1978

Carl Haueter v. Marvin E. Peguillan, Wilma J. Peguillan, His Wife; Francis H. Kellogg, Et Al : Brief of Respondent Kellogg

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL HAUETER,

Plaintiff-Appellant,

vs.

MARVIN E. PEGUILLAN, WILMA J. PEGUILLAN, his wife; FRANCIS H. KELLOGG, et al.,

Defendants-Respondent

Supreme Court No. 15497

BRIEF OF RESPONDENT KELLOGG

Appeal from Judgment of the District Court of Salt Lake County, State of Utah, Honorable Bryant H. Croft, District Judge

---

Richard A. Rappaport
920 Boston Building
Salt Lake City, Utah 84111
Attorney for Respondent

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL HAUETER,

Plaintiff-Appellant,

vs.

MARVIN E. PEGUILLAN, WILMA J. PEGUILLAN, his wife; FRANCIS H. KELLOGG, et al.,

Defendants-Respondent

Supreme Court No. 15497

BRIEF OF RESPONDENT KELLOGG

Appeal from Judgment of the District Court of Salt Lake County, State of Utah, Honorable Bryant H. Croft, District Judge

---

Richard A. Rappaport
920 Boston Building
Salt Lake City, Utah 84111
Attorney for Respondent

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Appellant

TABLE OF CONTENTS

Cases Cited

Authorities Cited

STATEMENT OF POINTS

POINT I

THE COURT DID NOT RULE THAT KELLOGG WAS A BENEFICIARY OF ANY TITLE INSURANCE POLICY. FURTHERMORE, THE INSURANCE POLICY WAS NOT PURCHASED BY HAUETER.

POINT II

THE COURT DID NOT RULE THAT PARAGRAPH 19 OF THE UNIFORM REAL ESTATE CONTRACT MODIFIED THE PROVISIONS OF PARAGRAPH 18.

POINT III

THE COURT CORRECTLY RULED THAT KELLOGG HAD NO KNOWLEDGE OF THE THAYNE JUDGMENT AND THAT HE PURCHASED THE SELLER'S INTEREST IN THE CONTRACT FOR GOOD AND VALUABLE CONSIDERATION.

POINT IV

THE COLLATERAL SOURCE RULE IS NOT APPLICABLE TO THIS CASE.

POINT V

THE TITLE INSURANCE COMPANY BY PAYING THE ENTIRE CLAIM HAS SUBROGATED TO ANY CLAIM APPELLANT HAD AGAINST ANY THIRD PARTIES.

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL HAUETER, Plaintiff-Appellant,	)	
vs.	)	Supreme Court No. 15497
MARVIN E. PEGUILLAN, WILMA J. PEGUILLAN, his wife; FRANCIS H. KELLOGG, et al., Defendants-Respondent	)	

STATEMENT OF THE KIND OF CASE

This action involves a Complaint and Counterclaim arising out of a Uniform Real Estate Contract. The Complaint is denominated a quiet-title action and also contained causes of action for fraud. The Counterclaim was one for termination and forfeiture of the Uniform Real Estate action by the Respondent for failure of the Appellant to make payments.

DISPOSITION IN THE LOWER COURTS

Judge Bryant H. Croft found no cause of action as to the Plaintiff-Appellants case. The Court ruled that Appellant had not made payments to Respondent since May, 1974 and was therefore in default. However, the Court determined that it would be inequitable to forfeit the Appellant's interest in the Uniform Real Estate Contract. The Court, therefore, entered judgment in favor of Respondent in the sum of $1,950.00 for back payments, plus $750.00 as reasonable attorney's fees.

RELIEF SOUGHT ON APPEAL

Respondent Kellogg seeks to have affirmed the District Court's judgment.

STATEMENT OF FACTS

On or about April 24, 1972, Marvin E. Peguillan and Wilma J. Peguillan, his wife, sold their real property at 1463 South 10th East, Salt Lake City, Utah (which property is the subject of this action) to John C. Larsen, pursuant to a Uniform Real Estate Contract (Exhibit I-P). On June 20, 1972, John C. Larsen assigned the Buyer's interest in said property to the Appellant. On July 11, 1972, Marvin E. Peguillan and Wilma J. Peguillan conveyed the Seller's interest in said real estate contract to Francis H. Kellogg, the Respondent herein and Josephine Kellogg, his wife, who is now deceased. At the time of the sale of the real property from Peguillan to Larsen, Peguillan provided Larsen with a policy of title insurance in which Pioneer National Title Insurance Company was the insurer and Western States Title Company was Pioneer's authorized agent (Tr. 32, Exhibit 8-D). When Appellant purchased the property from John C. Larsen, Larsen provided a title policy in which Pioneer National Title Insurance Company was the insurer and Western States Title Company was the authorized agent (Exhibit 19-D). Mr. Ray J. Keys, who performed the closing for the Larsen-Haueter transaction, testified that Mr. Larsen paid for the title insurance policy (Tr.97). The Buyers and Sellers statement prepared at the closing (Exhibits 14-D and 15-D) further indicated that Mr. Larsen paid for said policy.

At the time of the sale of the property from Peguillan to Larsen, there was a judgment against Peguillan in favor of Mr. Cleon Thayne. Although Appellant claims that there were other judgments on the property, all of the other judgments claimed were entered against Peguillan after the property had been sold to Larsen, and therefore are not liens on Appellant's interest. The Court indicated that the question of the other judgments was handled at pre-trial, that the other parties were not served and that pursuant to stipulation, and the law, any claim as to other judgment were dismissed (Tr.109). In fact, judgments entered against a person after he has sold his interest in the property do not cloud the title to that property.

The Appellant has paid $3,114.61 to clear the Thayne judgment. Thereafter, Appellant brought suit against the title insurance company which had failed to disclose the judgment on either title policy, Exhibit 8-D or Exhibit 19-D for recovery of the sum of $3,114.61 and other alleged damages. At trial, a settlement was reached in which the Appellant received $6,000.00 from the title insurance company, considerably more than the amount expended by Appellant. (Tr. 83 and Tr. 108-109).

The essence of the Appellant's claim is that because of the Cleon Thayne judgment, he is entitled to credit against the Real Estate Contract assigned to Respondent Kellogg for the amount of said judgment ($3,114.61), even though he has received payment from the title company in the sum of $6,000.00 for that judgment.

There is ample testimony that Respondent Kellogg was unaware of the Cleon Thayne judgment at the time he purchased the Seller's interest in the property (Tr. 30-31 and Tr. 55). There is further testimony that Respondent Kellogg paid $2,200.00 in consideration for having the Seller's interest in the Real Estate Contract assigned to him (Tr. 55) and (Exhibit 10-D). Despite Appellant's constant reference, both in the trial and in his brief, to Kellogg as a "wrong-doer" (see for example Page 14 of Appellant's Brief), the Court found the facts to be exactly the opposite (Tr.79

The lower court ruled that the Appellant did not have a cause of action against Respondent Kellogg as a result of the Cleon Thayne judgment, and that pursuant to the contractural relationships between the parties, the title insurance company had responsibility for making payment to Appellant, which it did.

It is clear from the Appellant's testimony, that this action was not brought on behalf of the title insurance company (Tr.

Appellant alleges in his Brief (Page 10) that Haueter paid $4,250.00. This comes from adding the $1,150.00 paid to the credit Appellant seeks of $3,114.61. No evidence was introduced showing payments of $4,250.00.

The Appellant has consistently stated in his Brief, that Peguillan knew that the judgment existed and that he defrauded the Appellant (see Brief Pages 4, 5 and 9). Although this issue is not material to the case before the Court, the record discloses that the only testimony on the issue is that Peguillan was not aware of the judgment at the time that he sold to Larsen (Tr.31). Furthermore

the Appellant's statement on Page 9 that "Peguillan actually defrauded Carl Haueter when he sold the property to him" is untrue. Peguillan did not sell the property to Haueter and there is no evidence from Haueter, or anyone else, that Peguillan made any representations to Haueter, or even knew Haueter prior to the sale from Larsen to Haueter.

ARGUMENT - POINT 1

THE COURT DID NOT RULE THAT KELLOGG WAS A BENEFICIARY OF ANY TITLE INSURANCE POLICY. FURTHERMORE, THE INSURANCE POLICY WAS NOT PURCHASED BY HAUETER.

Appellant's first argument is without merit. The Court did not rule that Kellogg was the beneficiary of the title insurance policy. Neither the record nor the Findings of Fact and Conclusions supports Appellant's contention. Furthermore, the Court and the evidence show conclusively that Haueter did not purchase any title insurance policy germane to this case. One title insurance policy (Exhibit 8-D) was purchased by Peguillan. The other policy (Exhibit 19-D), was purchased by Larsen. Appellant's brief argues a conspiracy theory which Appellant did not prove in trial. The Court clearly ruled at the end of the Plaintiff's evidence that Appellant failed to convince the Court that Kellogg knew of the Thayne judgment or was engaged in any conspiracy or collaboration with Peguillan to defraud anybody (Tr. 95). Appellant's Point 1 is obviously intended to be a straw-man which Appellant stands up and then knocks down. It does not reflect the ruling of the Court. In line with the foregoing, it should be noted that on Page 12 of Appellant's Brief,

Appellant states that nothing in Paragraph 19 of the Uniform Real Estate Contract permits a "wrong-doer" the right to "collect twice under the contract". Respondent again wishes to point out that Kellogg was not a wrong-doer and that all that Kellogg wants is the payments due to him under the contract. Kellogg has not received payment for the sums lawfully due to him once, much less twice. It is obvious that Appellant is seeking a windfall. Appellant received $6,000.00 as compensation for his paying a judgment of $3,114.61 and is now seeking credit against the contract for an additional $3,114.61.

ARGUMENT - POINT II

THE COURT DID NOT RULE THAT PARAGRAPH 19 OF THE UNIFORM REAL ESTATE CONTRACT MODIFIED THE PROVISIONS OF PARAGRAPH 18.

Appellant has again set up a straw-man. The Court ruled the Uniform Real Estate Contract must be interpreted as a whole. That since the expenditure by Appellant on the Thayne judgment was totally reimbursed, Appellant could not escape the payments due under the contract. In the case before the Court, Peguillan provided a title policy to Larsen which gave full coverage in the event that the title was not clear. Larsen provided Haueter with a re-issue on that policy. In fact, in part of his arguments to the Court, Mr. Minor agreed with the basic principle that the Court was getting at:

"The Court: Suppose to simply illustrate, as I

see the probable situation here, suppose the title insurance company had said right at the outset, 'We sure goofed. We missed that judgment. We will pay it off, No Sheriff's Sale'.

Mr. Miner: They didn't do that. They fought us right down to the wire with every defense they could find.

The Court: Suppose they had done that?

Mr. Miner: Then, we wouldn't be here today."

Paragraph 18 is not intended to give the Buyer under a Uniform Real Estate Contract a bonanza. It is intended to protect a buyer from having to pay more than the contracted-for purchase price. However, if a Buyer is compensated for sums advanced, surely then he cannot also withhold or suspend payments.

The Seller provided a title insurance policy in accordance with the Uniform Real Estate Contract to guarantee the buyer clear title. Surely, a Seller's obligation under the Uniform Real Estate Contract cannot be increased by an assignment of the contract by the buyer.

The real estate transactions which resulted in this lawsuit requires the seller of the property to provide the buyer with a clear title. Both the earnest money agreement (11-P) and the contract (1-P) establish that a seller's obligation is met by providing title insurance. If there is an undisclosed defect in the title, the buyer has several remedies. In this case the Appellant had decided to pursue the remedies under the title policy he received as part of the transaction. The Appellant made his election, proceeded with

it and was quite successful. The buyer is entitled to clear title. The buyer is not entitled to pursue more than one remedy. The Uniform Real Estate Contract does not envision that a buyer recover more than once for damages resulting from a title encumbrance. The Appellant wishes the Court to provide him with a windfall. He has received $6,000.00 in compensation for paying $3,114.61 on a judgme He now wishes to escape payment under the contract for sums which are in fact owed. The result would be highly inequitable, Appellan would benefit in the sum of $9,114.61 for having paid off a $3,114. judgment. Respondent Kellogg would not receive the funds due to hi under the contract. Such an interpretation of the transactions bef the Court is unreasonable.

ARGUMENT - POINT III

THE COURT CORRECTLY RULED THAT KELLOGG HAD NO KNOWLEDGE OF THE THAY JUDGMENT AND THAT HE PURCHASED THE SELLER'S INTEREST IN THE CONTRAC FOR GOOD AND VALUABLE CONSIDERATION.

The Appellant's innuendo to the contrary, the Court clear ruled that Kellogg had no knowledge of the Thayne judgment and was not a "wrong-doer". (Tr.79) This finding is amply supported by the record (Tr. 30, 31 and 55). The Appellant in effect, is requesting that the Supreme Court make a factual finding contrary to that of the lower court. The Supreme Court has stated on numerous instanc that it will view evidence and inferences drawn therefrom in the light most favorable to sustaining the decision. See for example, Oberhansly vs. Earle, No. 14820 Filed December 21, 1977 and Cutler

vs. Bowen, 543 P. 2d 1349 (1975). The consideration paid by Respondent Kellogg was not disputed. No evidence was introduced to controvert his testimony that he did not know of the Thayne judgment. The lower court's finding in this regard should be upheld.

ARGUMENT - POINT IV

THE COLLATERAL SOURCE RULE IS NOT APPLICABLE TO THIS CASE.

The collateral source rule is one which is applicable to tort cases. 22 Am. Jur. 2d Damages 286, §206 in explaining the collateral source rule, states that it is a rule applicable to tort cases. See also footnote 12, 22 Am Jur. 2nd Damages 284, §204.

Not only does the collateral source rule apply only to tort cases, but almost always only to health, accident and life insurance proceeds. See 77 Harvard L. Rev. 741, 742 (Feb. 1964). See also "The Collateral Source Rule" 21 Ohio St. L.J. 231, 233:

> "An examination of a long line of cases in many of the jurisdictions indicates that the doctrine has been applied in the following types of situations: (1) salary received by the injured person during his period of disability; (2) pensions, whether retirement or disability, received as a result of the injuries; (3) insurance proceeds-death, hospitalization, medical care, etc.; (4) hospital and medical care furnished gratuitously."

The cases cited by Appellant are traditional tort cases arising from automobile accidents. The collateral source rule does apply to such cases, but not to contractual cases as the one before

the Court.

Furthermore, in the collateral source cases, the insured paid for the policy or had the right pursuant to an employment arrangement of his own.

In this case, the insurance was provided by the seller to cover title defects. It is not a collateral benefit, but one arising directly from the transaction in question.

The collateral source rule, as an exception to the doctrine of mitigating damages and permitting recovery only for actual losses should be strictly construed.

ARGUMENT - POINT V

THE TITLE INSURANCE COMPANY BY PAYING THE ENTIRE CLAIM HAS SUBROGATED TO ANY CLAIM APPELLANT HAD AGAINST ANY THIRD PARTIES.

Paragraph 9 of the title insurance policy (Exhibit 19-D) provides, "Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the Insured, and it shall be subrogated to and be entitled to all rights and remedies which the Insured would have against any person or property in respect to such claim had this policy not be issued."

By receiving payment pursuant to that policy from the title insurance company, any claim of the Appellant against any "wrong-doer" passed to the title insurance company.

The rule is aptly stated in 44 Am Jur. 2d, §1320; p. 738. "The general rule is that upon payment of a loss, the insurer, or

the insurers in the case of co-insurance, is entitled to be sub-rogated pro-tanto, to any right of action which the insured may have against the third person, whose negligence or wrongful act caused the loss."

The Supreme Court of Utah has supported the majority position. In Potomac Insurance Company vs. Nickson 64 Utah 395, 23 Pac. 445 (1934) the Court stated: "The Courts have almost unanimously held that when an insurer has paid an entire loss, it is the only real party in interest."

In State Farm Mut. Ins. Co. vs. Farmers Insurance Exchange, 22 U. 2d 183 (1969), the Supreme Court stated:

"Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor." Id at 184.

The recognized law is also stated in 13 ALR 3d 229, 248 §6(a):

"In most of the cases wherein the question has arisen or been commented upon, it has been held or recognized that where a property loss caused by the wrongful act of a third person has been fully paid by insurance the insured cannot maintain an action in his own name against the tortfeasor to recover for the loss, on the theory that the insured has no interest in the claim, his insurer being subrogated to all his rights therein."

Numerous courts have held that when an insurance company pays a loss in full, that only the insurance company has the right to bring an action against a third party who caused the loss. See United States

vs. Aetna Insurance Company 338 U.S. 366 (1949); Shambly vs. Joe Blackey Plumbing & Heating Co. 264 N.C. 456, 142 SE 2d 18 (1965); Great American Insur. Co. vs. Watts, Okla. 393 P. 2d 236 (1964); and Campbell vs. Campbell, 172 Kan. 640, 243 P. 2d 197 (1952).

Any claim of the Appellant therefore passes to the title insurance company, and Appellant looses any right to use the $3,114.61 as an offset against the amount due to Respondent.

CONCLUSION

The trial court correctly determined that Appellant was not entitled to claim the sum of $3,114.61 as an offset and that Appellant was delinquent in payments totalling $1,950.00. The judgment of the trial court should therefore be affirmed.

Respectfully submitted:

Conne, Rappaport & Segal
By: Richard A. Rappaport
Attorney for Defendant-Respondent

920 Boston Building
Salt Lake City, Utah 84111