1948

S. W. Dowse v. Doris Trust Company : Brief of Respondent

Utah Supreme Court

La Mar Duncan; Attorney for Plaintiff and Respondent;

7220

In the Supreme Court

of the

State of Utah

S. W. DOWSE,
Plaintiff and Respondent.
— vs. —
DORIS TRUST COMPANY,
a corporation,
Defendant and Appellant.

Case No. 7220

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This is an appeal from a judgment on a verdict assessed against defendant and in favor of plaintiff and respondent herein for the sum of $250.00 compensatory damages and $500.00 exemplary damages making a total of $750.00

The plaintiff and respondent herein filed suit against defendant and appellant herein for libel and slander of his real property and plaintiff alleges in his complaint that defendant falsely and maliciously and with intent to encumber and cloud plaintiff's title and to vex and harass plaintiff in the quiet enjoyment thereof, caused to be recorded in the office of the County Recorder of Salt Lake County, State of Utah, a certain instrument as follows:

"DORIS TRUST COMPANY
1430 South Main Street,
Salt Lake City, Utah, Aug. 9, 1945.

NOTICE

To whom it may concern: That certain property described as: All of Lots one to eleven in Fox's Subdivision, an addition to Salt Lake City, Utah, was purchased for Doris Trust Company by S. W. Dowse as their agent. That One Thousand Dollars has been paid toward the purchase price and that the balance, plus a reasonable commission, will be paid on demand on delivery of deed.

(Signed) Addison Cain,
President, Doris Trust Co.

State of Utah }
County of Salt Lake } SS.

Addison Cain, being first duly sworn, did say that he is President of Doris Trust Company, has full knowledge of the within statement and that the same is true of his own knowledge.

(Signed) L. B. Cardon, Notary Public.
(Seal) My commission expires May 26, 1948.
(Recorded at request of Addison Cain, Aug. 9, 1945, at 2:50 M., fee paid $.50,
Cornelia S. Lund, Recorder, Salt Lake County, Utah.
(Signed) Cornelia S. Lund. (R 2)"

Plaintiff further alleges that as a result of defendant and appellant's conduct in so recording said instrument a certain cloud was created upon plaintiff's title, depressing the value thereof and making it unmarketable; Plaintiff was also compelled to employ and pay counsel the sum of $250.00 to commence and prosecute an action to quiet the

title to his land in order to remove the apparent cloud upon his title and make said title to said land marketable. Plaintiff in his complaint therefore asks for $250.00 special damages and $5,000.00 exemplary damages. The trial Court directed a verdict in favor of plaintiff and respondent herein and against defendant and appellant in the sum of $250.00 for special damages, and submitted the amount of punitive damages to the jury. The jury returned a verdict in the sum of $250.00 special damages and $500.00 exemplary damages. From this judgment defendant has appealed.

ARGUMENT

AS TO POINT 1 OF DEFENDANT'S BRIEF THAT COURT ERRED IN OVERRULING DEFENDANT'S GENERAL DEMURRER

We agree with counsel's general statement of the law relative to an action for slander of title. We further agree with the citations given, but submit that the four elements of an action for slander of title all appear in plaintiff's complaint. Paragraphs 3, 4, 5 and 6 of said complaint contain all of the essential elements and we refer this Court to plaintiff's complaint without further comment.

Now as to special damages:

We again refer this Court to paragraph 5 of plaintiff's complaint and submit that the complaint sets out completely the manner in which plaintiff suffered special damages and sets out the amount plaintiff was required to pay out as a result of defendant's act of slander to his title, to-wit: the sum of $250.00 to engage and pay counsel to commence

and prosecute this action to quiet title in order to remove the apparent cloud upon his title and to make said title to said land marketable.

See *Am. Law Inst, Restatement of the Law Torts, Vol.* 3, *Sec.* 633, *page* 347:

> "The pecuniary loss for which a publisher of disparaging matter is liable under the rules stated in Sec. 624 is restricted to (a) the pecuniary loss which directly and immediately results from the impairment of the vendibility of the thing in question caused by publication of the disparaging matter, and (b) the expense of litigation reasonably necessary to remove the doubt cast by the disparagement upon the other's property in the thing or upon the quality thereof."

Page 353:

> "The rule stated is primarily applicable to the disparagement of property in land since in the majority of decisions the person whose land is disparaged by matter of record may bring a bill in equity to remove the cloud cast upon his title by the disparaging publication. The rule, however, is applicable where by statute or otherwise similar relief may be obtained by an action at law or proceedings in equity to remove the cloud cast by the publication of disparaging matter upon the title to chattels, or intangible things or upon the quality of land or other things. It is, however, confined to the expense of litigation. It does not include the expense of an advertising campaign to convince the public that the statements are untrue."

The act of defendant and appellant in causing the instrument to be recorded in the office of the County Recorder of Salt Lake County, was in and of itself sufficient

to amount to a publication. The fact that the notice did or did not comply with the statute is certainly beside the point inasmuch as the instrument was recorded, and the general notice to the public given.

See *Cawrse vs. Signal Oil Co., Ore.* 103 P. 2nd 729; 129 A. L. R. 174.

53 C. J. S., p. 395, Sec. 275—

"The publication may be orally or by writing, printing or otherwise."

Coley v. Huber, 272 P. 1045, 206 Cal. 22.
Meyrose vs. Adams, 12 Mo. app 329, 332.
Cordon vs. McConnell, 120 N. C. 461, 27 S. E. 109.

Plaintiff's complaint alleges that as a result of defendant's act the land was not marketable and plaintiff was unable to make a sale of a good and marketable title. Certainly this statement of the ultimate facts is sufficient, without plaintiff being required to plead his evidence as counsel urges in his brief.

(B) *Falsity of the Words*

In paragraph 3 of plaintiff's complaint plaintiff alleges "That on or about the 9th day of August, 1945, the defendand *falsely* and maliciously and with intent, etc."

Again in paragraph 4 of said complaint plaintiff alleged "That the claim set forth in said instrument which was duly recorded as hereinabove set forth was *false* * * * etc."

Plaintiff's complaint alleges that the entire claim of defendant which was recorded for the general public to read and take notice thereof, was false and maliciously made

and the complaint we submit cannot be read with any other meaning.

(C) *Malice*

We again submit that the third paragraph of plaintiff's complaint sets forth the words "maliciously."

> 43 *N. J. L.* 16: Holding that if there is an averment that the statements are false and malicious, an averment that they are false to the knowledge of the defendant or an averment of want of probable cause is unnecessary even in the case of privileged communications."
>
> *Cawrse vs. Signal Oil Co., Ore.* 103 *p.* (2) 729-129 *A. L. R.* 174; *Eznairlean et al vs. Otto,* 34 P. 2*nd* 774: "Respondent urges support of judgment for nonsuit on the ground that 'The alleged first cause of action of appellant's complaint does not state a cause of action,' because the complaint fails to recite that the recorded assignment conveyed any interest in the lots to defendant. There is no merit in this point. The very gravamen of plaintiff's complaint is that the assignment gave defendant an interest in the property and therefore his recording of the document was wrongful and prompted alone by a desire to vex and annoy plaintiff and thus force him to pay a sum of money to which he was not legally entitled.'

POINT 2

AS TO THE COURT OVERRULING DEFENDANT'S SPECIAL DEMURRER.

Again we submit that the reading of the entire paragraphs 5 and 4 is clear and the use of the word "Claim" as set forth in paragraph 4 thereof can have no other meaning than that the words set out in the notice which defendant

caused to be recorded were false and malicious and that defendant acted without any right whatever.

Again we have no quarrel with counsel's general statement of the law that malice is an essential element of an action for slander of title.

As to points 3 and 4 they have already been discussed under point 1.

EVIDENCE

(a) *As to words published.*

Certainly recording of an instrument amounted to a publication.

> 45 *Am. Jur.* 464, Sec. 81: "The main purpose of recording instruments is to give constructive notice to subsequent purchasers and encumbrancers."

(b) *Falsity of the words published*

The truth or falsity of the words is a question to be determined by the jury.

Mr. Dowse testified on redirect Trans 78 as follows:

By Mr. Backman:

> Q. Mr. Dowse, referring to the statement contained in the notice which counsel referred to on cross examination, will you state whether or not the statement therein contained to this effect: "that said property described, all of Lots 1 to 11, Fox's sub-division, an addition to Salt Lake City, Utah, was purchased for the Doris Trust Company by S. W. Dowse as their agent," will you state whether that statement is true or untrue?
>
> A. It is untrue.

The testimony of Mr. Cain is different and as follows:

Q. Do you recall the transaction with respect to the purchase of Lots 1 to 11, Fox's sub-division?

A. Yes.

Q. Will you state what conversation you had with Mr. Dowse in respect to the purchase of those lots?

A. Well, Mr. Dowse called me up and told me that he could acquire title to that ground, that which adjoined some other ground which I owned on 13th South, west of the ground which I owned, and I told him I would like to have it.

He told me he could get the fee title from Bambergers and taxes for a comparative small amount.

I said, "Go ahead. I would furnish the money." He said he didn't have the money to take up the land or he would take it himself.

Q. And the check that has been offered here in evidence, the $1,000.00 check marked Exhibit "2," that is the check that you gave to Mr. Dowse at the time of your conversation, wasn't it?

A. Well, I can't remember now those dates, but that was either given to him shortly after he got the deed from Bambergers or before, to pay them; I can't remember exactly but that $1,000.00 was paid on that deal.

On the other hand, the deed to Dowse was dated July 17, 1945 (plaintiff's Exhibit "A"), and the check from Cain was dated July 31, 1945, evidence tending to repudiate the testimony of Mr. Cain.

Apparently the jury believed the plaintiff and respondent as against the testimony of defendant appellant

and the falsity of defendant's statement was thereby established.

> 37 C. J., p. 135, Sec. 619.
>
> 53 C. J. S., p. 403: "If there is any evidence of malice, the question of malice should be submitted to the jury. So ordinarily it is a question of fact for the jury to determine whether or not the statement complained of was false, and whether special damage resulted therefrom.
>
> *Linville vs. Rhodes*, 73 Mo. app. 217.

(c) *Malice*

Malice, or the want of it, like falsity is a question of fact for the jury.

> 33 Am. Jur. 319, Sec. 359: "The principles governing the trial of civil actions generally are applicable here, in the absence of any statuary provision to the contrary. Thus when there is sufficient evidence or where there may be a fair difference of opinion, on the issue of malice, the question whether the defendant in an action for slander of title was actuated by malice is one of fact for the jury."

Here again there is a conflict in the testimony relative to the transaction and the agreement which the parties had. Mr. Cain testified that the Mr. Dowse, the plaintiff and respondent herein, told him the land in question could be obtained for a small amount. That he gave a check to Mr. Dowse to buy the land. (Trans. 47).

On cross examination he testified that he placed the notice on record in order to prevent the sale of the land and to protect his $1,000.00. (Trans. 52). Mr .Cain

further testified that the receipt and writing for the purchase of the land was stolen from his automobile. (Trans. 54).

Again Mr. Dowse denied ever having given Mr. Cain a receipt and denied that he had told Mr. Cain that the land could be obtained for a comparatively small amount of money. (Trans. 103).

We further submit that the malice may be implied from the conduct of the parties.

> *Cawrse vs. Signal Oil Co., Ore.* 103, P. 2nd 729: "It was not incumbent upon the plaintiff to establish malice by direct evidence. It is sufficient if a reasonable inference of malice can be drawn from the evidence. Of course, if the defendant, at the time of making such statement knew it had no lease or had no probable cause for believing it had one, it acted maliciously."

(d) *Special Damages*

The testimony of plaintiff and respondent (Trans. 15) was that the expense of clearing the title of the cloud created by defendant came to $250.00.

POINT 5.

AS TO THE COURT'S RULING IN ADMITTING PLAINTIFF'S EXHIBIT "C."

The exhibits which consist of a check tendered by plaintiff and respondent to defendant and appellant for the sum of $1,000.00 and a letter by defendant refusing to accept the money. (Trans. 35). The check was properly received to show there was no justification for defendant's

filing the notice to protect as he testified, his $1,000.00. (Trans. 81).

POINT 6

As to the Court's refusing defendant's motion for a directed verdict: to further discuss this motion would be repetitious. (Trans. 107).

POINT 7

As to the Court's granting plaintiff's motion for a directed verdict: the question of malice and falsity have all been heretofore discussed and the question of special damages has been further discussed above. (Trans. 108).

POINT 8

As to the Court submitting the question of damages to the jury: this point, too, has been discussed hereinabove.

> 33 *Am. Jur.* 316: "Exemplary damages may be recovered in an action for slander of title where they are justified by the evidence."
>
> 53 *C. J. S.* 403, *Sec.* 279: "The primary object of an award of damages in an action for slander of title is just compensation for the injury sustained by the plaintiff as the proximate result of the defendant's act, although it has been held that exemplary damages may be awarded in addition to actual damages."

POINTS 9 AND 10

These points also have been discussed at length and nothing further could be added.

CONCLUSION

In conclusion we submit that the trial Court properly directed a verdict as to the compensatory damages and that the evidence as to malice, falsity, publication and the question of exemplary damages were properly submitted to the jury; that the Court did not err in refusing defendant's motion for a directed verdict and in granting plaintiff's motion as to the special or compensatory damages and therefore the judgment based upon the verdict should be affirmed.

Respectfully submitted,

LA MAR DUNCAN,
Attorney for Plaintiff and Respondent.