2001

Murray First Thrift and Loan Co. v. Dwayne Stevenson and Carolyn Stevenson : Brief of Respondent

Utah Supreme Court

Stringham, Follett and Larsen; Steven Flint Lowe; Attorney for Defendants-Appellants.
Van Cott, Bagley, Cornwall and McCarthy; Robert D. Merrill; Attorneys for Plaintiff-Respondent.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MURRAY FIRST THRIFT & LOAN CO.,
Plaintiff and Respondent,

vs.

DWAYNE STEVENSON and CAROLYN STEVENSON, his wife,
Defendants and Appellants.

Case No. 13820

BRIEF OF RESPONDENT

APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HONORABLE HAL G. TAYLOR, JUDGE.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Robert D. Merrill
141 East First South
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

STRINGHAM, FOLLETT & LARSEN
Steven Flint Lowe
808 East South Temple
Salt Lake City, Utah 84102
Attorney for Defendants-Appellants

TABLE OF CONTENTS

AUTHORITIES CITED

TABLE OF CONTENTS—Continued

Page

STATUTES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MURRAY FIRST THRIFT & LOAN CO.,
Plaintiff and Respondent,

vs.

DWAYNE STEVENSON and CAROLYN STEVENSON, his wife,
Defendants and Appellants.

Case No. 13820

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action commenced by Plaintiff-Respondent, Murray First Thrift & Loan Co. (hereinafter "Murray") against Defendant-Appellants Dwayne Stevenson and Carolyn Stevenson, (hereinafter jointly "Stevensons"), whereby Murray sought a judgment declaring that Murray held a valid security interest in certain real property pursuant to the terms of an Assignment of Contract dated September 25, 1973, and executed by Jerry W. Cooper and Candy Cooper (hereinafter jointly "Coopers"), in favor of

Murray. Stevensons denied that Murray held any interest in said real property and counterclaimed to have title quieted in themselves.

DISPOSITION IN LOWER COURT

Murray and Stevensons each filed Motions for Summary Judgment based upon the pleadings, affidavits and Memorandums of Points and Authorities on file with the lower court. The lower court entered its Findings of Facts and Conclusions of Law, and Judgment which recognized the validity of Murray's security interest and provided that Stevensons had a right to pay Murray $7,188.77 within 30 days or pay said sum over the repayment term of the promissory note executed by Coopers, and upon compliance with such terms, Murray would release said security interest. The Judgment further provided that if Stevensons failed to comply with said terms, the Motion of Murray for Summary Judgment would be granted. The lower court did not enter a Judgment against Stevensons for the sum of $7,188.77 as asserted by Stevensons in their Brief.

RELIEF SOUGHT ON APPEAL

Murray seeks affirmance of the Judgment entered by the lower court.

STATEMENT OF FACTS

The Statement of Facts contained in the Brief of Stevensons is essentially accurate, except for some un-

warranted conclusions and except for some assertions of facts which were not determined by the lower court. The material facts, as determined by the lower court are hereinafter set forth.

On or about September 24, 1973, Coopers duly executed and delivered to Murray a renewal promissory note, whereby they agreed and became obligated to pay Murray the principal sum of $7,188.77, together with interest thereon over a term as provided in said note. To secure the payment of this indebtedness, Coopers assigned to Murray, pursuant to the terms of that certain Assignment of Contract (hereinafter the "Assignment"), dated September 25, 1973, all of the right, title and interest of Coopers, as buyers, under the terms of a certain Uniform Real Estate Contract (hereinafter the "Contract"), dated August 29, 1967, entered into by and between Stevensons, as sellers, and Coopers, as buyers, covering certain real property owned by Stevensons, situated in Salt Lake County, Utah (hereinafter the "Subject Property"). The Assignment was duly recorded on September 28, 1973, in the office of the Salt Lake County Recorder.

The Coopers failed to pay any of the sums which had become due and owing under said note. On November 20, 1973, Jerry W. Cooper filed a petition in bankruptcy with the United States District Court for the District of Utah, and on that day he was duly adjudicated a bankrupt. Thereafter, at the first meeting of creditors on December 11, 1973, the Bankruptcy Court,

at the request of the parties herein, and pursuant to the application of Trustee, disclaimed any interest in and to the Subject Property.

Stevensons were unaware of the Assignment by Coopers to Murray until said first meeting of creditors. Murray, at that time, tendered to Stevensons full payment and performance of the obligations of the Coopers under the Contract. Stevensons refused said tender and denied that Murray had any right in the Subject Property by reason of said Assignment.

Stevensons refused said tender and denied the interest of Murray on the basis that Coopers had failed to comply with a sentence, in the body of the paragraph of the contract which set for the payment schedule, and which stated:

> The buyers agree that they cannot assign, sell or transfer their interest in this Contract without specific written permission of sellers. . . .

Stevensons thereafter entered into an agreement directly with the Coopers whereby the Coopers attempted to abandon their interest in the Subject Property.

ARGUMENT

POINT I

THE SUBJECT ASSIGNMENT WAS AN ASSIGNMENT FOR SECURITY AND THEREFORE NOT IN DEROGATION OF THE NON-ASSIGNABILITY CLAUSE.

The essential argument made by Stevensons in Points I and II of their Brief is that the non-assignability clause contained in the Contract is legally sufficient to vitiate *any* assignment, with respect to the interest of Stevensons, including the assignment from Coopers to Murray.

As noted above, Coopers assigned their interest in the Contract to Murray for the purpose of securing payment of an obligation owing from Coopers. Coopers were to retain possession of the Subject Property and were obligated to keep the Contract current and in full force and effect.

Courts have traditionally interpreted non-assignability clauses strictly because of the infringement on the right of alienation of property, and courts have held that assignments for purposes of securing an obligation are not in derogation of a such a clause. In 6 C.J.S. *Assignments* § 24(b) it is noted:

> As the right of alienation, however, is an incident of property, the right to make an assignment can be defeated only by a clear stipulation to that effect. *Further, stipulations against assignment have been held not intended to prevent assignment as collateral.* [emphasis added]

In the case of *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 14 P.2d 758 (1932), the Court was considering a non-assignability clause contained in a laese and option to purchase. The Court noted:

It hardly needs citation of authority to the prin-

> ciple that covenants limiting the free alienation of property such as covenants against assignment are barely tolerated and must be strictly construed. . . . [citations omitted]. These cases and many others that might be cited establish the rule that it is only a technical assignment that is prohibited by such covenant. A mortgage of the lease [in the instant case], of course, does not constitute a technical assignment. . . . [A] covenant against assignment is not violated by the giving of a mortgage [citations omitted].

14 P.2d at 760-761. *Also see, Lipsker v. Billings Boot Shop,* 129 Mont. 420, 288 P.2d 660 (1955); *Johnston v. Landucci,* 21 Cal. 2d 63, 130 P.2d 405 (1942); *Badger Lumber Co. Parker,* 85 Kan. 134, 116 P. 242 (1911).

In the case of *Inter-Southern Life Ins. Co. v. Humphrey,* 122 Miss. 579, 84 So. 625 (1919), the Court noted that the assignment in that case was clearly for purposes of securing payment on a note and that the assignee did not become the real and unconditional owner, but that the assignor retained the legal ownership. The Court held the assignment valid, notwithstanding a non-assignability clause, and noted:

> [W]e find the text book rule to be that stipulations against assignments are not intended to prevent assignment as collateral. This seems to be an announcement of the general rule, which we have found applied in many cases involving land contracts, insurance policies, etc. . . .

84 So. at 626.

It is noted that in the cases of *Inter-Southern Life Ins. Co.* and *Lipsker, supra,* the Courts adopted as law provisions similar to section 70A-9-311, *Utah Uniform Commerial Code,* which provides:

> The debtor's rights in collaterial may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

In the instant matter, Coopers assigned their interest under the Contract solely for the purpose of securing performance of an obligation in favor of Murray. Murray acquired no immediate right to possession of anything but an equity interest in the Subject Property. Therefore, pursuant to the above cited authority, the assignment from Coopers to Murray was not violative of the non-assignability clause contained in the Contract.

POINT II.

EQUITABLE PRINCIPLES PROPERLY APPLY TO THE INSTANT MATTER TO DEFEAT FORFEITURE.

In Point III of the Brief of Sevensons, it is argued that the lower court erred in granting the relief framed in the Judgment, which, Stevensons argue, was

equitable in nature, i.e. specific performance, because the assignment violated the non-assignability clause. Stevensons assert equity will not assist a party who is the sole cause of his own damage. The conclusion of Stevensons is based solely on the case of *Thein v. Silver Investment Co.*, 87 Cal. App. 2d 308, 196 P.2d 956 (1948). From the facts and conclusions of law of the *Thein* case which were recited by Stevensons in their Brief, it appears that the Court held that an assignee of a contract cannot avail himself to equitable principles against the obligor of the original contract when the contract contained a non-assignability clause. This conclusion from the case as asserted by Stevensons is unequivocally erroneous.

The Court in the *Thein* case denied the application of equitable principles, not because an assignment violated a non-assignability clause, but because Mr. Thein had failed to discharge obligations incurred *after* the assignment. The Court noted that the controlling factor in the case was that Thein had no interest in the property anyway because of the default under the original sales contract and the reentry by Silver and that Thein had not tendered payment until after said default and reentry.

Therefore, the case law upon which Stevensons rely to argue Point III is not supportive of the conclusions asserted, i.e. violation of a non-assignability clause defeats application of equity. Furthermore, the attempted assertion is contrary to established principles

of equity. In the Official Comments to the RESTATEMENT OF PROPERTY § 416, which deals with non-assignability clauses, it is stated:

> As restraints dealt with in this section, whether promissory or forfeiture in form, are primarily security devices designed to make more certain the payment of the purchase price, their attempted enforcement by the vendor may, under certain circumstances, be avoided by the various equitable doctrines.

The Comments further state, in direct contradiction of what Stevensons argue:

> The assignee may come in and demand specific performance of the contract of sale, having made tender of full performance prior to the action....

It is noted that Murray did in fact tender full performance to Stevensons of the obligations of Coopers. (See Paragraph 8 of Findings of Fact and Conclusions of Law.)

Consistent with the above cited Comments to the Restatement of Property, is the holding in the case of *Jankowski v. Jankowski,* 311 Mich. 340, 18 N.W.2d 848 (1945), wherein the Court held that where the vendor had been offered the entire balance owing under a contract which had been assigned in violation of a non-assignability clause, a Court will not permit forfeiture. In the case of *Coraci v. Noack,* 61 Wis.2d 183, 212 N.W.2d 164 (1973), the Court stated:

> The non-assignability provision in the land contract is for the benefit of the vendor to safeguard performance and if performance is tendered the restriction becomes moot and of no consequence. To permit enforcement of the non-assignability provision at this juncture would serve no purpose save for the imposition of a forfeiture upon the assignee. A court of equity will not permit such a result. . . . Thus, the courts have ruled that an assignee of the purchaser of a land contract may commence an action in strict performance under said land contract upon the tendering of the principal and interest due under said contract despite the presence of a non-assignment clause in the land contract.

212 N.W.2d at 167.

It is noted in 55 AM. JUR. VENDOR AND PURCHASER § 432:

> [A]ccording to the weight of authority, where a provision against the assignability of a contract for the sale of land is not followed by any provision for the forfeiture of the contract, the assignment thereof does not operate to forfeit the contract or confer an excuse for the vendor's refusal to carry it out, if the obligations of the vendee under the contract are due and have been fully performed or duly tendered by him or the assignee. In this respect, the view has been taken that the assignment is enforceable in equity, notwithstanding the restriction against assignment, where it appears that the restriction was in the nature of a mere security for the performance of the principal covenants, and where such enforcement appears equitable under the circumstances of the case.

Since Murray did in fact tender full performance, the lower Court properly would not permit Stevensons to declare a forfeiture. Any damage or inconvenience which may have been or may hereafter be incurred by Stevensons is a direct result of their refusal to accept the tender by Murray.

POINT III.

THE LOWER COURT COMMITTED NO ERROR IN HOLDING THE ASSIGNMENT CREATED A VALID SECURITY INTEREST.

Stevensons argue in Point IV of their Brief that the Assignment cannot create a security lien in the interest in the Subject Property held by Stevensons.

However, neither the Assignment nor the Judgment entered below creates any right in Murray to any interest of Stevensons. Murray only obtained the rights and interest of Coopers by the Assignment, and Murray only obtains such rights as a matter of law. In 6 AM. JUR. 2d *Assignments* § 102 it is stated that the assignee only acquires the rights and interests of the assignor and such rights and interests are subject to any setoff, claim or defense of the obligor.

Thus, the argument of Stevensons that Murray could not acquire an interest in the rights of Stevensons is clearly correct. However, all Murray acquired by the assignment was a security interest in the equity and

rights of Coopers and the Judgment of the lower court only effects the interests of the Coopers. The Judgment and Assignment do not effect any right, title or interest of Stevensons.

POINT IV.

VIOLATION OF THE NON-ASSIGNABILITY CLAUSE DOES NOT ENTITLE STEVENSONS TO DECLARE A FORFEITURE.

In the instant matter, there are two principles which exist which would defeat the attempt by Stevensons to declare a forfeiture of the Contract and quiet title in themselves. The first principle is that when a non-assignability clause is not followed by a clear and specific forfeiture provision, the vender may not declare a forfeiture for a violation of such a clause. *See generally,* 55 AM. *Jur. Vendor and Purchaser* § 432. In *Hull v. Hostettler,* 224 Mich. 365, 194 N.W. 996 (1923), Court stated that the vendor was not entitled to declare forfeiture where the non-assignability clause did not specifically provide that an assignment would constitute a default.

With respect to the Contract between Coopers and Stevensons, there is no specific reference to the rights of Stevensons if Coopers should assign their interest. It is submitted that in keeping with judicial policy of strictly construing non-assignability clauses, the non-assignability clause in the Contract must be construed

as insufficient to warrant forfeiture in the event of assignment. Therefore, the remedy of Stevensons is to recover damages, if any, from Coopers. *See,* 30 C.J.S. *Equity* § 56(b).

A second principle which would defeat Stevensons obtaining the relief sought is that equity will not now permit Stevensons to declare a forfeiture after they have received a tender of the full performance of the Contract. As noted above, notwithstanding the violation of a non-assignability clause, once tender to the vendor of all obligations of the purchaser is made, equity will not permit the vendor to thereafter declare a forfeiture. *See supra, Coraci v. Noack,* 61 Wis.2d 183, 212 N.W.2d 164 (1973); *Jankowski v. Jankowski,* 311 Mich. 340, 18 N.W.2d 848 (1945); RESTATEMENT OF PROPERTY § 416, Comment e; 55 AM. JUR. *Vendor and Purchaser* § 432.

Since not permitting a vendor to declare a forfeiture in this matter is essentially equitable, it is interesting to note that the Subject Property was sold to Coopers for $19,500.0, but was appraised as of November 4, 1973, at $24,000.00, and no doubt has continued to appreciate. Consequently, there should be sufficient value to the Subject Property to satisfy both the interests of Murray and Stevensons. To allow Stevensons to recover the total equity of Coopers amounts to a windfall, which Stevensons have not earned or for which they have given any consideration, and to permit such to occur would clearly prejudice Murray.

CONCLUSION

The relief granted by the lower court was proper in all respects, if not overly generous to Stevensons. The Court properly determined that Murray held a valid security interest in the equity and rights of Coopers and that the obtaining of such security interest was not in derogation of the non-assignability clause. Furthermore, principles of equity would not permit Stevensons to declare a forfeiture, even if there were a violation of the non-assignability clause, because a forfeiture would be a windfall to Stevensons, the non-assignability clause is not followed by a forfeiture provision and because Murray made timely tender to Stevensons in full satisfaction of all obligations of Coopers.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY
Robert D. Merrill

Attorneys for
Plaintiff-Respondent