

1997

Glen D. Wardle and Thora Wardle v. Lester Romero : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970139-CA

IN THE UTAH COURT OF APPEALS

GLEN D. WARDLE and THORA	:	
WARDLE,	:	
	:	Case No. 970139-CA
Plaintiffs-Appellees,	:	
	:	
v.	:	
	:	Priority No. 15
LESTER ROMERO,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A DECISION OF THE
SECOND DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH
HONORABLE RODNEY S. PAGE

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COURT OF APPEALS

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JURISDICTION OF THE COURT

The jurisdiction of this Court is based upon § 78-2-2(3)(j), and § 78-2-2(4) Utah Code Ann. (1953 as amended).

STATEMENT OF THE ISSUES

1. Whether the trial court committed reversible error by adopting clearly erroneous findings of fact that there was no credible evidence presented to the court that the plaintiff made payments to the defendant after 1965, thereby tolling the statute of limitations period in which Mr. Romero could enforce the Wardles' obligation.

The standard of review in equity cases where the trial court has made legal conclusions and factual findings is the clearly erroneous standard. Utah Rules of Civil Procedure 52(a); Bellon v. Malner, 808 P.2d 1089 (Utah 1991); Grayson v. Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Bountiful v. Riley, 784 P.2d 1174 (Utah 1989), Western Capital and Security Inc. v. Knudsvig, 768 P. 2d 989, 991 (Utah App. 1989).

2. Whether the trial court committed reversible error by adopting incorrect conclusions of law that the defendant is barred by the statute of limitation contained in Utah Code Annotated Sections 78-12-1, 78-12-23, 70A-3-122, and that therefore the plaintiff is entitled to judgment and decree quieting title in the plaintiff.

The trial court's legal conclusions are reviewed for correctness. Bellon v. Malner, 808 P.2d 1089 (Utah 1991);

Grayson v. Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Bountiful v. Riley, 784 P.2d 1174 (Utah 1989) and Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899-900 (Utah 1989); Western Capital and Security Inc. v. Knudsvig, 768 P. 2d 989, 991 (Utah App. 1989), cert denied, 779 P.2d 688 (Utah 1989).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES**

§ 70A-3-122 Utah Code Ann. Accrual of cause of action.

- (1) A cause of action against a maker or an acceptor accrues
 - (a) in the case of a time instrument on the day after maturity;
 - (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.
- (2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.
- (3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.
- (4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment.
 - (a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;
 - (b) in all other cases from the date of accrual of the cause of action.

§ 78-12-1 Utah Code Ann. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

§ 78-12-23 Utah Code Ann. Within six years - Mesne profits of real property - Instrument in writing - Distributing of criminal proceeds to victim.

Within six years:

- (1) An action for the mesne profits of real property.
- (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.
- (3) An action instituted under Section 78-12-12.5 regarding distribution of criminal proceeds to any victim.

§ 78-12-44 Utah Code Ann. Effect of payment, acknowledgment, or promise to pay.

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any

statute, it shall be unavailable either as a cause of action or ground of defense.

STATEMENT OF THE CASE

A. Nature of the case.

This action was brought by Respondents ("Plaintiffs" or "Wardles") to quiet title to certain real property located in Davis County, Utah. In response, Appellant ("Defendant" or "Romero") counterclaimed to foreclose on the property.

B. Course of Proceeding

Plaintiffs filed their complaint in this action in January, 1994. Plaintiffs had difficulty in locating and serving defendant and as result, obtained an order allowing publication and service by mail. Shortly thereafter, default judgement against defendant and decree quieting title in plaintiffs was entered. Thereafter, the Honorable Rodney S. Page, Second District Court Judge denied Defendant's Motion to set Aside Judgement and Decree Quieting Title in Plaintiffs. The Utah Court of Appeals then reversed the trial court's order denying defendant's motion to set aside the judgment and decree quieting title in the plaintiffs. Thereafter, plaintiffs filed an amended complaint and the defendant filed a counterclaim to foreclose on plaintiffs' property.

The Honorable Rodney S. Page denied the plaintiffs' motion for summary judgement on the basis that there were genuine issue

of material fact concerning whether the statute of limitations had run.

C. Disposition of the Trial Court

The matter was tried before the Honorable Rodney S. Page sitting without a jury, on November 1, 1996. At the conclusion of trial, Judge Page ruled from the bench that plaintiffs' title in the subject property was quieted against the defendant and persons claiming under him. The order and decree was entered on December 10, 1996.

D. Statement of Facts

1. In March, 1960, the defendant, Lester Romero, and his then wife, Maxine Romero, negotiated with Glen D. Wardle and Thora Wardle for the sale of a house and lot situated in North Salt Lake, Utah at 320 East Center Street, more particularly described as follows:

All of Lot 39 Hillside Gardens Subdivision, a subdivision of part of Sections 11 and 12, Township 1 North Range 1 West, Salt Lake Meridian. (subject property).¹

2. Thereafter, by Warranty Deed dated March 15, 1960, and recorded in the office of the Davis County recorder, Farmington, Utah on March 16, 1960, in Book 184 of official records at page 115, Lester Romero and Maxine Romero conveyed the subject property to Glen D. Wardle and Thora Wardle as joint tenants.²

¹ Findings, paragraph 1.

² Findings, paragraph 2.

3. The Defendant recorded a Quit-Claim Deed dated March 1, 1960, on May 24, 1993, wherein Glen D. Wardle and Thora Wardle are named as grantors and Lester Romero is named as grantee of the subject premises. Romero also recorded on May 24, 1993, a "Trust Deed" dated March 1, 1960, wherein the subject premises as securing a note in the sum of \$6,000.00. Plaintiffs denied executing the Quit-claim Deed, the Trust Deed and the Promissory Note dated March 1, 1960. Plaintiffs claimed that the obligation due to Lester Romero and Maxine Romero as of March 1960 was \$5,400.00 payable at the rate of \$100.00 per month.³

4. Romero claims he received a promissory note for \$6,000.00, secured by a deed of trust on the Property. He also received a signed quitclaim deed conveying the Property back to him, which he could record if Plaintiffs did not pay as promised.⁴

5. The Wardles claimed that they executed a mortgage in favor of defendant for \$5,400.00 to secure payment of the obligation.⁵

6. The Mortgage relied upon by the plaintiffs is an unsigned "conformed copy" and not the original.⁶

³ Findings, paragraph 3.

⁴ Rt. 126-30.

⁵ Rt. 13-14.

⁶ Rt. 31-32.

7. During the next several years the Wardles were rarely prompt in paying their obligations as required by the promissory note.⁷

8. It is undisputed that the Wardles made payments on the obligation up until at least 1965.⁸

9. The Wardles claim that no payments were made after 1965.⁹

10. Romero never allowed more than three (3) years to elapse without collecting a payment.¹⁰

11. Romero claims that the Promissory Note remained constantly delinquent.¹¹

12. On May 24, 1993, Mr. Romero, being unable to convince Plaintiffs of their remaining obligation, recorded the quitclaim deed.¹²

13. The plaintiffs' obligation to defendant was acknowledged in writing by the plaintiffs in 1980.¹³

⁷ Rt. 131-134, 152-156.

⁸ Findings, paragraph 4.

⁹ Rt. 12.

¹⁰ Rt. 131-34, 152-56.

¹¹ Rt. 131-34, 152-56.

¹² Findings, paragraph 3.

¹³ Findings, paragraph 6.

14. Defendant met with the plaintiffs in 1980 to discuss payment of the remaining amount due on the Note.¹⁴

15. Plaintiffs, as a result of that meeting, mailed defendant a check for the \$5,173.40 they claimed was the remaining amount due on the Note and asked for a full release of defendant's lien on the Property.

16. Romero returned the check to the plaintiffs because it was less than the total amount then owing. However, Romero continued receiving payments up until 1991.¹⁵

SUMMARY OF ARGUMENT

Mr. Romero appeals on the basis that the evidence at trial did not support the trial court's findings that no payments were made by the Wardles or received by Mr. Romero after 1965, and as a result the statute of limitations had run on Mr. Romero's right to enforce the Wardles' obligation. It is the position of Romero that the great weight of evidence clearly showed that payments were in fact received from the Wardles on the obligation, which tolled the statute of limitations and it was reversible error for the lower court to rule otherwise.

¹⁴ Rt. 33-35.

¹⁵ Rt. 131-34, 152-56.

ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANT'S COUNTERCLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS AND THEREFORE THE PLAINTIFFS ARE ENTITLED TO A DECREE QUIETING TITLE TO THE SUBJECT PROPERTY.

POINT I

The Trial Court's Finding That There Were no Payments Made By Plaintiffs After 1965 is Against the Great Weight of Evidence Presented at Trial.

The trial court entered a single finding, Finding No. 4, regarding the credibility of evidence of payment of the obligation by the Wardles to Romero.¹⁶ The trial court simply found that because of the conflicting testimony regarding payment of the obligation after 1965, Romero said he received several payments, Mrs. Wardle said no payments were made, that the only possible evidence before the court was the payment schedule maintained by Romero which was received as part of plaintiff's Exhibit 18, and as a result, the credibility of that payment schedule would be determinative.¹⁷

After comparing plaintiff's Exhibit 18 with the checks and receipts maintained by plaintiff and entered and received as defendant's Exhibit 12, the trial court found that because of the inconsistencies between the two sets of documents, that Romero's payment schedule (Plaintiff's Exhibit 18) was therefore not

¹⁶ Findings, paragraph 4.

¹⁷ Id.

worthy of any credibility as far as the court was concerned.¹⁸ This finding by the trial court, was based entirely on the assumption that the plaintiff's checks and receipts as set forth in defendant's Exhibit 12 was the undisputable and established starting point from which to determine the credibility of Romero's payment schedule (Plaintiff's Exhibit 18). As set forth below, such an assumption was unreasonable under the circumstances and not supported by the evidence.

Romero challenges both Finding No. 4 and the resulting Conclusions of Law. Romero acknowledges that the trial court's findings will not be set aside unless clearly erroneous¹⁹, however, the conclusions of law are not entitled to the same level of deference; a correction of error standard applies to conclusions of law.²⁰ A finding of fact is clearly erroneous if it is against the great weight of evidence or if the reviewing court is otherwise definitely and firmly convinced that a mistake has been made.²¹ "Findings of fact are clearly erroneous if the appellant can show that they are without adequate evidentiary foundation or if they are induced by an erroneous view of the

¹⁸ Id.

¹⁹ Utah Rules of Civil Procedure 52(a).

²⁰ Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

²¹ Bountiful v. Riley 784 P.2d 1174, 1175 (Utah 1989) citing State v. Walker, 743 P.2d 191, 193 (Utah 1987).

law."²² A finding is deemed clearly erroneous if this Court concludes that it is against the clear weight of the evidence.²³

The standard of review of findings of fact is governed by Rule 52(a) of the Utah Rules of Civil Procedure. The rationale of the Rule is revealed by its language:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

A. The Evidence Fails to Support Finding Number 4 Regarding Credible Evidence of Payments by Plaintiffs after 1965.

To successfully challenge the trial court's finding, Romero must marshall all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support it even when it is viewed in the light most favorable to the trial court.²⁴ In this section, therefore, Romero will review all of the evidence of which he is aware that supports finding No. 4 and will in this and subsequent sections demonstrate that the evidence is insufficient.

²² Western Capital and Security Inc. v. Knudsvig, 768 P.2d 989, 991 (Utah App. 1989), cert denied, 779 P.2d 688 (Utah 1989) citing State v. Walker, 743 P.2d 191, 193 (Utah 1987).

²³ Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899-900 (Utah 1989).

²⁴ Id. at 899.

1. Plaintiffs presented no credible evidence at trial to dispute defendant's claim that payments were made on the plaintiff's obligation which tolled the statute of limitations.

As set forth in the trial court's findings, the critical issue before the court was when and if, Romero received payments from the Wardles on the obligation after 1965, thereby tolling the applicable statute of limitations period.²⁵ As a result, and as revealed in the trial court's analysis, the issue of whether payments were made by the Wardles after 1965, would be resolved by determining the credibility of the payment schedule maintained by Romero and received as plaintiff's Exhibit 18.²⁶

The evidence supporting the trial court's finding that the Wardles made no payments on the obligation after 1965 and therefore the payment schedule (Plaintiff's Exhibit 18) was not credible consists solely of the testimony Mrs. Wardle and her daughter Maxine Romero.

Taking chronologically the testimony of these two witness most supportive of Finding No. 4, there is simply insufficient evidence to sustain the trial court's finding that no payments were received on the obligation after 1965.

First, on direct examination, Mrs. Wardle testified that the obligation owing to Romero was actually Five Thousand Four Hundred Dollars (\$5,400.00) and was secured by an unrecorded

²⁵ Findings, paragraph 4.

²⁶ Id.

mortgage executed in favor of the Romeros, rather than a Six Thousand Dollar (\$6,000.00) obligation secured by a trust deed as claimed by Romero. (Plaintiff's Exhibit "3").²⁷ Mrs. Wardle also testified that the Promissory Note, Trust Deed and Quit Claim Deed executed in favor of Romero (Plaintiff's Exhibits "11", "15" and "16") were not related to the transaction giving rise to the obligation as claimed by Romero.²⁸ Furthermore, on direct examination, Mrs. Wardle adamantly denied that neither she nor Mr. Wardle ever signed the documents which form the basis of Romero's claim for foreclosure and identified herein as plaintiff's Exhibits "11", "15", and "16".²⁹

Further, with respect to the obligation owing to Romero, Mrs. Wardle testified that the last payment made on the obligation to either Lester or Maxine Romero was in 1965.³⁰ To further support this claim, Mrs. Wardle also testified she handled the Wardle family finances exclusively, that she wrote all the checks from the family checking account, and that she did not recall Mr. Wardle ever making any payments on the obligation.³¹ Mrs. Wardle testified that she was the only

²⁷ Rt. pp 14-15.

²⁸ Rt. 20-26.

²⁹ Rt. 21-26.

³⁰ Rt. 27.

³¹ Rt. 27-28.

person who did, and could have made payments on the obligation to Romero.³²

On cross examination, Mrs. Wardle reiterated that she was the only person who made payments on the obligation to Romero³³ and also that Mr. Wardle never wrote a check or withdrew money from the Wardles' checking and savings accounts while they were married.³⁴ Mrs. Wardle also again stated that she did not sign the Promissory Note as asserted by Romero.³⁵

With respect to Romero's payment schedule (Plaintiff's Exhibit 18), Romero did in fact, admit under examination by Mr. Fadel, that the entry for the 1991 payment was mistakenly recorded as being received in 1992.³⁶

Maxine Romero corroborated Mrs. Wardle's testimony and also testified that the amount of the obligation in question was actually \$5,400.00 rather than the \$6,000.00 as claimed by Mr. Romero³⁷ and also that the mortgage (plaintiff's Exhibit 3) executed in favor of the Romeros was the controlling document given on the subject property³⁸. On cross examination, Mrs.

³² Rt. 27-29.

³³ Rt. 38.

³⁴ Rt. 44-45.

³⁵ Rt. 47.

³⁶ Rt. 90-91.

³⁷ Rt. 99-102.

³⁸ Rt. 101.

Romero testified that she received no payments or offers of payment from the Wardles after 1980.³⁹

It is clear from the marshalling of the evidence in support of the trial court's Finding No. 4 that the court found that the testimony of Mrs. Wardle and Maxine Romero were more credible than the testimony of Mr. Romero and that as result, there was simply no credible evidence of payment which would have tolled the statute of limitations. However, that finding is clearly erroneous because it is against the clear weight of the evidence.

2. Overwhelming evidence was presented at trial to demonstrate by a clear preponderance that at no time did a period of more than six years elapse between payments by the plaintiffs on their obligation to defendant, thereby tolling the statute of limitations.

Finding No. 4 completely overlooks the weighty testimony of Mr. Romero as well as the inconsistent and unreliable testimony of Mrs. Wardle, referred to herein. The finding also overlooks the obvious bias and unreliable testimony of Maxine Romero on issues which she conceded she was not familiar. The clear weight of all the evidence is that at no time did a period of more than six years elapse between payments by the Wardles on their obligation to Romero, thereby tolling the statute of limitations pursuant to § 78-12-44, Utah Code Ann. (1953 as amended).

³⁹ Rt. 111.

a. The Testimony of Mrs. Wardle was not Credible.

The weight of evidence cannot be disregarded on the basis that the court assessed the credibility of the witnesses and simply chose to ignore the obligation still owing and also decided to disregard the testimony of Mr. Romero. The evidence disregarded by the trial court consists not only of testimony of Mr. Romero, but also the testimony by Mrs. Wardle that she simply could not recall with clarity, the critical details of the transaction at issue.

First of all, Mrs. Wardle has taken the position that the obligation owing to Mr. Romero has been fully satisfied.⁴⁰ This position is simply unreasonable, particularly in light of Mrs. Wardle's direct testimony that in 1980 and after acknowledging the obligation to Romero, she and Mr. Wardle used money originally offered to Romero as satisfaction to purchase an automobile.⁴¹ Such a position is untenable and clearly demonstrates a lack of understanding and ability to recall the important details of the parties' transaction.

Of great significance is Mrs. Wardle's testimony regarding the checks and receipts contained in defendant's Exhibit 12, which the trial court used as the starting point in determining

⁴⁰ Rt. 33.

⁴¹ Rt. 33-34

the credibility of payments received after 1965.⁴² After the parties stipulated that defendant's Exhibit 12 contained copies of all the receipts received and canceled checks written by Mrs. Wardle to Romero concerning the obligation,⁴³ Mrs. Wardle testified to the best of her recollection that she paid Mr. Romero on the obligation approximately ninety percent (90%) of the time, by check.⁴⁴ However, defendant's Exhibit 12 which contains proof of at least 29 payments, contains only 3 canceled checks. Obviously, either the payment and receipts and canceled checks set forth in defendant's Exhibit 12 are inaccurate or Mrs. Wardle's testimony is incorrect in stating that she made payments by check approximately ninety percent (90%) of the time. Despite such glaring inconsistencies, the trial court found both defendant's Exhibit 12 and Mrs. Wardle's testimony persuasive.

Further, the trial court also apparently accepted Mrs. Wardle's testimony that Mr. Wardle never wrote a check or made a withdrawal from the family savings account while the parties were married,⁴⁵ and that it was not possible that Mr. Wardle could have made the payments to Romero which are in dispute.⁴⁶ Such

⁴² Findings, Paragraph No. 4.

⁴³ Rt. 40.

⁴⁴ Rt. 39.

⁴⁵ Rt. 44-45.

⁴⁶ Rt. 117-118.

testimony although unreasonable on its face, was fully accepted and relied upon by the trial court in reaching its decision.

Finally, it was clear from the record that Mrs. Wardle's testimony that her recollection was inconsistent and unreliable at best. For instance, with respect to the Trust Deed (Plaintiff's Exhibit 16), initially, Mrs. Wardle denied ever signing the document.⁴⁷ However in her deposition she previously testified that she did in fact sign the Trust Deed (Plaintiff's Exhibit 16).⁴⁸ After reviewing her deposition, Mrs. Wardle went on to reaffirm that she did in fact sign the Trust Deed.⁴⁹ However, on redirect by Mr. Fadel, Mr. Fadel introduced an additional portion of the deposition in which Mrs. Wardle stated that she simply could not recall whether or not she signed the documents.⁵⁰ On recross examination, Mrs. Wardle then testified that she simply could not recall "which documents she signed in 1960."⁵¹ It is abundantly clear that as a result of the foregoing, the testimony of Mrs. Wardle is simply unreliable and was an inadequate and insufficient basis for the trial court to base its Findings and Conclusions.

⁴⁷ Rt. 47.

⁴⁸ Rt. 50.

⁴⁹ Rt. 52-53.

⁵⁰ Rt. 52-55.

⁵¹ Rt. 55.

b. The Testimony of Maxine Romero was not Credible.

It is clear from the Record that Maxine Romero's testimony was not persuasive in determining whether defendant's Exhibit 12 was credible. For example, in her sworn testimony Maxine Romero admitted to signing Mr. Romero's name on receipts for payments received from the Wardles which were contained in defendant's Exhibit 12⁵². Such testimony would easily explain the discrepancies between plaintiff's Exhibit 18 and defendant's Exhibit 12, the basis upon which the trial court found the payment schedule not to be credible. However, such critical evidence was simply ignored by the Court.

c. The Testimony of Lester Romero was the Only Credible Evidence Before the Trial Court.

Given the unreliability of the testimony of Mrs. Wardle and Maxine Romero, the trial court should have based its findings on the more reliable testimony of Mr. Romero which clearly established that at no time did a period of more than six years elapse between payments by the plaintiffs on their obligation to defendant, thereby tolling the statute of limitations. Such a result is not only required under the law, but is also required as a matter of fairness. Simply put, Mr. Romero should not lose his right to collect on the obligation simply because he extended the Wardles considerable generosity in repaying their obligation.

⁵² Rt. 109.

At trial, Romero clearly established that the Wardles had an obligation and that it has not been satisfied. The agreement between the parties was reflected in the Promissory Note, Trust Deed and Quit Claim Deed (Plaintiff's Exhibits 11, 15 and 16).⁵³ In addition, the repayment history was reflected and established by Romero's payment schedule (Defendant's Exhibit 4, Plaintiff's Exhibit 12).⁵⁴ In addition to the payment schedule, Romero offered further proof in his testimony which indicated the he received payments from the Wardles in 1962, 1963, 1965, 1966, 1969, 1971, 1973, 1975, 1978, 1980, 1982, 1983, 1985, and 1991,⁵⁵ as well as an additional payment in 1988 (Exhibit 8).⁵⁶

3. The Evidence Clearly Established The Statute of Limitations was Tolloed by Payments after 1965.

The law is well settled that an action based upon a written contract must be commenced within six years after the cause of action has accrued.⁵⁷ Thus defendant's cause of action had to be initiated on or before 1971 (six years after the date of undisputed last performance in 1965), unless the Wardles engaged in some type of conduct which extended the statutory period.

⁵³ Rt. 126-30.

⁵⁴ Rt. 130-31.

⁵⁵ Rt. 131-33.

⁵⁶ Rt. 133-34, 152-53, 156.

⁵⁷ See § 78-12-1, § 78-12-23, § 70A-3-122 Utah Code Ann.

However, under § 78-12-44, Utah Code Ann., 1953 as amended, if Romero received payments of any part of the principle or interest due under the contract, then the statute of limitations runs anew from the date of receipt of the latest payment in 1991. Section 78-12-44, reads as follows:

" 78-12-44. Effect of payment, acknowledgment, or promise to pay. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledged or promise."

As a result of the foregoing, the statute of limitations does not bar Romero's counterclaim. As set forth herein, the defendant's unequivocal testimony and supporting documents produced at trial clearly established that at no time did a period of more than six or more years elapse between payments by the Wardles on their obligation. Appellant submits that the pertinent evidence in the present case so clearly preponderates against the trial Court's findings as to defeat any presumption in the trial Court's favor, and the result reached below should therefore be reversed.

It is well established that the Appellate Court may review the evidence in equity cases such as the present one, and that if such evidence preponderates against the lower Court's decision,

it will be reversed.⁵⁸ In fact, in the case of Richards v. Pines Ranch, Inc.⁵⁹ an action to establish a right-of-way by prescription, the Court again found that it was not bound to follow findings of the trial Court in an equity case where the findings appeared to be contrary to the evidence.

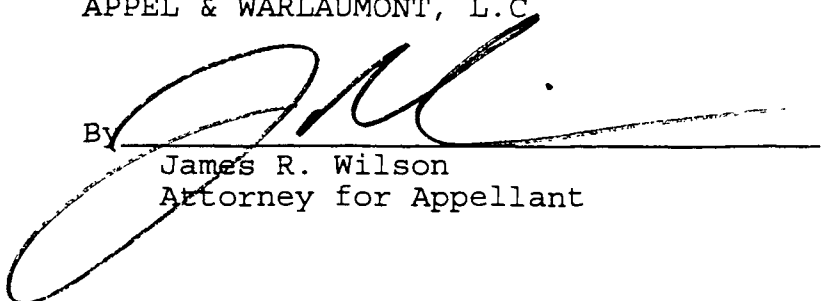
CONCLUSION

Based on the foregoing substantial and persuasive reasons, Appellant Romero respectfully submits this Appellant's Brief for the Court's consideration and determination, and requests that the lower court's ruling quieting title in the subject property be reversed in order to allow appellant to proceed with foreclosing on the property or otherwise enforcing the Wardles' obligation.

DATED this 21st day of May, 1997.

APPEL & WARLAUMONT, L.C.

By


James R. Wilson
Attorney for Appellant

⁵⁸ Barker v. Dunham, 342 P.2d 867 (Utah 1959).

⁵⁹ 559 P.2d 948 (Utah, 1977).

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 1997, I caused two copies of BRIEF OF DEFENDANT-APPELLANT to be hand-delivered to:

George Fadel
Attorneys for Plaintiffs/Appellees
170 East Fourth South
Bountiful, UT 84010

ADDENDUM "A"

Dec 10 8 11 AM '96

George K. Fadel #1027
Attorney for Plaintiffs
170 West 400 South
Bountiful, Utah 84010
295-2421

CLERK, 2ND DIST. COURT
BY LEWIS STOKER

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,
STATE OF UTAH

GLEN D. WARDLE and)	
THORA WARDLE,)	
)	FINDINGS OF FACT
Plaintiffs,)	AND CONCLUSIONS OF LAW
)	
vs.)	
)	Civil No. 940700002 QT
LESTER ROMERO,)	
)	Judge Rodney S. Page
Defendant.)	

This matter came on for trial before the above-entitled court on November 1, 1996, the Honorable Rodney S. Page, District Judge, presiding without a jury; Plaintiff, Thora Wardle, as surviving joint tenant of Glen D. Wardle appeared in person and by attorney George K. Fadel; Defendant, Lester Romero appeared in person and by attorney James R. Wilson; the court received the testimony, evidence and arguments of the parties, and being fully advised in the matter, now makes the following:

FINDINGS OF FACT

1. Some time in March, 1960, the defendant, Lester Romero, and his then wife, Maxine Romero, negotiated with Glen D. Wardle and Thora Wardle for the sale of a house and lot situated in North Salt Lake, Utah at 320 East Center Street, more particularly described as follows:

All of Lot 39 Hillside Gardens Subdivision, a subdivision of part of Sections 11 and 12, Township 1 North Range 1 West, Salt Lake Meridian. (subject premises).

2. Thereafter, by Warranty Deed dated March 15, 1960, and recorded in the office of the Davis County recorder, Farmington, Utah on March 16, 1960, in Book 184 of official records at page 115, Lester Romero and Maxine Romero conveyed the subject premises to Glen D. Wardle and Thora Wardle as joint tenants.

3. The Defendant recorded a Quit-Claim Deed dated March 1, 1960, on May 24, 1993, wherein Glen D. Wardle and Thora Wardle are named as grantors and Lester Romero is named as grantee of the subject premises. Romero also recorded on May 24, 1993, a "Trust Deed" dated March 1, 1960, wherein the subject premises as securing a note in the sum of \$6,000.00. Plaintiffs denied executing the Quit-claim Deed, the Trust Deed and the promissory note dated March 1, 1960. Plaintiffs claimed that the obligation due to Lester Romero and Maxine Romero as of March 1960 was \$5,400.00 payable at the rate of \$100.00 per month. Assuming that the Quit-claim Deed, the Note and the Trust Deed were in fact executed and delivered by the plaintiffs to the defendant, these were only as security and not intended as a conveyance, and it is not necessary for the court to determine the validity of the said documents for the reason that the bar of the statute of limitations precludes and recovery by the defendant upon any obligation claimed by the defendant.

4. The evidence is uncontroverted that the payments were made somewhat sporadically up until 1965. the last payment was \$50.00 in 1965. From that point on, the evidence is in conflict as to

whether or not any payments were made. The defendant indicates that they were, and the plaintiff indicates that they were not. There's no evidence in the form of checks or receipts which were in existence prior to that time to support the position of either of the parties in that regard. The only possible evidence that we have is the payment schedule maintained by the defendant which was received as part of plaintiff's Exhibit 18, and so there is need to look at the credibility of that payment schedule that he kept in his own handwriting or someone's handwriting. It's interesting to note from the defendant's Exhibit 12, which is the receipts and checks paid by the plaintiff, that Mr. Romero's statement shows four payments were made in 1960. However, the receipts show that there were at least five or six payments made in that year. Therefore, in fact, his record is incorrect in that regard. There were eleven payments made in 1961 and they matched the receipts and checks that were in defendant's Exhibit 12.

In 1962, the record of Mr. Romero shows that there were five payments made. However, the receipts and cancelled checks show there were actually eight. Again, his record is inaccurate. 1963 shows six payments were made and that appears to be accurate, and then the two payments were made in 1965. From then on, all subsequent entries made from time to time, about every other year or every three years by the defendants showing \$100.00 payments. It's interesting to note that from his own testimony the payment that he claims in 1980 is not shown on that record. From his own testimony, he recognizes that the payment shown in 1992 was

incorrect. He claims it was actually made in 1991.

From those discrepancies, the court finds that this payment record is not worthy of any credibility as far as the court is concerned, and with that finding, the court finds that there is no credible evidence before the court which this court believes that shows any payments that were made after June of 1965.

The court finds that these plaintiffs were in default at least beginning in 1962 and each year thereafter and certainly any payments after those acknowledged by both of the parties in 1965. The court recognizes, as do counsel, that there is a six year statute of limitations in this matter and that this statute of limitations would have run on this matter in 1971.

5. The court finds that there was no effort by this defendant to collect in any way on this particular obligation until 1985 when a Lis Pendens was filed. The law is clear that in order for a Lis Pendens to be effective it must be filed at the time the action is filed or shortly thereafter, and there was never any action filed, so the Lis Pendens in fact was void. Now, that may well be the fault of counsel, but it is not the fault of these plaintiffs and in no way can be considered by the court that is in any way prejudicing any rights that they might have.

6. The court recognizes that there is a statute, Utah Code Ann. § 78-12-44, which would allow contract obligations to be revived. It provides that if there is a written statement specifically acknowledging that obligation by the parties sought to be charged, then the obligation can be revived and the statutory

period would run from that date. However, that is qualified. That revival must take place within the statutory period. Here there is no evidence to support any kind of action that would support a revival after 1980, and the letter that was sent by the Wardles at that time to Mr. Romero was long after the statute of limitations had run. The court therefore finds that the statute of limitations had run on the note which was the basis of the obligation claimed by the defendant; that the claim is barred by the statute of limitations; and that any quit-claim deed which arose out of that is void and must be set aside and that any trust deed or note which might have been recorded in 1993 is also void. The court therefore finds that plaintiffs are entitled to have a decree quieting title to this property in the plaintiffs.

7. The plaintiffs' First Amended Complaint alleges a cause of action for slander of title under the provisions of Utah Code Annotated sections 38-9-1 and 38-9-4 and claim entitlement to treble actual damages and for reasonable attorney fees and costs.

The court finds that in order for the court to ward such a remedy in this matter, the court must find that the defendant knew or had reason to know that the documents were groundless or provided no basis for the filing of those things. The court would find that Mr. Romero was untrained in the law and that he did not know or have reason to know that they were invalid under the circumstances and therefore denies any remedy under the statute pertaining to slander of title.

From the foregoing Findings of Fact, the Court makes the

following:

CONCLUSIONS OF LAW

1. The counterclaim of the defendant is barred by the statute of limitations contained in Utah Code Annotated Sections 78-12-1, 78-12-23, 70A-3-118, and 70A-3-122, and the plaintiff is entitled to judgment of dismissal with prejudice of the defendant's counterclaim.

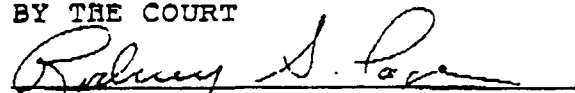
2. The Quit-claim Deed and Trust Deed dated March 1, 1960, and recorded by the defendant on May 24, 1993 are void and should be set aside and declared to have given defendant no interest in the subject premises.

3. The Defendant has no right, title, interest or claim to the Subject Premises nor any claim against the Plaintiffs with respect thereto.

4. Plaintiff, Thora Wardle as surviving joint tenant of Glen D. Wardle, is entitled to judgment and decree quieting title to the Subject Premises in Thora Wardle against the Defendant and all persons claiming by through or under the Defendant, and permanently enjoining the Defendant and all persons claiming under him from asserting any estate, right, title, possession, lien or interest in the Subject Premises adverse to the said Plaintiff.

Dated this 4th day of ^{Dec.}~~November~~, 1996.

BY THE COURT


District Judge

ADDENDUM "B"

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

Dec 10 8 11 AM '96

CLERK, 2ND DIST. COURT

BY DEPUTY CLERK

George K. Fadel #1027
Attorney for Plaintiffs
170 West 400 South
Bountiful, Utah 84010
295-2421

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,

STATE OF UTAH

GLEN D. WARDLE and
THORA WARDLE,

Plaintiffs,

vs.

LESTER ROMERO,

Defendant.

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JUDGMENT AND DECREE
QUIETING TITLE IN PLAINTIFFS

Civil No. 940700002 QT

Judge Rodney S. Page

This matter came on for trial before the above-entitled court on November 1, 1996, the Honorable Rodney S. Page, District Judge, presiding without a jury; Plaintiff, Thora Wardle, as surviving joint tenant of Glen D. Wardle appeared in person and by attorney George K. Fadel; Defendant, Lester Romero appeared in person and by attorney James R. Wilson; the court received the testimony, evidence and arguments of the parties, and the Court having heretofore made and entered Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff Thora Wardle is the owner absolutely in fee simple and is in sole, exclusive possession of the premises at 320 East Center Street, North Salt Lake, Davis County, State of Utah, more particularly described as:

All of Lot 39 Hillside Gardens Subdivision, a subdivision of part of Sections 11 and 12, Township 1 North Range 1 West, Salt Lake Meridian.

2. Plaintiff, Thora Wardle's title is quieted against the Defendant and all persons claiming under him, and said Plaintiff is granted quiet and peaceful possession of said premises as against the Defendant and all persons claiming under the Defendant, and the Defendant and all persons claiming by, through or under him have no estate, right, title, lien or interest in or to said property or any part thereof.

3. IT IS FURTHER DECREED that the Defendant and all other persons claiming under him are permanently enjoined from asserting any estate, right title, possession, lien or interest in or to said premises adverse to the Plaintiff or in any way interfering with Plaintiff's full use and enjoyment of said property or asserting any claim against Plaintiff in relation thereto.

4. The counterclaim of the defendant is hereby dismissed with prejudice.

5. The Plaintiff's claim for damages for slander of title is dismissed with prejudice.

6. Plaintiff is awarded costs herein.

Dated this 4th day of ^{Dec}~~November~~, 1996.

BY THE COURT

Robney S. Faye
District Judge