

1978

Gustave E. Bush v. Mickey M. Coult et al : Brief of Respondent

Utah Supreme Court

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GUSTAVE E. BUSH,

Plaintiff,

vs.

MICKEY M. COULT, et al,

Defendants.

THE LOCKHART CO.,

Third Party
Plaintiff and
Respondent,

vs.

COMMONWEALTH LAND TITLE
INSURANCE COMPANY,

Third Party
Defendant and
Appellant.

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BRIEF OF RESPONDENT

FILED

AUG 31 1978

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
STATE OF UTAH

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GUSTAVE E. BUSH,

:

Plaintiff,

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vs.

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MICKEY M. COULT, et al,

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Defendants.

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- - - - -

:

THE LOCKHART CO.,

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CASE NO. 15680

Third Party
Plaintiff and
Respondent,

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vs.

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COMMONWEALTH LAND TITLE
INSURANCE COMPANY,

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Third Party
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Appellant.

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BRIEF OF RESPONDENT

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COMMONWEALTH LAND TITLE
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Third Party
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-oo0oo-

BRIEF OF RESPONDENT

-oo0oo-

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
OF SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA, JUDGE

-oo0oo-

W. CLARK BURT
GARY R. HOWE
CALLISTER, GREENE & NEBEKER
Suite 800 Kennecott Building
Salt Lake City, Utah 84133

Attorneys for Respondent

BRANT H. WALL
Suite 500 Judge Building
Salt Lake City, Utah 84111

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Attorney for Appellant

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STATEMENT OF THE CASE

The Plaintiff, Gustave E. Bush, filed an action to quiet title to real property located in Salt Lake County, Utah, basing his claim upon a forged deed. Subsequently plaintiff was granted Summary Judgment against the Defendants, which judgment quieted title in the Plaintiff.

The Respondent as a Third Party Plaintiff filed an action against the Appellant, with the Respondent as the insured. This action was based upon the premise that if the Plaintiff was successful in quieting title against the Defendants, then this defect was covered by the title insurance policies issued by the Appellant.

DISPOSITION IN LOWER COURT

Following a trial without a jury the court entered Findings of Fact and Conclusions of Law and a Judgment in favor of the Respondent, The Lockhart Co.

RELEASE SOUGHT ON APPEAL

The Respondent asks that the Judgment entered by the District Court be affirmed, and that the Respondent be awarded costs and attorney's fees incurred in connection with this Appeal.

STATEMENT OF FACTS

In the early part of June, 1975, the Respondent, the Lockhart Co., made loans to the Defendants, Mickey M. Coult and Patricia Ann Coult, (hereinafter referred to as "Coult's") and to the Defendants, Merrill

Wilson Harward and Vera Mae Harward, (hereinafter referred to as ("Harwards")). The Coultts executed a Promissory Note in the amount of \$25,118.00 and the Harwards executed a Note in the amount of \$25,117.00. As security for these Notes, Coultts and Harwards executed Trust Deeds and conveyed to The Lockhart Co. as Trustee, certain real property located in Salt Lake County, State of Utah.

On or about the 24th day of May, 1975, the Appellant, Commonwealth Land Title Insurance Company, issued to The Lockhart Co. as the insured, a Commitment for Title Insurance insuring the title to the properties conveyed by the Defendants, Coultts and Harwards. (Ex. P-5) Commonwealth thereafter on each piece of property issued separate title insurance policies. Both policies were in the amount of \$25,117.00. (Ex. P-6, P-7)

On November 13, 1975, the Respondent was served with a Summons and Complaint filed by the plaintiff, Gustave E. Bush. Mr. Bush claimed ownership in Fee Simple to the property which The Lockhart Co. had taken as security for the money loaned to Coultts and Harwards. The Respondent thereafter tendered defense of the lawsuit by Mr. Bush to the Appellant on December 10, 1975. (Ex. P-8) By letter dated January 16, 1976, the Appellant declined to undertake the defense of this action on behalf of The Lockhart Co. (Ex. P-9)

Mr. Bush thereafter obtained a Summary Judgment in his favor against the Defendants, Coultts and Harwards and against the Respondent, The Lockhart Co., wherein it was determined that Mr. Bush did have fee simple ownership to the properties which had been given by the Coultts and Harwards

to The Lockhart Co. as security for the monies loaned. In his Affidavit filed with his Motion for Summary Judgment, Mr. Bush stated that he had examined the purported conveyances from himself to the Defendants, Mickey M. Coult and Patricia Ann Coult, and that the signature thereon of one Gustave E. Bush was not made by him personally or by anyone else with his knowledge or under his authority or under his direction. Because of this forgery there exists a defect in the titles of said property and the Appellant by virtue of its title policies insured The Lockhart Co. against this defect.

The Respondent obtained judgment against the Defendants, Coult and Harwards and has released its liens against the properties. Its claim in this lawsuit is only against the Appellant and judgment was entered in favor of the Respondent, The Lockhart Co., against the Appellant. The Respondent made the loans to Coult and Harwards after obtaining the title policies from Appellant. The Respondent's employee, Gary Lyons, did not order the insurance commitment. It was ordered by Mickey Coult after Appellant had already agreed to insure the property long before Lockhart was ever in the picture (T. 495, 532, 554-555). Gary Lyons, did not know Jerome Yeck's reputation; in fact, there is no evidence linking Jerome Yeck to the defect involved in this lawsuit.

ARGUMENT

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT

All of the facts set forth in Appellant's brief were considered by the Trial Court. The Trial Court entered its findings of fact based upon all the evidence and the Trial Court's findings should be sustained.

The Utah Supreme Court has made it clear that the findings of the trial court should be sustained unless evidence clearly preponderates against them. Elton v. Utah State Retirement Board, 28 Utah 2d 368, 503 P.2d 137 (1972); Stucki v. Stucki, 562 P.2d 240 (Utah 1977). The record supports the trial court's conclusion that the Respondent had no knowledge of any defect or other matter which would preclude Respondent from recovering its losses under the title insurance policies issued by the Appellant.

In making its Findings of Fact, the trial Court took judicial notice of Findings of Fact, Conclusions of Law and a Judgment entered by the Third District Court in favor of the Plaintiff, Gustave E. Bush, wherein it was held that Bush is the owner in fee simple of the property in which Respondent had a lien, and that Bush never executed any deed or document conveying any interest to any of the defendants, and that the purported conveyance from himself to Coultts does not contain the signature of Gustave E. Bush. (R.219). The Trial Court also found that Respondent had no knowledge of this defect or any other defect, lien, encumbrance, adverse claim or other matter affecting title to the property which would preclude recovery by the Respondent against the Appellant. (R.219,220).

Focusing in on the issue asserted by the Appellant, that Respondent was told of a deed to a Deseret Distributing Co., and that Respondent assumed that Jerome Yeck may have an interest in the property, there is no evidence whatsoever linking Jerome Yeck or Deseret Distributing to a forged deed. There is no evidence whatsoever that Respondent knew or even had reason to know of Yeck's reputation with the title insurance companies. There is no evidence whatsoever that Respondent suffered its

losses as a result of any claim by Yeck or Deseret Distributing, or as a result of a forgery by Jerome Yeck. Yet, Appellant is relying totally on the fact that Respondent was told of a deed to Deseret Distributing and that Respondent assumed that Yeck may have had an interest in the property. This is the "credible" evidence which Appellant argues, requires this Court to reverse the Trial Court's findings. All of the testimony elicited by Appellant as to Jerome Yeck is not material absent a showing that (1) Yeck's involvement affected title to the property and (2) Respondent had actual knowledge that Yeck's involvement affected title to the property. Without this evidence the trial court found Appellant liable to Respondent under its title insurance policies.

An examination of the title insurance policies is also important. (Ex. P-6 & P-7). These policies are identical in form and language. The Appellant relies on paragraph 3 of its "Exclusions from Coverage." This "Exclusions" section cannot be read, however, in context of this lawsuit, without reading the section entitled "Mortgagee's Title Insurance Policy" directly above the Exclusion section. This section is "subject to the Exclusion from Coverage," and specifies what "loss or damage" is covered. If the insured suffers loss as a result of any of the causes specified, and there is no exclusion as to that cause then the title company is liable for the insured's loss.

The judgment quieting title in Mr. Bush established the defect and as a result of that defect, the Respondent suffered loss, i.e., it lost its interest in the property. Respondent suffered no loss or damage as a result of a deed to Deseret Distributing or as a result of Mr. Jerome Yeck. The few facts known by Respondent, which Appellant is claiming

come within the exclusions, do not even give rise to a claim by Respondent under the policy. There is no question but that Respondent would not be entitled to claim damage as a result of a lien which was not the cause of Respondent's loss.

A contract of title insurance is an agreement to indemnify those who actually suffer loss through a defect in title, and is not a contract of guaranty, and in order to recover thereon an insured must establish a loss resulting from the defect, and until a loss occurs, there is no liability. Sattler v. Philadelphia Title Ins. Co., 162 A.2d 22 (Pa., 1960). Respondent is not contending that Appellant is liable to Respondent based on the fact that there was an unrecorded deed to Deseret Distributing or that Jerome Yeck may have claimed an interest in the property, because Respondent suffered no loss as a result. Any knowledge thereof is immaterial in this lawsuit. What is material is that there was a defect, a fact not disputed by Appellant, and that Respondent suffered loss as a result of that defect and had no knowledge of the defect, again facts not disputed by Appellant.

What Appellant is saying is that Respondent cannot collect on the defect which caused the loss because it knew of facts totally unrelated to the loss. Appellant is relying for this argument on language in the policy to the effect that Respondent knew of facts, which if known to Appellant, would have precluded issuance of the policies. Simply, the policies do not say what Appellant is contending they say. Appellant contends that because Respondent did not give Appellant written notice of Jerome Yeck, Deseret Distributing Company or the rejection of title

insurance by Western States Title that Respondent is precluded from re-
covering on a loss which had no connection with Jerome Yeck, Deseret
Distributing or the rejection by Western States Title. The exclusion
language cannot be interpreted as suggested by Appellant. Such an inter-
pretation would allow a title company to deny any claim on the basis
that "other matters" unrelated to the loss had not been disclosed in
writing.

It is the widely accepted rule that title insurance policies should
be interpreted liberally in favor of the insured and against the insurer.
Hall by Goodell v. San Jose Abstract & Title Insurance Co., 172 Cal 2d 421,
342 P.2d 362 (J), H. Trisdale Inc. v. Shasta County Title Co., 146 Cal
2d 831, 304 P.2d 832 (1956); Overholtzer v. Northern Counties Title
Insurance Co., 116 Cal 2d 113, 253 P.2d 116 (1953). An earlier
California case involving language construction of a title policy said:

The courts have also announced a **** to the effect
that when the language employed in an insurance con-
tract is ambiguous, or when a doubt arises in respect
to the application, exceptions to, or limitations of
liability thereunder, they should be interpreted most
favorably to the insured. **** Where the language and
terms of a policy are framed and formulated by the
insurer, every ambiguity and uncertainty therein
should be resolved in favor of the insured. Coast
Mutual Building Loan Ass'n v. Security Title Insurance
& Guaranty Co., 57 P.2d 1392 (Cal. 1936).

In particular, "provisions relating to exclusions or exceptions
from the performance of the insured's obligations are construed strictly
against the insurer and liberally in favor of the insured." Paramount
Properties v. Transamerica Title Co., 463 P.2d 746, 83 Cal. Rptr. 394
(1970). It is evident that the above cited rule of construction used
in title insurance cases was derived from its general insurance counter-

part. The rule on the level of general insurance has been expressly adopted in Utah by the Courts' statements that insurance policies should be construed liberally in favor of the insured and strictly against the insurer. Jorgensen v. Hartford Fire Insurance Co., 13 Utah 2d 303, 373 P.2d 580 (1962); Tucker v. New York Life Insurance Co., 107 Utah 478, 155 P.2d 173 (1945).

The Respondent respectfully submits that the policies in question (ex. P-6 and P-7) and the commitment (Ex. P-5) are not subject to the construction given them by Appellant. The trial court so found, and these findings should not be disturbed. The Appellant has failed to show that these findings are not supported by the evidence. Appellant is attempting in its brief, as it did at trial, to make something out of nothing. At trial, Appellant's theory was to show Gary Lyons as the "architect" of a scheme to defraud and conceal facts from the Appellant. Contrary to this theory, the evidence is clear and convincing that there was no such scheme. To advance this theme on appeal, Appellant has misstated facts and testimony. For example, on P. 6 of Appellant's brief, Appellant infers that Gary Lyons suggested that the defendants get a policy from some other title company. On the contrary, both Mr. Coult and Mr. Lyons testified that Mr. Coult suggested another title company (TR 495; 532, 554). In fact, Mr. Coult testified that Appellant had already issued a commitment on this property before Respondent was ever involved, and that he suggested that it be used. (TR 532, 554). Mr. Coult contacted Appellant and had Respondent named as insured. (TR. 555) Also on P. 17 Appellant misstates the testimony given by Del Rowley. In

summarizing Mr. Rowley's testimony, Appellant says: "That he (Lyons) had told the loan applicants that if they could get another company to write the title insurance, the loan could be made..." The actual testimony of Mr. Rowley says: "...so they asked him (Lyons) if he got title insurance through another company if he could still make the loan..." (TR 461) (emphasis added). This testimony is consistent with that of Lyons and Coult. The Respondent was not attempting to mislead Appellant. There is no evidence Mr. Lyons knew of Jerome Yeck's reputation. There was nothing to hide.

The foregoing facts are not really material to the question of the sufficiency of the evidence, but Respondent feels they should be correctly stated so as not to mislead this Court. These statements are important, however, to show that there was no concealment or misrepresentation on the part of the Respondent. The evidence supports the court's findings on this point.

Furthermore, Appellant's reliance upon Utah Code Ann. §31-19-8 (1953), and the numerous insurance cases cited in its brief, is misplaced. This statute and all the cases cited only have application to insurance policies requiring a written application as evidenced by the entire chapter 19 in the Utah Code. Utah Code Ann. §31-19-5, 6 & 7 (1953). Title insurance contracts differ from insurance contracts in this regard. There is no application in title insurance, of the nature required by Section 31-19-7 and the representations mentioned in §31-19-8 are representations on a written application. Title insurance contracts are warranties and the insurer actually determines the state of the title.

This is made clear in Research Loan & Invest. Corp. v. Lawyers Title Ins. Corp. 225 F. Supp. 287 (W.D.Mo. 1964) Rev at 361 F.2d 764 (1966), which cites Empire Development Co. v. Title Guarantee & Truste Co., 225 N.Y. 53, 121 N.E.468 (1918), one of the leading cases on title insurance in the country, which examined the purpose and object of a title insurance policy. The court noted

"...to a layman a [title] search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown."

It [Empire] then held that:

"To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained, is the very purpose for which the owner seeks insurance."

That case [Empire] continued:

"A title policy is much in the nature of a covenant of warranty or a covenant against encumbrances. (emphasis added) 225F.Supp at 289, 290.

The Eighth Circuit Court of Appeals, in reversing the District court, did not disturb these concepts of title insurance. Rather, the circuit court reinforced them:

"This appeal raises serious questions concerning the fundamental nature of title insurance...Usually, the very purpose and essence of the title insurance transaction is to obtain a professional title search, opinion and guarantee. The policy of title insurance is in the nature of a warranty." 361 F.2d at 767 (emphasis added).

The law does not impose any duty upon an applicant for title insurance to do the work of the title insurance company. Id at 290. The very purpose Respondent required title insurance was to protect it against the type of loss it suffered as a result of a forged deed. There simply is no evidence that Respondent concealed or misrepresented facts which it knew would influence the risk of issuing the title policies in question. If Respondent

knew, and policy requires "actual knowledge," that the deed was forged and failed to notify Appellant in writing, the Appellant's Exclusion section would be applicable. But to say Respondent knew facts which are in no way related to the loss, is a gross restructure of the conditions of the policy. Even the Statute (Utah Code Ann. §31-19-8) quoted by Appellant on p.21-22 of its brief requires that concealed or misrepresented facts be related to the "hazard resulting in the loss."

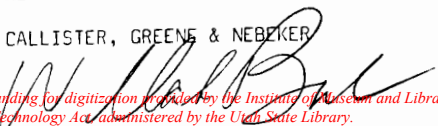
In every life and fire insurance case cited by Appellant, the concealed or misrepresented fact was related to the hazard resulting in the loss. If, for example, an applicant for life insurance concealed a heart condition, but died of cancer, the insurer could not deny coverage, because the fact concealed did not cause the loss. This is exactly the far fetched concept Appellant is asking this court to accept. The trial court rejected this contention, and the evidence supports the trial court's findings that Respondent had no knowledge of the defect which caused the loss (forgery) or which would preclude recovery by the Respondent.

CONCLUSION

The Respondent asks this court to affirm the lower court and to award Respondent its costs and attorneys fees on this appeal. The evidence relied upon by Appellant was considered by the trial court. The Appellant failed to meet its burden of proving that Respondent had actual knowledge of the alleged defect on any other matter which resulted in Respondent's loss.

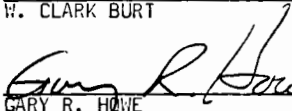
RESPECTFULLY SUBMITTED,

CALLISTER, GREENE & NEBKER





W. CLARK BURT



GARY R. HOWE
Suite 800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Brief have been
mailed to:

BRANT H. WALL
Suite 500 Judge Building
Salt Lake City, Utah 84133

by depositing said copy in the U.S. Mails, postage prepaid thereon,
this 31st day of August, 1978.



W. CLARK BURT