1948

Pherrel Draper v. J. B. & R. E. Walker, Inc : Brief of Respondent

Utah Supreme Court

D. M. Draper; Attorney for Plaintiff and Respondent;

Case No. 7214

In the Supreme Court of the State of Utah

PHERRELL DRAPER,

Plaintiff and Respondent,

vs.

J. B. & R. E. WALKER, INC., A corporation,

Defendant and Appellant.

BRIEF OF RESPONDENT

D. M. DRAPER,
Attorney for Plaintiff and Respondent

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BRIEF OF RESPONDENT

Pherrell Draper, respondent here was plaintiff below and J. B. & R. E. Walker, Inc., a corporation, appellant here was defendant below. In stating the facts, the parties will be referred to as plaintiff and defendant, respectively.

STATEMENT OF FACTS

At all times mentioned in his complaint, plaintiff was the owner in fee and in possession of the land described in his complaint, and Old Mill Tavern, Inc., a Utah corporation owned or claimed to own land adjoining plaintiff's, and by virtue of certain invalid tax deeds,

it claimed to own plaintiff's land. To test the validity of these tax deeds, it filed an action against plaintiff praying that title to said land be quieted in it. Plaintiff joined issue and trial was had thereon. A decree was entered declaring the tax deeds to be invalid and title to the property was quieted in plaintiff.

But while said action was pending, Old Mill Tavern made, executed and delivered to defendant, herein, a mortgage encumbering plaintiff's said land. (See paragraphs 5 of both the complaint and answer herein.)

Plaintiff knew nothing of this mortgage until long after it was put of record when his financial necessities impelled him to offer the land as security for a loan. Extension of his abstract in 1947 to satisfy his prospective lender that his title was good, disclosed this mortgage to him for the first time. (Tr. pp. 7, 18, 35 and 36)

Upon discovery of said mortgage plaintiff prepared a release thereof to be signed by defendant which he delivered to defendant with a demand that it execute the same. Both the release and the demand were turned over to Mr. Burton, defendant's counsel, and plaintiff was directed to deal with him concerning the matter. (Tr. p. 16)

Accordingly, he saw Mr. Burton and told him of his demands for a release, whereupon Mr. Burton told him if he would sign an agreement and have a surveyor survey the property line within 60 days he would get

a release. Plaintiff responded that the mortgage had no right on the property and that he did not feel disposed to incur any obligation to get a release. (Tr. p. 20)

No claim was ever made that the mortgage had any validity. The answer admits ownership and possession of the mortgaged land in plaintiff and disclaims any interest therein. At the trial defendant, through its attorney, made this statement:

> "In any event we make no claim for the validity of the mortgage on the property he described here." (T. p. 37)

The nature of the obligation sought to be imposed upon plaintiff for the execution of a release is fully disclosed by statements made to plaintiff at the trial, in the form of questions by Mr. Burton, and by his sworn testimony when he took the stand on behalf of defendant, and by defendant's Ex. 2, as follows:

Q. When you first came to my office, Mr. Draper, we had a map of the Cottonwood area where your property and the Old Mill Property meets, did we not?

A. We had a map.

Q. We had a discussion as to this adjoining line between yours and the property of the Old Mill, didn't we.

A. We had a discussion on that, but I don't recall the map. (T. p. 26)

Q. In fact you said you knew you were encroach-

ing over on the Old Mill property the way you were using your property at that time?

A. No, I never made that statement. (T. p. 27)

Q. Well, when you first came in, you were advised we wanted to have a dividing line by the fence corrected to meet what any survey showed?

A. I never made the statement I would correct the line. (T. p. 28)

Q. I told you the only thing Mr. Walker wanted was to have the connecting line, the property line between the two of you adjusted.

A. Yes, you told me that. (T. p. 29)

Q. And that if your fence was too far on your side that it could be moved over; if it was over on the Old Mill side, that it be moved to correspond to the line, that is all we were asking.

A. You asked me that, and I refused. (T. p. 32)

Mr. Burton's direct testimony:

> "I was directed to deliver the release upon the securing of an agreement to correct the fence lines to a survey which was to be had. In a discussion in the office with the plaintiff, I explained that there was some question as to the fence lines between the two, it appearing to the defendant that there was an encroachment upon their lands, on the lands of the Old Mill Corporation, and they felt that the lines should be adjusted." (T. p. 54)

Ex. 2 is a proposed agreement between plaintiff and defendant, prepared by defendant, in which defendant asserts ownership of land adjoining plaintiff's, on the disputed line.

Failing to get a release without incurring an obligation, therefor, plaintiff brought this suit.

THE ISSUES

Appellant cites 15 errors committed by the Court below raising the following questions:

1. Does plaintiff's complaint state a cause of action?
2. Did the court exceed its powers or discretion in allowing the prayer of the complaint to be amended?
3. Was plaintiff entitled to an order requiring defendant to release the mortgage?
4. Is plaintiff entitled to damages and costs?

ARGUMENT

1. Defendant demurred generally and specially to plaintiff's complaint and also moved to strike all of paragraph 9 thereof. The demurrer was overruled and the motion to strike denied. This is assigned as error, but all that is argued as error in defendant's brief is that under Section 78-3-8 of our statutes, plaintiff may not avail himself of both remedies therein provided. It is then categorically stated that plaintiff "may sue for double damages or he may sue to have the mortgage released and all damages from such failure, or he could sue in equity to quiet title against the land."

That the "complaint was fatally defective and did not state a cause of action to permit the recovery of any relief other than that of quieting title, because there is

nowhere contained in the complaint any allegation that the mortgage has been satisfied."

That the "defendant was unable to determine from plaintiff's complaint which of the two causes of action provided by 78-3-8 the plaintiff was pursuing or whether an action only to quiet title." Appellant's Brief ———

No authority, except Section 78-3-8 is cited to support the foregoing statements.

Our Code of Civil Procedure provides that a complaint must contain provisions as follows:

> "A statement of the facts constituting the cause of action in ordinary and concise language.
>
> A demand for relief which the plaintiff claims.
>
> If the recovery of money or damage is demanded, the amount must be stated." 104-7-2 U.C.A. 1943

Section 104-30-5 provides that any relief consistent with the case made by the complaint and embraced within the issues may be granted.

Plaintiff's complaint in substance alleges that he was and is the owner in fee and in possession of certain land and had been for a long time.

That Old Mill Tavern placed of record certain invalid tax deeds affecting plaintiff's land and then brought suit to quiet title to said land; that defendant joined issue in said suit, and while that action was pending the Old Mill Tavern gave and defendant accepted a mort-

gage on the land involved in the action, knowing or charged with knowledge, that Old Mill had no title to the land, and that they willfully and wrongfully clouded plaintiff's title by recording said mortgage; that the court in said action decreed the tax deeds to be invalid; that plaintiff knew nothing of said mortgage until after the conclusion of said action when he sought a loan on the land and had his abstract continued for that purpose; that he demanded of defendant that it release or cancel said mortgage of record, which defendant refused to do; that plaintiff suffered certain specified damage because of said refusal, in the total sum of $547.00.

Plaintiff's prayer is as follows:

> "Wherefore, plaintiff prays judgment against defendant adjudging and decreeing that the mortgage aforesaid is null and void and of no effect *and for an order requiring defendant to release said mortgage of record* insofar as it affects the title to the property aforesaid, and for judgment awarding plaintiff his costs herein expended and for damages in the sum of $547.00." (Italics supplied).

Paragraph 9 of the complaint sets the damage forth in detail. Defendant moved to strike this paragraph and demurred generally to the whole complaint and specially to allegations concerning a warranty to Henry L. Butler, and to allegations concerning the placing of $150.00 securing with a loan company against the cloud of said mortgage.

The italicized words of the prayer were not in the

prayer at the time the demurrer and motion to strike was ruled on, but were allowed as an amendment at the beginning of the trial.

It is submitted now that neither the demurrer or the motion to strike have any merit; nor has the objection made to the amendment any merit.

Defendant elected not to stand on its demurrer and motion, or to appeal therefrom. Instead it answered and made its case at the trial. Whatever error, if any, was made in ruling on the pleadings were cured by defendant's answer and by the facts presented by it at the trial.

The answer admitted the ownership and possession of plaintiff, and it admitted the invalidity of the mortgage and the invalidity of the tax deeds upon which it was predicated. It also admitted the making and taking and recording of the mortgage by Old Mill Tavern and defendant while an action was pending to test the validity of the tax deed. (See paragraphs 1 to 6 of the complaint and answer.)

At the trial, J. B. Walker was shown to be an officer of defendant company (Tr. p. 8); and the testimony quoted above in the Statement of Fact discloses that he acted for the Old Mill Tavern as one who had full authority to do so. That testimony and the admissions in the answer disclose that at the time plaintiff made his demand for release of the mortgage both Old Mill Tavern and defendant knew that mortgage, made and recorded by them while an action was pending to determine

ownership of the land, was absolutely null and void. It is further disclosed by compelling and legitimate inference therefrom, that the interests of Old Mill and defendant with respect to said mortgage are the same.

Not only was the mortgage made and recorded under the circumstances above set forth, but when a release was demanded, plaintiff was shown a map where the property of plaintiff and *Old Mill* meet, and plaintiff was charged with saying that he knew that he was "encroaching over on the *Old Mill Property.* Plaintiff was advised that *'we'* want 'a dividing line by the fence corrected to meet what any survey showed," plaintiff to bear the cost of the survey. Who "we" are is disclosed in the following statements quoted and cited above:

"I told you (plaintiff) the only thing *Mr. Walker* wanted was to have the connecting line, between *you two* adjusted, that if the fence was too far on your side, that it could be moved over; if it was on the *Old Mill* side, that it be moved to correspond to the line, that is all *we* were asking. I was directed to deliver the release upon the securing of an agreement to correct the fence lines to a survey which was to be had. I explained that there was some question as to the fence lines between *the two,* it appearing to *the defendant* that there was an encroachment upon *their* lands; on *the lands of the Old Mill Corporation,* and *they* felt that the lines should be adjusted." (Italics supplied.)

In addition, defendant asserts ownership of the land adjoining plaintiff in its Exhibit 2.

It seems to us that it would impugn the intelligence of the court to spell out the meaning of the foregoing language. It shows without attempted construction that the interests of Old Mill and defendant with respect to said mortgage are the same and that Mr. Walker spoke for both of them.

Defendant complains that the cause of action was changed by the amendment to the prayer of the complaint and deprived defendant of substantial rights.

A casual examination of the complaint will disclose the absurdity of this contention. The complaint alleges ownership and possession of the land at the time the tax deeds and mortgage were recorded and became clouds upon plaintiff's title. It further alleges that while the Old Mill Tavern and plaintiff were engaged in a suit in which plaintiff was challenging the validity of the tax deeds, that the Old Mill and defendant willfully and knowingly further clouded plaintiff's title by recording the aforesaid mortgage.

The prayer of the complaint to which defendant demurred was merely that the court decree the mortgage to be null and void. If as matter of fact it was null and void the plaintiff was entitled to such a decree and if it was collusive and fraudulent, as a matter of right and equity, plaintiff was entitled to have it expunged from the record by a release or cancellation thereof.

Since said mortgage is on record in the name of the defendant, it is the proper party to expunge the same from the record and as a matter of equity it should pay

damage for refusal to do so.

It is elementary doctrine that the prayer is not a part of the complaint, and the defendant was required to do nothing after the amendment to meet the allegations of the complaint than it could or did do after the amendment.

But defendant cites section 78-3-8 U.C.A. 1943 and argues that plaintiff is estopped thereby to recover damages from defendant for refusal to expunge its void mortgage from the records, on the theory that the common law did not allow damages for refusal to release a mortgage, and that said statute gives the right of damages to a mortgagor only.

As authority for such doctrine defendant cites and quotes from Hasquet v. Big West, 29 Fed. 2nd 58, and Morrill v. Title 162, p. 360. The quote from the Morrill case cannot be found in the text of the opinion found at 162, p. 360. We assume, however, that the quote is from some other good authority. Whatever case it comes from it is authority for the doctrine that damages for refusal to satisfy a mortgage may be had in an equity action, and plaintiff's case is primarily an equity action and was so tried without a jury.

Quoting from the real Morrill case, supra, it is made to appear that damages were allowed in such cases even at common law:

> "The effect of the statute is to substitute remedies. It postpones a right of action in the interest of peace. It provides a certain recovery

in all cases in lieu of the uncertainty of the common law action.''—162 P. 362.

It is our contention that under the facts and pleadings we are entitled to recover damages as a matter of equity, but even if the statute applies it does not deny, but merely defines and limits damages.

But, says respondent, if the statutes applies, plaintiff does not come within its provisions: first, because there is no proof that the mortgage was ever paid or satisfied, and second because only a mortgagor may avail himself of the statute where only the mortgagor is named as beneficiary thereof because such statutes must be strictly construed and limited to operate only in favor of those included in the statutory designation. Citing and quoting from Hope v. United Savings, 60 P. 2nd, 737, and Graham v. Sindergaard, 238 Mich. 210, 213 N.W. 200, in support of these propositions. — Defendant's brief, page .....

The first proposition is absurd because at the time demand was made to expunge the record by a release there was no mortgage obligation in existence. There was nothing to satisfy; nothing to do but expunge from the record a dead document with the appearance of life.

As to the second proposition, it has already been shown that the mortgagor and the mortgagee were one and the same in interest so far as keeping the void mortgage on record is concerned, and under no equitable doctrine could it be said that they had a right to exact from plaintiff a consideration for expunging the records.

Besides in not all cases has a strict construction of such statutes been slavishly adhered to. At the trial we cited, and now cite, the case of Van Doren v. Wolf (Kans.), 211 P. 144, based on a statute giving, in terms, only the mortgagor the right to damages upon refusal to satisfy a mortgage, but based upon circumstances set forth in the case they refused to follow the literal language of the statute and gave a non-mortgagor relief under the statute.

In the instant case, defendants own authorities show that equity may relieve such a situation, and if the statute applies at all, it applies only to limit and measure plaintiff's damage.

We, therefore, conclude that the lower court committed no error and the judgment and decree should be affirmed.

Respectfully submitted,

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Attorney for Plaintiff and Respondent