1975

Cecil O. Eckard and Marilyn J. Eckard v. Gale G. Smith and Joy T. Smith: Brief of Respondent

Utah Supreme Court

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14123

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CECIL O. ECKARD and
MARILYN J. ECKARD, his wife,

Plaintiffs- Respondents,

vs.

GALE G. SMITH and
JOY T. SMITH, his wife,

Defendants-Appellants.

Case No. 14153

RESPONDENTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, HONORABLE STEWART M. HANSON, JR., JUDGE

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RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

Respondents were originally granted specific performance in December, 1973 by the lower court for the sale of one-half of a duplex to them, and they received a deed to the subject property from Appellants in January, 1974. In October, 1974, this Court, in a 3 to 2 decision, reversed the lower court on the ground that the contract was not sufficiently definite to allow specific performance. After remittitur to the lower court, Appellants moved for restitution of the premises. Respondents moved for summary judgment on the ground that the issues had been rendered moot by Appellants' own acts before and after filing their notice of appeal.

DISPOSITION IN LOWER COURT

The lower court granted Respondent's motion for summary judgment on the ground that the issues were moot and denied Appellants' motions for restitution and damages.

RELIEF SOUGHT ON APPEAL

Respondents request this Court to sustain the summary judgment awarded them by the lower court on May 13, 1975.

STATEMENT OF FACTS

Respondents state the facts upon which the lower court based its summary judgment because many of the relevant facts which show mootness are omitted from Appellants' brief. The facts are divided into numbered paragraphs for convenience.

1. After hearing the witnesses and reviewing the evidence, the lower court in December, 1973 decreed that Respondents were entitled to specific performance for conveyance of one-half of a duplex and that they had to exercise their option to purchase within 25 days after judgment. (R. 109-11).

2. The lower court's decision does not specify how the option was to be exercised. (R. 109). In fact, Appellants set the terms for exercising the option. (R. 71).

3. The lower court's decision does not require or even mention a party-wall agreement. (R. 109).

4. When the end of the 25 day period was approaching, Respondents asked Appellants for an extension of time in which to obtain the money to make the purchase, but Appellants refused. In fact, Appellants insisted that Respondents pay by cash or cashier's check rather than personal check. (R. 71). (Respondents were unable to obtain a conventional home loan because Appellants refused at that time to execute a party-wall agreement).

5. As a result of Appellants' insistence, Respondents were required to secure a loan from a personal friend and to deliver to Appellants a cashier's check in the amount of $37,744.02 in full payment for their one-half of the duplex on Friday, January 4, 1974 because they could not obtain a cashier's check at any later time to comply with the 25 day requirement. (R. 71). This payment occurred six days before Appellants filed their notice of appeal. (See R. 107).

6. In anticipation of the payment, Appellants had already completed a warranty deed to Respondents on January 3, 1974. (R. 98-100).

7. Appellants accepted the said cashier's check on January 4, 1974 and delivered to Respondents the said warranty deed signed by Appellants and notarized by their attorney. (R. 89, 100).

8. Appellants' attorney also signed a receipt that the said cashier's check was received "in full and complete payment for one-half (1/2) of the duplex . . ." (R. 42; see R. 89 (Affidavit of Appellant's attorney)).

9. Both Appellants endorsed the said cashier's check and voluntarily cashed it several weeks after they had filed their appeal. (R. 71; see copy of check R. 40-41).

10. No Writ of Execution or other supplemental proceedings were ever instituted by Respondents against Appellants.

11. At the time of the sale to Respondents, Appellants did not:

(a) Attempt to stay the sale as provided in Rule 62 of the Utah Rules of Civil Procedure by filing a supersedeas bond;

(b) Reserve any right or claim under the litigation;

(c) Protest the sale; or

(d) Take any other preventive action.

12. Appellants did not file their Notice of Appeal until six days after they had conveyed the property to Respondents. (See R. 107).

13. Almost two weeks after filing their Notice of Appeal, Appellants executed a party-wall agreement dated January 22, 1974, which states that the "Eckards [Respondents] are owners in fee" of one-half of the duplex, and requested Respondents to sign it. The said party-wall agreement had been prepared by Appellants' attorney who notarized their

signatures. (R. 43-46; see R. 90).

14. Respondents did not sign the party-wall agreement submitted by Appellants because Appellants were then negotiating to sell the other half of the duplex to the Townsends. (R. 71).

15. On February 5, 1974 several weeks after filing their Notice of Appeal, Appellants sold the other half of the duplex to the Townsends. (R. 71).

16. As a condition of the sale to the Townsends, Appellants required the Townsends to execute a party-wall agreement with Respondents on February 5, 1974. (R. 71-72; see R. 47-50).

17. The cashier's check from Respondents to Appellants was negotiated by Appellants after February 5, 1974. (R. 71; see R. 40-41).

18. Because Respondents had declined to execute the party-wall agreement prepared by Appellants' attorney, Appellants had, on January 30, 1974 moved the lower court for an order setting aside their conveyance to Respondents. (R. 98). Appellants were then complaining to the lower court that the basis of their motion to set aside the conveyance was not because they had been forced to convey but because Respondents had not complied with the judgment! (R. 101, 98).

19. After the party-wall agreement between the Townsends and Respondents was executed, Appellant's attorney told the lower court on or about February 19, 1974 that the

matter had been "resolved and settled", and as a result the lower court denied Appellants' motion to set aside the conveyance to Respondents. (R. 98, which shows the notation thereon by Judge Croft; see minute entry, R. 103).

20. Upon the original appeal the majority of this Court expressly declined to consider the mootness issue (R.82) and did not order restitution although empowered to do so under Rule 76(b) of the Utah Rules of Civil Procedure. The dissent argued that the issues had been mooted. (R. 82-83).

21. After remittitur and after reviewing the record and hearing the arguments on mootness the lower court granted summary judgment to Respondents but inadvertently signed the wrong summary judgment form. (See R. 8). The lower court executed and filed the correct judgment on May 13, 1975. (R. 28).

A R G U M E N T

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS ON THE ISSUE OF MOOTNESS AND PROPERLY DENIED APPELLANTS' MOTIONS FOR RESTITUTION AND DAMAGE.

This Court has held that when a party "acquiesces in a judgment against him he thereby waives his right to have said judgment reviewed on appeal." Ottenheimer, et al., v. Mountain States Supply Co., 56 Utah 190, 188 Pac.1117, 1118 (1920)

Although the present appeal contests the lower court's decision of mootness, the facts of the Ottenheimer case are in point and the above stated principle is applicable because the facts upon which mootness is based all occurred prior to the hearing of the initial appeal. In Ottenheimer, the defendant-appellant vacated certain property pursuant to an order of the lower court but in doing so served a written notice on respondent stating that it was vacating the property pursuant to the order but was not waiving any of its claims. This Court dismissed the appeal in Ottenheimer in spite of the written notice that the defendant-appellant was not waiving its claims.

In the instant case, Respondents brought no process to enforce their judgment, and thus Appellants were not forced into conveying the property or accepting payment. In fact, Appellants set the terms, insisted on a cash payment and acknowledged that the cashier's check was in "full and complete payment". Moreover, when payment was made Appellants indicated no intent to preserve their rights to appeal and took no action to preserve those rights-they filed no supersedeas bond, they requested no stay; on the contrary, they demanded performance within the twenty-five day period set by the court and refused to accept less than cash in payment. As is stated in the Facts, Respondents were forced to take extraordinary measures to comply with the terms set by Appellants. See

Golden Spike Equipment Co. v. Croshaw, 16 Utah 2d 391, 401 P.2d 949, 951 (1965), wherein this Court indicated that there should be an evident intention to preserve an appeal at the time a judgment is satisfied.

Appellants were at all times pertinent hereto represented by counsel who was even asked if he wanted his name on the check paid to Appellants. If Appellants wanted to protect their interests on appeal they could and should have filed a notice of appeal, requested a stay of the judgment or filed a supersedeas bond before demanding and accepting a full cash payment and delivering their deed. Appellant's actions in the period following judgment both before and after filing their notice of appeal are an irrevocable waiver of their claims.

On the question of mootness, some courts have distinguished between acts occurring before appeal and those occurring after. In our case, Appellants took voluntary actions contradictory to their position both before and after filing their notice of appeal. Such prior or subsequent actions taken separately should be sufficient to render Appellants' claims moot. When such actions are combined, the issue must be conclusively mooted. It would be inequitable indeed if Appellants could set the terms, demand and receive a cashier's check in full payment for the property in dispute, voluntarily cash the check several weeks after filing their

notice of appeal, thereafter tell the lower court that the issue had been "resolved and settled", and then claim they are entitled to restitution.

Further, for Appellants' benefit, Respondents executed a party-wall agreement after the appeal had been filed so that Appellants could sell the other one-half of the duplex to the Townsends. All of Appellants' actions in regard to the sale to Respondents and the Townsends contradict any further claims Appellants now assert. A case becomes moot when by an act of the parties the controversy has come to an end. Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970). A moot question is one that existed but because of the happening of certain events has ceased to exist. Harvey v, Cahill, 206 N.E.2d 500 (Ill. App.).

In the instant case, the Affidavit of Appellants' attorney contained in the file (R. 89) establishes most of the facts to show mootness. Moreover, the lower court dismissed Appellants' motion to set aside the conveyance to Respondents because Appellants' attorney told the lower court long after the appeal had been filed that the matter had been "resolved and settled".

After remittitur the question of mootness was placed directly before the lower court. Mootness, as grounds for dismissal, is discussed in 6A Moore's Federal Practice Section 57.13 as follows:

. . .

> One or more of the issues involved in an action may become moot prior to or during the trial of the action in the lower court. In this event the trial court should refuse to make an adjudiciation of the moot issue(s). If the non-mooted issues that remain are sufficient so that the action itself remains justiciable then the trial court properly proceeds to adjudicate those issues; but if the mooted issues are controlling the trial court should dismiss the action . . .

Respondents do not contest the right of restitution in a proper case when process has issued to enforce a sale or judgment. See Rule 76(b), Utah Rules of Civil Procedure. However, the parties in the present case voluntarily entered into a contract for the "full and complete" payment of cash for the property which payment became final upon acceptance and delivery of the warranty deed, all of which Appellants later confirmed by voluntarily cashing the cashier's check long after they had appealed.

It is clear from the cases cited in Appellants' brief that the facts of each case determine whether restitution is proper. In Holmes v. Williams, 273 P.2d 931 (Cal. 1954), cited by Appellants, the court held that restitution will be allowed only if it is not inequitable and the parties have not contracted that payment be final. In the instant case, all actions were taken at the direction of Appellants, and the payment was acknowledged by Appellants as "full and complete". It is submitted that under the facts of this case,

the acts of Appellants were voluntary, payment was final, the issues are moot, and restitution would be inequitable. The principle stated in the Ottenheimer case is applicable to this case.

Appellants also claim damages for unlawful detainer. Under no circumstance in the instant case would Appellants be entitled to damages. There was nothing in the lower court's Findings of Fact, Conclusions of Law or Judgment in regard to unlawful detainer. No issue of unlawful detainer was raised in any of the points stated in Appellant's original brief to this Court. There was no discussion whatever by this Court in regard to unlawful detainer in its initial opinion. Appellants did not petition for rehearing as to that matter after the initial decision by this Court was rendered. Appellants thus have no basis for claiming such damages.

C O N C L U S I O N

Appellants demanded and received full cash payment from Respondents. Appellants set the conditions upon which payment was required and voluntarily cashed the check and insisted on the party-wall agreement long after filing their appeal. It is clear that the issues have been rendered moot and that Appellants are not equitably entitled to restitution or damages. The judgment granted Respondents should be affirmed.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered three copies of the foregoing Brief to Richard W. Perkins, attorney for Defendants-Appellants, 2525 South Main Street, Salt Lake City, Utah, this 19th day of September, 1975.

By Richard L. Peshell