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Piero G. Ruffinengo v. Robert F. And Nancy H.
Miller The Art Company, J. Blair Jones , John Does
1 Through 20 : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PIERO G. RUFFINENGO,

Plaintiff and Appellant,

vs.

ROBERT F. AND NANCY H. MILLER,
THE ART COMPANY,
J. BLAIR JONES,
JOHN DOES 1 THROUGH 20,

Defendants and Respondents.

Case No. 15348

REPLY BRIEF OF PLAINTIFF-APPELLANT

Appeal from a Judgment
Of the Third Judicial District Court
Of Salt Lake County, Utah
Honorable Dean E. Conder, Judge.

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FILED

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Clock, Supreme Court, Utah

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REPLY TO STATEMENT OF
FACTS BY RESPONDENTS

Although Appellant does not believe that the differences between the Statement of Facts in Respondents' and Appellant's briefs should be determinative of the outcome of this appeal, he nevertheless would like to take issue with some of the statements made by Respondents.

In their Statement of Facts, Respondents state that Appellant's brief "in several instances states that the Millers' home is three stories high. . . This is a total misrepresentation. Since such statements are irrelevant to any issue before the Court on appeal, it is assumed that they are injected to influence the Court's sense of equity."

Respondents' Brief at 6, fn. While Appellant may agree that such facts may be irrelevant to any issue before the Court on appeal, it certainly does not agree that such statements were "injected" to influence the Court's sense of equity. Respondents are correct in their assumption and position that the briefs should only deal with the issues which are properly before the Court, but in view of such assumption it is difficult to understand why Respondents' brief is replete with facts which are not properly before the Court and which were never introduced in the Lower Court.

Respondents' brief states that when suit was brought by Dr. Carvalho and Dr. Herzberg the "external frame of the Millers' home was fully in place" (Respondents' Brief at 3) without mentioning that such state of affairs was caused by

the fact that while Defendant Miller kept assuring the other parties that modifications would be made to bring the house in compliance with the covenants and repeatedly requested the other parties to refrain from starting legal action, trying to gain time, he was continuing construction on the house under the original plans.

Respondents' Brief also improperly includes, as an attachment, physical evidence of the transfer of title from Phenix Investment, Inc. to Northcrest Investment Corporation. While this is only one in a chain of transfers of titles, it is improperly introduced at the appeal level. In addition, by itself, it does not shed any light on the actual chains of title affecting the claims of the parties.

Respondents' also introduce in their brief new evidence as to the consideration paid in the purchase of the stock of Northcrest Manor by Mr. James B. Cunningham. Appellant did not claim in his brief, as the Respondents would have the Court believe, that the stock of the Northcrest Manor was purchased for nominal consideration but rather that the transfers of assets from one corporate name to another occurred for nominal consideration.

Respondents' Brief also states that "[s]ince the entry of the Order and Judgment the Millers' home has been completed and the Millers are now occupying it as their residence." Respondents' Brief at 5. Given Respondents' apparent aversion to the introduction, in the briefs, of facts not properly

before the Court, it is hard to find any reason for the introduction of such statement other than to influence the Court.

POINT I

LOWER COURT ERRED IN FINDING THAT PLAINTIFF HAD NO STANDING TO SUE.

It is interesting to note that Respondents, trying to support their claim that Appellant has no standing to sue, only cite two cases which did in fact give plaintiffs in both cases the right to sue.

Moreover Respondents claim that Appellant has no standing because he did not take under the same chain of title as Respondents. Aside from the fact that Northcrest Manor owned the land on which Respondents' house was erected and therefore there was a common original grantor, Appellant was not given the opportunity to introduce any evidence showing that the purchaser of the stock of Northcrest Manor (Mr. James B. Cunningham) promised to Northcrest Manor to continue the development under the same conditions and the same covenants as Northcrest Manor, which he did. Moreover the change in ownership of the stock of a company does not affect the duties and obligations of a company and even the promise made by Mr. Cunningham would not have been necessary to give standing to Appellant.

Summary judgment is not proper where questions of fact are involved and Appellant, to this day, has not been given the opportunity to introduce evidence which would show he does

indeed have standing. This reason alone should be sufficient to reverse the findings of the Lower Court.

POINT II

THE DOCTRINE OF EQUITABLE ESTOPPEL DOES APPLY TO DEFENDANTS-RESPONDENTS.

To state, as Respondents do (Respondents' Brief at 16), that Appellant uses an alternate doctrine of law because it recognizes the weakness of his other arguments is simply ridiculous. The law has long recognized that a plaintiff may be entitled to relief under alternate doctrines without necessarily implying that one doctrine is weaker than the other.

Respondents do not have a clear view of the reality of the facts when they state that "since Appellant purchased his lot in a chain of title from Northcrest Manor, and not from Northcrest Investment, it is difficult if not impossible to see how Northcrest Investment could be in a position wherein Appellant was relying upon anything it did or said. . .". Respondents' Brief at 17. When Appellant purchased his lot he had the opportunity to verify, through the maps available at the County Recorder's Office, that his lot was completely surrounded by other lots, including Respondents', which were also in the Northcrest Subdivision. Such map clearly did not contain any indication that, as Respondents claim, such lots were actually not in the same subdivision for

reasons which did not appear in Appellant's chain of title.

It is therefore clear that even though reliance on this doctrine is not necessary, it would certainly be sufficient to give standing to Appellant.

POINT III

THE LOWER COURT ERRED IN FINDING THAT PLAINTIFF WAS COLLATERALLY ESTOPPED BY THE JUDGMENT IN THE PRIOR ACTION.

Respondents fail to cite any cases showing the applicability of collateral estoppel to a party who was not a party to the prior action. To Appellant's knowledge no such case exists. Since the Lower Court found that Appellant was collaterally estopped and Respondents have been unable to cite even one case where a plaintiff not a party to the prior action was collaterally estopped, the decision should be reversed.

The position taken by Respondents that once a defendant has successfully litigated a suit he cannot be sued again on the same issue by another plaintiff not a party to the first action is clearly erroneous and novel under existing law in any jurisdiction. Such position would negate the principle that each party is entitled to his day in Court.

The weakness of Respondents' position is shown by the fact that the first case cited by them, In re Town of West Jordan, 7 Utah 2d 391, 326 P.2d 105 (1958), is clearly inapplicable to the present situation. In In re Town of

West Jordan Plaintiffs in the two suits were the same. Since the issue in question in the second suit was the same as in the first one and Plaintiffs had already had their day in Court, the Court properly held that res judicata applied. In this case Appellant was not a party to the first suit and In re Town of West Jordan certainly sheds no light on whether he is bound by the prior judgment.

Respondents also seem to confuse the doctrines of res judicata and collateral estoppel. Although the Court held that Appellant was barred by collateral estoppel, Respondents, obviously unable to find any cases supporting the position that Appellant's suit should be barred by collateral estoppel, try to support their position using cases where the holding is based on the doctrine of res judicata.

Respondents state that Appellant should be barred from bringing suit because he is in privity with the Plaintiffs in the first suit. To support their contention that Appellant was in privity with the prior Plaintiffs, Respondents cite National Lead Co. v. Nilsen, 131 F.2d 51 (8th Cir.), cert. denied, 318 U.S. 758 (1953): obviously a poor choice on Respondents' part since in that case, even though the Plaintiff in the second action controlled a corporation which was a party in the first action, the Court held that no privity existed between Plaintiff and the corporation which he controlled and that therefore his action was not barred.

Respondents also cite Zaragosa v. Craven, 33 Cal.2d 315,

192 P.2d 73 (1949) where a wife was barred from bringing an action against defendant who had successfully defended a prior suit brought by the husband. The Court held that husband and wife were in privity since any recovery by either one would have constituted community property under §§ 162, 163, 164 and 687 of the California Code. No such statute exists here linking Appellant and the prior plaintiffs.

In some of the cases cited by Respondents privity was held to exist because the party in the prior action was suing on behalf of the party to the second action. In State Farm Mutual Auto Ins. Co. v. Salazar, 155 Cal. App.2d 861, 318 P.2d 210 (1957), the insured was barred from bringing a second action since the insurance company had already brought a prior action in the insured's name.

Respondents keep stating that Courts are willing to take a broad view of privity and that a plaintiff in a subsequent action should be barred if the issue was determined in the prior action. To bolster their statement Respondents rely on Hixson v. Kansas City, 361 Mo.1211, 239 S.W.2d 341 (1951), (Respondents' Brief at 22), Barret v. City of Chicago, 11 Ill. App.2d 146, 136 N.E.2d 564 (1956) and Campbell v. Nassau County, 192 Misc. 821, 82 N.Y.S.2d 179, aff'd, 274 App. Div. 929, 83 N.Y.S.2d 511 (1948) (Respondents' Brief at 23). Such cases are not controlling since the defendants in all cases were governmental entities and plaintiffs in the prior action represented the class of citizens.

In an effort to show the existence of privity between Appellant and the prior plaintiffs, Respondents rely on dictum in Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943), which held that no privity existed and is contrary to the doctrine Respondents are trying to establish.

Respondents carefully avoid distinguishing any of the cases cited by Appellant which clearly show the inapplicability of res judicata to this situation. If Respondents' arguments were held to be correct, one would certainly have to come to the conclusion that, for example, a plaintiff in an aircraft crash would be barred from relitigating the issue of the airline's liability if the airline had successfully defended against another plaintiff. This is clearly not the law. [See Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).] Appellant's Brief at 11, 14, 15.

POINT IV

THE APPLICATION OF COLLATERAL ESTOPPEL DID RESULT IN A DENIAL OF DUE PROCESS IN THIS CASE.

Respondents argue (Respondents' Brief at 30) that the right to a day in Court is not absolute and that in this case Appellant should be bound because he was in privity with prior plaintiffs. Respondents then define privies as "persons who are affected by lawsuits but who are not entitled to notice, or to a hearing and who have no control over the litigation and no right to appeal". Respondents' Brief at 30. Such

definition of privity, which was not supported by any citation, is certainly a novel one since one cannot imagine a more blatant denial of due process than the one which would result from the application of such definition. Respondents also incorrectly state that the issue of privity was twice argued orally to Judge Conder below. The issue of privity was never argued below and certainly Judge Conder could not have made any finding of fact on facts which were never introduced. Respondents simply argued that once a Court has decided an issue, the finding is a bar to any other party under the doctrine of res judicata. To show that privity existed between Appellant and the prior plaintiffs, Respondents would have had to show a legal relationship between the parties sufficient to establish privity. No evidence was introduced or arguments made to establish such relationship. Respondents therefore, in their brief (Respondents' Brief at 30) have simply misstated the facts.

To prove how freely Courts are willing to apply collateral estoppel or res judicata, Respondents keep citing freely generic dicta from various cases without pointing out that in all of the cases by them cited the people barred from relitigating the issue had a legal relationship with the party to the prior suit which made them legally the same individual.

Respondents' reference to the Utah Rules of Civil Procedure, Rule 23 (Respondents' Brief at 35), misstates the law under the Rule and misrepresents its applicability in the context of this

case. Rule 23, in certain instances, allows a judgment to be binding on the members of a class who had no opportunity to participate in the proceedings only upon a judgment by the Court, which originally heard the case, that includes and describes those that the Court found to be members of the class. The first suit in the instant case was not a class action suit and, had it been, no such finding was made by the Court.

DATED: April 6, 1978.

Respectfully submitted,

Nann Novinski-Durando

NANN NOVINSKI-DURANDO

CERTIFICATE OF MAILING

I hereby certify that I caused to be hand delivered two copies of the foregoing to Anthony L. Rampton, Attorney for Defendants, at 800 Continental Bank Building, Salt Lake City, Utah 84101, on April 6, 1978.

Nann Novinski-Durando

NANN NOVINSKI-DURANDO