

1985

Wasatch Bank, a Utah banking corporation v. Kevin B. and Darlene J. Leany, husband and wife : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

20624

WASATCH BANK, a Utah
banking corporation,

Plaintiff-Respondent,

vs.

Case No. 20,624

KEVIN B. and DARLENE J.
LEANY, husband and wife,

Defendants-Appellants.

BRIEF OF RESPONDENT

Appeal from Judgment, March 26, 1985
Fourth Judicial District Court, Utah County
Honorable George E. Ballif, District Judge

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OCT 22 1985

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STATEMENT OF ISSUES PRESENTED UPON APPEAL

1. Whether or not it is within the province of the Supreme Court of Utah to review the trier of fact's determination, and, if so, to substitute its own judgment for that of the trial court's.
2. Whether or not the trier of fact erred in determining the weight and credibility given expert witnesses, and, if so doing, ruled contrary to that to which all reasonable minds would have been persuaded.
3. Whether respondents are entitled to attorney fees by reason of appellants' initiating a frivolous appeal.

IN THE SUPREME COURT OF THE STATE OF UTAH

WASATCH BANK, a Utah
banking corporation,

Plaintiff-Respondent,

vs.

KEVIN B. and DARLENE J.
LEANY, husband and wife,

Defendants-Appellants.

Case No. 20,624

BRIEF OF RESPONDENT

STATEMENT OF THE CASE AND FACTS

Respondent, Wasatch Bank, acknowledges the accuracy of appellants' "Statement of the Case" which delineated the purchase of real property, the execution of a promissory note and trust deed in favor of Wasatch Bank, appellants' failure to meet the terms, the declaration of default, trustee's sale, and the subsequent trial for deficiency which resulted in the decision of the trial court, Judge Ballif, awarding Wasatch Bank a deficiency judgment in the amount of \$30,466.91, together with costs in the amount of \$104.38.

Respondent does, however, take issue with appellants' "Statement of Facts." Set forth below is respondent's brief

factual summary based upon the trial record; however, areas of dispute are addressed in detail within respondent's Argument.

On the 23rd day of December, 1980, to facilitate their purchase of real property located in Payson, Utah, appellants executed a trust deed and promissory note in favor of Wasatch Bank in the amount of \$55,920. (R. 4, 5-8; Exhibit 1).

Upon appellants' failure to make payments, Wasatch Bank, according to the terms of the note, declared due and payable the outstanding principal and accrued interest. On May 18, 1983, appellant received the Notice of Default from Wasatch Bank. (R. 101-2). A trustee's sale was held on September 20, 1983. As of that date there was due, owing, and unpaid the principal sum of \$55,396.87, together with interest in the sum of \$5,769.81. (R. 46, 62-63). On that same date there was accrued as costs and expenses in exercising the power of sale the amount of \$3,382.22. (R. 46, 62-63). The total due as of September 20, 1983, was \$64,466.91. (R. 59, 63).

As of the date of the trustee's sale in September of 1983, the premises had been inspected and appraised and found to be in considerable disrepair which was characterized as substandard, inadequate and nonhabitable. It had deteriorated to the point that the City or County Health Department would not allow anyone to live in it. The mechanical systems, such as plumbing, heating

and electrical systems had deteriorated to the point that they were inoperable. The cosmetic condition of the home was also substandard. (R. 72-74). At the trustee's sale in September of 1982, Wasatch Bank bid the sum of \$34,000. (R. 63).

Wasatch Bank was in possession of the property from September 20, 1983, until the time that it was resold in May of 1984. Wasatch Bank replaced broken glass, placed locks on the home and installed a new roof. (R. 64). The property was resold on May 18, 1984, for \$31,500. (R. 68). After the resale of the property, Wasatch Bank handled the disbursements of funds, which were provided directly for the repairs of the property. Wasatch Bank disbursed repair funds in the amount of \$41,700. (R. 105).

An action for a deficiency judgment in the amount of \$30,553.70 was brought by Wasatch Bank against the appellants on October 28, 1983. (R. 1-3). On February 26, 1985, the court ruled in favor of Wasatch Bank and granted the deficiency judgment in the amount sought. (R. 41-42). Judgment was entered on March 26, 1985. (R. 49-50).

SUMMARY OF THE ARGUMENT

The trial court heard the testimony of four witnesses, admitted documentary evidence and made its determination based upon its assessment of the weight of the evidence. There existed only minor disputes and appellants' witness, upon learning

additional information at trial, substantially concurred with the opinion of respondent's witness.

The judge determined that, in any event, the testimony of respondent's witness was the more believable.

The Supreme Court must only determine whether there was sufficient evidence supporting the judge's factual findings, and is not permitted to substitute its judgment for that of the trier of fact. The trial record herein clearly shows that there was more than substantial evidence to justify the determination of Judge Ballif as the trier of fact.

ARGUMENT

POINT I

AN APPELLATE COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIER OF FACT AND THUS CAN ONLY REVIEW THE EVIDENCE TO DETERMINE INSUFFICIENCY RESULTING IN AN ABUSE OF DISCRETION.

The Utah Supreme Court has adopted the standard of appellate review which prohibits the substitution of the Supreme Court's judgment for the trial court on issues of fact.

This court has consistently followed the well-recognized standard of appellate review which precludes the substitution of our judgment for that of the trial court on issues of fact, and where its findings and judgment are based upon substantial, competent, admissible evidence we will not disturb them.

Fisher v. Taylor, 572 P.2d 393 (Utah 1977).

The evidence was sufficient to sustain the judgment made, and we should sustain the trial court even if we might have come to a different decision had we been trying the matter.

Wash-A-Matic, Inc. v. Rupp, 532 P.2d 682 (Utah 1975).

The only determination left to the appellate court is whether or not the trial court's factual determinations support its legal conclusions and whether there was sufficient evidence upon which to base the factual findings. Hidden Meadows v. Mills, 590 P.2d 1244 (Utah 1979).

It is not [the Supreme Court's] prerogative to determine whether the evidence preponderated on one side of the other. That is a responsibility of the trier of fact. It is only for us to determine whether there is substantial evidence in the record to support the ruling.

Reimschiessel v. Russell, 649 P.2d 26 (Utah 1982).

Respondent does acknowledge that in matters of equity the Supreme Court may review the facts with more scrutiny; however, such review is still limited.

Although this Court may review both the facts and the law [citation omitted] we typically accord considerable deference to the judgment of the trial court due to its advantaged position and will not disturb the action of that court unless the evidence clearly preponderates to the contrary, or the trial court abuses its discretion or misapplies principles of law. [citations omitted]

Jeppson v. Jeppson, 694 P.2d 69 (Utah 1984).

Furthermore, considerable deference is given to the trial judge who was in the advantaged position to see and hear the witnesses and even if the weight of the evidence appears slightly in favor of the non-prevailing party, the reviewing court cannot alter the judgment.

Although this Court's statement of the standard of review of findings of fact in equity cases have varied considerably [citation omitted] it is most commonly said that we reverse only when the evidence clearly preponderates against the findings of the trial court. [citations omitted]. This principle is well stated in the plurality opinion in Nokes v. Continental Mining and Milling Co., 6 Utah 2d at 178-179, 308 P.2d 954:

[T]he finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of a trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.

In substance, this is the same standard applied in those cases which state that we reverse only when the trial court's finding is against the clear weight of the evidence. [citations omitted].

In applying this standard, we are mindful of the advantaged position of the trial judge who sees and hears the witnesses and therefore give due deference to his decisions. . . . [citations omitted].

Jensen v. Brown, 639 P.2d 150 (Utah 1980).

POINT II

IT IS WITHIN THE STRICT PROVINCE OF THE TRIER OF FACT TO DETERMINE THE WEIGHT AND CREDIBILITY GIVEN TO EXPERT TESTIMONY AND SUCH DETERMINATIONS CANNOT BE DISTURBED BY THE APPELLATE COURT UNLESS ALL REASONABLE MINDS WOULD HAVE FOUND TO THE CONTRARY.

It is axiomatic that it is the prerogative and duty of the trier of fact to judge the credibility of the witnesses and determine the weight to be given their testimony. The fact finder can only be reversed where the evidence demonstrates that "all reasonable minds" would come to a contrary conclusion.

The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary.

Hanover-Limited v. Fields, 568 P.2d 751 (Utah 1977). Once the trier of fact has made his determination, the basic principles of review apply: inasmuch as it is the prerogative and duty of the trier of fact to judge the credibility of the witnesses, the reviewer is obliged to assume that the trier of fact believed the evidence which supports the verdict; and therefore, it is the duty of the Supreme Court to survey the evidence and all reasonable inferences that fairly can be deduced therefrom in the light favorable to the verdict. Hindmarsh v. O.P. Skaggs Foodliner, 21 Utah 2d 413, 446 P.2d 410 (1968); Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

The matter of witness credibility also falls within the province of the fact-finder. When there is a discrepancy in testimony rendered by the witnesses, the fact-finder must decide which account is the most accurate. Then on appeal, we must review the facts in the light most favorable to the prevailing party.

Lamkin v. Lynch, 600 P.2d 530 (Utah 1979).

Judge Ballif heard the testimony of Leonel Castillo, manager of the Real Estate Department at Wasatch Bank, Jud Harward, a professional real estate appraiser, Don Gurney, also a real estate appraiser, and Kevin Leany, the purchaser and appellant. All witnesses were subject to proper direct and cross-examination. (R. 58). Exhibits included the promissory note, seventeen photographs of the premises in question, an additional photograph, and an appraisal. (R. 39). At the close of the case, the matter was taken under advisement and a decision rendered the following day, to-wit, in pertinent part:

The Court finds the issues herein in favor of the plaintiff, Wasatch Bank, and against the defendants and finds that the fair market value of the real property at the time of the trustee's sale did not exceed \$34,000 . . . the Court further finds that the total amount due on the promissory note, including the principal balance, accrued interest and costs of sale, totals \$64,466.91, and that the plaintiff herein bid the sum of \$34,000 at the trustee's sale and is therefore entitled to a Deficiency Judgment against the defendants for the sum of \$30,466.91.

The evidence presented by the Appraiser, Jud Harward, was the most realistic, and which the appraiser, Gurney, agreed with upon verification of the costs of repair items

which were substantially as represented by Harward upon verification by the witness, Castillo, who had paid bills from the bank to repair the property in the sum of \$41,000 expended by the bank and \$2,000 by the buyer. [emphasis added]. (R. 41-42).

To aid the reviewing Court, set forth below is a brief synopsis of the pertinent testimony of the witnesses with reference to the record:

Testimony by Jud Harward revealed that 1) he had been a real estate appraiser for approximately 15 years and was recognized as a Residential Member in the American Institute of Real Estate Appraisers, (R. 70-71); 2) most of his work was oriented to bank loan type properties, (R. 71); 3) his fair market value evaluations were based upon explicit definitions from the American Institute of Real Estate Appraisers, upon definitions utilized by courts, and upon the three recognized approaches of replacement cost, income, and market sales approach, (R. 72); 4) with two others, he thoroughly examined the property in question on May 18, 1984, (R. 73); 5) he determined that there existed functional obsolescence with regard to the floor plan, that the building was probably fifty to sixty years old, that it was nonhabitable, that it had deteriorated to the point that the City or County Health Department would not allow anyone to live there, that the plumbing, heating, and electrical systems had deteriorated to the point of inoperability, that the painting, carpeting and general cosmetic condition of the home were substandard, (R. 74); 6) he

determined that it was actually borderline as to whether to rehabilitate the home or to destroy it and start with a vacant lot; however, he decided that there was some salvageable value to the dwelling and thus the "highest and best use" was to renovate the property and bring it up to acceptable standards (R. 75); 7) after examining the property, he also went through it with another individual who determined that based upon the inoperability of the heating, electrical, and plumbing systems that the unit had to be completely stripped down to the shell and built back up again, in other words, the mechanical systems were not salvageable. (R. 76); 8) it was determined that it would take approximately \$50,000 to bring the dwelling up to a standard of acceptable housing, (R. 76); 9) he determined that the fair market value of the property, once brought up to the requisite standard and put in rentable condition, would be \$80,000 and, therefore, the "as is" value was \$30,000, (R. 76-77); 10) it was his opinion that the fair market value of the premises as of September 30, 1983, was \$30,000 (R. 77); 11) he examined pictures taken of the premises near September 20, 1983, which pictures were introduced as exhibits at trial, talked to two other people who examined the property on approximately those dates, and determined that the condition of the property in September of 1983, was virtually the same as of May in 1984, and, in fact, the condition of the

property had probably increased because of improvements that had been made prior to May of 1984. (R. 79).

Mr. Don Gurney, witness for the appellants, testified as follows: 1) that he had been a real estate appraiser for approximately ten years, that he was a member of the Society of Real Estate Appraisers, and was recognized as a senior residential appraiser, (R. 81); 2) that he appraised the property in question on two separate occasions, on October 20, 1980, and August 25, 1983, (R. 82-83); 3) that it was his opinion that as of October 20, 1980, that the fair market value of the property was \$70,000, (R. 83); 4) upon the second appraisal of August 25, 1983, he found the property to be in a less desirable condition than it was upon the first inspection and therefore projected a value of \$71,000 based upon the property being repaired; (R. 85); 5) he felt that the estimation of the repairs necessary to bring the property up to a suitable condition would be approximately \$15,000 so that his "as is" estimation of the value of the property was \$54,000, (R. 89); 6) he then indicated that he did not physically inspect the mechanical systems such as the electrical, water, and heating, (R. 89); 7) he did have access to the list of repairs formulated by Wasatch Bank and concurred with the items on that list; however, "I am not a contractor, and so I am somewhat limited in terms of being able to come up with precise figures for all these items". (R. 89); 8) he testified that, if in fact, the costs of repairs

were approximately \$50,000, then his "as is" appraisal as of August of 1983, would have been \$20,000, (R. 91); 9) he testified that at the time of his appraisal he did not know that the heating system had to be replaced, he did not know that the wiring or electrical systems had to be replaced, and he did not know that the plumbing fixtures needed to be replaced, and that he was working under the assumption that such systems would be repairable at a fairly minimal cost and that if it turned out they were not salvageable, then his estimations were off a considerable amount of money, for example, \$10,000 in the heating system alone, (R. 92, 94); 10) he then testified that having received, at trial, the actual cost of repair, he did, in fact, agree with Mr. Harward's appraisal as to the "as is" value on September 20, 1983:

Q: Having received and now knowing the actual cost figures, and what is necessary, as far as the property is concerned, would you agree with Mr. Harward's appraisal as to his "as is" value on September 20, 1983?

A: Yes. I would agree that it would be a lot closer to that than what I used in my estimate of the expenses to repair it. (R. 95.).

Mr. Leonel Castillo, the manager of the Real Estate Department for Wasatch Bank, testified as to the undisputed figures regarding the promissory note, the dates, the principal balance, the accrued interests, the actual cost of the sale, the bid by Wasatch Bank, and the subsequent sale of the property in

1984. (R. 61-64). He also testified that Wasatch Bank, after the resale of the property, did handle the disbursement of funds that went directly to the repairs of the property, and that the amount disbursed was \$41,107. He also testified that there was an additional \$2,000 that the buyer paid to one of the major contractors for repairs. (R. 105).

Clearly there was sufficient evidence introduced at trial upon which the trier of fact could formulate his findings. Clearly, there was some slight difference of opinion as to the fair market value of the property on September 20, 1983; however, after learning of the cost of the repairs actually expended by Wasatch Bank, even the expert witness for the appellants conceded that the "as is" value estimated by Wasatch Bank's appraiser was probably the most correct.

[T]his Court is constrained to look at the whole of the evidence in the light favorable to the trial court's findings, including any fair inferences to be drawn from the evidence and all of the circumstances shown. The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary.

Hanover Limited v. Fields, 568 P.2d 751 (Utah 1977).

It is also well recognized that factual determinations which involve property values are strictly within the province of the fact-finder and that there need only be "a reasonable basis in the evidence for the finding [with] respect to damages. . . . "

State of Utah v. Taggart, 19 Utah 2d 247, 430 P.2d 167 (1967).

[T]he trier of fact as the exclusive judge of the credit and weight to be given to the testimony of witnesses, including expert witnesses, is the judge of the effect and value of opinion evidence. [citation omitted]. Generally speaking, opinion evidence as to value usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received, the trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions.

Whether the opinion as to values is that of an expert or an owner, the weight to be given it is largely dependent on the reasons for the opinion and unless the opinion is wholly and entirely based on improper considerations or incompetent matters, the weight to be given the opinion is a question for the trier of fact.

City of Gilroy v. Filice, 34 Cal. Rptr. 368, 221 Cal. App. 2d 259 (1963); MCA Inc. v. Universal Diversified Enterprises Corp., 103 Cal. Rptr. 522, 27 Cal. App. 3d 170 (1972).

POINT III

RESPONDENT IS ENTITLED TO ATTORNEY FEES BY REASON OF APPELLANTS' FRIVOLOUS APPEAL.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, if the court determines that an appeal taken is frivolous, it can award just damages of single or double costs, including a reasonable attorneys fees, to the prevailing party.

It is respondent's contention that the appeal undertaken by the appellants was unnecessary and frivolous. The decision rendered by the trial court was clearly predicated upon the

judge's role as a trier of fact and the judge was in the most advantaged position to assess the credibility of the witnesses, and, in fact, the testimony offered by the appellants' expert witness did not conflict with the testimony of the witnesses for Wasatch Bank. The court below committed no error of law, there was significant evidence upon which the trial court could base its decision, and the defendants-appellants simply failed to prevail.

CONCLUSION

Upon being presented with a calculation of the actual monies expended by Wasatch Bank to repair the deteriorated premises, appellants' witness agreed with respondent's witness as to the "as is" or fair market value of the property on the date of the trustee's sale. In any event, Judge Ballif, as trier of fact, found the testimony of Wasatch Bank's witness to be more believable. Appellants' witness admitted to insufficient knowledge regarding the total replacement of the mechanical systems of the unit.

Clearly the evidence preponderated in favor of Wasatch Bank, and it is the duty of the Supreme Court to determine only whether there was sufficient evidence to support the findings of the trier of fact. The reviewing court cannot substitute its own judgment and the court below was in the advantaged position to determine the credibility and weight to be given the evidence.

WHEREFORE, the respondent respectfully seeks affirmation of the trial court's ruling and seeks attorneys fees for appellants frivolous appeal.

DATED this 19th day of October, 1985.

S. Rex Lewis

S. REX LEWIS, and,

DANIELLE EYER DAVIS

DANIELLE EYER DAVIS, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Respondent

MAILING CERTIFICATE

I certify that in the 21st day of October, 1985, ten true and correct copies of the Respondent's Brief was mailed to the Supreme Court and four true and correct copies of same were mailed, postage, prepaid, to the following:

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