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W.A. Nielson v. John W. Smith, Albert S. Wheelwright and Smith Land Co v. M.M. Johnson : Petition for Rehearing and Supporting Brief

Utah Supreme Court

J.D. Skeen, E.J. Skeen; attorneys for appellants.

In the Supreme Court of the State of Utah

W. A. NIELSON,
Plaintiff and Respondent,
vs.
JOHN W. SMITH, AND J. CAMERON SMITH, E. LINCOLN SMITH, POLLY SMITH, JOHN W. SMITH AND MAX GAILEY, Trustees of the Smith Land Company, and SMITH LAND COMPANY, a Corporation,
Defendants and Appellants.
ALBERT S. WHEELWRIGHT, Trustee in Bankruptcy of John W. Smith, Bankrupt, Intervenor and Respondent,
} No.6199

AND

SMITH LAND COMPANY, a Corporation, Plaintiff and Appellant,
vs.
M. M. Johnson, Receiver of Nielson-Burton Company, Formerly a Co-Partnership, Composed of A. J. Nielson and Charles S. Burton, CHARLES D. MOORE, WILSE A. NIELSON,
Defendants and Respondents.
} No.6198

Appeal From First District Court, Boxelder County
Honorable Lester A. Wade, Judge

Petition for Rehearing, and Supporting Brief

J. D. SKEEN,
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Attorneys for Appellants.

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Come now the appellants in the above entitled cases, consolidated for hearing herein, and petition for rehearing herein, upon the following grounds, towit:

1.

The Court has failed to consider facts which show conclusively that predecessors in interest of the plaintiff, W. A. Nielson, in the Box Elder County case had notice in 1930 of the assignment of the contract of purchase described in the complaint, and that by reason thereof, this Court has erroneously concluded that the cause of action sued upon was not barred by the Statute of Limitations.

2.

The Court has erroneously held and concluded that the notice of the transfer of the said contract of purchase, given to the sheriff of Box Elder County, as agent of the plaintiff's predecessor in interest, was not notice to his principal.

3.

The Court has erroneously failed to apply to this case the well established rule that the means of knowledge of a fraud is equivalent to knowledge.

4.

This Honorable Court erred in stating that

> "There is considerable conflict as to whether Nielson and his privies knew and should have known of the assignment of the contract to the corporation,"

for the reason that there is no conflict in the evidence whatsoever as to facts reasonably calculated to give the judgment creditor notice of the assignment towit: the fact that the sheriff was instructed to make a levy upon the property involved in this suit, and that he did not make the levy because he found that the property had been transferred by John W. Smith, the judgment debtor. These facts

are shown by documentary evidence — the records of the sheriff's office.

5.

This Honorable Court erred in concluding that the exact method and time of notice of modification of the transfer are not alleged. It is well settled that the plaintiff, in a suit to set aside a fraudulent conveyance, which is commenced more than three years after the conveyance, must specifically allege facts which negative notice of the said conveyance. The burden is not on the defendant, but is on the plaintiff.

6.

The Court erred in awarding costs to the respondents.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Appellants.

Brief in Support of Petition for a Rehearing

This petition is addressed to two issues:

1.

The Court erred in holding that the cause of action in the Box Elder County case was not barred by the Statute of Limitations, and

2.

The Court erred in awarding costs to respondents.

The defense of the Statute of Limitations is dismissed by the Court with the statement:

"There is considerable conflict as to whether Nielson or his privies knew or

should have known of the assignment of the contract to the Corporation. But the exact method and time of notification are not alleged. Conditions on the farm remained the same, that is, John W. Smith and family continued to live on and to operate said farm. We are, therefore, unable to say at what time Nielson or his predecessor had, or should have had, notice and we cannot hold the action barred by the Statute of Limitations."

We feel that the Court has failed to consider undisputed documentary evidence which, as a matter of law, charged the predecessor of the plaintiff with notice of assignment of the contract. Under date of August 16, 1930, a few days less than five years before the suit was brought, a praecipe for execution was filed with the Clerk of the District Court of Box Elder County in the case of Bertha K. Skeen, the predecessor in interest of W. A. Nielson, respondent. (B. E. 272; Ab. 112). At about the same time, D. A. Skeen, attorney for the plaintiff, Bertha K. Skeen, in the same case, gave a praecipe to the Sheriff of Box Elder County as follows:

"TO THE SHERIFF OF BOX ELDER COUNTY:

You will please proceed to levy upon any property, either real or personal, which you may locate belonging to defendants in Box Elder County, State of Utah, and advertise the same for sale, pursuant to the execution and levy as soon as you may do so.

(Signed) D. A. Skeen,
Attorney for Plaintiff."
(B. E. 272; Ab. 114).

The sheriff made a return dated December 3, 1930, as follows:

"I, John H. Zundel, Sheriff of the County of Box Elder, State of Utah, do hereby certify and return, that I received the within and hereunto annexed writ of execution, on the 26th day of September, 1930, and that by virtue of the same, I have made demand upon the within named defendant, John W. Smith, for the payment of the within judgment, with interest and costs, all as more fully appears in the within writ of execution, the defendant stated then and there if I would call J. D. Skeen he would take care of the within judgment as he had the money to pay said judgment. I did take up the matter with J. D. Skeen, and on or about the 7th day of November, 1930, I received a letter from said J. D. Skeen; a copy of said letter is hereto attached and marked exhibit A and made a part of this return.

I do further certify and return that I have made due and diligent search and inquiry within my jurisdiction and have been unable to find any property belonging to the within named defendant, but what is mortgaged or exempt from execution, upon which to levy in satisfaction of the within writ.

I therefore return the within writ unsatisfied.

Dated at Brigham City, Utah, this 3rd day of December, 1930.

JOHN H. ZUNDEL,
Sheriff of Box Elder County, Utah.
By ..... Deputy."

(R. E. 275; Ab. 114).

Attached to the return as recited therein, was a letter from J. D. Skeen to John H. Zundel, Sheriff, as follows:

> "Dear Sir:
>
> John W. Smith has requested me to advise you that he has no money or property out of which the execution you hold against him might be satisfied. The property he occupied was sold on contract and title reserved to both the land and the crops. Any equity he might have had was sold some time ago.
>
> Respectfully,
>
> J. D. SKEEN."

(B. E. 274; Ab. 114).

Let us briefly review the facts. The plaintiff alleged in paragraph 4 of his complaint "that *upon the entry* of said judgments, execution was issued thereon and delivered to the Sheriff of Box Elder County and said executions were duly returned by the said Sheriff wholly unsatisfied . . ." (Ab. 2). It was stipulated by the respondents that no execution was issued except the one upon which the above return was made. (Ab. 101). The attorney who caused the execution to be issued in 1930 also represented W. A. Nielson in the other two cases in which judgments were rendered against John W. Smith. (Ab. 52-53). The sheriff, by his deputy, Joseph R. Olsen, served the execution but was unable to find property belonging to the defendant. He prepared a return stating the facts and attached thereto the letter from J. D. Skeen. The return bears the date December 3, 1930. (Ab. 115).

The facts stated above are not in conflict. There is not a word of evidence to the contrary. In

order to defeat the defense of the Statute of Limitations, the Court must hold that under these circumstances the plaintiff and Bertha K. Skeen, his predecessor, were under no duty to make inquiry. It must hold that they had no means of knowing the fact of the transfer. Here we have an attorney directing the sheriff to make a levy upon the property of the defendant, and we have a return prepared which stated that the property the defendant was purchasing under contract *had been sold some time ago.* It is reasonable to presume that the attorney was advised, orally at least, that the levy had not been made. The plaintiff paid the sheriff for the service; and is it the ordinary thing to cause issuance of execution and then wonder for *five years* whether it had been served? Of course it is not. It may be presumed that the attorney made inquiry and was told that the levy on execution was not made, because the equity in the land evidenced by the contract had been transferred. He did not deny that he had discussed the matter with the sheriff. He simply did not recall! (Ab. 105).

The test as to what facts constitute such means of knowledge as to be the equivalent thereof is well stated in the Utah case —

> Jones Mining Co. v. Cardiff Mining & Mill Co., 56 Utah 449; 191 P. 426, as follows:
>
> "In all such cases the statute begins to run from the time the complaining party discovered the wrongs complained of or *when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry.* The law is stated

> to that effect by this Court in the case of Gibson v. Jensen, 48 Utah 248; 158 Pac. 426, and in Salt Lake City v. Investment Co., 43 Utah 181; 134 Pac. 603. If therefore the facts and circumstances which came to the knowledge of the plaintiff corporation were such as would have caused a person of ordinary prudence and intelligence to act, then it should have acted, and the statute of limitations was set in motion as to it."

It is submitted that a "person of ordinary prudence and intelligence" would inquire of the sheriff as to the reason for not making the levy, and would have been in a position to know all of the facts. This rule is based on sound reasoning. A person who claims that he has been defrauded should be diligent in pursuing his remedies. Otherwise, equities of third persons attach, evidence is lost and destroyed, witnesses die and proof becomes difficult. As stated by the California Supreme Court,

> ". . . A party who has the opportunity of knowing the facts constituting the fraud of which he complains, cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence."
>
> Shain v. Sresovich, 104 Cal., at p. 405; 38 P. at p. 42.

The respondent could have known all the facts if he had said, "Sheriff, what did you levy on in the John W. Smith case?" He would have learned all about the transaction then. We think he knew all about it in 1930, and that no other inference

from the evidence is reasonable. We believe that he stood by and remained inactive for a purpose. If he had brought this suit in 1930 and had been successful, he would have recovered only a contract for purchase, badly in arrears, and subject to large tax delinquencies. That is the reason he did not start the suit in 1930. Meanwhile Olsen, the deputy sheriff died.

Unless this Court repudiates the fundamental rule that knowledge gained by an agent in the course of his duty is knowledge of his principal, the Court must hold that as a matter of law, the Statute of Limitations started to run in December, 1930, and the cause of action is barred. The sheriff was employed to make the levy and was the agent of the judgment creditor. He knew of the transaction in December, 1930.

The burden of alleging lack of notice is on the plaintiff as is also the burden of proof of facts which would excuse him from bringing the suit at an earlier date. No such facts are alleged and none proved. There is no claim that the defendant concealed anything. The Court was in error when it stated that the appellants had failed to allege "the exact method and time of notification." The burden was the other way.

> Wood v. Carpenter, 101 U. S. 135; 25 L. Ed. 807.

The facts discussed above are not even mentioned in the opinion of this Court. We feel that in all fairness this phase of the case should be reconsidered and a rehearing granted.

Although the Court has ordered modification of the judgment by reducing it approximately one-third,

costs are assessed against the appellant. We realize that assessment of costs is discretionary, but believe that where a litigant is faced with a judgment which is excessive to the extent of at least one-third (as found by this Court) costs should not be assessed against him, if as in this case he is successful in getting the judgment modified to that extent. Judgment for costs should be for appellant, or should be divided.

Respectfully submitted,

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E. J. SKEEN,
Attorneys for Appellants.