

1986

James v. Preston : Brief of Respondent

Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF
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DOCKET NO. 860091-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

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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MAY 24 1985

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFFORD JAMES,)	
Appellant,)	Case No. 20407
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FIRST NATIONAL BANK, N.A.,)	
GENEVA ROCK PRODUCTS,)	
Respondents,)	

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff has raised two issues on this appeal. First, Plaintiff claims that even if the Trust Deed signed by Defendant Wayne R. Preston is not legally valid as a Trust Deed, then Plaintiff should nevertheless be entitled to an equitable mortgage or lien upon the real property owned by Defendant Preston. Plaintiff raises this issue for the first time on this appeal. Secondly, an issue exists as to whether Plaintiff's purported lien was discharged by Defendant's bankruptcy proceeding.

STATEMENT OF FACTS

During 1980, Defendant Wayne R. Preston engaged Plaintiff Clifford James and one Patty Dean for the purpose of locating

approximately \$350,000.00 in investment funds for a real estate development located in Salt Lake City, Utah.

(Trial transcript, page 12 to page 15.) Later, Plaintiff telephoned Defendant and told him that he thought the investment funds had been obtained. (Trial transcript, page 15 and pages 35 and 36.) Then, on June 10, 1980, Plaintiff flew to Salt Lake City where he met with Defendant and viewed the real estate project.

On that date, Plaintiff delivered to Defendant a check in the amount of \$10,000.00, which Defendant immediately handed back to Plaintiff. (Trial transcript, pages 5 to 7, and page 17.) Later that day, after viewing the development property, Plaintiff informed Defendant that Defendant would need to offer additional collateral for the large investment loan which Defendant was seeking. At that time, Defendant indicated that he had a parcel of real property located in Vernal, Utah, which could be used as collateral. (Trial transcript, page 20.) Plaintiff then presented Defendant with a blank trust deed form, which Defendant signed without a notary public being present. Subsequently, Mr. Preston's property description was placed on the trust deed form, and Plaintiff was designated as Trustee thereof. (Trial transcript, page 21 to page 23; page 37, lines 2 to

13.) Defendant did not receive any consideration for his signing of the trust deed. (Trial transcript, page 25.)

Defendant also testified at trial that he subsequently filed a bankruptcy petition, listing Plaintiff as an unsecured creditor. Documents relating to the bankruptcy were admitted into evidence by the trial court as Exhibit No. 5.

From the evidence presented, the trial court found that Plaintiff's trust deed was defective and of no legal force or effect. The trial court also found that the debt which Plaintiff claimed was discharged as a result of Defendant's bankruptcy proceeding. Finally, the trial court found that no cause of action existed against Defendant.

SUMMARY OF ARGUMENT

POINT I: Plaintiff is barred from raising the issue of equitable mortgage on this appeal since the issue was not raised before the trial court. Plaintiff's sole theory there was that he had a valid trust deed regarding Defendant's property and that he was entitled to a judgment of foreclosure. It is a fundamental point of law that an appellant is held on appeal to the theories upon which he relied at trial.

POINT II: This is an inappropriate case for application of the doctrine of equitable mortgage. Defendant received no consideration for his execution of the defective

trust deed, and, furthermore, the parties intended that the trust deed be used only to secure an investment loan which never materialized.

POINT III: The findings and judgment of the trial court are to be viewed in a light most favorable to them and they are presumed to be valid unless the appellant meets his burden of showing otherwise.

POINT IV: Prior to the trial date, Defendant filed a bankruptcy petition and was discharged. Defendant's purported obligation to Plaintiff was discharged by the proceeding, particularly where Plaintiff was an unsecured creditor.

ARGUMENT

POINT I

PLAINTIFF IS BARRED FROM NOW RAISING THE ISSUE OF EQUITABLE MORTGAGE, SINCE THAT ISSUE WAS NOT RAISED BEFORE THE TRIAL COURT.

Plaintiff's Brief indicates that Plaintiff is apparently now willing to concede that his trust deed is invalid on its face and defective in several respects, under Utah State Law. First, the trust deed was signed by the Defendant in blank. Second, the trust deed was not signed before a notary public, as required by Utah Law. Third, Defendant was not placed under oath at the time he executed

the trust deed. Fourth, the trust deed did not meet the requirements contained in Utah Code Annotated Section 57-1-21, which states that a trustee be a member of the Utah State Bar, a bank, a building and loan association, or other similar entity. Fifth, no consideration was given for the trust deed. Sixth, the property description is not accurate, since it covers a parcel of ground including Defendant's home, which was not intended to be covered. (Trial transcript, pages 4 and 27.) Also, First Security Bank, who is not a party to this action, has a first mortgage on a portion of the property described in Plaintiff's trust deed. Clearly, as found by the trial court, Plaintiff's trust deed is legally defective.

To avoid these defects, Plaintiff is now claiming on this appeal, for the first time, that the trust deed should be upheld under the doctrine of equitable mortgage. Even if this doctrine is a recognized exception in certain defective trust deed cases, it would be clearly inappropriate to now allow Plaintiff to raise this issue since it was not presented to the trial court.

It is a fundamental principal of law that issues not raised before the trial court cannot be presented on appeal, and that parties on appeal will be held to the theories on

which the cause was tried before the lower court. Van Dever v. Sears, Roebuck & Company, 629 P.2d 566 (Ariz. App. 1981); Robinson v. Spicer, 383 P.2d 844 (Id. 1963); Frost v. Mead, 383 P.2d 834 (Id. 1963); Chrysler Corporation v. Allen, 375 P.2d 878 (Ok. 1962). The Supreme Court of Utah has stated that "the standard rule is that appellate jurisdiction is the authority to review the actions or judgments of an inferior tribunal upon the record made in that tribunal, and to modify or reverse such action or judgment." Peatross v. Board of Commissions of Salt Lake County, 555 P.2d 281 (Ut. 1976) (citing State v. Johnson, 100 Utah 316, 114 P.2d 1034.)

In our case, Plaintiff's complaint is straight forward in asserting that Plaintiff had a valid trust deed, that Defendant Wayne Preston had failed to tender payments which were secured by the trust deed, that the trust deed was superior to other liens, and that foreclosure of the trust deed or lien therefore should be permitted. At trial, Plaintiff rested exclusively upon this theory. The trial transcript is utterly devoid of any mention of the doctrine of equitable mortgage. Because Plaintiff did not raise this theory or issue before the trial court, he should not be

allowed to raise it for the first time during this appeal.

POINT II

THE DOCTRINE OF EQUITABLE MORTGAGE IS
INAPPROPRIATE HERE SINCE THE NECESSARY
ELEMENTS ARE LACKING.

In his attempt to avoid the defective trust deed, Plaintiff is contending on this appeal that he should be entitled to rely on the doctrine of equitable mortgage. Although that doctrine may be recognized in certain circumstances, it is nevertheless inappropriate in our case because essential elements are lacking.

Court decisions have universally held that a critical element for use of the doctrine of equitable mortgage is the requirement that any equity powers exercised by the court must carry out the actual intentions of the parties. In Beaulaurier v. Buchanan, 16 Wash. App. 87, 555 P.2d 1372 (1977), a Washington court held that a prerequisite of an equitable mortgage is the intent of the parties to create a lien on the subject property, and that if the intent is not present, equity will not establish a lien. Furthermore, the court indicated that the intent "must appear unequivocally." 559 P.2d 1374.

One of the cases relief upon by Plaintiff in his brief, Garnett State Sav. Bank v. Tush, 232 Kan. 447, 657 P.2d 508

(1983), also clearly indicates that intention of the parties to create a lien is necessary for application of the equitable mortgage doctrine. In Garnett, the Supreme Court of Kansas, quoting another case, stated that "(i)f the purpose and intention behind a transaction is to secure a debt, equity will consider the substance of the transaction and give effect to that purpose and intention." 657 P.2d 514 (emphasis added).

The same conclusion has been reached by the Supreme Court of Utah. In Rodgers v. Hansen, 580 P.2d 333 (Ut. 1978), which has also been cited by Plaintiff in this brief, the Supreme Court stated that the equitable mortgage doctrine is applicable where it was the intention of the parties to create such a relationship. 580 P.2d 235.

In our case, the evidence is confused as to the intent of the parties. Defendant Preston states that he executed the blank trust deed with the intention of offering certain property as collateral for the future investment loan which Plaintiff was to obtain. The investment loan, however, did not materialize. It cannot be concluded reasonably that the parties did intend that the trust deed would be effective otherwise. Given this, our case presents a situation where the imposition of an equitable mortgage clearly is not in keeping with the intention of the parties.

The equitable mortgage doctrine is also inappropriate here because Defendant did not receive the benefit of the consideration as agreed on by the parties. Defendant testified that he executed the blank trust deed in anticipated consideration of the large investment loan. Because the loan was not obtained, consideration was never given to Defendant. It should also be noted that the \$10,000.00 check delivered to Preston on June 10, 1980, was immediately returned to Plaintiff as his finder's fee, and it would not be consistent with equity and justice to allow him to recover for his failure to perform, by treating the transaction as a secured loan.

A fundamental principle of equitable mortgages is the prevention of injustice and inequity. Beck v. Brooks, 224 Kan. 300, 580 P.2d 882 (1978). In our case, the allowance of an equitable mortgage would create an injustice to Defendant, because Plaintiff would gain a windfall in the form of a lien for which he gave no consideration. This would be manifestly unjust, and therefore should not be exercised within the realm of equity powers.

POINT III

ON APPEAL, THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE PRESUMED TO BE VALID AND CORRECT, AND THE RECORD WILL BE REVIEWED IN A LIGHT MOST FAVORABLE TO THEM, AND THEY WILL NOT BE DISTURBED IF SUBSTANTIAL SUPPORT IS FOUND IN THE EVIDENCE.

Ample support can be found for the proposition that the findings of a trial court are presumed to be valid and that the reviewing court will examine the record in the light most favorable to those findings. Furthermore, the appellant must bear the burden of demonstrating any error in the lower court. Litho Sales, Inc. v. Cutrubus, 636 P.2d 487 (Ut. 1981).

Interestingly, Plaintiff does not appear to be contending that the trial court erred. Instead, Plaintiff is, in essence, asking that the Supreme Court consider an issue being presented for the first time. This is tantamount to a trial de novo on an issue presented to an appellate court, even though it was not raised at trial.

POINT IV

PLAINTIFF'S CLAIM AGAINST DEFENDANT IS
BARRED BY DEFENDANT'S BANKRUPTCY PROCEED-
ING.

At trial, evidence indicated that Defendant Preston had filed a bankruptcy petition and that Plaintiff's claim against him had been eliminated thereby. Given this, Plaintiff's claim against Defendant must fail on this ground alone.

Despite this, Plaintiff's claim on appeal is, apparently, that the bankruptcy court should not have discharged the

purported debt owed to Plaintiff. To support this contention, Plaintiff claims that he was erroneously listed as an unsecured creditor in the bankruptcy file, that the bankruptcy court informed him that he was not allowed to file a proof of claim, and that Plaintiff therefore did not have an opportunity to assert his purported position as a secured creditor, thereby preventing discharge of the obligation.

This position is erroneous. Even though Defendant's case may have been designated a "no asset" case, Plaintiff certainly would not have been prevented from petitioning the bankruptcy court for a re-classification as a secured creditor. Plaintiff, however, failed to do this, thereby acquiescing in discharge of the obligation. Also, Plaintiff does not dispute that he had notice of the bankruptcy.

It should also be noted that any claim which Plaintiff might have for a lien upon Defendant's land is necessarily conditioned upon his demonstrating the validity of the lien. As shown at trial, Plaintiff's purported trust deed is defective for numerous reasons, including the lack of consideration, and therefore should not serve as the basis for allowing Plaintiff to be considered as a secured creditor in Defendant's bankruptcy proceeding. Since the trust deed

is materially defective, Plaintiff cannot claim that the instrument would have granted him the status of a secured creditor. His claim did not survive the bankruptcy proceeding.

CONCLUSION

Defendant Wayne R. Preston respectfully requests that this court affirm the findings and judgment of the lower court. Appellant's brief does not assert that the trial court committed error; rather, Appellant is claiming that the matter ought to be decided on the theory of equitable mortgage even though the theory was not raised in the pleadings or at trial. Furthermore, the doctrine of equitable mortgage does not apply to the facts of this case since the intent of the parties is at best confused, and the evidence presented by the Defendant Wayne Preston is that the trust deed signed in blank was to secure the large investment loan he was seeking and that he had already paid a finder's fee of approximately \$20,000.00. The trust deed clearly is defective, and even Appellant does not assert that it is valid since it was signed in blank, not properly notarized, has an unlawful trustee named, was apparently filled out in the state of Florida, and was sent to the

Uintah County Recorder in Vernal, Utah for recording, including an erroneous description. Equity would not be served by granting Plaintiff's request. Finally, Plaintiff's claim against Defendant is barred because it was extinguished by the Defendant's bankruptcy proceeding.

DATED this 17th day of May, 1985.

Respectfully Submitted,


Kenneth C. Anderton

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of May, 1985, I mailed four copies of the foregoing Brief of Respondent to Robert M. McRae and JoAnn B. Stringham, McRAE & DeLAND, 209 East 100 North, Vernal, Utah 84078, postage prepaid.


Jan Cole, Secretary