1977

Lavell A. Desbouillons and Henrietta R. Desbouillons v. Kenneth O. Holt and Verdell T. Holt : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

LaVELL A. DesBOUILLONS and HENRIETTA R. DesBOUILLONS,

Plaintiffs-Respondents,

vs. Case No. 15297

KENNETH O. HOLT and VERDELL T. HOLT,

Defendants-Appellants.

BRIEF OF RESPONDENTS

Appeal from the Judgment of the District Court of Weber County, Honorable Ronald O. Hyde, Judge

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BRIEF OF RESPONDENTS

STATEMENT OF KIND OF CASE

Complaint was originally filed by the Plaintiffs and Respondents, seeking the recovery of delinquent rent due and owing by the Defendants and Appellants on a Covenant of Lease for rental of premises set forth as a First Count and on a Second Count for delinquent rental due and owing on a Rental Contract of certain signs. The Respondents filed an amendment to Repondents' Complaint seeking recovery for damages resulting from the breach of a Lease Agreement for real property and for the breach of a Sign Rental Agreement, to which the Appellants

and Defendants filed an Answer, wherein the Defendants allege as a defense scrivenor's error in the description of the premises set forth in the Land Lease Agreement and Defendants and Appellants filed a Counterclaim, complaining of breach of contract as against the Plaintiffs and Respondents.

DISPOSITION IN LOWER COURT

Judge Ronald O. Hyde, in a trial without a jury, entered a Judgment of no cause of action on Defendants' Counterclaim for breach of contract and damages, and entered Judgment in favor of the Plaintiffs and Respondents for rentals as provided for in the Covenant of Lease of real property, together with a cost of living index increase for rental and interest, as provided for in the Covenant of Lease, together with the delinquent sign rentals, and for an amount due and owing under the terms of the Covenant of Lease and Rental Agreement as and for taxes, insurance, and window breakage for a period from July, 1975, to September 10, 1976, together with attorney's fees as provided for in the covenants entered into by the Defendants and Appellants.

RELIEF SOUGHT ON APPEAL

The Respondents seek an Order of this Honorable Court upholding the Judgment of the Lower Court confirming the Judgment entered therein.

STATEMENT OF FACTS

A Covenant of Lease for premises situated on the corner of 20th Street and Washington Boulevard, in Ogden, Utah (R-95), was entered into on October 6, 1973, (Pl.Ex.1), together with an additional piece of property situated to the west of the demised property and contiguous to said property which was set forth in the Lease Agreement by metes and bounds. (Pl.Ex.1)

The Sign Rental Agreement was entered wherein the Respondents were the Lessors and the Appellants were the Lessees on November 12, 1973, (R-24)(Pl.Ex.3), said sign being upon the leased property (R-24).

The demised premises and the leased sign were previously operated by the Respondents under the trade name of Auto Care Center.

The Appellants were in possession of the demised premises from October 6, 1973, and of the rented sign from November 12, 1973 (R-24), and continued in possession and operation of the premises and peaceably occupied the premises, doing business and without interference of the possession of the premises by any one (R-58), and did not allege a wrongful description of one of the parcels of property set forth in the Covenant of Lease until notified by Attorney for the Appellants on September 11, 1975 (R-24).

The Appellants further paid rent for the demised premises from date of Lease of 1973, becoming delinquent in payment of the monthly rents and failing to pay thereafter commencing with July 15, 1975, (Pl.Ex.13), and did also pay rent for the Sign Contract from date of entry into said Sign Contract in 1973 and became delinquent in payment of the Sign Contract commencing with the month of July 1, 1975.

The Appellants abandoned the premises on November 7, 1975, (Pl.Ex.25), and advised the Attorney for the Respondents on January 27, 1976, of the vacating of the premises and returned the keys to the premises in a communication of January 27, 1976, (Pl.Ex.25).

The Respondents, upon notice of the abandonment of the premises by the Appellants and upon receipt of the return of the keys to the premises from the Appellants, attempted to make a sale of the property (R-119), and upon the sale not being consummated, entered into a Listing Agreement for the sale and/or rental of the property with the Wardley Corporation, a real estate broker, (Pl.Ex.8), and subsequently upon the failure of the broker to make a sale or lease of the premises, engaged the services of Junius Tribe, a realtor, (R-121), which resulted in the sale of the property to Robert H. Hinkley, Inc., September 1, 1976. (Pl.Ex.15)

ARGUMENT

POINT I

SCRIVENOR'S ERROR DOES NOT NULLIFY LEASE WHERE NO INTERFERENCE WITH PEACEABLE POSSESSION.

A Covenant of Lease as between the Appellants and the Respondents contained the description of two parcels of property, wherein the description describing the premises contained a wrong description as to that part of the premises upon which the building and sign was situated and a correct description as to the parking area and property immediately west and contiguous to the building and premises. (Pl.Ex.1)

The Appellants occupied the premises and did business for a period of approximately two years from 1973 to 1975, (R-58), had peaceable possession thereof until the Appellants abandoned the premises and vacated same by a notice of January 27, 1976. (Pl.Ex.25)

The Appellants visited the property on a number of occasions (R-106) prior to entering into a Lease Agreement and the property was also viewed and examined by the Appellants' son, a son-in-law, and a key employee (R-107).

The property leased had minimal parking adjacent to the property on the north and had a tract of property west of the building, which was vacant (R-108).

A verbal agreement existed between the Respondents and

the property owner adjoining the Appellants' property to the north for use of such property for parking and an attempt to enter into a written agreement for an easement to rent or lease said property for the joint use of the Respondents and Tony Dekazos, who operated premises known as The Cedars Lounge, to the north and contiguous to the premises (R-215) was drafted, (Pl.Ex.16), and the scrivenor's error occurred when the description of the Dekazos property was drafted as the property upon which the building and sign were located belonging to the Respondents. (R-110)

A scrivenor's error does not per se invalidate a written agreement between the parties, where there is no mutual mistake of fact, and particularly where the Appellants herein were in peaceable possession of the premises and continued in such peaceable possession until the Appellants by their own volitional act abandoned the premises.

The Utah Supreme Court has allowed the reformation of a deed based on oral conversations between the parties as set forth in Sine v. Harper, 222 P.2d 571, wherein the Court allowed evidence for reformation of a deed based upon such oral conversations and stated:

> The conversations between the attorney and the decedent show the attorney's authority and the purposes and limitation of such authority. The conversations between the attorney and Respondents

showed negotiations for and the consummation of a deal with Respondents in accordance with the attorney's authority. There was no assertion by any extra-judicial witness of a material fact for the purpose of proving the existence of such fact, but the fact that such conversations occurred were circumstances would show the purpose and intention of Decedent to convey to the Respondents unconditionally. The attorney was the one who acted for the Decedent in the transactions involved herein and his evidence was competent to relate his version thereof and a relation of the conversations he had with the principals and the transaction was not hearsay, even though it necessarily included statements made by the other parties to the conversation which were not made in the presence of Appellant.

In Bench v. Pace, 538 P.2d 180, the Supreme Court of Utah held that the oversight on the part of the scrivenor in preparing a real estate purchase option agreement was the proper basis for reformation of the document.

In the case of In Re Harmon's Trust, 164 N.Y.S.2d 468, the Supreme Court of New York County held as follows:

> If, in fact, there was a scrivenor's error in transcribing settlor's intention at the time of creating the trust, it is correctible by the Court in an action to reform the instrument.*** In all the cases where reformation was granted by the Court, Petitioner presented direct and convincing evidence of the necessary facts of settlor's original intentions and instructions and of the mistake in the instrument as drawn.

The original Covenant of Lease of the premises (Pl.Ex.1) contained an Option to Purchase in paragraph 26 thereof, setting forth an optional purchase price in the amount of $217,500.00 (Pl.Ex.1), which property when sold by the Respondents following

the abandonment of said property by the Appellants was sold on September 10, 1976, to Robert H. Hinkley for the sum of $210,000.00 (Pl.Ex.15).

At the time of the abandonment of the premises by the Appellants, the option of purchase had expired, but the Appellants had made an offer to purchase the property on June 13, 1975, which communication contained no mention whatsoever or objection to any description of the property, alleging that the Appellants had had the buildings and properties appraised and were ready and willing to purchase same. (Pl.Ex.6)

A follow-up letter was sent by the Appellants on July 25, 1975, complaining of the Respondents' failure to reply to the offer made by the Appellants, again not bringing into notice or making any statements in regards to any defects of the description of the property or the right of possession thereof by the Appellants, but stating that unless the Respondents agreed to respond to the communication of June 13, 1975 (Pl.Ex.6), the Appellants would discontinue paying rent. (Pl.Ex.7)

Respondent telephoned and spoke to the Appellant, Mr. Holt, and invited him to come and visit with the Respondent to discuss the matter. (R-113,-114)

The Appellants did cease making payments upon the premises and the sign commencing July, 1975, as threatened by the Appellant:

in their communication of July 25, 1975. (Pl.Ex.7) (R-115)

The first claim made for Appellants as alleging improper description of one of the parcels of land as set forth in the Lease as a basis of the Appellants' failure to pay rent upon the premises and the sign was made for the first time by the Attorney for the Appellants on September 16, 1975, (R-119), with return of the keys not being made by the Attorney for the Appellants and actual notification of vacating of the premises until January 27, 1976. (Pl.Ex.25) (R-119)

In Paulsen v. Coombs, 253 P.2d 621, the Utah Supreme Court rendered Judgment reforming a written contract which contained a provision inserted by inadvertence or mistake. The Court stated as follows:

> I am entirely in accord with the principle of preserving the sanctity of written contracts, but this applies only when the contract represents the intent of the parties. Where errors occur, clerical, typographical, or otherwise, of course, a contract can be reformed to show the true intent of the parties. In order to prove such mistake and avoid the effects of the written contract, the evidence must be clear and convincing; that is, it must be such that there is no serious nor substantial doubt what the true intent is.

In the instant matter before the Court, there was no right or option to purchase the property at time of abandonment by Appellants, nor the necessity of reformation of the Lease Agreement, in that the Appellants were at no time interferred with in their possession of the premises and peaceably enjoyed

same until the Appellants, because of their own economic problems, as stated in the Appellants' communication set forth in Plaintiffs' Exhibit 6, abandoned and vacated the premises, and only after retaining counsel alleged as a defense to the abandonment of the premises an allegation of a wrongful description of the very building and premises upon which the Appellants did business for a period of more then two years.

The error in itself made by Respondents' Attorney in using a description intended to create an easement in adjoining property (Pl.Ex.16) and by wrongfully inserting same in the Covenant of Lease as one of the descriptions of the property is alleged by Appellants to justify the invalidation of the total Lease Agreement as between the Respondents and Appellants.

In Sheedy v. Stein, 101 N.Y.S.2d 773, the Supreme Court of Queens County held, that it was proper to reform a deed because of a scrivernor's error by the attorney who drew the deed. The Court observed as follows:

> Where a mistake is made by the scrivenor in reducing an agreement to writing, such mistake may be corrected 'no matter how it occurred'.

In Delap v. Leonard, 178 N.Y.S. 102, the Supreme Court, Appellate Division of New York, held that it was proper to reform a deed containing an error made by the lawyer-scrivenor and observed as follows:

> The Plaintiff should not be penalized because of this mistake. When there is no mistake

about Plaintiff's intention, but only in the writing, the mistake of the scrivenor, no matter how it occurred, ought to be corrected.

And this is so, notwithstanding the long period of time that has elapsed between the time of the execution of the deed and the discovery of the mistake.

In the case of Mills v. Schulba, 213 P.2d 408, the District Court of Appeals of California held that it was proper to reform a deed because of a mistake of the attorney employed by the parties to draw up the deed. The Court observed:

Our courts have repeatedly held, that the mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties.

In Sunnybrook Childrens' Home, Inc., v. Dahlem, 265 So.2d 921, the Supreme Court of Mississippi held, that a scrivenor's error in a deed was a proper basis for its reformation.

It would, therefore, appear that there is a unanimity of various jurisdictions and courts cited hereinabove, that a scrivenor's mistake is an obvious basis for reformation where necessary where the error thwarts the purposes and intention of the party executing the document, and it is evident that contracts and deeds have repeatedly been reformed when the evidence was clear and convincing that a scrivenor's error had taken place.

The Respondents concede that if the Appellants had been ready and willing to exercise the previous expired option to

purchase the property, that the error in the description would not in any way have thwarted the Appellants in acquiring title to the property and, in fact, the Respondents were always ready and willing to allow the exercise of the option of purchase as evidenced from the entering into an Addendum to the Covenant of Lease extending the period for the exercise of the original option of purchase given by the Respondents to the Appellants (Pl.Ex.5), and by the expressed desire of the Respondents to discuss a sale of the property with the Appellants, which offer was made by the Respondents to the Appellants as late as June of 1975. (R-113,-114)

The Appellant was directly asked whether or not the Respondent had ever misrepresented anything to Appellant to which Appellant answered that there never was any misrepresentation and that he had inspected the property and was aware of what property he was leasing and was aware of the parking arrangement with the neighbor. (R-59,-60)

POINT II

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOUND BY THE LOWER COURT IS BASED UPON THE EVIDENCE PRESENTED BEFORE THE COURT.

The Appellants in their argument to the Court as evidenced in Point I of Appellants' Brief seeks to establish the fact that the presentation of oral testimony in evidence of

scrivenor's error is inadmissible evidence, and the Respondents submit that Point I of Respondents' Brief responds to the allegations of the Appellants in regards to the legality of the admittance of such evidence.

The Record before this Court as to the testimony and records as evidenced by the exhibits before the Court is supportive of the findings of the Lower Court, and this Court has stated in Sandall v. Hoskins, 137 P.2d 819 (1943), that Findings of Fact are defined as "ultimate facts" and that many facts which must be determined by deduction or inference from the basic facts require the application of a principle or proposition of law or an interpretation of contract or a statute in order to arrive at either the ultimate fact or some fact on the way, and that some factual deductions can be made from basic facts without the mental processes entertaining any legal propositions, and the Court further stated:

> We do not think that we should be technical in requiring a court to make refined separations between Findings of Fact and Conclusions of Law, especially where the basis for the so-called finding clearly appears in the Findings.

The Court further stated that the Conclusions of Law are those conclusions which the Judge concludes flow from the ultimate facts as he finds them illuminated by subsidiary facts.

The Findings of Fact and Conclusions of Law and Judgment are fully in accord with the Memorandum Decision of the Court,

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondents was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellants, Kenneth L. Rothey, Esq., 2275 South West Temple, Salt Lake City, Utah 84115, on this 7 day of December, 1977.

Jeannine Stowell, Secretary