

1977

G. Dale Flake and Cynthia R. Flake v. Duane A. Frandsen : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

G. DALE FLAKE and CYNTHIA
R. FLAKE, husband and wife,)

Plaintiffs-Respondents,)

vs.)

DUANE A. FRANDSEN,)

Case No. 15309

Defendant-Appellant.)

RESPONDENTS' BRIEF

Appeal from the Judgment of the
Seventh District Court for Carbon County
Honorable Edward Sheya, Judge

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Defendant-Appellant.)

Case No. 15309

RESPONDENTS' BRIEF

NATURE OF THE CASE

The Plaintiffs-Respondents filed suit against the Defendant-Appellant to recover possession of a stock certificate for shares in the Cottonwood Creek Consolidated Irrigation Company. Defendant-Appellant claims an attorney's lien on the stock certificate.

DISPOSITION IN THE DISTRICT COURT
FOR SEVENTH JUDICIAL DISTRICT

The Honorable Edward Sheya granted Summary Judgment in favor of Plaintiffs-Respondents.

STATEMENT OF FACTS

The Statement of Facts as made by the Appellant are only partially correct, and therefore, a full statement of the

facts on behalf of the Respondent becomes necessary. In the middle of January of 1973 the Appellant's client, Maurice and Evie May L'Heureux filed an action in the District Court in Emery County, Utah, against Ray and Maribell Wareham for an accounting and for damages for a cloud on the title to real property under a contract of sale between the parties dated January 26, 1967. The prayer in the Complaint prepared by the Appellant on behalf of L'Heureux was as follows:

COUNT ONE

WHEREFORE, plaintiffs pray judgment against the defendants for the sum of \$25,000.00 by reason of the property not being clear and marketable, \$10,750.00 by reason of the livestock not being registered, and for an accounting by defendants of the payments that have been made by plaintiffs and the credits and off sets that they are entitled to, and for judgment against defendants for any excess due plaintiffs over and above the balance due on said contract, and for a reasonable attorney fee.

COUNT TWO

WHEREFORE, plaintiffs pray that the defendants be required to account to plaintiffs for the crops and livestock sold and kept by them, and they be required to account for the use of the machinery and equipment, and that plaintiffs be awarded judgment against defendants for the sum of \$56,034.00 as above set forth, and such further amounts as may be determined by said accounting.

Wareham Counterclaimed for a money judgment against Appellant's client L'Heureux.

Title or ownership in the water stock represented by the water certificate now being held by the Appellant was never in question and was not a part or portion of the subject matter of the cause of action that L'Heureux stated against Wareham.

In March of 1973, before the case between L'Heureux and Wareham was tried, and with full knowledge of the Appellant, L'Heureux sold the water stock, along with other land purchased from Wareham by contract of sale to the Respondent. Respondent subsequently paid the contract in full.

The case between L'Heureux and Wareham was tried and the Court entered judgment on December 20, 1974, in favor of Wareham on his Counterclaim, and against Appellant's client L'Heureux, a copy of the Judgment is attached to Respondent's Affidavit supporting his Motion for Summary Judgment. Contrary to Appellant's Statement of Facts, no mention is made of the water stock in the Judgment.

The Appellant, as L'Heureux's attorney, did not make a motion for a new trial as stated in his Statement of Facts, but did make a motion to amend certain paragraphs of the Findings of Fact and Conclusions of Law relative to the accounting of the cattle, and the Court on May 5, 1975, entered its Order to reopen the case for the receipt of additional evidence on the question of the number of calves involved in the transaction.

Before the new evidence was introduced, the parties settled the matter between them and a Satisfaction of Judgment was entered on August 18, 1975. The water stock certificate
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which is the subject matter of this proceeding was delivered
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to Appellant at that time by Wareham and at a time when his client, L'Heureux, did not own and did not claim any interest in the certificate or the water stock. L'Heureux requested the Appellant to deliver the certificate to the Respondent, and the Appellant has refused to do so upon demand.

Respondent subsequently sold the stock to Utah Power and Light Company, but is unable to complete the sale because Appellant refuses to deliver the stock certificate to the Respondent so that he can complete the transaction with Utah Power and Light and have the stock transferred on the books of the corporation.

The District Court found no issue of facts based upon both the Affidavit of the Respondent and the Affidavit of the Appellant, and that the Respondent was entitled to Judgment as a matter of law, and Judgment was entered in accordance therewith.

ARGUMENT

POINT 1

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT MOTION FOR SUMMARY JUDGMENT, AND APPELLANT WAS NOT ENTITLED TO A RETAINING LIEN ON THE WATER STOCK CERTIFICATE IN HIS POSSESSION.

The Appellant is not entitled to a common law retaining lien on the water stock certificate in his possession in that the Appellant's client at the time that he received the certificate had no legal title in the water stock represented by the certificate.

ed by the certificate, and the stock and the certificate representing ownership in the stock was not property of the Appellant's client.

We agree with the statements in 3 A. L. R. 2d at page 148, which, in effect, states that an attorney has a possessory or retaining lien that attaches to all papers, documents and moneys of the client. We further agree with the statement as cited by the Appellant in 7 C. J. S. 1141 at Section 210 which states that a retainint lien is the right of the attorney to retain possession of a client's documents, money or other property.

In this case, L'Heureux has no right, title or interest in the stock or the certificate represented thereby.

This was not a case where there was an attempt to defeat the lien by conveyance either as a matter of fraud or otherwise, since the sale by Appellant's client was made before the case was tried or concluded and with the full knowledge of the Appellant.

Cases cited by the Appellant are not in point under this fact situation since they all refer to cases either involving the element of fraud or a transfer or assignment of the property interest after the judgment was entered. We find a good characterization of this type of lien in 3 A. L. R. 2d

" The value of the attorney's retaining lien is principally in the leverage which it gives the attorney over a client who fails or refuses to pay for services rendered, through the embarrassment and inconvenience caused the client by withholding papers, documents and other valuables; and since that lien is not one which is actively enforceable by foreclosure proceedings but merely a passive one, dependent upon continued possession of the client's property....."

If the lien that the Appellant contends he is entitled to as a matter of common law is allowed the Appellant would keep the water certificate in his possession without right of foreclosure, neither Wareham nor L'Heureux would use the water represented by the stock since neither claims any interest or ownership therein, and the Respondent would be unable to complete his sale to Utah Power and Light Company and the matter would be at a standstill unless someone other than L'Heureux was willing to pay all of L'Heureux's legal fees claimed by the Appellant. Clearly, the objective of this type of lien would not be accomplished.

POINT 2

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, AND APPELLANT IS NOT ENTITLED TO A STATUTORY CHARGING LIEN ON THE WATER STOCK CERTIFICATE IN HIS POSSESSION.

The undisputed facts in this case show that Appellant's client received no judgment to which a statutory lien under the provisions of Section 78-51-41, Utah Code Annotated, 1953

The action filed by L'Heureux against Wareham was for an accounting, and Appellant's client had judgment entered against him on Wareham's Counterclaim. As an incident to the payment of the judgment entered against Appellant's client, Appellant received possession of the stock certificate representing ownership in the water stock in which Appellant's client had no right, title or ownership. Appellant's client had not exercised any of the incidents of ownership of title since March of 1973, such as use of the water represented by ownership of the stock or payment of the annual water assessment. Appellant came in possession of the stock certificate sometime after the 5th of May, 1975, the date of the Judge's Order to reopen to receive additional evidence on the status of certain cattle.

Appellant's client does not and has not asserted any claim of ownership in the water stock since he sold it to the Respondent in March of 1973.

None of the cases cited by Appellant are in point to this Statement of Fact. All cases cited by Appellant involve property that was the subject matter of the lawsuit and attempted assignment of the subject property after judgment, which is certainly not the facts of this case.

The crucial important fact is that there was no

"judgment in his client's favor and to the proceeds thereof"

(Section 78-51-41) to which a foreclosable lien could attach.

It is stated in C. J. S. 211 at Page 1144 as follows:

"In order that a valid charging lien may exist, it is essential that there exists some subject matter to which that lien may attach."

In Cooper v. McNair, 49F. 2d 778, the universally accepted proposition is stated as follows:

"Suit by an attorney to impress an attorney's charging lien upon the fruits of his labor will lie only after there has been a recovery, through the efforts of the Attorney, of something to which such lien can attach."

In this case the judgment gives the Appellant's client no money, no property right or anything to which the lien could attach, and in particular did not establish any property rights in the water stock.

In Lundburg v. Dastrup, 497 P.2d 648, 28 Ut. 28, Justice Crockett interpreting Section 78-51-41 stated as follows:

"The lien which this Statute gives the attorney is upon his client's cause and/or the judgment; and with respect thereto he stands in no better a position than his client."

Since the Appellant's client L'Heureux, in the lawsuit with Wareham, received no property interest that he could assert, then the Appellant, standing in the position of his client, received no property interest to which a lien could attach.

POINT 3

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE RESPONDENTS FAILED TO RESPOND TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT AS REQUIRED BY RULE 56(e) OF THE UTAH RULE OF CIVIL PROCEDURE.

The matters contained in Appellant's Motion for

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Summary Judgment and Supporting Affidavit state that there is

no issue of fact to be determined by the Court, and the Respondents so agreed and had already filed their Motion and Affidavit so stating. Therefore, no response was necessary to the Motion of the Appellant, and the Respondent certainly could not respond and set forth the specific facts showing that there is a genuine issue for trial" (Rule 56 (e)).

Based upon the urging of both parties, the Court found that there was no genuine issue of facts, heard arguments and received further statements of fact at the time of the hearing on the respective motions and found that Respondent was entitled to judgment as a matter of law.

CONCLUSION

In summary, the Respondent contends that the Appellant is not entitled to a common-law retaining lien on the water stock certificate since the stock represented by the certificate was not the property of his client at the time he received it, and his client has no title or rights thereunder and cannot legally withhold possession from Respondents. Appellant is not entitled to an attorney's lien under the provisions of Section 78-51-41, Utah Code Annotated, 1953, as Amended, since the judgment entered in the lawsuit Appellant filed for his client did not give his client a property interest in the water stock to which the lien could attach, and the water stock was not involved in the cause of action

and no judgment was entered in relation thereto. Further, the Appellant is not entitled to Summary Judgment on his Motion on the ground that the Respondent failed to file a response since the response required must set up issues of fact to be tried and both parties agreed that there were no issues to be tried by the Court, and further, that the Appellant was not entitled to the Summary Judgment as a matter of law.

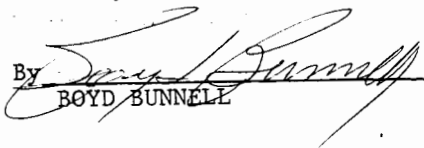
Respondent therefore respectfully prays that the District Court's judgment on Respondent's Motion for Summary Judgment be affirmed.

DATED this 13 day of October, A. D., 1977.

Respectfully submitted,

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By 
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