1977

Melvin H. Jensen v. Manila Corporation of The Church of Jesus Christ of Latter-Day Saints, A Corporation Sole, And John Tinker And Genevieve L. Tinker, His Wife v. Brief of Respondent Melvin H. Jensen

Utah Supreme Court

Robert L. Backman; Attorneys for RespondentJoseph C. Rust; Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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MELVIN H. JENSEN,

Plaintiff-Respondent,

vs. : Case No. 14806

MANILA CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation sole, and JOHN TINKER and GENEVIEVE L. TINKER, his wife,

Defendants-Appellant.

- -

BRIEF OF RESPONDENT MELVIN H. JENSEN

- -

Appeal from a Judgment Against Defendants
in the Fourth Judicial District Court
in and for Daggett County, State of Utah

Honorable J. Robert Bullock, Judge

- -

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- -

BRIEF OF RESPONDENT

- -

NATURE OF THE CASE

Appellant, Manila Corporation of the Church of Jesus Christ of Latter-day Saints, appeals from a judgment in favor of Respondent relative to the purchase and sale of real estate.

DISPOSITION IN THE LOWER COURT

Respondent's complaint for reformation of a Real Estate Contract of Sale and Appellant's counterclaim for forfeiture of the contract were tried without a jury before the Honorable J. Robert Bullock on June 17, 1976, at which time the lower court held in favor of Respondent on the issue of reformation of the Real Estate Contract of Sale and awarded Respondent attorney's

fees, but limited Respondent's claim for damages to $1.00 and denied Appellant's counterclaim for forfeiture of the contract.

RELIEF SOUGHT ON APPEAL

Respondent prays that this Court affirm the judgment of the trial court and award Respondent attorney's fees incurred herein.

STATEMENT OF FACTS

Respondent basically agrees with the Statement of Facts set forth in Appellant's brief, with the following additions:

Additions:

1. That prior to the execution of the Real Estate Contract of Sale, the Appellant and Respondent executed an Earnest Money Receipt and Offer to Purchase wherein the property offered and accepted was described as abandoned LDS chapel, approximately 1/3 acre of ground, Manila City, Daggett County, State of Utah. (D Ex. 4; Finding of Fact Number 3.)

2. At the time of the execution of the Earnest Money Receipt and Offer to Purchase, the Appellant was the record title owner of the property within the fence lines, at least to the extent of that property which was not part of the legal description subsequently used in the Real Estate Contract of Sale. (Finding of Fact Number 10; Tr. 74.)

3. After the execution of the Earnest Money Receipt and Offer to Purchase, the Appellant executed and delivered

to the defendant Tinker a quit-claim deed conveying the South 32 feet of the property within the fence lines, which is the property claimed by the Respondent in this suit. (Finding of Fact Number 11; P Ex. B, as attached to plaintiff's complaint; Tr. 73-75, 80.)

4. That prior to the execution of the Earnest Money Receipt and Offer to Purchase, the Respondent examined the real property being offered for sale with a real estate salesman who was the agent for the Appellant. (Finding of Fact Number 4; Finding of Fact Number 8; Conclusion of Law Number 1; Tr. 60-61, 72.)

5. The real estate salesman, who was the agent for the Appellant, represented to the Respondent that the property being offered for sale was the property within the then existing fence lines. (Finding of Fact Number 8-9; Tr. 15-18, 63.) This is the same parcel of property that the Respondent is now claiming.

6. That the Respondent relied upon the representations of the Appellant's agent and took possession of the property within the fence lines and has had actual and continuous possession since that time. (Tr. 70; Finding of Fact Number 14, 16-17.)

7. That prior to the sale and purchase of the property by the parties, the property which the Respondent claims was offered for sale was entirely fenced and was used and possessed by the Appellant. (Finding of Fact Number 5-7; Tr. 17, 26, 70-71)

ARGUMENT

POINT I

PAROL EVIDENCE IS NOT BARRED UNDER THE FACTS OF THIS CASE AND APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

Appellant relies upon the case of Percival vs. Cooper, 525 P2d 41 (Utah 1974) in support of the proposition that where there is no ambiguity in the document conveying property, regarding the description of the premises to be conveyed, extrinsic evidence cannot be introduced to show that it was the intention of the grantor to convey a different tract or that he did not intend to convey all of the land described.

In that case, however, the grantees obtained by warranty deed the very land that the grantors had shown to them. In fact, the grantee was present when a survey was made to determine the location of the property and he expressed satisfaction with the land included in the survey. On the other hand, the case presently before the Court involves a factual situation where the grantee claims that although a particular enclosed parcel of real estate was represented as being the subject matter of the sale, the property described in the Real Estate Contract of Sale was substantially smaller. Obviously there is a great deal of difference between being told what particular parcel of real estate is being offered and then receiving that particular parcel, and being told what particular parcel of real estate is being offered and then receiving only a portion of it.

Percival can be distinguished on the basis that there was a meeting of the minds, unlike the case presently before the Court.

The objection that the grantees had in the Percival case was that the exact parcel of property agreed to was not as many acres as represented by the grantor and, therefore, it limited the use to which it could be put because of the zoning.

Any statements regarding parol evidence, as they appear in the Percival case, can only be considered in connection with the facts of that case. Consequently, it is evident that Appellant's reliance on the Percival case is misplaced.

The controlling case under these facts is Sine vs. Harper, 222 P2d 571 (Utah 1950). In that case, this Court stated the law regarding parol evidence where the grantee claims the description to be of a smaller parcel than represented by the grantor. Unlike Percival, this is the factual situation now confronted by this Court. In the Sine case, this Court held that the contract, as written, did not express the agreement reached by the parties and, therefore, a decree was entered reforming the instrument. As is true in the case now before the Court, an Earnest Money Receipt and Offer to Purchase was executed, merely identifying the property as 656-658 West North Temple. These numbers had been assigned to a duplex which was located on the West 49.5 foot frontage of the premises. Subse-

quently, a Uniform Real Estate Contract was executed with the same description, together with a legal description which only included the 49.5 foot frontage. The grantee claimed that an additional 25.5 foot piece of frontage was intended to be part of the property being purchased. As in our case, the grantee took possession of the full parcel, which he claimed should have been the description in the contract. On appeal, the Appellant assigned as error the fact that the court had admitted into evidence that which had a tendency to vary the written terms of a contract. In response to that argument, this Court said:

"If such a contention could be sustained, then the equitable theory of reformation of contract would not apply to written instruments. The right to reform is given, at least in part, so as to make the written instrument express the bargain the parties previously orally agreed upon. When a writing is reformed, the result is that an oral agreement is by Court decree made legally effective, although at variance with the writings which the parties had agreed upon as a memorial of their bargain. The principle itself modifies the parol evidence rule."

The Sine case is not the only authority for this proposition. In the case of Janke vs. Beckstead, 332 P2d 933 (Utah 1958), the grantees claimed that the deed to them did not convey all of the property that the parties had intended. The grantor contended that the Court erred in admitting parol evidence to vary the description in the deed because it contained no latent ambiguities and sufficiently identified the land conveyed. This Court held that this is not the rule where reformation of an instrument is sought on the ground of mutual

mistake or fraud. Citing 45 Am Jur 650, Reformation of Instruments, §113, this Court held as follows:

"It is practically a universal rule that in suits to reform written instruments on the ground of fraud or mutual mistake, parol evidence is admissible to establish the fact of fraud or of a mistake and in what it consisted and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had, ..."

Since parol evidence is admissible in this type of situation, this opens the door to several further factual disputes which required an evidentiary hearing and justified the denial of the Appellant's motion for summary judgment.

The construction of a contract according to the intention of the parties is a question that cannot be decided on affidavits under summary judgment procedure where it depends on parol evidence. Borrelli vs. J. H. Taylor Construction Company, 37 NYS 2d 150.

The lower court properly ruled wherein they denied the Appellant's motion for summary judgment.

POINT II

THERE WAS MUTUAL MISTAKE SUFFICIENT TO JUSTIFY REFORMATION OF THE REAL ESTATE CONTRACT OF SALE.

The evidence set forth in Respondent's Statement of Facts is sufficient to justify reformation of the Real Estate Contract of Sale. From those facts, it is evident that there was mutual mistake, as well as inequitable conduct on the part of the Appellant. This is all the law requires before the Respondent

is entitled to a reformation of the Real Estate Contract of Sale. Simmons Creek Coal Company vs. Duran, 142 US 147 12 SCt 239, 335 L Ed 1063.

The Appellant, in its brief, says that there was no mutual mistake for the reasons that the Appellant did not own any more property than that property described in the Real Estate Contract of Sale and neither the corporation, nor any of its agents, ever intended to sell more property than was owned by Appellant. This is simply not true. The real estate salesman, who was the agent for the Appellant, represented to the Respondent that the Appellant was selling all the property within the then existing fence lines. (Finding of Fact 8-9; Tr. 15-18, 63.) Representations of a real estate broker to a buyer as to the quantity of real estate being offered for sale are binding on the agent's principal. This is true even if the broker had no authority to make such representations. King vs. H. J. McNeel, Inc., 489 P2d 1324 (Idaho 1971).

Since the representations of the agent are imputed to the principal, the Appellant was mistaken when it executed the Real Estate Contract of Sale with a description that was less than the property offered for sale and accepted. Since the Respondent thought the contract description was the property within the fence lines, he, too, was mistaken in executing it since the description was inaccurate.

In support of the proposition that there was no mutual mistake, the Appellant, in its brief, said that the corporation sole testified that the realtor was told that a survey would have to be taken to establish the property boundaries. Not only did the realtor deny that he had been told that there would have to be a survey (Tr.83), but even if he had been, that does not excuse the fact that neither the Appellant nor the realtor told the Respondent that there would have to be a survey. On the contrary, the Respondent was told that the property was all the property that had been used by the Church or, in other words, that within the then existing fence lines.

Furthermore, even if Appellant said there would need to be a survey, it could have been interpreted to mean that a survey would have to be made to determine the exact legal description of the property within the fence lines.

Appellant's brief says that the corporation sole and the realtor both knew that the sale was only 1/3 of an acre. What is relevant is not what they knew, even assuming that that was the case, but what they represented to the Respondent.

Finally, Appellant says that it could not have intended to sell more property than it owned and, hence, there was no mistake by the Appellant as to the property being offered for sale. Unfortunately for the Appellant a Vendor cannot ignore

misrepresentations made by itself or its agents as to property offered for sale merely on the basis that it was not owned by the offeror at the time. If a Vendor does not own property which it sells on contract it has the responsibility to acquire title before delivery of a deed is due. A Vendor can offer for sale property which it does not own at the time of the offer. Furthermore, in this case, the Appellant owned the property in dispute at the time of the representation that it was being offered for sale. (Finding of Fact Number 10, Tr. 74

Not only is there mutual mistake sufficient to justify the equitable remedy of reformation, but there is also mistake on the part of the Respondent and inequitable conduct on the part of the Appellant. This, too, under the law, is sufficient to justify the reformation of the Real Estate Contract of Sale. Simmons Creek Coal Company vs. Duran, supra; Percival vs. Cooper, supra, at page 43. Certainly it is inequitable to represent through an agent that a certain parcel of real estate is being offered for sale and then attempt to diminish the offering by executing a Real Estate Contract of Sale with a smaller parcel described therein. Based upon either mutual mistake or the inequitable conduct of Appellant, Respondent is entitled to reformation.

POINT III

RESPONDENT IS NOT GUILTY OF LACHES, AND, THEREFORE, CAN SEEK EQUITABLE RELIEF IN THE FORM OF REFORMATION.

The reason that the Respondent did not file his suit

for reformation until 1975, even though he had been informed by defendant Tinker that there was a dispute as to the South 32 feet of the property, was because all the parties to this lawsuit were trying to get the matter resolved. (Tr. 27-28.) This was also the reason why the Respondent was late in making his annual payment. (See Exhibits N, P, Q, S, T, U, V, W, and X attached to Appellant's fourth request for admission submitted to Respondent under date of April 29, 1976, all of which were admitted as being correct by the Respondent, to show the negotiations between the parties from the time the error in the description was discovered until the filing of the lawsuit, and also in support of Respondent's failure to make payment timely.) Respondent was understandably hesitant to pay the purchase price until he was satisfied that he was going to receive a conveyance of all the property represented by the real estate salesman. (Tr. 27-28; Finding of Fact Number 24.) Respondent's good faith is evident from the fact that he tendered the balance due on the contract upon filing this suit. (Finding of Fact Number 23.) Furthermore, Respondent offered to deposit the balance due on the contract into escrow while the dispute was being settled. (Tr. 28.) The Appellant cannot spend years negotiating with the Respondent over the boundary dispute and then claim that the Respondent is guilty of laches. Nor should the Respondent be able to misrepresent the property being sold and then expect

timely payments on a smaller parcel until the Respondent was guaranteed that he would receive the parcel originally offered. Furthermore, since the Respondent had what he wanted, namely, the possession of the property, there was no need for him to bring suit for reformation until he knew that the Appellant had no intention of satisfying him for their misrepresentations. The defendant Tinker made no attempt to remove the Respondent from the property in dispute and the portion he claimed, nor did he file suit against the Respondent. (Tr. 25.) Respondent was also paying taxes on the property. In fact, the records of the County Recorder show he was being assessed for 3/4 of an acre. (Tr. 58; P Ex. 6.)

Appellant's brief says that Respondent was told by defendant Tinker of the boundary dispute in 1968 and yet did not mention the problem to the Appellant until 1969. In fact, the Respondent's testimony was that he was informed of the dispute by the defendant Tinker in either the fall of 1968 or in 1969. (Tr. 24.)

Appellant complains that Respondent knew of the boundary dispute prior to investing money in the remodeling of the old church. It is difficult to see the significance of that investment in terms of this laches argument, since the Appellant is not damaged in any sense by the investment of the Respondent. To the contrary, the Respondent's complaint for damages was denied.

Appellant's brief complains that Respondent should have made the Appellant aware of Respondent's confusion as to the boundaries prior to the signing of the contract on November 1, 1965. The Respondent was not confused. The Appellant and its real estate salesman were. Furthermore, the Respondent was unaware of the Appellant's confusion and since the Respondent himself was not confused and did not even know of the potential dispute, he had no way of bringing this to the attention of the Appellant prior to November 1, 1965, as the Appellant claims he should.

Finally, and most importantly, the law does not support the claim by the Appellant that the Respondent was guilty of laches.

The only law cited by the Appellant in its brief is the general principle that Appellant is free to assert the defense of laches since Respondent's claim sounds in equity. Unfortunately for the Appellant, there are specific elements to the equitable defense of laches which are not present here.

The other elements to a defense in equity based on laches which are pertinent to this case are (1) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit, and (2) injury or prejudice to the defendant. 27 Am Jur 2d §162, Equity. Of the several elements of laches, the only one set forth by the Appellant is the mere lapse of time. Lapse of time, of itself,

is not decisive in determining whether the plaintiff is guilty of laches. 27 Am Jur 2d §163, Equity. Lapse of time is only one, and, moreover, not ordinarily the controlling or most important of the elements to be considered in determining the existence and application of laches as a defense in a suit in equity. Finucane vs. Hayden, 384 P2d 236 (Idaho 1963). Laches must not only consist of delay, but of a delay which works a disadvantage to the opposing party. Burningham vs. Burke, 245 P 977 at 983 (Utah 1926). The Appellant, in its brief, makes no allegation of any disadvantage to it due to the delay. This is because there was none. Laches requires an inequity founded upon some change of conditions or relation of the parties or property. Holmberg vs. Armbrecht, 327 US 392, 90 L ed 743, 66 S Ct 582; 27 Am Jur 2d §169, Equity. There has been no such change in this case.

At all times, the Appellant had knowledge that the Respondent claimed the right to the entire parcel of real estate within the fence lines. This was evident by Respondent's possession, improvements and payment of taxes. The improvements consisted of placing a trailer on the parcel of real estate in dispute and running sewer and water pipes from the street to the trailer. (Tr. 25.) Respondent also renovated the old ward house. (Tr. 23.)

The adjudicated cases proceed on the assumption that

the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay, the adverse party has a good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition of relations during this period of delay, it would be an injustice to the latter to permit him now to assert them. Osincup vs. Henthorn, 130 P 652 (Kan 1913), 27 Am Jur 2d §162, 164, Equity. Obviously, it would have been unreasonable for the Appellant to assume that the alleged rights had been abandoned or even that they were worthless.

Not only must the laches be prejudicial to the adverse party, but it must be unexplained. Osincup vs. Henthorn, supra; 27 Am Jur 2d §164, Equity. In the case before the Court, the delay in bringing suit is explainable and, thus, excusable. The Respondent was attempting to resolve the boundary dispute with the parties in concern. (Tr. 27-28.)

Finally, it has been held that as a general principle, the lapse of time does not bar the right to property if it is in possession or under the control of the claimant. Cleveland Clinic Foundation vs. Humphrys, 97 F2d 849, cert den 305 US 628, 83 L ed 403, 59 SCt 93 (CA6 Ohio). Thus, where the suit involves a dispute as to the title or ownership of real estate, laches may be negatived by the circumstances that the complainant has been in undisturbed possession of the property. Brainard vs. Buck,

184 US 99, 46 L ed 449, 22 S Ct 458, 27 Am Jur 2d §165, Equity. A party in possession of land who resorts to a Court of equity to settle a question of title is not chargeable with laches no matter how long the delay. First National Bank vs. McIntosch, 79 So 121 (Ala).

POINT IV

APPELLANT SHOULD BE REQUIRED TO CONVEY THE PROPERTY THAT IT AGREED TO SELL TO THE RESPONDENT BY WARRANTY DEED, RATHER THAN QUIT-CLAIM DEED.

The Real Estate Contract of Sale executed by Appellan and Respondent provides as follows in paragraph 13:

"Seller,...agrees to execute and deliver to the buyer...a good and sufficient warranty deed conveying the title to the above described premises, free and clear of all encumbranc ...and to furnish at his expense a Policy of Title Insurance in the amount of the purchase price..."

Once the legal description of the real property being sold to the Respondent is reformed, the obligation of the Appellant to convey by warranty deed and to insure becomes an obligation upon the property described in the reformed instrumen Appellant's request that it only be required to convey the property in the original description by warranty deed and that it be allowed to convey the balance of the property by quit-claim deed is a request that, in effect, would reverse the effect of the ruling of the trial court and would mean that the Respondent has accomplished nothing by this lawsuit. Since it was the Appellant's own act in quit-claiming the South 32 feet to defendan

Tinker after entering into the Earnest Money contract with the Respondent and since the lower court has held that the defendant Tinker was not a bona fide purchaser for value without notice and that his interest in the property in question is inferior to the Respondent's, it is not an unfair and improper burden upon the Appellant to be required to convey all the property offered by warranty deed. There is nothing in the evidence to indicate that any other party besides defendant Tinker, other than the Respondent, claims any interest in the old church site. Defendant Tinker has not appealed the decision of the lower court. For these reasons, fairness and justice should require the Appellant to convey the entire parcel offered to the Respondent and to do it by warranty deed and to insure it as required by the Real Estate Contract of Sale.

POINT V

RESPONDENT IS ENTITLED TO ATTORNEY'S FEES.

Appellant, in its brief, claims that Respondent is not entitled to attorney's fees. The reason given by the Appellant is that Respondent failed to make timely payment of the contract payment. It is difficult to see what this has to do with Respondent's claim for attorney's fees. Respondent's claim is based upon the Real Estate Contract of Sale, which provides for attorney's fees in this situation. Furthermore, during the trial, both Appellant and Respondent stipulated that the successful

litigant would be entitled to a reasonable attorney's fee of $1,000.00. (Tr. 85.)

Not only should the award of $1,000.00 attorney's fees to the Respondent be affirmed, but the Respondent should be entitled to the additional attorney's fees incurred in defending this appeal. It is in the discretion of this Court to increase as well as affirm, the award of attorney's fees made by the lower court. Swain vs. Salt Lake Real Estate and Investment Company, 279 P2d 709 (Utah 1955). Respondent's attorney's fees incurred to date, solely in connection with this appeal, are $750.00. It is estimated that after oral argument and any other legal work required by this case, that Respondent's attorney's fees for this appeal will be approximately $1,000.00.

POINT VI

APPELLANT IS NOT ENTITLED TO A FORFEITURE OF THE REAL ESTATE CONTRACT OF SALE.

Not only was the Respondent justified in not making timely payments because of the dispute, which has already been discussed, but, furthermore, the Appellant cannot be heard to complain regarding late payments where it has accepted them. The acceptance constitutes a waiver of any objections. Swain vs. Salt Lake Real Estate and Invesment Company, supra.

Furthermore, this Court has previously held that a liquidated damage provision is unenforceable if not in accord with equity and good conscience. Spencer vs. Perkins, 243 P2d

446 (Utah 1952). In that case, this Court held that there must be a reasonable forecast of damages which must also be reasonable in amount before there can be a forfeiture and the buyer must be given credit for improvements to the premises. It could hardly be said that a forfeiture of the contract at this point, after the Respondent has paid approximately $6,000.00 of the $7,000.00 purchase price and has made valuable improvements, would be equitable. In the case of Croft vs. Jensen, 40 P2d 198 (Utah 1935), this Court held that where all but $200.00 of a $6,500.00 purchase price had been paid, the Seller was not entitled to a forfeiture and the buyer was to be allowed to pay the last payment with interest and to be given clear title to the property.

Even if the facts of this case justified a forfeiture, the Appellant never declared such a forfeiture by any notice served upon the Respondent. The notice served upon the Respondent, which the Appellant claims terminated the contract, (see Exhibit B, Appellant's Request for Admission Number 2 under date of April 29, 1976), says as follows:

"You and each of you will take notice that on the 20th day of June, 1975, notice was served upon you forfeiting your interest in the Uniform Real Estate Contract referred to in said notice for failure to make payments as set forth in said notice and you and each of you, under the terms of said contract and notice of June 20, 1975, have become and now are the tenants at will of Manila Corporation of the Church of Jesus Christ of Latter-day Saints and as such, you and each of you are hereby required to vacate the premises..."

The notice referred to under date of June 18, 1975, and served upon the Respondent June 20, 1975, did not forfeit the contract, nor could it have until Respondent was given an opportunity to cure the delinquency, if such was required of him. It merely says that the contract will be forfeited if the delinquency is not cured. Thus, there never was a forfeiture, even assuming arguendo that Appellant was entitled to such. Thus, not only is forfeiture an unreasonable and improper remedy under the facts of this case, but it never has even been declared.

CONCLUSION

The ruling of the trial court should be affirmed for the reasons that have been given. An evidentiary hearing was necessitated due to the admissibility of parol evidence. Upon the admission of parol evidence, it became evident that there was mutual mistake, as well as mistake upon the part of the Respondent and inequitable conduct on the part of the Appellant. This is primarily for the reason that the Appellant's agent represented to the Respondent that all of the old church site and all of the property within the then existing fence lines was being offered for sale. Respondent relied upon this representation and, therefore, agreed to purchase that parcel of property. From the authorities cited in this brief, it is apparent that the Respondent was not guilty of laches. Finally, it is also apparent that forfeiture is not proper under these

circumstances.

Since the Appellant represented that a certain parcel of real estate was being offered for sale and agreed to insure title to it and convey it by warranty deed, it should now become their duty to do so and to pay the Respondent for the attorney's fees he has incurred in the trail of this matter, as well as the appeal.

Respectfully submitted,

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