1976

Verna R. Smith v. Albert Coon and Twentieth Century Housing : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF

VERNA R. SMITH,

Plaintiff-

vs.

ALBERT GOOD
HOUSING,

Verna
908
Salt
Pet
Appellant

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IN THE SUPREME COURT FOR THE STATE OF UTAH

VERNA R. SMITH, Plaintiff-Appellant, vs. ALBERT COON and TWENTIETH CENTURY HOUSING, a Nevada corporation, Defendants-Respondent.	)	Case No. 14519

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

Plaintiff-appellant sought judgment for breach of a Uniform Real Estate Contract, possession of the subject real property, treble damages, attorney's fees and costs. Defendant-respondent, Twentieth Century Housing (hereinafter referred to as TCH) counterclaimed for an order requiring plaintiff-appellant to accept defendant-respondent's payments and to submit an accounting of all sums received pursuant to the Uniform Real Estate Contract, damages for abuse of process, attorney's fees and costs.

DISPOSITION IN LOWER COURT

The trial court rendered judgment on the parties' cross motions for summary judgment as follows:

1. Defendant TCH's motion for partial summary judgment was granted.

2. Plaintiff's cross motion for summary judgment was denied.

3. Plaintiff wrongfully refused defendant Twentieth Century Housing's tender of payments.

4. There was no default by defendants on the Uniform Real Estate Contract.

5. The assignment of contract between the defendants was valid.

6. Plaintiff was awarded $30.55 as reimbursement for unpaid net taxes.

7. Defendant Twentieth Century Housing was awarded $1,000 as attorney's fees, to be offset against the unpaid net taxes and the accumulated payments which total $1,350.55 owing plaintiff for the period of April, 1974, through January, 1976.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and remand to the lower court solely for the purpose of determining additional attorney's fees to which respondent is entitled.

STATEMENT OF FACTS

Respondent respectfully submits that appellant's recitation of the facts includes statements not included in the pleadings

nor evidence presented to the lower court herein, and not at issue nor relevant in those proceedings. Also, appellant fails to include facts necessary to accurately reflect the status and nature of this action. Although no record on appeal has been filed herein, respondent, submits the following as an accurate and complete statement of the facts herein for the court's examination.

On or about February 2, 1965, defendant Albert Coon and appellant executed a Uniform Real Estate Contract whereby defendant Albert Coon agreed to purchase and appellant agreed to sell certain real property located in Salt Lake County, State of Utah. The contract recited a purchase price of $10,500.00, with a downpayment of $500.00. The balance of $10,000.00 was to be paid in monthly installments of $60.00 with interest at the rate of 6 1/2 percent per annum. The remainder of the contract contained the standard provisions, including the requirement that the buyer assume responsibility for payment of real property taxes and insurance. On or about February 20, 1974, defendant-respondent TCH and defendant Albert Coon and his wife, Oleita S. Coon, executed an Assignment of Contract, whereby respondent assumed all rights and obligations under the aforesaid Uniform Real Estate Contract with appellant. Said assignment of contract recited that the balance due under the Uniform Real Estate Contract as of March 5, 1974, was

$9,391.04. Respondent notified appellant of the assignment by letter dated March 11, 1974. Respondent commenced tender of payment of the $60.00 per month as required by the Uniform Real Estate Contract to appellant. Appellant refused to accept any of said payments, asserting that the balance recited on the assignment was incorrect, the payments were not legal tender, and various other reasons. Respondent offered to make payments in any medium desired by appellant and requested an accounting of sums received and those due under the Uniform Real Estate Contract. Appellant failed to specify a medium of payment acceptable to her and also failed to provide the accounting requested by respondent. A notice of delinquency was served on both defendants and thereafter, a notice of tenancy at will. Appellant thereafter filed a complaint alleging breach of the Uniform Real Estate Contract because of failure to make the required monthly payments, and sought, as a remedy, repossession of the subject real property, treble damages, attorney's fees and costs. Respondent answered and counterclaimed, denying a breach of contract on the basis that it had tendered all required payments and that said payments had been wrongfully refused by appellant. Respondent also sought an accounting of sums paid and owing on the Uniform Real Estate Contract, damages for abuse of process,

attorney's fees and costs. Subsequent to the filing of the complaint herein, defendant Albert Coon, died. Appellant moved to substitute a party for defendant Coon, and petitioned for letters of administration. The lower court denied said motion and petition on the grounds that defendant Coon had left no estate, the assignment between the defendants was valid, and defendant Coon therefore had no interest in the Uniform Real Estate Contract subject to probate.

After extensive discovery by the remaining parties, respondent moved the court for partial summary judgment, seeking dismissal of appellant's complaint and judgment on its counterclaim, excepting the claim of abuse of process. Appellant made a cross motion for summary judgment on her complaint. A hearing was held in the lower court to consider the motions along with the affidavits and memoranda submitted, and arguments of counsel. The hearing was continued for a determination of the balance due on the contract and any deficiencies thereon after each party submitted accountings, cancelled checks, receipts, amortization schedules and affidavits relating thereto. As a result of the continued hearing, Judge Croft awarded the plaintiff the sum of $30.55 to reconcile the balance due on the Uniform Real Estate Contract with that recited in the Assignment of Contract between the defendants.

ARGUMENT

I

THE ALLEGED INCAPACITY OF APPELLANT'S COUNSEL IS NOT A PROPER GROUND FOR APPEAL.

Appellant has raised the issue of the incapacity of her counsel in the trial court proceedings. However, the issue of whether or not the health of appellant's counsel prevented her from being adequately represented in the lower court is one which requires an evidentiary hearing on matters which have not and cannot be adequately presented to this court. The statements in appellant's brief are in the nature of unverified hearsay with little or no probative value. Respondent's counsel was surprised to read that appellant's counsel suffered a heart attack while in court and that the lower court "abruptly concluded the proceedings and took the matter under advisement. . . ." (Appellant's Brief, Page 8). In actuality, the lower court heard all arguments to their conclusion and appellant's counsel suffered no visible infirmity at that time. However, respondent realizes that such statements, without verification, are as useless and self-serving as those made by appellant and will not respond in like kind to appellant's assertions.

The appropriate means for seeking relief under the circumstances described by appellant would have been to

petition the lower court for relief under one of the provisions of Rule 60(b) of the Utah Rules of Civil Procedure. As stated by this court, relief under Rule 60(b)

> is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. Warren v. Dixon Ranch Company, 123 Utah 416, 260 P.2d 741, 743 (1953).

Appellant's contention that her counsel "was physically incapacitated and was not capable of properly representing me" (Appellant's Brief, Page 8), falls most clearly under the parameters of Rule 60(b) rather than as a grounds for appeal. Matters on appeal are limited to questions of law in law cases, or questions of law and fact in equity cases. Rule 72, Utah Rules of Civil Procedure. Appellate review is further limited to the record on appeal and cannot include "matters dehors the records, such as statements or affidavits of counsel, certificates or statements of the clerk, or statements of the trial judge." 4 Am.Jur.2d Appeal and Error § 487.

Rule 60(b) is applicable to those situations where "justice has been so thwarted that equity and good conscience demand that this extraordinary relief be granted." Kettner v. Snow, 13 Utah 2d 328, 375 P.2d 28, 30 (1962).

Furthermore, such a motion is clearly within the exclusive province of the trial court, where evidence can be re-

ceived and a factual determination made as to the competency of appellant's legal counsel, and, equally important, whether or not the lack of competency, if established, prevented appellant from presenting her case to the lower court. In Warren v. Dixon Ranch Company, supra, the court stated:

> The rule that the courts will incline towards granting relief to a party who has not had opportunity to present his case is ordinarily applied at the trial court level, . . . 260 P.2d at 744.

That this is a matter to be raised with the trial court under Rule 60(b) was reiterated by this court in Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973).

> The rule that the courts will incline towards granting relief to a party, who has not had the opportunity to present his case, is ordinarily applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion could have been granted. 513 P.2d at 431.

This is the rule not only in Utah, but also the majority view throughout the country:

> Whether there should be a new trial for misconduct of counsel is left almost entirely to the discretion of the trial court, whose action in this respect will not be reversed on appeal except for clear abuse of discretion. 5 Am.Jur.2d Appeal and Error §897.

Therefore, the issue of the competency and effectiveness of appellant's counsel ought to have been raised in the trial court under Rule 60(b). The decision of the lower court could then be appealed to this court for a determination of whether or not the trial court had abused its discretion in ruling,

based on the record presented therein. This court, at this time, has no record upon which to make such a determination.

In the event that the court hesitates to deprive appellant of a rehearing as requested by her, for fear that her contentior of lack of adequate representation may be well-founded and that the time has passed when she could have petitioned the lower court for a rehearing or other appropriate relief, respondent respectfully submits the following for the court's consideratior

First, the following would be presented by respondent in opposition to appellant's contentions: Appellant was apparently aware of her counsel's health problems from at least the time of the assignment of contract between the defendants (Appellant's Brief, Page 7); at no time, to the best of respondent's knowledge, did appellant attempt to substitute counsel; appellant signed various affidavits during the course of litigation and presumably knew the contents of both those and other documents presented to the court; appellant was present at both hearings held in this matter; and, appellant made no attempt to raise the issue of effective legal counsel until the filing of her brief herein.

Second, legal authorities and precedent in this area tend to indicate that appellant would not have been successful even had she brought a timely motion before the lower

court under Rule 60(b). As stated in 68 Am.Jur.2d New Trial §160,

> Frequently a new trial is sought on the ground of the alleged incompetency or negligence of the applicant's attorney, or upon the ground that the attorney was incapacitated by illness or by intoxication. In civil cases the rule is practically universal that a new trial will not be granted on the ground of the negligence or incompetence of the attorney for the party applying for such new trial. The law regards the neglect of an attorney as the client's own neglect and will give no relief from the consequences thereof.

Utah law has followed the same rule, that improper or inadequate actions on the part of the moving party's representative do not usually merit equitable relief under Rule 60(b). Justice McDonough stated the following in Warren v. Dixon Ranch Company, supra:

> . . . although a judgment may be erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that the negligence of the attorney, agent, trustee or other representative of the present complainant prevented a fair trial. . . . The requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative. 260 P.2d at 743, 744.

In Airkem Intermountain, Inc. v. Parker, supra, a much more egregious situation than that herein was presented where defense counsel filed a notice of withdrawal on the day of trial, which withdrawal was refused by the trial court. When neither the defendant nor his counsel appeared at trial a default judgment was entered against the defendant. Defendant's motion for relief from a final judgment

under Rule 60(b) was denied by the trial court and affirmed on appeal. The court said:

> For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative. The movement must show that he has used due diligence and that he was presented from appearing by circumstances over which he had no control. 513 P.2d at 431.

Appellant herein had her day in court with counsel and the issues were decided upon not only oral argument, but also a voluminous record. Respondent contends that appellant would have difficulty establishing that she had "no control" over the situation and used "due diligence".

II

THE JUDGMENT OF THE LOWER COURT IS SUPPORTED BY THE EVIDENCE.

Appellant has argued that the judgment of the lower court was not supported by the evidence. In support of the same she recites alleged facts which are supposedly in conflict with the judgment. Also included are several statements to the effect that the purpose of the lawsuit was to clarify the terms of the contract and determine the correct balance due (Appellant's Brief, Pages 10 and 13). Since the sole allegation of default on the contract in the complaint of appellant was a failure to make required monthly payments, issues of

interpretation of the contract did not arise. The balance on the contract was determined by the lower court pursuant to respondent's counterclaim and submission of the issue by both parties.

However, most significantly, appellant has failed to refer to the record herein to support either her factual or legal arguments. A fundamental rule of appellate review is that the party prevailing in the lower court is entitled to have the evidence reviewed in a light most favorable to him. As stated in Buckley v. Cox, 122 Utah 151, 247 P.2d 277 (1952), "if there is any competent evidence in the record to support the court's findings the judgment must be affirmed." In order to overcome this presumption the appellant,

> must detail, with citation to the record where appropriate, the particulars wherein the evidence touching the findings is inconsistent therewith or is not of enough moment to sustain it. In Re Lavelle's Estate, 122 Utah 253, 248 P.2d 372 (1952).

The appellate court herein is limited solely to the record on appeal as a source of evidence and cannot consider extraneous matters, such as unsupported statements contained in briefs, or references to materials not before the court (See Appellant's Brief, Page 15, wherein she refers to attorney's bills, receipts and letters). See 4 Am.Jur.2d Appeal and Error § 487.

The record on appeal was not filed nor designated by appellant. Therefore, the decision herein must be based

solely on the judgment roll and the decision of the lower court affirmed. See, U.S. Building and Loan Ass'n. v. Midvale Home Finance Corp., 86 Utah 506, 44 P.2d 1090, 1092 (1935).

> The rights of the parties to an appellate proceeding must be determined on the record before the appellate court. The appellate court is not required to and may not pass on questions not presented by the record, although decided by the trial court. 4 Am.Jur.2d Appeal and Error § 491.

Affirmance of the trial court's judgment in situations such as that herein was strongly propounded by Justice Henriod in the recent case of Bagnall v. Suburbia Land Company, 542 P.2d 183 (Utah 1975). In Bagnall the defendants designated only parts of the record favorable to them and made few references to the record to substantiate their factual statements. Plaintiffs also failed to designate the record. Justice Henriod's majority opinion states:

> As a result we have before us briefs of both sides loaded with unreferenced, self-serving statements of facts and contentions, with an apparent invitation that we perform their procedural obligation and conduct their research. We cannot indulge them such luxury under the circumstances here. This court, therefore, under elementary principles anent appellate review, in this particular case will presume the findings of the court to have been supported by admissable, competent, substantial evidence--to any criticisms of which, by any litigants this court feels constrained to turn a deaf ear. 542 P.2d at 184.

Respondent has attempted to avoid duplicating the situation described in Bagnall v. Suburbia Land Company, by not

responding to appellant's arguments with its own statements equally unsupported by any record before the court. The law is clear as to the result mandated herein--affirmance of the trial court.

III

THE CASE HEREIN SHOULD BE REMANDED TO THE TRIAL COURT FOR THE SOLE PURPOSE OF DETERMINING ADDITIONAL ATTORNEY'S FEES TO WHICH RESPONDENT IS ENTITLED.

The subject matter of this lawsuit is a Uniform Real Estate Contract which provides for attorney's fees for the prevailing party, incurred for the enforcement of the contract. Attorney's fees were awarded to respondent in the lower court and any additional fees should be ascertained and awarded for fees incurred in the prosecution of this appeal.

CONCLUSION

Appellant's contention that the ill-health of her legal counsel denied her effective representation in the lower court is not properly brought before this court prior to a determination of the issue by the lower court pursuant to motion under Rule 60(b) of the Utah Rules of Civil Procedure. This court lacks any record or evidence properly before it, sufficient to enable it to make a decision in relation thereto, and is indeed precluded by law from doing so.

Because of appellant's failure to refer to the record on appeal in her argument of insufficient evidence, or even to designate the record on appeal, this court must presume that

the judgment of the lower court was supported by sufficient and reliable evidence and, therefore, affirm the judgment of the lower court.

Respondent, if successful herein, is entitled to a remand to the lower court for the awarding of attorney's fees incurred by respondent in prosecuting this appeal, pursuant to the provisions of the subject Uniform Real Estate Contract.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Respondent's Brief, postage prepaid, this 5th day of January, 1977, to Verna R. Smith, 906 South 19th East, Salt Lake City, Utah 84108, acting pro se for plaintiff-appellant.

Nancy Brough