

1949

George M. Whiteley v. John DeVries, Barbara DeVries, Harry L. Barnum, strevell-Paterson Finance Corporation, M. L. Ewell : Brief of Respondent

Utah Supreme Court

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Case No. 7314

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE M. WHITELEY,

Plaintiff and Respondent,

vs.

JOHN DeVRIES, BARBARA De-
VRIES, HARRY L. BARNUM,
STREVELL-PATERSON
FINANCE CORPORATION

Defendants,

M. L. EWELL, doing business as
Ewell Plumbing and Heating,

Defendant and Appellant.

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BRIEF OF RESPONDENT

RAWLINGS, WALLACE,
BLACK & ROBERTS,
DWIGHT L. KING

Attorneys for Respondent

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M. L. EWELL, doing business as
Ewell Plumbing and Heating,
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7314

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees with most of what is stated as the facts of this matter by appellant in his brief. However, there are certain matters which should be clarified.

On the 10th of March, 1947, respondent loaned \$4,000.00 to John DeVries and Barbara DeVries on a promissory note secured by mortgage, said loan to bear interest at the rate of 6% per annum and payable at the rate of \$50.00 per month; thereafter, on April 16, 1947, respondent loaned to DeVries \$1,000.00 on a promissory note secured by a mortgage on the said premises. The original loans were made to enable the DeVries to build a tourist court on their property at 4214 South State Street. Construction was commenced. Among those working on the property was one M. L. Ewell, the appellant, who did the plumbing work. He commenced working on the premises about the 1st of July, 1947 and finished his work on August 15, 1947. After he had agreed to do the plumbing work on the tourist motel and had commenced work, it became necessary for DeVries to get additional financing. Therefore, on July 31st, DeVries borrowed an additional \$600.00 from respondent. To secure said loan DeVries gave respondent a warranty deed (Tr. 124, 125, 126). It was to be repaid in sixty days. The \$600.00 was paid to appellant and thereafter appellant finished the plumbing work he had undertaken.

The answer and counterclaim of appellant deny the execution of the mortgages, admit the recording of them, and deny generally, for lack of information, the allegations of plaintiff's complaint. However, there was no controversy over the execution of the mortgages or the warranty deed. The only issue made by the pleadings over which there was any controversy was whether

or not the receipt by respondent of the warranty deed, the subject of his third cause of action, caused a merger of his two mortgages, effectively destroying the prior claims against the property.

The appellant alleges in paragraph 2 of the affirmative defense portion of his answer, "That at the instance and request of the defendants *John DeVries and Barbara DeVries* defendant performed labor and furnished materials on the property described in said complaint * * *"

The fifth paragraph of said answer sets up the theory upon which this case was tried before the trial court; said paragraph 5 reading as follows (Tr. 28):

"5. That by reason of the relinquishment of said mortgage by reason of the warranty deed set out above the lien of this defendant is prior and paramount to the mortgaged indebtedness alleged in plaintiff's First Cause Of Action."

There are no pleadings which make an issue of the fact of appellant's reliance on respondent.

The court's decree sets down the priority of the claims of respondent and appellant. The sheriff's costs were given first priority; respondent's \$4,000.00 mortgage, the interest thereon and attorneys' fees applying thereto, were placed second; his \$1,000.00 mortgage, the interest thereon and the attorneys' fees applicable thereto, were placed third, then the court decreed that if there were any proceeds remaining the sheriff should deposit in court the sum of \$1, 514.75, together with in-

terest thereon from the 1st day of July, 1947, said amount being the claimed debt for which appellant had a mechanic's lien.

The loan which was secured by the warranty deed was given fifth place in priority by the court's decree.

The theory of defense made by the pleadings was that the receipt by respondent of the warranty deed merged all of his interest in the DeVries' property and therefore the mechanic's lien, which was filed by appellant on October 3, 1947, taking priority as of July 1, 1947, came ahead of respondent's mortgage of March 10th and his mortgage of April 15, 1947. It was only after the finding of the court that said warranty deed did not merge the two prior mortgages that appellant advanced his theory of reliance upon respondent as the party responsible for all the building on the motel at 4214 South State Street.

SUMMARY OF ARGUMENT

POINT I.

NEITHER THE PLEADINGS NOR THE EVIDENCE MAKE ANY ISSUE ON APPELLANT'S RELIANCE UPON RESPONDENT AS HIS DEBTOR.

POINT II.

APPELLANT MAY NOT SEEK REVIEW ON A DEFENSE NOT PRESENTED BY THE PLEADINGS OR EVIDENCE IN THE TRIAL COURT.

POINT III.

THE DECREE OF THE COURT IS SUPPORTED BY SUBSTANTIAL AND UNCONTROVERTED EVIDENCE.

ARGUMENT

POINT I.

NEITHER THE PLEADINGS NOR THE EVIDENCE MAKE ANY ISSUE ON APPELLANT'S RELIANCE UPON RESPONDENT AS HIS DEBTOR.

Appellant's argument under his first subheading is based completely upon his reliance theory. The cases which he cites in support of said argument are all cases where the mortgagees have, by their conduct, caused a mechanic or other person doing work on mortgaged premises to believe that the mortgagee was the owner and responsible person to whom they could look for the payment of any obligation against the premises. In the case at bar no such facts exist. Appellant's answer is completely inconsistent with any such theory. It states specifically that the services and materials furnished by appellant were furnished at the "instance and request of the defendants John DeVries and Barbara DeVries."

The work which appellant did was contracted and commenced prior to the date of the \$600.00 loan. The record is clear that Ewell did not even know who appellant was at the time he contracted to do the plumbing work for DeVries (Tr. 116, 117). It is also clear that respondent, Whiteley, did not know who Ewell was (Tr. 126). The only persons Ewell ever saw were DeVries and Gaddis. Gaddis was the agent of Whiteley but for a very limited purpose, to loan Whiteley's money and,

at the same time he was the agent of DeVries in securing a loan for him. There is no evidence whatsoever of any authority on the part of Gaddis to contract with mechanics or workmen for work on property owned by DeVries. Ewell frankly stated that he dealt only with DeVries and the money which he received was from DeVries. All of the parties involved, Whiteley, Ewell, Gaddis and DeVries looked upon and considered DeVries to be the owner of the motel when the loan of \$600.00 was made. DeVries exercised the control of the details of the work and construction and acted at all times as the owner.

POINT II.

APPELLANT MAY NOT SEEK REVIEW ON A DEFENSE NOT PRESENTED BY THE PLEADINGS OR EVIDENCE IN THE TRIAL COURT.

The defense which appellant asserts on appeal seems to be that he relied on respondent, Whiteley, in doing his work. That defense was not pleaded and no issue on it ever made in the trial court.

The law of this state is that if there is any reason why defendant should prevail it is his duty to plead it as a defense. Not having done so he cannot complain on appeal. *Mills v. Gray*, 50 Utah 224, 167 P. 358; *Chipman v. American Fork City*, 54 Utah 93, 179 P. 742.

The cases are numerous that the type of defense which appellant now asserts must be pleaded and relied upon in his action in the trial court before he can raise

the matter in the appellate court. See *Dolinsky v. Williams*, 56 Utah 186, 189 P. 873.

It would be a strange situation if an appellant was allowed to urge upon this court a defense and theory which he did not plead and which was inconsistent with the allegations of his complaint. To allow it would give such an appellant an unconscionable advantage over both respondent and the trial court. *Fisher v. Bank of Spanish Fork*, 93 Utah 514, 74 P. (2d) 659; *Obradovich v. Walker Bros. Bank*, 86 Utah 587, 16 P. (2d) 212.

POINT III.

THE DECREE OF THE COURT IS SUPPORTED BY SUBSTANTIAL AND UNCONTROVERTED EVIDENCE.

Under Point II, appellant argues that the trial court erred in not sustaining defendant's objections and motion to strike the testimony of witness Gaddis. Appellant quotes only a part of the testimony concerning the nature of the warranty deed. Gaddis, after the testimony to which appellant objected, testified fully concerning what he remembered of the transaction involving the warranty deed. During the cross-examination the following pertinent information was elicited (Tr. 96):

“Q You were the agent of Mr. Whiteley, is that right?

“A Yes.

“Q For the purpose of negotiating this loan?

“A Mr. Whiteley was going to lend six hundred dollars to mortgage on the property.

“Q What did he say?

“A He would lend six hundred dollars provided they would give him a Warrenty Deed to the property instead of a third mortgage.”

And at a still later time the following question and answer was elicited by appellant's counsel (Tr. 100,101):

“Q What did you say to Mr. DeVries?

“A What did I say to Mr. DeVries?

“Q Yes.

“A I said, ‘Mr. Whiteley demands a Warranty Deed to the property if he gives you this third loan of six hundred dollars.’ He wants this Warranty Deed to the property, which DeVries and his wife agreed to.”

And then on redirect examination the following interchange occurred (Tr. 103):

“Q You were the agent for Mr. Whiteley and what did you understand this instrument to be?”

* * * * *

“A Security for the six hundred dollar loan.”

In the review by this court of an equity case wherein the judge sat without a jury, the court will presume

that the trial court disregarded incompetent, immaterial or valueless evidence. The court in effect gives a trial de novo on the record made in the trial court. In this trial de novo the judgment will be reversed only if after excluding improper evidence, the judgment of the trial court does not then have support in the evidence. *Federal Land Bank of Berkley v. Salt Lake Valley Sand & Gravel Co.*, 96 Utah 359, 85 P. (2d) 791; *Lipscomb v. Exchange National Bank of Spokane*, 80 Wash. 296, 141 P. 686.

Whiteley himself testified clearly and succinctly concerning the nature of the transaction. The record is replete with statements to the effect that the taking of this warrenty deed was merely to secure an additional loan of \$600.00 and that it was not intended by either the DeVries or respondent to merge and destroy the rights which respondent had under his two earlier mortgages.

The law of this state is clear that where a mortgage incumbrancer becomes the owner of the legal title ~~on~~ the equity of redemption, a merger will not be held to take place, if it be apparent that it was not the intention of the mortgagee, or if, in the absence of any intention, the merger would be against his manifest interest. *Chausse v. Bank of Garland*, 71 Utah 586, 268 P. 781; *O'Reilly v. McLean*, 84 Utah 551, 37 P. (2d) 770.

Under the facts of the present case the manifest interest of respondent Whiteley are against merger, it being abundantly clear that if merger occurred the pri-

ority date of Whiteley's interest would be July 31, 1948. Not only would Ewell's mechanic's lien come ahead of the two mortgages which respondent had upon the premises, but the mechanic's lien of one Harry L. Barnum would be prior. Whiteley specifically stated his intentions (Tr. 125, 126):

“A Well, he said to me—I am taking both parts—Mr. DeVries told me this condition that I am repeating, that the plumber wouldn't go any further until he had \$600 more, and, if he had \$600 more, he could get opened, and that we—if I would let him have another \$600, he'd get open there in sixty days; he would return the \$600 to me, and that, for this \$600, he would give me a deed to the property for sixty days, guaranteeing to pick up the \$600 that I was to let him have within sixty days, and that's how this—

“Q That instrument then that he gave you—

“A This is what was given me for the security for my \$600.

“Q Now, did Mr. DeVries or his wife ever pick this deed up or pay you the \$600?

“A Never did, no.

“Q Never received any money on account of this loan of \$600?

“A I received a \$50 interest payment.

“Q That is all you have ever received?

“A That is all I have ever received.

“Q This proposition, this security arrangement, was Mr. DeVries' suggestions, was it, Mr. Whiteley, as you have related here?

“A No, I think that was Mr. Gaddis’ idea to take—he said, ‘We’ll take a deed to this property from you if Mr. Whiteley will let you have the \$600, and at the end of sixty days, if you pick up the \$600, you can have the deed back and then the two first and second mortgages will ride.’”

In view of the testimony both the *Chausse* and *O’Reilly* Cases are controlling and no merger occurred.

CONCLUSION

We submit that the lower court’s judgment that the liens created by respondent’s two mortgages did not merge with the warranty deed is correct and therefore the decree of the court awarding respondent priority as to his first two mortgages over appellant’s lien is a correct and lawful judgment.

Respectfully submitted,

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