"

16 The corollary to **Murphy's Law** is "Just when you think things
17 can't get any wore, THINGS GET WORSE." "Worse" for Mr. Russell
18 in this case was he never seriously considered any possibility a
19 disgruntled customer harboring personal issues toward him would
20 begin a wild, vindictive, all-out campaign against him to
21 tarnish his name and drive him out of business by waging war
22 against Russell on the internet. Customer **Jeff Johnson**, also a
23 **California licensed Real Estate Broker** was one such individual.
24 **Johnson** demanded a refund of his upfront \$2,900 fee. He
25 obtained a Small Claims Court judgment against Russell for
26 \$2,900, and as a real estate broker he would obtain his refund
27 for \$2,900 satisfying the judgment by simply filling out an
28 application with the Department of Real Estate (DRE) Recovery

(Ronald Russell, Habeas Corpus Petition, General Case Overview, page 10.)

1 Account. Instead, Mr. Johnson took Mr. Russell into a
2 Creditors' Hearing, required Russell to produce records of all
3 his assets and financial holding allegedly to discover the
4 existence of any property or accounts Johnson could attach to
5 satisfy his \$2,900. judgment. This would seem like quite a
6 bother considering the facts: As a real estate broker himself,
7 he knew all he needed to do was submit a copy of the judgment
8 and an application to DRE Recovery Account and he would receive
9 his \$2,900 refund. He also knew the DRE would suspend Mr.
10 Russell's brokers license until such time as Russell reimbursed
11 the DRE Recovery Account in the amount of Johnson's claim.
12 After the Creditors' Hearing as they rode down together in the
13 elevator Jeff Johnson put it to Mr. Russell like this: " don't
14 care about the \$2,900. I'm going to bury you!"

15 Additionally, Mr. Johnson went to every federal, state and
16 local agency he could think of, including the Sacramento County
17 District Attorney's office with his claims about Mr. Russell.
18 (These claims were outrageously false or made without context.)
19 He further obtained a list of all of Mr. Russell's Rent to Own
20 customers complete with their e-mail addresses and began
21 repeatedly contacting each one. He told all of them Mr. Russell
22 was attempting to bilk them and they would never get their money
23 back. Based on Johnson's word, these other customers began
24 demanding refunds (creating a situation similar to "a run on the
25 bank") and repeatedly contacting the District Attorney's Office
26 at Johnson's behest. As a broker himself however, Johnson had a
27 fiduciary responsibility to inform the same people he sent to
28 the District Attorney about the DRE Recovery Fund as a means to

(Ronald Russell, Habeas Corpus Petition, General Case Overview, page 11.)

1 obtain their \$2,900. refund. He failed to fulfill this responsibility.

2 Friends and supporters of Mr. Russell urged him to file a civil lawsuit
3 for libel and slander against Johnson. Mr. Russell however, not looking for
4 revenge assured his friends and supporters that things would work themselves
5 out without resorting to a civil action against Mr. Johnson. Further discus-
6 sion of Mr. Johnson's role in bringing prosecution against Petitioner is found
7 in "Grounds for Habeas Corpus Petition.

8 Much to Mr. Russell's pleasure; vindication was soon his, or so he belie-
9 ved at the time. The Department of Real Estate launched a full-scale investi-
10 gation into Mr. Russell's activities and his Rent to Own project. They cared
11 off all of his business records for close scrutiny. Investigator Brenda Smith
12 extensively interviewed Mr. Russell and all of his customers. Had the DRE in-
13 vestigation determined Mr. Russell had violated any laws or regulations regar-
14 ding rental deposits, escrow accounts or "funds held in trust", DRE would have
15 immediately issued either a **LETTER TO CEASE AND DESIST** or **SUSPENDED/REVOKED**
16 Mr. Russell's brokers license. No action of any kind was taken by the Depart-
17 ment of Real Estate against Mr. Russell.

18 At a pre-trial hearing in the criminal case DRE Investigator Brenda
19 Smith, appearing as a state's witness was asked: "What regulations did Mr.
20 Russell violate?" Her testimony was "He didn't violate any laws or regula-
21 tions." She further testified the DRE Recovery Fund was available to Mr.
22 Russell's customers and some customers had already received their refunds.
23 Earlier the District Attorney had maintained "the Fund" was not available for
24 use by Mr. Russell's customers. After the conflicting testimony from Ms.
25 Smith, the prosecution moved the court to disallow any mention of the Recovery
26 Fund's existence and reimbursement application in front of the jury.

27 Then, after conviction was taken, in the absence of the jury, the prose-
28 cution gave the Judge all of the alleged victims' applications to DRE for
(Ronald Russell, Habeas Corpus Petition, General Case Overview, page 12.)

1 transferred to the custody of the California Department of
2 Corrections & Rehabilitation.

3 Thoroughly frustrated at the snail's pace the direct appeal
4 was proceeding, Petitioner allowed himself to be talked into
5 submitting a Habeas Petition to the trial court before his
6 direct appeal was decided. Petitioner was totally unaware he
7 could not rightfully begin the post conviction relief habeas
8 corpus process until after his criminal conviction was affirmed
9 as final based on the California Court of Appeal decision on
10 direct appeal. In result of this ignorance was his premature
11 submission of a poorly written petition, drafted without the
12 benefit of any access to trial transcripts and discovery
13 materials. The premature petition was denied by the Superior
14 Court and it was essentially futile to attempt to salvage the
15 denied petition for presentation to the California Court of
16 Appeal which still hadn't finalized his direct appeal!

17 Having received 19 volumes of trial transcripts in August
18 2016 from appellate counsel and the 17,000+ pages of discovery
19 materials from defense counsel in October, 2016, Petitioner
20 submitted the instant habeas petition Grounds 1-8 to the
21 Sacramento County Superior Court (Case No. 16HC00392) October
22 29, 2016. Despite Petitioner's explanation to the Superior
23 Court that his initial Habeas Petition was untimely and why,
24 (probably not even legally viable) as it was erroneously filed
25 before direct appeal was finalized and drafted without any
26 access to the trial court transcripts or related discovery
27 material, the Superior Court ruled this instant petition was a

28 (Ronald Russell, Habeas Corpus Petition, General Case Overview, page 13b.)

1 successive petition and would then only consider Petitioner's
2 Ground Eight, "Ineffective Assistance of Appellate Counsel"
3 because that Ground could not have been brought before the
4 direct appeal was finalized. The Superior Court further ruled
5 appellate counsel, appointed at public expense was not
6 ineffective because appellate counsel was not required to raise
7 all possible grounds on direct appeal, and only required to
8 raise issues where there was a likelihood of prevailing on
9 direct appeal. Thusly, the Sacramento Superior Court denied the
10 instant petition on January 26, 2017.

11 Subsequently, Petitioner filed the instant petition in the
12 California Court of Appeal (Case No. C084587) on May 5, 2017.
13 The Third Appellate District of the California Court of Appeal
14 issued an undated one page blanket denial of the Petition
15 without comment in June, 2017. Petitioner then submitted the
16 instant Habeas to the California Supreme Court (Case No.
17 S243220) on July 17, 2017. The California Supreme Court issued
18 a one (1) page blanket denial without comment on October 11,
19 2017.

20 Petitioner contends the State of California had ample fair
21 opportunity to consider all of the issues raised in Grounds 1-8
22 of the instant petition and thus, Petitioner's submission of the
23 instant petition to the United States District Court based
24 solely on federal constitutional grounds is proper and timely.
25 He further contends it would have been lawful, proper,
26 reasonable and just had the Sacramento County Superior Court
27 under the circumstances set aside the early initial Habeas
28 Petition as "premature" and/or untimely vacating the initial

1 ruling and then considering the instant petition in its entirety
2 instead of limiting the Court's consideration to Ground 8.