

2001

Joseph R. Bagnall, and Florence Bagnall v. Suburbia Land Company, United Paint and Colors Company : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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J.R. BAGNALL, aka, JOSEPH
R. BAGNALL, and FLORENCE
BAGNALL,

Plaintiffs-Appellants,

vs.

Case No. 13753

SUBURBIA LAND COMPANY, an
Idaho Corporation, ...UNITED
PAINT AND COLORS COMPANY,
et al.,

Defendant-Respondent,

PETITION FOR REHEARING

Brief of Defendant-Respondent,
United Paint and Colors Company

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PETITION FOR REHEARING

Comes now the Defendant-Respondent, United Paint & Colors Company, by and through its attorney, Richard L. Maxfield, and respectfully petitions the Court for a rehearing of the above-entitled case as it applies to the Plaintiff-Appellants and the Defendant-Respondent, United Paint & Colors Company.

Said Defendant-Respondent alleges the Court erred in the following particulars:

POINT I

THE COURT ERRED IN QUESTIONING THE VALIDITY OF THE DEED MADE TO UTAH VALLEY LAND & DEVELOPMENT CORPORATION, WHEN IN FACT SAID CORPORATION WAS INCORPORATED AS UTAH VALLEY LAND & DEVELOPMENT COMPANY.

The affidavit of Jean B. Nyberg Shirk, filed herein by the Plaintiffs, shows that on March 3, 1962, she executed a Warranty Deed conveying a one-half interest in 140.15 acres to Utah Valley Land and Development Corporation. In said affidavit, she states that at the time of executing the Deed, "...it was my intent at the time I signed the Deed and handed it to Mr. Redmond, that I was conveying the property to Utah Valley Land and Development Corporation."

Within 20 days after the Deed was signed, a corporation was formed in the name of Utah Valley Land and Development Company, and when the corporation was formed, the Deed was given to its officers by the promoter, who had possession of it. Mrs. Shirk was paid a valuable consideration for the Warranty Deed, and recognized thereafter that she no longer held an equitable interest in said 140.15 acres. The Corporation, after being formed, took the legal title to said property, and years later in conveying the title to said property, conveyed it out in the name of "Corporation", the same as received which most persons believe to be synonymous with "Company".

The Courts have uniformly recognized that a deed is to be construed in favor of vesting title and that a slight difference in the spelling of a name is to be disregarded.

Carlson v. Lindauer, 259 P2d 925 (1953)-Calif.
A deed is to be construed in favor of vesting title...
The deed should be construed to give effect to the intention of the grantor...It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person or persons intended, the deed is effectual.

Woodward v. McCollum, 111 NW 623 (1907)-ND
Language used in a deed of conveyance of real property, as well as other contracts, should be given a common-sense interpretation, to the end that the evident meaning and intention of the parties may be given effect (at 625).

City Bank of Portage v. Plank, 124 NW 1000 (1910)-Wisc. (In ascertaining the grantee) the real intention of the parties is to be sought and effectuated by courts...that intent may be effectuated by ascertaining under proper rules of evidence the intention of the parties, although such person (the grantee) be not designated by his legal or usual name...If the court can find that a certain person was intended as grantee, it matters not what name is given him in the deed (at 1001).

Hodgkiss v. Northern Petroleum Consol., 67 P2d 811, (1937)-Mont. A deed is sufficient if the grantee can be identified by extrinsic evidence (at 814).

York v. Stone, 34 P2d 911 (1934)-Wash. A deed, in order to pass title, must designate the grantee without uncertainty, but it is not necessary that the grantee be described by name, if otherwise identified or made susceptible of identification by extrinsic evidence (at 913).

Byrd v. Patterson, 48 Se2d 45, 229, N.C. 156 (1948)
While the correct name of the grantee affords a ready means of identification of the person intended, its use is not a prerequisite to the validity of the instrument. If a living or legal person is intended as the grantee and is identifiable by the description used, the deed is valid, however he may be named in the deed (at 47).

Stainsby v. Schallenkamp, 34 NW2d 832 (1948) S.D.
If the deed in its entirety distinguishes the grantee from the rest of the world it is sufficient (at 832, quoting 26 C.J.S. Deeds Sec. 24b).

In dealing with grants to corporations, the Courts also have uniformly held that the misnomer of a corporation as a grantee in a deed is not sufficient to defeat the grant if the identity is manifest and the corporation accepted the deed as delivered.

Elbert v. Wilmington Turngemeinde, 107 A 215 (1919)-Delaware. In regard to mistake in setting out the name in a deed, the rule is that if it can be ascertained from the deed who is intended, the deed is not vitiated by mistake. The misnomer of a corporation as grantee in a deed is not sufficient to defeat the grant if the identity is manifest and the corporation accepted the deed as delivered. In the absence of extrinsic circumstances, it is sufficient if the grantee in the deed is expressed in the substance of the name of the corporation (at 216-217).

Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., Limited, of London, 56 SE 654 (S.C. 1907). To hold that the slight change in the name of the corporation should defeat the deed would be to refuse to regard the intention of the parties concerned for the sake of an attenuated technicality.

Public Industrials Corporation v. Reading Hardware Co., 29 F2d 975 (CCA 3rd) 1929. As a matter of law, the authorities clearly show that a deed or mortgage is valid although the corporate name as set forth is not correct...An immaterial misnomer, as the omission of one word in the corporate name, will not render an instrument invalid, where there was a proper authority to execute it (at 976-last sentence is from Thompson on Corp., but no cite given).

The New York Court ruled directly on a case with almost the identical facts situation as that before the Court at this time. A deed was made to Falconer Realty Corporation prior to the corporation being formed. When the corporation was formed, the name was Falconer Realty Company, Inc. The Court held the deed to be valid and title to be in the name of the corporation as formed.

Manufacturers Trust Co. v. Falconer Realty Corporation, 90 N.Y. 2d 345. It is conceded by the defendant, Buck, that Falconer Realty Company, Inc. was, in truth and in fact, intended to be the grantee named in the deed which conveyed the premises to Falconer Realty Corporation. Such error upon the part of the scrivener of the deed is readily understandable where, as here, Falconer Realty Corporation was not in existence at the time of such conveyance. Under these circumstances the title is in Falconer Realty Company, Inc., the intended grantee (at 346).

See also 19 C.J.S., Section 1093 at page 645:

If, in a conveyance to or for a corporation, it can be ascertained from the deed who is intended to take as grantee, the designation thereof will be sufficient. A misnomer of a corporation as grantee will not defeat the grant if the identity is established, and, particularly, if the deed is accepted by the corporation...The courts will presume that the words used were intended to be a description of, rather than to express the accurate full name of, the grantee; and this is specially so in the absence of proof of the existence of a corporation having the identical name used to describe the grantee in the conveyance.

POINT II

THE COURT ERRED IN HOLDING THERE WAS A QUESTION OF FACT TO BE DECIDED AS TO WHETHER OR NOT THE PLAINTIFFS HAD ACTUAL KNOWLEDGE OF THE CLAIMED INTEREST OF THE DEFENDANT-RESPONDENT, UNITED PAINT AND COLOR COMPANY.

On page 6 of the Plaintiff-Respondent's Brief (which has just come to the attention of the attorney for Defendant-Respondent), Plaintiffs' attorney admits that the Plaintiffs had knowledge of the claimed interest of the Defendant-Respondent, United Paint & Colors Company, when he states as follows:

In any event, the modification agreement was prepared by Mr. Tibbs, who had relied upon the representations of Messrs. Maxfield and Hughes that Maxfield had acquired the outstanding interest of Mrs. Nyberg, the outstanding interest of all the other parties to the 1952 contract;...(J. R. Bagnall - Direct; Florence Bagnall - Direct; Don V. Tibbs - Direct and Cross).

Further on page 18 of Plaintiff-Respondent's Brief, Mr. Howard again recognizes that the Defendant-Respondent claimed to have acquired Jean Nyberg's interest when he states:

Contrary to the assertions of the appellants, the question of marketable title was never a point of issue since Maxfield represented to Mr. Tibbs and to the sellers that he had acquired all of the balance of the outstanding interest of the parties. (Tr. 3, 23, 24, 27, 30, 31) Relying on his own assertions, the modification agreement of July 15, 1962 was made.

When we look at this testimony we see there is no question but what the Bagnalls both knew of the claim of United Paint and Colors Company to the 140.15 acres. On page 3 of book 3 of the transcript, at line 19 the testimony of Mr. Bagnall being

questioned by Mr. Howard on direct examination is as follows:

Q. Prior to this litigation did you have any reason to believe that Mr. Maxfield hadn't acquired all of the outstanding interests?

A. I had no reason to believe that he hadn't. I took his word on it.

Further in book 3 of the transcript at page 29 line 14 the question was asked by Mr. Howard of Mrs. Bagnall on direct examination:

Q. When was it that you met Mr. Maxfield in Mr. Tibbs' office?

A. Near July 16, 1962.

Then continuing on that page, line 28:

Q. Well, will you relate to the Jury, to the Court the circumstances and conversations that took place on that meeting date?

A. Well, we were surprised to see Mr. Maxfield and his attorney and his father. And he told us that they had possession of the ranch.

MR. LORD: Your Honor, I'd ask that she specify who's talking rather than just "they".

A. Mr. Maxfield said he had possession of the ranch, he had moved his family on it, and he owned all of the outstanding interests in it, and that we -- we could accept him there as a buyer or else.

Then on line 29, page 30 the Plaintiff, Mrs. Bagnall, was asked:

Q. Was anything said about where he was living at the time?

A. He was living on the ranch.

Q. What did he say about it?

A. Well, he said he had possession and that he owned all the interests from other parties and that he was going to stay there.

Q. Was anything said about the nature of your interests? Did he describe it for you?

A. No. Mr. Tibbs, I think, did that for us.

Then on the cross examination of Mr. Bagnall, book 2, page 23, line 10, the question was asked:

Q. Did you make any statement concerning the one-half interest in the hundred and 40 acres which Jean Nyberg owned?

A. I think that we did, but, on the other hand, we were not allowed to discuss that. Mr. Maxfield, when he came in, I asked him if he said --

Q. Well, my question was --

MR. HOWARD: Let him answer.

A. He said, "I own all of this -- I've gathered up all of these interests."

Then again on the cross examination of Mr. Bagnall, book 2, at page 24, line 11, by Mr. Lord:

Q. How did you purport in your understanding -- I'm not asking you the legal implications, but from your understanding of the title, how could you feel you could transfer a warranty deed, sign a warranty deed conveying marketable title to that hundred and 40 acre tract when you only had a half interest in it?

A. If the titles were merging, it would be entirely possible --

Then on the same page at line 22, he continued:

A. Not only that, but it would be a sensible approach to it. Mr. Maxfield had represented to me that he had all of the outstanding titles, I had bought all of them, and I own them, I have deeds for them. If he had that, why should I have to transfer the hundred and 40 point 15, which have I too had been deeded to my sister, Jean, in 1952, and the other half interest to myself.

For the Bagnalls to testify in Court that Mr. Maxfield had told them in 1962 that he'd picked up all the outstanding interests in the property, and Mr. Bagnall to testify that he only had a one-half interest in the property and that he felt that Mr. Maxfield's one-half interest in the property which had been acquired from Jean Nyberg

would merge with his, is completely contrary to the Affidavit which the Plaintiffs now ask the Court to accept. The Plaintiffs, in order to win their main case on marketable title, testified that Mr. Maxfield told them in 1962 that he had acquired Jean Nyberg's interest. Later in order to win their case on the 140.15 acres they made an affidavit that in 1971 (9 years later) they were not aware nor did they have notice that Jean Nyberg had conveyed or attempted to convey her interest in said property. Their affidavit is completely contrary to their testimony at the trial and that given in the deposition of Mr. Bagnall prior to the pre-trial.

In considering the affidavit of the Bagnalls, and whether or not they had knowledge of the claimed interests of the Defendant-Respondent, Judge Harding was appraised of the fact that Mr. Maxfield was in possession of the property, that he had been in possession since 1962, that he claimed to hold possession under color of title, and that he claimed to have acquired all of the other outstanding interests in the property other than the Bagnalls. Possession has always been recognized as notice.

Further, when Judge Harding granted the Defendant's Motion for Summary Judgment he was familiar with the deposition of Mr. Bagnall which had been given in April of 1972. In the deposition at page 72, lines 16-19, he testified that he had been told that his sister, Jean Nyberg Shirk, had sold her one-half interest in the 140.15 acres. Judge Harding had read this deposition, and had spent more than 40 hours in pre-trial where many of these matters were brought to the attention of the Court although they were not reported and made a part of the transcript. At the pre-trial where the Defendant's Motion for Summary Judgment was granted, both of the Plaintiffs

were present. When the question arose as to what if any consideration the Bagnalls had given Jean Nyberg Shirk for the Quitclaim Deed to some 25 parcels of property, Judge Harding remarked, "Well, they're here, let's ask them." And so the Bagnalls were asked at that time what, if any, consideration they had paid Mrs. Jean Nyberg Shirk for the property. Mr. Bagnall replied, after some hesitation, that he had forgiven Jean of her obligations under the contract. It was recognized that she had no obligations under the contract, so in fact, she received no consideration at all for the Quitclaim Deed.

It is here suggested that Judge Harding, at the pre-trial, recognized a fact of human nature, although it was not so expressed: The Bagnalls, realizing that Jean Nyberg Shirk had good title to one-half of the 140.15 acres of ground which was worth several thousands of dollars, would not have requested her to deed the property to them for what in effect amounted to nothing as consideration, had they not known that she had previously deeded out her interest in the property and really had nothing of value to convey to them. Further, Mrs. Shirk would not have deeded the property to the Bagnalls without receiving a substantial sum of money, except for the fact that she had sold her interest in the 140.15 acres to Utah Valley Land and Development Corporation, had given a Warranty Deed to the property, and therefore felt she had no further interest in the property.

Furthermore, the Bagnalls were educated, professional people, familiar with real estate transactions. Particularly Mrs. Bagnall, who testified on cross examination at the trial that she had worked for ten years in California as a licensed real estate agent. (Book 2, page 156, lines 20-22). She further testified that she wrote contracts, established escrows, showed properties, and had knowledge

of the necessity of conveying good title and evidence of ownership.
(Book 2, page 157, lines 3-19).

On May 8, 1974, after the plaintiffs' case had been tried and Judge Harding had heard all of the evidence, the plaintiffs filed a motion to vacate the Summary Judgment awarded in favor of the defendant, United Paint & Color Company.

Said Motion came on regularly for hearing before Judge Harding on June 25, 1974 at Provo, Utah. The question of notice, possession and other matters were duly argued before the Court by plaintiffs' attorneys, Jackson B. Howard and Ronald Brent Boutwell. Judge Harding being very familiar with all of the evidence introduced at the trial, all of the motions and other pleadings filed before and after the trial, and all of the pre-trials that had been held, carefully reviewed the Summary Judgment granted defendant, United Paint and Color Company, and then denied plaintiffs' Motion and ordered the Summary Judgment to stand.

CONCLUSION

It is respectfully submitted that the Court erred in remanding the case between the Plaintiffs and United Paint & Colors Company for a new trial.

From the cases cited, and the facts of this case, there should be no question but what the Warranty Deed from Jean Nyberg Shirk to Utah Valley Land and Development Corporation was a valid conveyance for a valuable consideration, and that the legal and equitable interest to one-half of the 140.15 acres was held by the Defendant-Respondent, United Paint & Colors Company.

Further, the evidence before the Court, the Plaintiffs' own brief, testimony, and other facts before the Court, clearly show that the Plaintiffs had knowledge of the Defendant-Respondent, United Paint & Color Company's interest in said property.

Based on the foregoing, Defendant-Respondent, respectfully requests a rehearing before the Court, and upon said rehearing, the Trial Court's Order granting Summary Judgment be affirmed.

Respectfully requested,



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