

2000

Grand County v. Lester W. Rogers : Brief of Respondent

Utah Supreme Court

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W. Scott Barrett; Barrett and Daines; Attorney for Respondent.

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IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

GRAND COUNTY,

Plaintiff / Respondent,

Case No. 20000672-SC

vs.

Court of Appeals No. 990766-CA

LESTER W. ROGERS,

Priority No. 13

Defendant / Petitioner.

BRIEF OF RESPONDENT

ON CERTIORARI TO THE UTAH COURT OF APPEALS

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FILED
UTAH SUPREME COURT

FEB 26 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

GRAND COUNTY,

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Case No. 20000672-SC

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LESTER W. ROGERS,

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STATEMENT OF ISSUES

The Court of Appeals unanimously held that the District Court did not err in deciding the following issues in favor of Grand County. The Parties will hereafter be referred to as County and Mr. Rogers.

1. Whether or not Mr. Rogers properly raised any genuine issue of a material fact sufficient to make the judgment of the District Court granting Summary Judgment erroneous.
2. Whether recording transfers of lots described by metes and bounds constitutes an equitable estoppel such that County cannot require Mr. Rogers to comply with the zoning and subdivision statutes and ordinances.
3. Whether the recording of lot sales by metes and bounds constitutes a waiver by County of compliance by Mr. Rogers with the subdivision and zoning statutes and ordinances.
4. Whether the District Court erred in not requiring joinder of persons to whom Mr. Rogers sold lots.
5. Whether the persons to whom Mr. Rogers sold lots are “occupying claimants” such that their rights would be damaged or affected by the Court’s judgment.
6. Whether Mr. Rogers made any showing that further discovery would raise any genuine issues of material facts. (Mr. Rogers has abandoned issue number 6 in this appeal.)

CONSTITUTIONAL OR STATUTORY PROVISIONS

State statutes, which are determinative in this action are as follows:

Utah Code Ann. § 17-27-103 (t)(i), “Subdivision” means any land that is divided, as resubdivided or proposed to be divided into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms, and conditions.

Utah Code Ann. § 17-27-103 (t)(ii). “Subdivision” includes the division or development of land whether by deed, metes and bounds description, devise and testacy, lease, map, plat or other recorded instrument.

Utah Code Ann. § 17-27-804(1). Unless exempt under Utah Code Ann. § 17-27-806 or not included in the definition of a subdivision under Subsection 17-27-103(1), whenever any lands are divided, the owner of those lands shall have an accurate plat made of them that sets forth and describes:

- (a) all the parcels of ground divided, by their boundaries, course, and extent, and whether they are intended for streets or other public uses, together with any areas that are reserved for public purposes; and
- (b) all blocks and lots intended for sale, by numbers, and their precise length and width.

Utah Code Ann. § 17-27-811(2)(a). Any owner or agent of the owner of any land located in a subdivision as defined in this part who transfers or sells any land in that

subdivision before a plan or plat of the subdivision has been approved and recorded as required in this part is guilty of a violation of this part for each lot or parcel transferred or sold.

(b) The description by metes and bounds in the instrument of transfer or other documents used in the process of selling or transferring does not exempt the transaction from a violation or from the penalties or remedies provided in this part.

Utah Code Ann. § 17-27-1002(1)(a) A county, county attorney, or any owner of real estate within the County in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur may, in addition to other remedies provided by law, institute:

- (i) injunctions, mandamus, abatement, or any other appropriate actions; or
- (ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

(b) A county need only establish the violation to obtain the injunction.

(2)(a) The county may enforce the ordinance by withholding building permits.

(b) It is unlawful to erect, construct, reconstruct, alter, or change the use of any building or other structure within a county without approval of a building permit.

(c) The county may not issue a building permit unless the plans of and for the proposed erection, construction, reconstruction, alteration, or use fully conform to all regulations then in effect.

STATEMENT OF FACTS

Mr. Rogers obtained three extensions of time to file his brief but there are no new issues raised and one issue abandoned since argument in the Court of Appeals. The same arguments are presented and no new controlling authority submitted. There is no disputed fact to try. Mr. Rogers admitted sales as stated in the affidavit of Mary Hofhine. Her Affidavit is set forth hereafter in Addenda A. The only Affidavit filed in opposition to County's Motion for Summary Judgment was that of Mr. Rogers, as set forth in Addenda B. In his Affidavit, Mr. Rogers admits owning the parcel in question, selling lots to various individuals, and failing to have a subdivision plat approved. He says he was still in the process of preparing a preliminary plat at the time of his Affidavit. Mr. Rogers had appeared before Planning and Zoning and the County Council on one or more occasions and knew of the subdivision requirements (Addenda A).

Since Mr. Rogers has basically admitted the facts as alleged by County, Mr. Rogers contended "facts" may have been raised by discovery, which would support his affirmative defenses. No showing was made as to what those "facts" would be and that issue appears to be abandoned in this appeal.

SUMMARY OF ARGUMENT

- I. MR. ROGERS PRESENTED NO GENUINE ISSUES OF MATERIAL FACTS WHICH WOULD PRECLUDE SUMMARY JUDGMENT.
- II. RECORDING LOT TRANSFERS BY METES AND BOUNDS DESCRIPTIONS DOES NOT ESTOP OR CONSTITUTE WAIVER.

THE COUNTY IS REQUIRED TO ENFORCE THE SUBDIVISION LAWS.

- III. LOT OWNERS ARE NOT INDISPENSIBLE PARTIES. THEY CANNOT GET BUILDING PERMITS UNTIL A SUBDIVISION IS APPROVED.
- IV. THE JUDGMENT WILL ASSIST LOT OWNERS AND WILL NOT INTERFERE WITH THEIR RIGHTS AS OWNERS.
- V. MR. ROGERS MADE NO PROPER SHOWING THAT FURTHER DISCOVERY WOULD RAISE ANY GENUINE ISSUES OF MATERIAL FACTS.
- VI. CONCLUSION

ARGUMENT

- I. MR. ROGERS PRESENTED NO GENUINE ISSUES OF MATERIAL FACTS WHICH WOULD PRECLUDE SUMMARY JUDGMENT.

Mr. Rogers argues that Summary Judgment was improper because genuine issues of material facts existed as to whether the County was estopped to enforce or waived subdivision plat compliance.

The problem with this argument is that there is no issue of fact which is disputed. Both parties concede that transfer documents were recorded describing lots by metes and bounds. The only issue is one of law, i.e., did recordation constitute estoppel or waiver. The District Court ruled that it did not, and this ruling was upheld by the Court of Appeals.

II. RECORDING LOT TRANSFERS BY METES AND BOUNDS DESCRIPTIONS DOES NOT ESTOP OR CONSTITUTE WAIVER. THE COUNTY IS REQUIRED TO ENFORCE THE SUBDIVISION LAWS.

Mr. Rogers contends that the conduct of Grand County in recording certain documents constitutes an estoppel or waiver and that therefore the Court erred in granting summary judgment. He further argues that the issues of “waiver” and “estoppel” are “intensely fact dependent” and that therefore, genuine issues of material facts exist as to whether or not County waived its rights to challenge the lot sales or is estopped from enforcing the subdivision ordinance.

The problem with Mr. Roger’s argument is that “waiver” and “estoppel” are legal conclusions. No showing is made by Mr. Rogers as to what the “material facts” are, which are not already admitted. There is no dispute about the fact that a number of Mr. Roger’s grantees were successful in recording their lots by metes and bounds descriptions. What other facts are genuine and would have a bearing on the issues of waiver of estoppel are not identified by Mr. Rogers.

The argument is so novel that little law can be found concerning whether or not the recordation of deeds or sales contracts describing lots by metes and bounds constitutes a waiver or estoppel such that the County cannot enforce its subdivision ordinance. The reason why there is little law on the subject is probably because state statutes specifically provide that a transfer of a lot by metes and bounds does not avoid the necessity for a subdivision plat. Utah Code Ann. § 17-27-811(2)(b).

Further, general law provides that waivers of subdivision controls are not to be inferred unless the conduct said to constitute a waiver was clearly intended as such. 83 Am Jur.2d, Zoning and Planning, §576. Normally waiver is delegated, if at all, to an administrative agency such as a board of adjustments. Even then, the power to waive requirements imposed by statute must be supported by sufficient standards to contain the discretion of the agency and provide a basis for judicial review. Certainly, it cannot be argued that the mere recordation of a lot by metes and bounds by the County Recorder constitutes a waiver by the County such that Mr. Rogers is not subject to the subdivision ordinances and statutes.

While County Recorders are prohibited by statute from recording unapproved subdivision plats, that prohibition does not extend to the recordation of parcels described by metes and bounds. On the contrary, the Recorder is required to record every document that is presented, provided it is accurately described and the signatures are acknowledged. The Recorder is not empowered to waive subdivision requirements by accepting metes and bounds descriptions. Neither is the Recorder required to determine whether the lot described was originally part of a larger parcel. This would impose upon the Recorder a duty to conduct an investigation before any metes and bounds description lot was permitted to be recorded. Such is not the law and should not be.

III. LOT OWNERS ARE NOT INDISPENSIBLE PARTIES. THEY CANNOT GET BUILDING PERMITS UNTIL A SUBDIVISION IS APPROVED.

Mr. Rogers joined 20 Doe third party defendants identified as lot buyers/or owners. None were ever served though he obviously knew who they were. He now contends they are necessary parties.

Mr. Rogers argues that the Court should not have granted judgment without joining as parties the persons to whom he transferred ownership interest. The judgment, as constituted, assists rather than hinders the rights of Mr. Roger's transferees. They cannot get building permits under current conditions (Utah Code Ann. § 17-27-1002 (2)(a)), and they cannot have the benefits of subdivision improvements, which may be required such as drainage, streets, and sidewalks. Nothing would be gained by making them parties unless they wanted to rescind the purchase of their lot. In that event, they could easily bring an independent action against the Seller.

Mr. Rogers argues that the grantees should have been made parties since the "disposition of the action in their absence may as a practical matter, impair or impede their ability to protect their interest." It is easily seen that such in not the case. On the contrary, the judgment is of great benefit to the transferees and will not impair or impede their ability to protect their interests. It could do nothing but enhance their interest since the requirement that Mr. Rogers submit a proper subdivision plat for approval will enable the transferees to get building permits and obtain the benefits of subdivision improvements. Instead of preparing a proper plat (which Mr. Rogers said he was doing

before the Judgment was entered) he has chosen to pursue two appeals.

IV. THE JUDGMENT WILL ASSIST LOT OWNERS AND WILL NOT INTERFERE WITH THEIR RIGHTS AS OWNERS

Mr. Rogers contends that the Occupying Claimants statute (Utah Code Ann. § 57-6-4(2)(a)) protects the rights of Mr. Roger's transferees. He also contends that genuine issues of material facts exist as to whether or not the third party property owners occupy their properties under color of title.

The interest of the transferees is a non-issue. It is not disputed by the County. The interests of Grand County in attempting to enforce the subdivision ordinance are not "competing interests" with the interests of Mr. Roger's transferees.

The judgment granted to the County in no way interferes with or contests whatever interest the transferees of Mr. Rogers may have in the property he sold or contracted to sell to them. It is true that they may have claims against Mr. Rogers, but they can only benefit by the enforcement of the judgment granted to the County, requiring Mr. Rogers to submit a proper subdivision plat and have it approved and recorded by the County. The Court of Appeals properly held that the occupying Claimant's act does not apply to these facts.

V. MR. ROGERS MADE NO PROPER SHOWING THAT FURTHER DISCOVERY WOULD RAISE ANY GENUINE ISSUES OF MATERIAL FACTS.

Mr. Rogers argues that the Court abused its discretion in granting summary

judgment simply because no discovery had been undertaken. He made no showing in either his Memorandum opposing the Motion for Summary Judgment or in his Affidavit that additional and genuine issues of fact could be obtained through discovery.

U.R.C.P. Rule 56 (f) specifically provides for continuances before ruling on a Motion for Summary Judgment. However, in order to obtain such a continuance, there should be a showing by Affidavit why the party opposing the motion cannot, for reasons stated, present the facts essential to justify his opposition. If such a showing is made, then the Court may order a continuance to permit discovery.

There is no showing anywhere by Mr. Rogers as to what facts he expected to discover or intended to rely on, which would raise genuine issues of material facts. There is no dispute about the facts presented by Mary Hofhine's Affidavit, and there is no showing by Mr. Rogers as to what additional facts he expected to obtain through discovery.

The only showing Mr. Rogers makes of any kind is that certain transfer documents were recorded by the County Recorder. The Defendant argues that these recordations constitute waiver or estoppel. However, no facts were asserted which could possibly make any change in the Court's decision. In Downtown Athletic Club v. Horman, 740 P.2d 275, Cert. Denied, 765 P.2d 1277 (1987), it was held that the District Court properly denied a Motion to Compel further discovery where counsel was simply on a fishing expedition for purely speculative facts.

In American Towers Owners Association v. CCI Mechanical Inc., 930 P.2d 1182

(Utah 1996), the denial of Plaintiff's Motion to Continue Discovery was proper because the facts the Plaintiff sought to discover would not be legally relevant to the resolution of the issues.

It is apparent in this case also, that not only was no showing made as to what additional facts Defendant expected to find, but there was no showing that any such facts would be legally relevant to a resolution of the issues before the Court.

VI. CONCLUSION

There are no disputed material facts in this case. Mr. Rogers argues that "waiver and estoppel" raise "material facts" but they are not identified. No showing is made of what "facts" would make a difference if the case were tried.

Mr. Rogers transferred lots without plat approval and admitted he was working on a plat. He now attempts to use his unlawful "transfers" as a defense to the necessity for a plat by arguing there was a partition and/or that the transferees should be parties.

The County has a duty to enforce the subdivision laws, which should not be frustrated by such arguments. The Judgment of the District Court and the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 26 day of February, 2001.

BARRETT & DAINES



W. Scott Barrett

Attorney for Plaintiff / Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of February, 2001, I mailed two (2) true and correct copies of the foregoing BRIEF OF RESPONDENT, postage prepaid, to the following:

Scott L. Wiggins
Mark E. Arnold
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101



W. Scott Barrett

ADDENDUM

Addendum A: Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment

Addendum B: Affidavit of Lester Rogers

Tab A

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**IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY STATE OF UTAH**

GRAND COUNTY,

Plaintiff,

vs.

LESTER W. ROGERS,

Defendant.

**AFFIDAVIT OF MARY HOFHINE
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Civil No. 9907-38

Judge: Anderson

STATE OF UTAH)
 ss:
County of Grand)

Mary Hofhine, being duly sworn on oath, deposes and says:

1. That she is the zoning administrator for Plaintiff Grand County, and among her duties are the responsibilities of enforcing the zoning ordinance and requiring proper application for subdivision approval.
2. That Affiant has had a number of conversations with Defendant Lester W. Rogers and has determined from information received from him and from documents recorded with the Grand County Recorder's Office that Defendant has subdivided and sold a number of parcels from a 34-acre parcel, which he owns in Grand County.

3. That Affiant has obtained from the Grand County Recorder copies of documents which are attached hereto and incorporated herein showing that Defendant has subdivided and sold the following parcels among others:

- (1) Land contract dated April 21, 1997 showing sale of a lot by metes and bounds to Clark Messik.
- (2) A warranty deed dated the October 1, 1996 showing sale of a parcel of land by metes and bounds by the Defendant to Elizabeth Lanz.
- (3) A uniform real estate contract dated February 26, 1994, whereby Defendant conveyed lots to Betty L. Relitz.
- (4) Sales contract whereby Defendant conveyed a lot by metes and bounds to William and Vera Clay on November 1, 1997.
- (5) Vacant land sales contract whereby Defendant conveyed a lot by meets and bounds on August 21, 1997 to Earl L. Murphy.

4. Affiant further states that all of the conveyances or agreements to sale are in violation of Grand County subdivision law in that no subdivision plat has ever been approved.

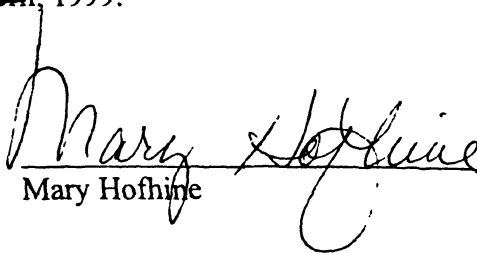
5. That Affiant has read the Answer and Cross Claim whereby Defendant Rogers alleges that he has claims for partition against a number of doe defendants. Affiant knows of her own knowledge that Defendant Rogers knows the true names of all of the Defendants since he has entered into agreements with them to sell or has conveyed lots to them by written agreement

executed by himself and the grantee parties.

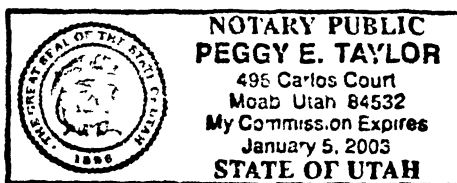
6. That Defendant Rogers has on one or more occasion appeared before the Grand County Planning and Zoning Commission and the Grand County Council and has promised at those meetings to submit a proper subdivision plat but has failed to do so.

7. Affiant further states that she has personal knowledge of the foregoing facts and is competent to testify thereto.

DATED this 3 day of ^{MAY}~~April~~, 1999.


Mary Hofhine

SUBSCRIBED AND SWORN TO before me this 3 day of ^{MAY}~~April~~, 1999.




Notary Public

Tab B

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DIANA L. GARRETT, Bar No. 7206
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Attorneys for Plaintiff and Third Party Defendants

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY,
STATE OF UTAH

GRAND COUNTY,

Plaintiff,

v.

LESTER W. ROGERS

Defendant.

Case No. 9907-3A

Judge: Anderson

LESTER W. ROGERS

Counter and Third Party
Plaintiff

v.

DOES I through XX

Counter and Third Party
Defendants

AFFIDAVIT OF LESTER ROGERS

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

LESTER ROGERS, being first duly sworn on oath, deposes and says:

1. I am the Defendant and Third Party Plaintiff of record in the above-entitled and captioned matter;
2. I am over twenty-one (21) years of age;
3. I have personal knowledge of that which I am testifying herein;
4. I am a resident of GRAND County, State of Utah;
5. I am the owner of real property in Grand County, state of Utah, situated in or about an area known as Thompson Springs and which said property is a portion of the property which is the subject of this lawsuit.
6. That there exists other landowners, other than myself, who own property which was at one time owned by myself and which is the subject of this lawsuit.
7. That I have not conducted a title search on those parcels previously conveyed by me and therefore, I do not know who the current owners are.
8. That I conveyed portions of my property to individuals know to me as Clark Messik,, Elizabeth Lanz,, Betty L. Relitz, William Clay, Vera Clay and Earl L. Murphy.

9. That at the time I conveyed the property to the above named owners, the deeds of conveyance were duly recorded by the Grand County Recorder.

10. That the purchasers named in ¶ 8, above possessed the property and made valuable improvements to their individual parcels.

11. that I have not conveyed or sold any of my remaining property since May 20, 1998, approximately 9 months prior to the commencement of this lawsuit.

12. That I have not done or attempted to do anything with my remaining parcel of property since the last conveyance on or about May 20, 1998.

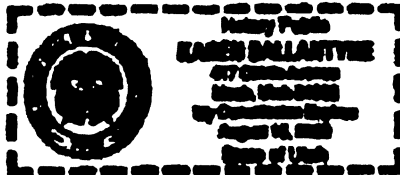
13. That even while traveling to Arizona over the winter for my health, I still had my engineer continue to work towards compliance with the Grand County Planning Commission and as previously agreed to..

14. I do not intended to partition off, sell and/or do anything with my remaining parcel without first fully complying with all rules, regulations, ordinances and laws which govern the use, zoning and subdividing of my property.

DATED this 28th day of MAY, 1999.

Lester Rogers
LESTER ROGERS

SUBSCRIBED AND SWORN to before me this 28th day of May, 1999



Karen Ballantyne
NOTARY PUBLIC