1976

Helen Ingram v. Henry H. Forrer : Brief of Appellant

Utah Supreme Court

James J. Smedley; Attorney for Defendants-Appellees;
Robert M. McRae; Attorney for Plaintiff-Appellant;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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HELEN INGRAM, formerly known as Helen Woolworth,

Plaintiff-Appellant.

v.

Case No. 14608

HENRY H. FORRER and CHLORA FORRER, his wife,

Defendants-Appellees.

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APPELLANT'S BRIEF

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JAMES J. SMEDLEY
30 North Main Street
Heber City, Utah 84032
Attorney for Defendants-Appellees

ROBERT M. McRAE of
HATCH, McRAE & RICHARDSON
370 East Fifth South
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

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SECONDARY AUTHORITIES

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STATEMENT OF THE NATURE OF THE CASE

Appellee seeks to sustain judgment of the trial court.

DISPOSITION OF THE LOWER COURT

After a trial on the merits the Court denied Appellant's claim and entered decree reforming instrument so that it complied with agreement made at the time of the sale.

RELIEF SOUGHT ON APPEAL

Appellee seeks to have the decision of the Lower Court sustained.

STATEMENT OF FACTS

In September of 1968, Appellees, as Sellers, and Appellant, as Purchaser, entered into an agreement for the sale of the surface rights of 54 acres of Appellees' land located in Duchesne County, Utah, together with 31 shares of water and a mobile home for a total purchase price of $7000.00. An Earnest Money Receipt and Offer to Purchase was executed on or about September 12, 1968. On November 10, 1968, Appellees and Appellant executed an Uniform Real Estate Contract for the purchase of the property agreed upon. On October 30, 1969, Appellees executed a Warranty Deed in favor of Appellant including a right of way to and from the land and 31 shares of Dry Gulch Irrigation Company.

The Earnest Money Receipt, the Uniform Real Estate Contract, and the Warranty Deed were prepared by Appellant or at Appellant's instructions.

At the time of the execution of those documents, the Appellees were the owners of only one-fourth of the mineral rights. Appellant was aware of this at the time she prepared the documents of sale. No mention of the mineral rights is made in any of the documents of sale nor in the deed.

Appellee, Mr. Forrer, testified that just prior to signing of the Earnest Money Receipt and again prior to the execution of the Uniform Real Estate Contract, he walked over the land with the Appellant and told her that no minerals went with the land and that Appellant replied that she was not interested in the minerals but only wanted a place for her cattle.

Appellant testified that there was no discussion of the minerals except that Appellee, Mr. Forrer, gave her a copy of an escrow agreement executed in 1951 indicating that Appellee, Mr. Forrer, together with his brother then owned a one-fourth interest. Appellee testified that he did not have such a meeting with the Appellant and that he had not had a copy of the escrow agreement since he signed it over to his brother 13 years ago.

The testimony of the Appellee, Mr. Forrer, was

corroborated by the stipulated testimony of Appellee, Mrs. Forrer. Appellant's testimony is uncorroborated.

In July of 1970, the Appellees were contacted by Mr. Howell Spear to whom they sold their interest in the minerals for $500.00. Appellant made no effort to lease or sell the minerals, nor to collect the lease payments or to have the deed reformed until just shortly before this suit was brought in 1975.

I

THE TRIAL COURT CORRECTLY ADMITTED PAROL EVIDENCE TO REFORM THE DEED.

The deed and instruments of sale were silent concerning the mineral rights, yet the Appellees owned only a one-fourth interest therein which they claimed to have reserved and which Appellant claims should pass by operation of law. Parol evidence has been readily allowed by this Court to determine the actual intent of the parties where the parties omitted the mineral rights from the deed. In Bench v Pace, 538 P 2d 180 (1975), this Court sustained Judge Sorensen's admission of parol evidence to establish the clear agreement of the parties with regard to the mineral rights. In that opinion the Supreme Court of Utah cited Sine v Harper, 11 Utah 415, 222 P 2d 571 and E. A. Strout Western Realty Agency, Inc. v Broderick, Utah, 522 P 2d 144 (1974) in support of this rule.

The general proposition is stated by Professor Corbin at Contracts Section 536.

> "Before the legal operation of any agreement can be determined, however definitely it may be embodied in a written "integration", it must be interpreted by the Court. For this process of interpretation, the "parol evidence rule" does not exclude evidence of prior communications and understandings (although there may be some other limitations on the extent to which such evidence may be used). Until a contract has been interpreted, the Court cannot know whether there is an inconsistency between it and other agreements, oral or written, prior or subsequent. Before interpretation, a Court cannot know what it is that cannot be "varied or contradicted". In addition, the rule does not purport to exclude any testimony to prove fraud, illegality, accident, or mistake, it does not prevent rescission or a decree for reformation and enforcement."

In E.A. Strout Western Realty supra this Court stated:

> "Parol evidence may be received to clarify ambiguous language in a contract, to show what the agreement was relative to filling in blanks, and to supply omitted terms which were agreed upon but inadvertantly left out of the written agreement."

The Trial Court in this case correctly allowed parol evidence to interpret the written instruments because they were ambiguous and failed to express the parties understanding. It would be repugnant to law and equity to allow the Appellant to employ the parol evidence rule to hide the true and concurring intent of the parties.

II

THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO REFORM THE DEED TO CONFORM WITH THE ORAL AGREEMENT BETWEEN THE PARTIES.

This case is comparable to the recent case of Bench v Pace, supra. In that case, as in this case, the conduct of the plaintiff showed that they made no claim to the minerals until shortly before the suit was initiated some five years following execution of the agreement. Accordingly the controlli written instrument was interpreted to include such a reservation even though the instrument contained no provision relating to the oil and mineral estate.

The legal standard of Bench v Pace is stated at 123

> . . . in view of all the circumstances it appears the omission was an oversight on the part of the scrivener and the parties to the contract, and the conduct of the plaintiffs clearly shows they made no claim to the mineral estate until shortly before this suit was initiated.

Thus, the Court looks to all the circumstances includi the conduct of the parties. Furthermore, in evaluating the findi of the Trial Court the evidence to sustain the judgment need not be uncontradicted. Weight should be given to the opportunity of the Trial Court to observe the demeanor of the witnesses. As was stated by this Court in Naisbitt v Hodges 6 Utah 2d 116, 307 P 2d 620 (1957)

> All that is required is that evidence exists whereby this court can say that the trial judge acted as a reasonable man in finding that the proof of the fact asserted is greater than a mere preponderance.

It is not required that the testimony be uncontradicted to be clear and convincing. In Neal v Green, 71 Wash. 2d 40, 426 P 2d 485 (1967) the Court relied on the Trial Court's evaluation of the creditability of the witnesses and the conduct of the parties to uphold the reformation of the deed. The Court said:

> "There was conflict in the testimony. But this does not mean that the Court must deny reformation. 'Certainty of error' is not the same as 'uncontradicted testimony of error.' "

See also, Wright v Brem, 467 P 2d 736, 81 N.M. 410 (1970), and Corbin on Contracts, Vol. 3 (1950), Section 615 and cases cited.

In Nelson v Dougherty, Okla. 357 P 2d 425 (1960) the Court said:

> "Evidence to sustain a judgment reforming a written contract must be clear, unequivocal, and decisive, but this does not mean that it must be uncontradicted; and the judgment of the Trial Court in such action, where the evidence is conflicting, should be given weight, and should be affirmed on appeal, unless the Appellate Court is satisfied that the standard of proof required has not been met and the conclusion reached is wrong.
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> * * * *
>
> "In Crabb v Chisum, 183 Okl. 138, 80 P 2d 653, we considered a case where the factual situation was very similar to that involved in the instant case. The mistake in the notes in that case was due to an error on the part of the scrivener, which was not noticed by the plaintiff until long subsequent to the date of the execution of the notes. In that case we affirmed the judgment of the Trial Court granting reformation, although the evidence was conflicting, pointing out that the Trial Court, which had the witnesses before it and had an opportunity to observe their demeanor and to determine their credibility, had decided this issue in favor of the plaintiffs."

The evidence in the instant case adequately supports the findings of the Trial Court. The Appellee testified that he twice told the Appellant that he was not conveying the minerals and that the Appellant stated that she was only interested in land for her cattle (T.T. pp. 62,63, and 66). The Appellee only owned an one-fourth mineral interest as Appellant knew, yet Appellant, an experienced and liscensed real estate saleswoman, prepared the agreements and did not include any reference to the mineral estate although the deed specifically listed the right of way and water rights (T.T. p. 27 and Exhibit C). The testimony of Mr. Forrer is corroborated by the stipulated testimony of Mrs. Forrer (T.T. p. 77). Appellant did not attempt to sell or lease the minerals between 1968, the date of the sale, and the bringing of this suit in 1975 despite increased speculation in oil and gas in the area (T.T. p. 74). Nor did Appellant attempt to collect the rental even though she knew the minerals were under lease (T.T. p. 12).

In addition to the foregoing facts, the relative experience of the parties is significant. Appellees are elderly and without experience in selling real estate and stated that they believed that for the minerals to be included they should be listed as were the water and rights of way. Appellant, an experienced real estate saleswoman, came to the Appellees for a listing, but bought the property herself, subtracting a $600.00 commission or

of the $1000.00 down payment. Appellant now seeks to rely on a legal presumption and the parol evidence rule which she wasn't aware of at the time, to claim damages of $1000.00 per acre.

These circumstances and the corroborated testimony of the Appellee thus adequately supports the findings of the Trial Court.

III

THE MUTUAL MISTAKE IS NOT OF THE TYPE WHICH PRECLUDES REFORMATION OF THE DEED.

Based on his conversations with the Appellant upon whom he relied to prepare the documents of sale and in light of other items listed on the deed as included, Appellees understood the deed to reserve them the minerals. This is not unusual for a layman to rely on his listing real estate agent in this fashion. It is more unusual that the Appellant failed to expressly list the one-fourth mineral interest. In fact, it is this mutual mistake which gave rise to the admission of parol evidence and reformation. For negligence to prohibit reformation, it must be the sole cause of the oversight and a violation of a positive legal duty that prejudices the other party.

As was stated by this court in McMahon v Tanner, 122 Utah 333, 249 P 2d 502 (19):

> "The type of negligence which will preclude a party from securing equitable relief of the nature here demanded is thus stated in Pomeroy's Equity Jurisprudence, 4th Ed., Sec. 856:

> 'As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of the legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby.' "

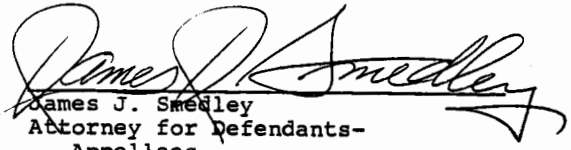
This is the general rule applied in the majority of cases. See Carpenter v Hill 131 Colo. 553, 283 P 2d 963 ( ); Seydin v Frade, 88 Nev. 174, 494 P 2d 128 (1972); and Thorstein v Waters, 65 Wash. Ed 739, 399 P 2d 510 (1965).

CONCLUSION

The Trial Court in the instant case correctly admitted the parol evidence and reformed the deed to conform to the initial agreement between the parties. There was no negligence in this case of the type that would preclude reformation of the deed.

The deed did not express the understanding of the parties and was clearly ambiguous. The clear and convincing evidence before the Trial Court was that no mineral estate was intended to pass to the Appellant.

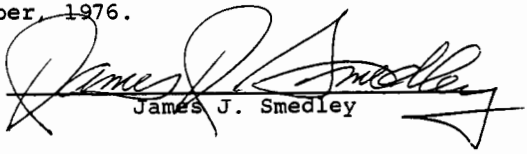
Respectfully submitted,



James J. Smedley
Attorney for Defendants-
Appellees
30 North Main Street
Heber City, Utah 84032

CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Robert M. McRae, Attorney for Plaintiff-Appellant, 370 East Fifth South Street, Salt Lake City, Utah 84111, this 22nd day of November, 1976.



James J. Smedley