

1986

James v. Preston : Reply Brief

Utah Supreme Court

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DOCKET NO. 860091-CA IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFFORD JAMES,	:	
Appellant,	:	Case No. 20407
vs.	:	860091-CA
WAYNE R. PRESTON, ZIONS	:	
FIRST NATIONAL BANK, N.A.,	:	
GENEVA ROCK PRODUCTS,	:	
Respondent.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH
The Honorable Richard C. Davidson, Presiding

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JUL 19 1985

Clerk, Supreme Court, Utah

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

Plaintiff objects to defendant's Statement of Facts. Defendant only cites those portions of the record that support his version of what transpired between these two parties, and totally omits the other evidence.

The evidence before the trial court consisted of Preston's and others' testimony at trial and James' deposition, which was published in lieu of his appearance at trial pursuant to court order. (R.62)

James denies Preston's testimony that after he handed a \$10,000.00 cashier's check to Preston he ". . . give (sic) it right back to him." (R. 158, Trial transcript, p. 5) James testified that he delivered a \$10,000.00 cashier's check to Preston, which was endorsed by him (R. 33, James'

deposition, Ex. 2) and deposited by Preston into an escrow account to extend the option to purchase the real property the parties anticipated acquiring. (R. 33, James deposition p. 14-15) James also denies that the Trust Deed was signed blank, without a notary present, as claimed by Preston, but that it was signed at Zions Bank (R. 33, James' deposition, p.8) He also testified it was intended as security for the \$10,000. (R. 33, James' deposition, p. 7) It is undisputed that James, who was named as Trustee and Beneficiary on the trust Deed was not qualified to act as such under §57-1-21 U.C.A. (Appellant's Brief, p. 7)

The court did not make any findings as to whose version was truthful but found that the trust deed was " . . . defective and of no legal force or effect" (R.150), and that the debt was discharged by the bankruptcy proceedings. (R. 150-152)

ARGUMENT

POINT I

THE ISSUE OF EQUITABLE MORTGAGE WAS BEFORE THE COURT.

District courts have general equity powers, and plaintiff's claim is one seeking an exercise of that power.

James' complaint specifically requested a ". . . judgment of foreclosure foreclosing out all rights of defendants in and to said realty and for an Order of Sale treating said Trust Deed as a mortgage and for the entry of

such other orders as are necessary and just to foreclose out all of defendants' interest in said realty." (R.2)

At trial, counsel for James stated: "and the trust deed can be deemed a mortgage, and therefore it does have some security valuation." (R. Trial transcript, p.44)

Plaintiff raised a number of issues any one of which, if the trial judge believed him, would have been sufficient to find the deed invalid. However, there were no findings entered by the trial judge which would indicate why he found the deed invalid. Preston claimed at trial it was invalid because it was signed in blank; not signed in front of a notary; was induced by misrepresentations; lacked consideration and that the Trustee wasn't a member of the Utah Bar (R. 158 Trial transcript, p.42)

James strongly disputes all of these allegations except that as Trustee he was not qualified to act as such. Counsel for James stated there were problems with the Trust Deed:

Mr. McRAE: I admit the Trust Deed says what it says, the title report. I do submit, however - - and the reason that I proceeded in the fashion that I did is because of the problems with the Trust Deed which, pursuant to Sec. 57-1-23 can be the subject of a foreclosure action which, because of the beneficiary purportedly being the trustee did create some problems and so I deemed it a mortgage and proceeded in that fashion."

James' counsel's statements at trial and the prayer of the Complaint seeking "such other orders as are necessary and just" to foreclose defendant's interest in the real property are sufficient to invoke the court's equitable powers to impress an equitable mortgage on the property.

POINT II

AN EQUITABLE MORTGAGE MAY EXIST IF PLAINTIFF'S VERSION OF THE FACTS IS TRUE.

James agrees with the statement in Preston's brief that in order to find the existence of an equitable mortgage, the court must find that the purpose and intent of the parties was to create a security interest. Preston argues he never received the \$10,000.00. James strongly disputes this. It is unclear from the trial judge's Findings of Fact why he considered the Trust Deed defective.

If this court finds that an equitable mortgage could have been imposed on the property, if the requisite intent and consideration were present, despite irregularities in the deed itself, this matter should be remanded to the trial court to enter a finding as to why it found the Trust Deed defective.

POINT III

IT IS UNCLEAR FROM THE FINDINGS OF FACT WHY THE TRIAL COURT FOUND THE TRUST DEED DEFECTIVE.

Preston's argument in Point III is that the findings of a trial court are presumed to be valid. However, it is

unclear what the court's basis was for finding the Trust Deed invalid. If it was because of the fact James was not qualified to act as Trustee, the Court could still have found an equitable mortgage, and the matter should be remanded for a clarification of that issue.

POINT IV

THE BANKRUPTCY PROCEEDINGS DO NOT DISCHARGE AN EQUITABLE LIEN.


If it is determined that even though the deed was invalid, that an equitable mortgage was created, such a security interest is not discharged in the bankruptcy proceedings. In Garnett State Sav. Bank v. Tush, 232 Kan 447, 657 P.2d 508 (Kan. 1983), as was pointed out in James' original brief, he did not have to file an adversary proceeding, but a security interest, such as equitable liens, pass through the bankruptcy case, unaffected unless an adversary proceeding is held to determine the validity of the lien. It is not the responsibility of the secured creditors to file the adversary proceeding. As was pointed out in In Re Honaker, 4 B.R. 415 (B.C.E.D. Mich. 1980) the legislative history of Sec. 506 (d) makes this clear (quoted in Footnote 4, p. 13, appellant's brief). Plaintiff may still look to the secured property even though he is precluded from a personal judgment against defendant.

CONCLUSION

This court should find that an equitable mortgage may be an appropriate remedy in this case, and that if it exists, that it was not discharged in the bankruptcy proceedings. Since the Findings of Fact entered by the trial judge do not indicate upon what grounds he found the Trust Deed to be invalid and of no force and effect, the case should be remanded for such a clarification. If the grounds were that the trustee was not a member of the Utah bar, or some other irregularity, then the trial judge should enter findings regarding the other factual issues in dispute, i.e. was consideration given; did the parties intend to create a security interest; was the execution of the Trust Deed procured by misrepresentation.

Respectfully submitted this 17th day of July, 1985.

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CERTIFICATE OF DELIVERY

I do hereby certify that I hand-delivered four true and correct copies of Reply Brief of Appellant to Kenneth G. Anderton, Attorney for Respondent, 110 East 100 South, Vernal, Utah 84078 on this 17th day of July, 1985.

