1978

Harold S. Sanders and Eleanor Sander v. Donn E. Cassity, Trustee, et al. : Appellant's Reply Brief Donn E. Cassity, Trustee

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

HAROLD S. SANDERS and ELEANOR SANDERS,

Plaintiffs-Respondents,

vs.

DONN E. CASSITY, Trustee, et al.,

Defendants - Appellant.

Case No.

APPELLANT'S REPLY

DONN E. CASSITY,

APPEAL FROM JUDGMENT

OF THE

DISTRICT COURT OF THE

DISTRICT OF

STATE OF

Honorable James S.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

HAROLD S. SANDERS and ELEANOR SANDERS, Plaintiffs-Respondents, vs. DONN E. CASSITY, Trustee, et al., Defendants - Appellant.	)	Case No. 15515

APPELLANT'S REPLY BRIEF

DONN E. CASSITY, TRUSTEE

APPEAL FROM JUDGMENT

OF THE

DISTRICT COURT OF THE THIRD JUDICIAL

DISTRICT OF SUMMIT COUNTY

STATE OF UTAH

Honorable James S. Sawaya, Judge

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I,

UCA 28-1-10 (1953) DOES NOT PERMIT A LAND OWNER TO CLAIM A HOMESTEAD EXEMPTION IN LAND TO DEFEAT A FORCED SALE AT ANY TIME BEFORE IT OCCURS. IT MERELY ALLOWS THE LAND OWNER TO DEFEAT A FORCED SALE BY RECORDING OR SERVING A HOMESTEAD DECLARATION WHICH WAS MADE PRIOR TO THE TIME THAT A JUDGMENT LIEN, OR OTHER LIEN, ATTACHED.

Respondents assert in Point I of the Argument in their brief that "A [Homestead] declaration can be made before the 'time of sale'", Page 11, implying therewith that the declaration can be made at any time before a forced sale for the purpose of defeating it. This assertion is founded upon UCA 28-1-10 (1953) which respondents claim was ignored by appellant in his brief.

In order to properly deal with this incorrect construction of UCA 28-1-10 (1953), the premise must be established that a judgment lien is not in any way affected by a subsequent homestead declaration. Respondent's brief puts this premise in question by discrediting the applicability of McMurdie vs. Chugg, 107 P. 2d 163 (Utah 1940). Appellant admits that McMurdie is not directly on point. However, the case provides language, supported by an earlier case, Evans vs. Jensen, 168 P 762 (Utah 1917), which unequivocally supports appellant's position.

In Evans, the court held that a mechanic's lien which attached when the land owner was single, and therefore unable to claim a homestead exemption, could not be defeated later when the land owner married, and then attempted to claim the exemption. In reaching this decision, the court emphasized two particular points. First, at the time the lien attached, the land owner could not have claimed a homestead because he was not a "head of family". Second, the mechanic's lien was prior in time to the homestead exemption.

Beginning with the 1947 amendments to the homestead statutes, a homestead exemption arises only upon the proper execution of a homestead declaration. UCA 28-1-10 (1953). Prior to the 1947 amendment, such a declaration was not necessary. Consequently, one could only be shown to have no homestead exemption by a showing that the claimant was not a "head of family." The Evans court emphasized the fact that the land-owner was not a head of family at the time the lien attached for the purpose of demonstrating that no homestead exemption was in existence. Had the court decided this case under the present statute, UCA 28-1-10 (1953), it would have looked to the existence, or failure thereof, of a homestead declaration.

A court is thus assured of a party's homestead status by determining that a homestead declaration exists. Therefore,

the fact that defendant Leoda Dunham may or may not have been a "head of family" at the time appellant's judgment lien attached to her land is not ultimately important. The most important fact is whether she had made a declaration of homestead.

As to the second point, the Evans court based its decision on the fact that the mechanic's lien had attached prior to the time that the homestead claim arose, and, in language clearly applicable to all liens, stated its position as follows:

> "This court, so far as we are aware, has never authorized the character of property to be changed after a lien has once attached. Indeed, this court is committed to the contrary doctrine . . ." Page 765.

The Evans case undeniably justified the court's language in McMurdie that:

> "Existing liens on property cannot be defeated by subsequently claiming said property as a homestead." Page 166.

The docketing of a judgment undeniably creates a lien upon all realty belonging to a judgment debtor in the county where the judgment is docketed. UCA 78-22-1 (1953). This lien is statutory in nature and deserves the same force and effect as that given a mechanic's lien. Consequently, a judgment lien, attaching to realty prior to the time that a homestead is declared thereon, does not lose any of its force and effect as against the subsequent homestead claim.

This principle is reflected in UCA 78-23-3 (1953). This statute clearly manifests the legislative intent that a pre-existing lien is not defeated by a homestead claim. (See appellant's brief.)

An understanding of this principle is necessary in order to properly construe UCA 28-1-10. This statute provides as follows:

> "The homestead must be selected and claimed by the homestead claimant by making, signing and acknowledging a declaration of homestead as provided in Section 28-1-11, Utah Code Annotated 1953, which declaration must, before the time stated in the notice of sale on execution, or on other judicial sale, as the time of sale, of premises in which the homestead is claimed, be delivered to and served upon the sheriff or other officer conducting the sale or recorded as provided in Section 28-1-12, Utah Code Annotated 1953. If no such claim is filed or served as herein provided, title shall pass to the purchaser at such sale free and clear of all homestead rights."

Respondents contend that this statute authorizes one to make a homestead declaration sufficient to defeat a forced sale brought about by foreclosure of a judgment lien at any time before the sale takes place. This is not its intent. The statute merely explains how a declaration is to be made, what must be done with the declaration to protect the claimant, and the consequence of failing to serve or record the declaration

In order for a declaration to protect a homestead claimant from a lien, the declaration must be signed and acknowledged before the lien attaches to the property. In the case of a judgment lien, this is before the judgment is docketed. In the event the lien is foreclosed, the homestead declarant must record the declaration or serve it upon the proper person before the sale takes place. Failure to serve or record the declaration amounts to a waiver of the exemption claim. In other words, UCA 28-1-10 (1953) does not expand the force and effect of a homestead. It merely directs how a homestead is to be obtained and how a proper homestead declaration is to be used to defeat a forced sale in foreclosure of a judgment lien which is subsequent in time to the homestead declaration. Thus, the protection granted a judgment creditor in the form of a judgment lien is not destroyed by a subsequent homestead declaration which is used to shield the declarant from responsibility for his wrongful acts.

II.

THIS COURT HAS NEVER HELD THAT ONE NEED NOT SPECIFICALLY REFER TO A HOMESTEAD EXEMPTION IN A CONVEYANCE THEREOF.

Respondents claim that the case of Stucki vs. Ellis, 201 P. 2d 486 (Utah 1949) "held" that a conveyance of a homestead interest need not be specifically referred to when the respective property is conveyed. Respondents Brief, Page 16. This claim is apparently made in reply to appellant's proposition that this court should hold as a matter of law that the reservation of any interest in homestead property which is capable of supporting a homestead is also a reservation of the homestead unless the deed of conveyance specifically provides that the homestead is to be conveyed. Appellant's brief Page 16.

Stucki did not hold as respondents contend. It involved the conveyance of homestead property in its entirety. Nothing was reserved to the grantor as is the case at bar. Further, nothing was said relative to the question of what language must be used in a conveyance in order that a homestead may be transferred. Stucki has no application to the facts of the present matter.

CONCLUSION

A qualified landowner is not entitled to claim a homestead exemption at any time for the purpose of defeating a forced sale in foreclosure of a judgment

lien. A homestead declaration can defeat the foreclosure sale of a judgment lien only if the declaration was made, signed, and acknowledged prior to the time that the judgment lien attached to the property. Apppellant's judgment became a lien upon defendant Dunham's property before she made a homestead declaration. The fact that defendant Dunham recorded the declaration prior to the time she conveyed her interests to respondents, reserving a life estate, and prior to the foreclosure sale has no affect upon the validity of the judgment lien or the foreclosure proceedings begun pursuant thereto. Consequently, the sheriff's sale of the subject property was proper and respondents' interest in the subject property passed to appellant, who was the purchaser at the sale.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

I hereby certify that on this 26 day of June, 1978, I mailed a true and correct copy of the foregoing Appellant's Reply Brief, to Bill Thomas Peters, of Tibbals and Staten, 400 Chancellor Building, 220 South 2nd East, Salt Lake City, Utah, 84111.

James B. Tadje