1978

David M. Stauffer And Connie A. Stauffer v. Russell Call And Velma Call And Sunset Canyon Corporation : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF STATE OF UTAH

DAVID M. STAUFFER and CONNIE A. STAUFFER,

Plaintiff,

vs

RUSSELL CALL and VELMA CALL and SUNSET CANYON CORPORATION,

Defendants.

Case No. 15468

APPELLANTS' BRIEF

Appeal from Judgment of Fifth Judicial District Court for Washington County, State of Utah, The Honorable J. Harlan Burns, District Judge, Presiding.

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IN THE SUPREME COURT OF STATE OF UTAH

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BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action by Plaintiffs for specific performance of a contract to convey real property, and for partition, and an action by Defendants seeking to quiet title to the real property concerned, and requesting an Order requiring Plaintiffs to quit the premises.

DISPOSITION IN LOWER COURT

The case was tried to the Court. Judgment was granted to Defendants, the Court ruling that the Uniform Real Estate Contract dated 2 January 1969, entered into by the parties, was void and of no effect as a contract for the sale of real property, by reason of insufficiency of description therein contained. Judgment was also rendered in favor of Plaintiffs and against Defendants in the amount of $9,228.00 as of 1 September 1977, representing monies paid by Plaintiffs on the contract, with interest at 6% per annum from the date of payment.

RELIEF SOUGHT ON APPEAL

Appellants seek an Order of this Court reversing the Judgment of the trial court and ordering that the Uniform Real Estate Contract of 2 January 1969, is specifically enforceable in its entirety as to eight (8) parcels of real property specifically described in said contract; or that this Court reverse the trial court and order that the contract is specifically enforceable in accordance with certain descriptions contained in a survey commissioned by Plaintiffs or reversing the Order of the trial court and determining that the contract is specifically enforceable as to parcels 1, 2, 5, 7, and 8 therein described; or, in the event the Supreme Court determines that the trial court's Judgment is supported by Utah law, that the Supreme Court change and modify Utah law to permit Plaintiffs to select ten (10) acres around two (2) homes, to allow Defendants to select forty-eight (48) acres of farm land, and to permit the remainder of the Uniform Real Estate Contract of 2 January 1969 to be specifically enforced as it stands; or, if the court determines that the trial court's Judgment is supported by Utah law, that said law be modified and changed by the Supreme Court to create a tenancy in common in and to the eight (8) parcels of real property described in the Uniform Real Estate Contract which is the subject of this action, to and between Plaintiffs and Defendants SUNSET CANYON CORPORATION the successor in interest of Defendants CALL; or, for an Order of the Supreme Court remanding the case to the trial court for a new trial.

STATEMENT OF FACTS

On or about 2 January 1969, Plaintiffs/Appellants STAUFFER and Defendants/Respondents CALL entered into a certain Uniform Real Estate Contract. (R259, and Plaintiffs' Exhibit 17). The wording of the descriptions of the property involved was supplied by Defendant/Respondent RUSSELL CALL. (Court Proceedings, page 101, lines 23-30; page 102, lines 1-8). The total purchase price was the sum of $12,000.00, payable in two payments of $1,000.00 each, the balance then payable at the rate of $100.00 per month. Plaintiffs/Appellants enjoyed the right of accelleration. (Plaintiffs' Exhibit 18).

Plaintiffs/Appellants STAUFFER, with their sixteen children, went into possession of the property in April, 1969. (Court Proceedings, page 17, lines 19-25; R259). The two homes on the property were unfit for human habitation, and Plaintiffs/ Appellants renovated the same for living purposes. Other improvements were also placed upon the property over a period of years. In general, Plaintiffs/Appellants did everything that an intelligent, progressive owner would do to improve his property. The improvements were substantial. (Court Proceedings, pages 47-50; R259-260). Defendants/Respondents CALL knew of the substantial improvements that were being made by the STAUFFERS. (R260). STAUFFERS even have a son buried on the property, which property was home to them. (Court Proceedings, page 115, lines 1-2). STAUFFERS faithfully made the payments required of them, in the total amount of $6,400.00, through 7 September 1972. (R260).

On or about 22 September 1972, STAUFFERS tendered payments of the balance owing, and demanded title, which was refused by CALLS. (R3, R45). After negotiations failed, this lawsuit was filed on 7 March 1973. (R1).

CALLS, as had obviously been their intent since refusing to convey the property in 1972, sold the property a second time to Defendant/Respondent SUNSET CANYON CORPORATION in 1975, (R260) for the price of $60,000.00, exactly 500% of the price of the original sale to STAUFFERS. (Court Proceedings, page 267, lines 1-30; page 268, lines 1-11).

At trial, the lower court found the contract to be unenforceable due to insufficiency of description, quieted title to the property in Defendants/Respondents, and ordered all monies paid on the contract to be returned to STAUFFERS with interest from the dates of payment. (R257-264; R265-268). STAUFFERS now appeal.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT THE UNIFORM REAL ESTATE CONTRACT OF 2 JANUARY 1969, WAS VOID AND OF NO EFFECT AS A CONTRACT FOR THE SALE OF REAL PROPERTY FOR INSUFFICIENCY OF THE PROPERTY DESCRIPTION CONTAINED THEREIN, FOR THE REASON THAT SAID DOCUMENT FIRST CONVEYED EIGHT SPECIFICALLY DESCRIBED PARCELS OF LAND TO APPELLANTS, AND CLAIMED AMBIGUITIES ONLY AROSE WHEN THE DOCUMENT THEN SOUGHT TO PARCEL OUT THE LAND CONVEYED, BETWEEN APPELLANTS AND RESPONDENTS CALL.

Paragraph 2 of the Uniform Real Estate Contract of 2 January 1969, states:

> "Witnesseth: that the seller for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration hereof

mentioned agrees to purchase the following described real property, situate in the County of Washington, State of Utah, to-wit: Andersons' Junction, more particularly described as follows: see enclosed legal description. (Attached to the Uniform Real Estate Contract is a two page document entitled "legal description" setting forth eight specifically described and surveyable parcels of land, together with water rights.) Stauffers to purchases two houses using the natural boundaries which is approximately ten (10) acres collectively plus approximately 1/5 water rights. Calls to retain the fenced natural farm ground on the SE South side from interstate freeway (which is approximately forty acres plus 2/5 water rights. The remaining ground SE of the old highway to be STAUFFERS along with the two houses. STAUFFERS to purchase 1/2 of all remaining property to be owned as tenants in common with CALLS. (Words in parenthesis added as explanatory note.)"

Under the doctrine of equitable conversion, the Uniform Real Estate Contract conveys to Plaintiffs the eight (8) specifically described parcels of property described in the annex to the contract. Such parcels are surveyable and locatable. (R296, page 20, 26-30; and page 21, lines 1-3). It is only after such conveyance by the terms of the contract itself, that Plaintiffs and Defendants began to discuss the idea of varying the interests of each. The "insufficiencies" of description upon which the trial court based its ruling could only arise following the conveyance of all the property to Plaintiffs. Defendants' contention, and the trial court's ruling, that the provisions following the specifically described parcels are ambiguous, and seeking to declare the said provisions void, would, arguendo, void the provision concerning the two houses and ten acres of land and would also void the provision for Defendants to retain the fenced natural farm ground of approximately forty acres, and void

any tenancy in common between Plaintiffs and Defendants, thus leaving Plaintiffs the sole owners of all the land described specifically in the annex to the contract.

It must be remembered that Defendant RUSSELL CALL supplied the language contained in paragraph 2. (Court proceedings, page 101, 23-30; page 102, 1-8.). It is axic that language in a written instrument is interpreted agai a drafter who executes it. It is equally elementary that parties are bound by the language they deliberately use i such contracts, irrespective of the fact that it appears t result in improvidence, beyond and perhaps in excess of wh the mythical, reasonable, prudent man might feel constrai to venture. See Skowsen v. Smith, 27 Utah 2nd 169, 493 P.2d 1003 (1972). Defendant RUSSELL CALL, having specifi supplied the wording used in paragraph 2 of the Uniform Re Estate Contract, Defendants cannot now claim that the word means other than what it says.

In addition, it is a well known rule of construction that the specific controls over the general, and that a contract must be construed in favor of its validity as opposed to its non-validity. Such construction requires that the eight specific descriptions prevail over any dispute with those general provisions claimed by Defendant to be ambigious, and therefore, the court's ruling that th contract was void by reason of insufficiency of descriptio is clearly in error.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR

WHEN IT FAILED TO RULE THAT ANY CLAIMED AMBIGUITIES IN THE UNIFORM REAL ESTATE CONTRACT WERE CURED WHEN THE RESPONDENT RUSSELL CALL MARKED AND APPROVED THE BOUNDARIES OF THE LAND DIVISIONS BETWEEN APPELLANTS AND RESPONDENTS CALL, THUS MAKING THE UNIFORM REAL ESTATE CONTRACT FULLY ENFORCEABLE.

If the Supreme Court fails to accept the argument set forth in Point I, then the trial court committed reversible error by failing to rule that any defective description had been cured by reason of the marking and approving by Defendant RUSSELL CALL of the boundaries of the divisions between Plaintiffs and Defendants Call.

A defective description may be cured by the purchasers taking possession. Brown v Ward, 81 NW 247, 110 Iowa, 123. Such a description may also be cured when the purchaser makes improvements. In Ray McKee's Estate, 31 Pitts B. Leg. J. N. S. 309. A defective description may also be cured by the grantor's marking of boundaries. McKee's Estate, supra.

As is admitted by all concerned, Plaintiffs, following 2 January 1969, moved immediately into possession of the property with the knowledge and consent of Defendants. (R259-260). Thereafter, Plaintiffs made substantial improvements to the premises. (260) Also thereafter, Defendant RUSSELL CALL, in walking over the property, marked the boundaries which are set forth in the survey by Gale J. Day. (Court proceedings, pages 104-116; Plaintiffs' Exhibit 18; Defense Exhibit 2). It also appears that Defendants Call retained possession and use of the fenced natural farm ground, and in

fact, leased it one year to Plaintiffs for the sum of $40[illegible] Plaintiffs and Defendants having gone into possession of their respective parcels, having made improvements thereo and used the same, and the boundaries of the same having thereafter been marked and approved by Defendant RUSSELL CALL, and acquiesced in by Plaintiffs, and appropriately surveyed by Gale J. Day, any defects claimed by Defendants or the court were obviously cured and the Uniform Real Estate Contract of 2 January 1969, is specifically enforceab in connection with the specifically surveyable and locatable parcels and the descriptions set forth in Plaintiffs' Exhibit 18 and Defendants' Exhibit 2.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO RULE THAT THE UNIFORM REAL ESTATE CONTRACT OF 2 JANUARY 1969 WAS VALID AND EFFECTIVE AS A CONTRACT FOR THE SALE OF PARCELS 1,2,5,7, and 8, THEREIN DESCRIBED, DUE TO INSUFFICIENCY OF THE LEGAL DESCRIPTION IN SAID CONTRACT, FOR THE REASON THAT IF THERE WERE ANY AMBIGUITIES, THE ONLY INSUFFICIENCIES IN DESCRIPTION OCCURRED WITH RESPECT TO PARCELS 3,4, and 6, AND THE TRIAL COURT SHOULD HAVE HELD THE CONTRACT ENFORCEABLE AS TO PARCELS 1,2,5,7, and 8.

As it appears from the two page document entitled "legal description", attached to the Uniform Real Estate Contract of 2 January 1969 (Plaintiffs' Exhibit 17) there are eight separate legal descriptions. These descriptions are specific and surveyable. (R296, Reporters Transcript. page 20, 26-30; page 21, 1-3). These descriptions do not describe a single, contiguous plot of land. They describe several distinct and separate parcels. (See Plaintiffs'

Exhibit 19, admitted into evidence by stipulation and without objection.)

The insufficiencies and ambiguities in description claimed by Defendants, and considered by the court, arise only in connection with parcels 3, 4, and 6, and have nothing to do with parcels 1, 2, 5, 7, and 8.

If there is to be any avoidance of the terms of the Uniform Real Estate Contract of 2 January 1969 by reason of insufficiency and ambiguity in description, then such avoidance should only take place as to parcels 3, 4, and 6, in which the claimed ambiguities arise. Where several distinct parcels of land are conveyed, the contract is obviously severable.

POINT IV

IN THE EVENT THE TRIAL COURT'S DECISION IS FOUND TO ACCURATELY REFLECT THE STATE OF THE LAW IN UTAH, THEN SUCH LAW SHOULD BE CHANGED AND MODIFIED TO PERMIT PLAINTIFFS TO SELECT THE TEN ACRES AROUND THE TWO HOMES, TO ALLOW DEFENDANTS TO SELECT THE FORTY ACRES OF FARM LAND AND TO PERMIT THE REMAINDER OF THE UNIFORM REAL ESTATE CONTRACT OF 2 JANUARY 1969, TO BE SPECIFICALLY ENFORCED AS IT STANDS.

In 23 AmJur 2d, DEEDS, Section 225, Grantees' Right of Selection, we read,

> "A common law canon of construction under which to overcome uncertainty as to the land conveyed, the grantee is allowed to select the land conveyed, but not located, has been applied in a number of cases, especially those decided at a comparatively early time. Pending the exercise of such right, the deed operates to convey an undivided interest, conferring on the grantee and his successors in interest the right of destroying the co-tenancy by exercise

of the right of selection."

It is obvious that this ancient rule of construction allowing a grantee to make a selection of land previously unlocated avoids the unequities inherent in a situation such as the present situation, where a grantor himself provides the words in the instrument, and then seeks to avoid their effect by claiming that the words are ambiguous, and later resells the property for a much higher price.

In the case of Calder v Third Judicial District Court, 2 Utah 2nd 309, 273 P.2d 168, (1954), this Court recognized that where a contract permits one of the parties to make a selection of a fixed quantity of land, leaving to that party the selection of the boundaries, the contract is fully valid and specifically enforcable.

Virginia and Texas hold to the rule that where an unidentified portion of a larger tract is conveyed, the grantee is automatically entitled to select the boundaries of the quantity of the land involved. See Ransome v Watson Administrator , 134 S.E.707 (1926), and Turner v Hunt, 110 S.W. 2d 688 (Texas 1938); House v Humble Oil Company, 97 S.W. 2d 314 (Texas 1936); and Penney v Booth , 220 S.W. 417 (Texas 1920).

The equities of this case are overwhelmingly in favor of Plaintiffs, who with their large family, went into possession made two homes liveable, made substantial improvements to the rest of the real property, buried their dead there, and made payments, only to find that in the end, Defendants Calder had sold to Defendant Sunset Canyon Corporation for a price

five times larger than the original sale price of the land.

Defendants will contend that if Plaintiffs are allowed to choose the boundaries of their ten acre tract, then Defendants should be allowed to choose the boundaries of their approximately forty acre tract of fenced natural farm ground. Plaintiffs concur.

POINT V

IN THE EVENT THE TRIAL COURT'S DECISION ACCURATELY REFLECTS UTAH LAW, AND IN THE EVENT THAT THIS COURT REFUSES TO ALLOW PLAINTIFFS AND DEFENDANTS THE RIGHT OF SELECTION, AS SET FORTH IN POINT IV, THEN UTAH LAW SHOULD BE CHANGED AND MODIFIED TO CREATE A TENANCY IN COMMON IN PLAINTIFFS AND DEFENDANTS, IN AND TO ALL LANDS COVERED BY THE CONTRACT OF 2 JANUARY 1969.

In the case of Gibbs v Swift, 12 Cush. 393 (Mass.), in Jackson v. Livingston, 7 Wend. 136 (N.Y.), and in L.I. Railroad Company v Conklin, 79 N.Y. 572, it is held that even where there was an attempt to convey a given part of a larger tract of land, and the instrument should fail to locate the quantity by a sufficient description, yet, upon the delivery of the document, the grantee would become the owner as tenant in common with his grantor, with respect to the entire tract, in the proportion of the smaller tract to the larger tract.

Plaintiffs urge the Court to avoid the harsh and punitive results reached by the trial court, by adopting the above rule.

POINT VI

THE COURT ERRED REVERSIBLY IN OVERRULING, AND DENYING PLAINTIFFS' MOTION FOR NEW

TRIAL, OR IN THE ALTERNATIVE, TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT, FOR THE REASON THAT EQUITY DEMANDS THAT APPELLANTS' DEFENSES OF LACHES, UNCLEAN HANDS, BAR AND ESTOPPEL SHOULD HAVE BEEN HEARD BY THE TRIAL COURT IN THE INTEREST OF FAIRNESS AND JUSTICE; AND RESPONDENTS SHOULD HAVE BEEN BARRED AND ESTOPPED FROM CLAIMING THAT THE CONTRACT OF 2 JANUARY 1969, WAS UNENFORCEABLE IN ANY MANNER.

On or about 6 May 1977, prior to trial, Plaintiffs/Appellants filed a First Amended Complaint, and a First Amended Reply to Counterclaim. (R202, R219). On the day of trial, after receiving a written objection to the filing from Defendants/Respondents, STAUFFERS moved that the filing be recognized by the trial court. The trial court took the motion under advisement. (Court Proceedings, page 2, lines 14-30; pages 3-4). The motion to file the First Amended Complaint was later withdrawn by Plaintiffs/Appellants. (Court Proceedings, page 180, lines 1-15). The motion to file the First Amended Reply to Counterclaim was not withdrawn containing the additional defenses of laches, unclean hands, bar, and estoppel. The trial court failed to rule on the matter either before, during, or after trial, and therefore could not consider the defenses raised, to which defenses and relief STAUFFERS were entitled. The failure to rule upon the motion was therefore an "irregularity in the proceedings of the court" and would justify a new trial, or amendment of the findings of fact and conclusions of law, and the entry of a new judgment, barring and estopping Defendants/Respondents from claiming the existence of any ambiguities which would render the Plaintiffs' Exhibit 17, unenforceable; pursuant to URCP 59 (1). From the facts of this case, it is clear

that the conduct of Defendants CALL could be held to be so misleading, so unfair and unjust, or culpably negligent, to justify the use of estoppel.

CONCLUSION

In view of all of the foregoing, and the equities which overwhelmingly preponderate in Plaintiffs' favor:

1. This Court should reverse the Judgment of the Trial Court and order the specific enforcement of the Uniform Real Estate Contract of 2 January 1969, in its entirety as to the eight (8) parcels of real property specifically described therein; or

2. The Court should reverse the Trial Court, and order the contract specifically enforced in accordance with the descriptions contained in Plaintiffs' survey; or

3. The Trial Court should be reversed and the contract ordered enforced as to parcels 1,2,5,7 and 8 therein described; or

4. This Court should reverse the Trial Court and amend Utah law to permit Plaintiffs to select ten (10) acres around the two homes, and to then allow Defendants to select forty (40) acres of natural farm ground, and specifically enforce the remainder of the contract; or

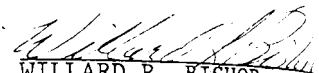
5. Utah law should be amended to permit the creation of a tenancy in common in and to the entire property, between STAUFFERS and SUNSET CANYON CORPORATION, in proportion to their ownership interests; or

6. This Court should remand the case to the Trial Court, and order a new trial.

DATED: 23 February 1978.

Respectfully submitted,

MORRIS AND BISHOP



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