1977

Stanley Katz v. Ronald John Arnold and Janet Lee Arnold : Brief of Appellants

Utah Supreme Court

Gary A. Weston; Attorney for Plaintiff-Respondent;
Brian M. Barnard; Attorney for Defendants-Appellants;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

STANLEY KATZ,

Plaintiff-Respondent,

vs

RONALD JOHN ARNOLD and
JANET LEE ARNOLD, his wife,

Defendants-Appellants.

Case No. 15015

BRIEF OF APPELLANTS

AN APPEAL FROM THE ORDER OF DISMISSAL OF
DEFENDANTS' COUNTERCLAIM AND ORDER DENYING
DEFENDANTS' MOTION FOR A NEW TRIAL
IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE G. HAL TAYLOR, JUDGE PRESIDING

GARY A. WESTON
431 South Third East
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

BRIAN M. BARNARD
214 East Fifth South
Salt Lake City, Utah 84111
Attorney for Defendants-
Appellants

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Attorney for Plaintiff-
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BRIAN M. BARNARD
214 East Fifth South
Salt Lake City, Utah 84111
Attorney for Defendants-
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RULES

IN THE SUPREME COURT

OF THE

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I

NATURE OF THE CASE

This action, initiated by the Plaintiff-Respondent in the Court below, was to terminate and foreclose a Uniform Real Estate Purchase Contract. The Defendants filed a Counterclaim alleging conversion and damage to their

personal property done by agents of the Plaintiff while the Plaintiff sought to regain possession of the real property in question.

II

DISPOSITION IN LOWER COURT

The Counterclaim of the Defendants was dismissed by the Court below, after a hearing and trial, on the grounds and for the reason that the Defendants failed to prove a cause of action for the alleged conversion and damage.

III

RELIEF SOUGHT ON APPEAL

The Defendants seek a reversal of the Dismissal of Defendants' Counterclaim and an order remanding this case for a full hearing and trial, with instructions, on the Defendants' Counterclaim.

IV

STATEMENT OF THE CASE

This action was filed in the District Court of

the Third Judicial District in and for the County of Salt Lake by the Plaintiff-Respondent seeking to terminate and foreclose a Uniform Real Estate Purchase Contract on certain real property located in Salt Lake County. The Defendants-Appellants filed an Answer and Counterclaim to this action alleging among other things that the Plaintiff by and through agents, had wrongfully entered the premises of the Defendants while they occupied the same and had removed items of personal property of the Defendants from the dwelling and have damaged other personal property of the Defendants located in the dwelling. The matter was tried on October 22 and 26, 1976 to the Court, the Honorable G. Hal Taylor, judge presiding. The Plaintiff prevailed on his complaint and was awarded damages. The Defendants presented certain evidence and proffered other evidence to establish an agency relationship between the Plaintiff and a person named Jerry Gardner, and to establish certain wrongful conduct of Gardner as agent for the Plaintiff. The Court ruled that the evidence proffered was inadmissible. Without this evidence, the Defendants were unable to establish a cause of action, and the Defendants' Counterclaim was dismissed.

The Defendants made a motion for a New Trial, which was denied and the Defendants-Appellants filed a

timely notice of appeal on the dismissal of their Counterclaim.

V

STATEMENT OF FACTS

The Plaintiff filed this action on December 26, 1973 to foreclose and terminate a Uniform Real Estate Purchase Contract on certain real property located in Salt Lake County (R. 2-4). The Defendants filed an Answer and Counterclaim against the Plaintiff in January, 1974 alleging that the premises in question had been wrongfully entered by the Plaintiff and his agents and that the Plaintiff's agents had damaged and converted certain items of personal property of the Defendants located in the premises (R. 13-17). Jerry Gardner was specifically alleged to have been an agent of the Plaintiff in the Counterclaim (R. 15). The Defendants made a motion for Leave to Name Additional Parties to the action (R. 22) which was granted (R. 40). An Amended Answer and Counterclaim was filed, which specially named as additional Defendants, Daniel A. Payne, Irene Payne and Jerry Gardner (R. 43-47). The Sheriff of Salt Lake County was unable to locate the additional parties for service (R. 46-

The Amended Answer and Counterclaim alleged that Jerry Gardner was an agent of the Plaintiff and acting as such an agent he had caused harm and damage to the Defendants (R. 45).

The matter was tried to the Court, the Honorable G. Hal Taylor, judge presiding, on October 22 and 26, 1976, (R. 58, 59 & 63). The Plaintiff prevailed on his complaint.

At the trial certain evidence was presented on the Defendants' Counterclaim regarding the relationship between Jerry Gardner and the Plaintiff and the fact that in December, 1973 and Janurary, 1974 the Defendants still had personal property in the premises.

The Defendant Janet Arnold testified that she had personal property in the dwelling from early December, 1973 until January 11, 1974 (Trans. P16, line 2-3). Mrs. Mayne, an employee of the Plaintiff testified that the Defendants had property in the dwelling on December 10, 1973 (Trans. P18, lines 2, 19; P28, lines 28-30).

Mrs. Mayne, acting for the Plaintiff, authorized Jerry Gardner to do some repairs on the premises (Trans. P35, line 30 to P36, line 2); and she gave him a key to enter the premises (Trans. P35, line 18). Mrs. Mayne authorized Jerry Gardner to enter the premises and to do

repairs knowing that the personal property of the Defendants was still in the dwelling (Trans. P43, lines 6-9). Mrs. Mayne told Jerry Gardner to move the property of the Defendants into one room of the dwelling (Trans. P43, lines 15-22).

In answers to interrogatories the Plaintiff had, before trial, admitted that Jerry Gardner had entered the dwelling on December 20, 1973, and again on a number of occasions from January 7 to January 15, 1974, acting for the Plaintiff (R. 28).

On January 11, 1974, the Defendant Janet Arnold arrived at the dwelling to find Jerry Gardner making repairs; he identified himself as Jerry Gardner and said that he was the handyman of the Plaintiff, Stanley Katz (Trans. P68, line 27; P98, line 17-18). This is the first time that the Defendant Janet Arnold had ever met Jerry Gardner (Trans. P68, lines 23-24). Upon her arrival she discovered all of her remaining personal property (refrigerator, televisions, baby crib, etc.) in a damaged and disheveled state, piled outside the house underneath the adjacent carport (Trans. P70, lines 6-7). The personal property was in a state of disarray (Trans. P70-76; Exhibits 5, 6, 7, 8 & 9) and was damaged and broken.

The property had been moved outside by Jerry

Gardner (Trans. P71, line 18).

At this time the Defendant Janet Arnold had a conversation with Jerry Gardner (Trans. P98, line 20).

The Court, sustaining an objection by Plaintiff's counsel, refused to hear the content of that conversation and a similar conversation which occurred on the same day. (Trans. P98, line 23). The Defendants made a proffer to the Court of what the testimony would be regarding those conversations (Trans. P99, line 20 through P100, line 3). The evidence of those conversations was for the purpose of establishing the agency relationship between the Plaintiff and Jerry Gardner and to establish that Gardner had been instructed by the Plaintiff to remove the property of the Defendants from the dwelling. After the proffer, the Court ruled the conversations to be inadmissible hearsay (Trans. P100, lines 24-25).

Without the admission of those conversations, the Defendants were unable to establish the agency between the Plaintiff and Jerry Gardner and the removal of the personal property (R. 71) and the Defendants' Counterclaim was dismissed for failure to establish a prima face cause of action (R. 64-65).

VI

ARGUMENT

THE COURT ERRED IN REFUSING TO ADMIT THE HEARSAY EVIDENCE OF THE DEFENDANT REGARDING HER CONVERSATIONS WITH THE PLAINTIFF'S AGENT

There is no question that the contents of the two conversations that took place between the Defendant Janet Arnold and Jerry Gardner is hearsay evidence as defined by Rule 63 of the Utah Rules of Evidence. That rule defines hearsay as follows:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible. . .
> Rule 63, Utah Rules of Evidence.

The Defendants sought to introduce statements made by a non-witness to prove the truth of the matters contained in those statements. The Defendants however, contended that the statements at issue fell within two exceptions to the hearsay provisions of Rule 63.

Exception (9) to Rule 63 of the Utah Rules of Evidence provides in pertinent part:

> VICARIOUS ADMISSIONS. As against a party, a statement which would be admissilbe if made by the declarant at the hearing if (a) the judge finds the declarant is unavailable as a witness and that the statement concerned a matter within the scope of an agency or employment of

> the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

Jerry Gardner was employed by the Plaintiff to do repairs on the premises in question and to move property of the Defendants within the dwelling. He was doing so between January 7 and January 17, 1974 when the conversations were had with the Defendant Janet Arnold. The declarant Jerry Gardner was participating with the Plaintiff in a plan of action which caused a civil wrong to the Defendants. One of the crucial issues in the action is the legal liability of Jerry Gardner as between the Plaintiff and the Defendant.

Exception (10) to Rule 63 of the Utah Rules of Evidence provides in pertinent part:

> (10) DECLARATIONS AGAINST INTEREST. . . [A] statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary. . interests or so far subjected him to civil or criminal liability . . . that the declarant under the circumstances existing would not have made the statement unless he believed it to be true.

The Sheriff of Salt Lake County was unable to locate the party Jerry Gardner to serve him with the summons and complaint in this action (R. 49-50). The return indicated that after due search and diligent inquiry the deputy could not find Gardner. (R. 50). Clearly, an admission by Gardner that he had removed the personal property of the Defendanst from their home and placed them in an unsecured area, would tend to subject him to civil or criminal liability.

The two conversations between Jerry Gardner and the Defendant Janet Arnold which occurred on January 11, 1974 should have been admitted under exceptions 9 and/or 10 of Rule 63 of the Utah Rules of Evidence, and considered by the Court.

CONCLUSION

The Court erred in refusing to hear and consider the proffered testimony of the Defendant. The Order of Dismissal from the Court below should be reversed and the matter remanded for trial.

Respectfully submitted,

BRIAN M. BARNARD, Esq.
Attorney for Defendants-
Appellants
214 East Fifth South
Salt Lake City, UT 84111
Telephone: (801) 328-9531

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellants to Gary Weston, Esq., Attorney for Plaintiff-Respondent, 431 South Third East, Salt Lake City, Utah 84111, postage prepaid in the United States Postal Service, this 14th day of July, 1977.

BRIAN M. BARNARD
Attorney for Defendants-
Appellants