1979

T. Val Christiansen v. Utah-Idaho Sugar Company : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

Cohne, Rappaport; Attorneys for Plaintiffs-Appellants;
McKay, Burton, Thurman & Condie; Attorneys for Defendants-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN

Plaintiff-Appellant

vs.

Case No. 15751

UTAH-IDAHO SUGAR COMPANY, a corporation, and UNION PACIFIC RAILROAD, a corporation

Defendants-Respondents

REPLY BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Summary Judgment of the Fourth District Court for Utah County
Hon. J. Robert Bullock

COHNE, RAPPAPORT [illegible]
66 Exchange Place
Salt Lake City, [illegible]
Attorneys for Plaintiff-Appellant

MCKAY, BURTON, THURMAN & CONDIE
500 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendants-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN

Plaintiff-Appellant

vs.

UTAH-IDAHO SUGAR COMPANY, a corporation, and UNION PACIFIC RAILROAD, a corporation

Case No. 15751

Defendants-Respondents

REPLY BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Summary Judgment of the
Fourth District Court for Utah County
Hon. J. Robert Bullock

COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

MCKAY, BURTON, THURMAN & CONDIE
500 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendants-Respondents

INDEX

ARGUMENT

AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN

Plaintiff-Appellant

vs.

Case No. 15751

UTAH-IDAHO SUGAR COMPANY, a corporation, and UNION PACIFIC RAILROAD, a corporation

Defendants-Respondents

ARGUMENT

POINT I

I. THE APPLICABLE STATUTE OF LIMITATION IS 78-12-23(2)AND PROVIDES FOR A SIX YEAR STATUTE WHEN ACTION IS BASED UPON AN INSTRUMENT IN WRITING.

Defendant-Respondent argues that this action is barred by the three year statute of limita tions found in 78-12-26. Defendants' argument is extraordinary in light of the circumstances surrounding this case. As previously set forth this action is based upon a Special Warranty Deed from Defendants to Plaintiffs. Clearly a warranty deed is an instrument in writing, thus coming under the six year statute of limitations. Defendants' argument that this is an action for breach of covenants of title and consequently is an action created by the statutes of this state, coming under 78-12-26(4), providing for a three year statute of limitation would effectively abrogate the need for

the other more specific statute of limitations provisions found in the code. If defendants' argument were adopted, it could be used in numero situations and would effectively circumvent the purpose of having a si year statute of limitations for written documents.

The statute cited by Defendants specifically intends by its very wording and plain meaning that it would not apply in this situation, Section 78-12-26(4) Utah Code Annotated, 1953, as amended, states that it applies:

> "except where in special cases a different limitation is prescribed by the statutes of this state."

The case at bar is certainly one of those situations coming under the aforementioned exception, because of another statute, to wit: 78-1 23(2), Utah Code Annotated, 1953, as amended, has provided for the "special cases" in which written instruments are the basis of an actio

In addition this Court in Soderberg v. Holt, 86 Utah 485, 46P 2d 428(1935), has applied the 6(six) year statute to a claim for breach of a covenant under a warranty deed.

Plaintiff submits that Defendants cannot seriously argue before this Court that the 3(three) year statute of limitations is applicable, in light of the plain clear meaning of the statutes invol and a previous judicial determination by this court.

POINT II

II. MATERIAL ISSUES OF FACT ARE IN DISPUTE AND IT WAS IMPROPER FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT.

Defendant on page 7 of its brief states, "the material facts in this case are not disputed". Defendant on page 3 in his

statement of facts states:

> "On Sepetember 16, 1956, Plaintiff-Appellant leased from the Los Angeles and Salt Lake Railroad a triangular piece of property adjoining the subject property on the south. There was attached to that lease as Exhibit A a plat showing the property leased. On that plat there is shown a spur track number 6 which parallels and bounds the east boundary line of the subject property. Shown to the west on the plat outline is a double line in the middle of which appear the words "spur track (abandoned)." Since September 16, 1946, up to the present time, Plaintiff-Appellant has been aware of the fact that there was an easement which was designated as abandoned by the railroad extending through the subject property. (Wunderli Affidavit dated January 6, 1968, paragraph 7.) Plaintiff had knowledge at the time of his purchase that there had been a spur track located on the property. (Wunderli Affidavit dated January 6, 1978, paragraph 11.)

Defendant uses his interpretation of the facts to support his argument that Plaintiff's claim is barred even if the 6(six) year statute of limitations is applicable. Defendant is thus claiming that Plaintiff was put on notice of the subject easement either in 1946 or 1956 (Defendant uses both dates as show in Defendants's brief as quoted above). Certainly the time that Plaintiff first became aware of a possible easement which might cloud his title and prevent him from conveying his property is a "material issue of fact", going to the question of when the statute of limitations began to run on Plaintiff's claim.

In Plaintiff's initial brief it is stated in the statement of facts:

> On or about the 13th day of March, 1973, while Plaintiff-Appellant was attempting to negotiate

> the sale or the re-financing of the subject property, the Plaintiff-Appellant first received notice that the Defendant, UNION PACIFIC RAILROAD claimed an interest in the subject property, to wit: a twenty-five (25) foot right-of-way. Notice was first received by verbal communication on March 13, 1973 and Plaintiff-Appellant was first shown a Plat Map showing the claimed interest on May 22, 1973. (Affadavit of Plaintiff dated August 5, 1977, Pages 1 and 2, Paragraphs 6,7,8 and 11.)

From the statement of facts of both parties used for appe it appears clear on its face that a substantial dispute over a materi issue of fact does exist. That issue could be stated as:

> "When did Plaintiff first receive notice of a possible defect in his title?"

Plaintiff contends this was in 1973, and Defendants contends this was in 1946, or 1956. Certainly an issue of this magnitude should have prevented the lower court from granting summary judgment in favor of Defendants. Plaintiff reiterates that in a motion for summary judgme the factual issues must be considered in a light most favorable to th party opposing the motion. Welchman vs. Wood, 9 Utah 2d 25, 337 P. 2 410(1959), Controlled Receivables Inc. vs. Harman, 17 Utah 2d 420, 4 P. 2d 807 (1966), Burningham vs. Ott,525 P.2d 620 (1974).

The factual dispute abovementioned, if seen in favor of Plaintiff, would thus not bar Plaintiff's cause of action based on th notion of when Plaintiff first received notice.

Plaintiff submits that numerous spur tracts were previous used on the subject property and the specific trackage mentioned by Defendant in his statement of facts is not even the same trackage whic

the basis of the claim upon which this action is based. The track mentioned by Defendant is in fact separate, distinct and distinguishable from that section which is the basis of this action.

A second material issue of fact that is in dispute is whether the easement previously granted by the Defendant prevented Plaintiff from selling, conveying, mortgaging or transferring his property consequently damaging him. In Plaintiff's statement of facts it is stated:

> "The action of the Defendants prevented the Plaintiff from selling or re-financing the subject property due to the fact that no buyer or lender was willing to buy or re-finance this property because of the claimed right-of-way. As a direct result of these events, Plaintiff-Appellant was evicted from the property in a foreclosure action and was undable to redeem the property."

Plaintiff has stated that the facts will show that he was in fact evicted from his property as a direct result of actions of the Defendant, in conveying a right-of-way which directly would go through Plaintiff's building on the premesis.

Defendants contend however, as stated in their statement of facts:

> "In 1970 and 1971, Plaintiff-Appellant suffered a major setback in the operation of his business due to the theft of equipment. (Deposition of Plaintiff dated March 14, 1977, p. 32, lines 21 and 22.) This led to the failure of his business, and in the years 1971 through 1975, Plaintiff-Appellant had no income. (Deposition of Plaintiff dated March 14, 1977, p. 32 lines 12-20.)"

> "Due to the failure of his business, Plaintiff was unable to make the mortgage payments on the subject property (Wunderli Affidavit dated January 6, 1978, paragraph 12), and on March 10, 1975, Dean Terry and Vilate Terry, holders of the mortgage, obtained a judgment and decree of foreclosure of the mortgage. The property was sold at public auction and the Plaintiff-Appellant failed to redeem the property. (Wunderli Affidavit dated January 6, 1978, paragraph 10.)"

Defendants position seems to be that it was in fact not t subject easement that caused Plaintiff to forfeit the property in que because of the unwillingness of both buyers and lending institutions to deal with property that might have a defective title, but that business setbacks were the cause of Plaintiff's lo sing the property. Plaintiff's position as set forth above is in direct opposition to th

Certainly, this is a material issue of fact. Plaintiff should be allowed to present evidence as to why he lost the subject property. It was improper for the district court to grant summary judgment in favor of the Defendants in light of these material issues of fact, still in dispute, and which certainly could be outcome deter minitive.

POINT III

III. THE COVENANT IN QUESTION IN THIS CASE WAS, NO MATT HOW DESIGNATED, A COVENANT THAT "RUNS WITH THE LAND" AND IS NOT BREAC UNTIL PLAINTIFF WAS PUT ON NOTICE AND HARMED THEREBY.

As Plaintiff has previously stated, a covenent of this nature, and the breach thereof could be characterized as any one of the following:

(1) Quiet Enjoyment

(2) Encumbrances

(3) General Warranty

Defendants argument concerning the law surrounding a covenant of "seisin" is misplaced and not applicable in the case now before the court. Plaintiff submits that the Defendant was seised of the property in question and both sides have agreed that Defendant did in fact own the land which they conveyed to Plaintiff. If in fact the covenant of seisin is breached at the time of conveyance, that has no effect at all on the present case, because we are not dealing with the breach of the covenant of seisin. We are dealing with the (3) three covenants as specified above. The following cases cited by Defendant are thus not related to the issue before the Court: Creason vs. Peterson, 24 Utah 2d 305, 470 P. 2d 403 (1970); Bernklau v. Stephens, 150 Colo. 187, 371 p. 2d 765 (1962); Anderson vs. Larson, 177 Minn. 606, 225 N.W. 902(1929); Faller vs. Davis, 30 Okl. 56, 118 P. 382 (1911). Plaintiff also points out that with the exception of the Creason case which merely states the majority rule, these cases come from other jurisdictions and are not binding on this court. Plaintiff submits that Utah has always taken a unique stand in regard to covenants in order to protect a remote grantee.

If the easement in question in this case is seen as either a breach of the covenant of quiet enjoyment or the covenant of general warranty, the Defendant cannot seriously argue that it does not, "run with the land". This court has previously decided that they

do in fact run. Van Cott vs. Jacklin, 63 U 412, 226 P460(1924); East Canyon Land and Stock Company vs Davis and Weber Counties Canal Company, 65U 560, 238 P280(1925).

It appears that the only basis that Defandant has to contend that this covenant does not run with the land, is to characterize this as a covenant against encumbrances. In Plaintiff's initial brief, he outlined the specific law in Utah surrounding a breach of the covenant against encumbrances. The case used by both sides on this issue is, of course, Soderberg vs Holt, 86 u 485, 46 P 2d 428 (1935). Defendants attempt to distinguish this case due to the fact that the Soderberg case involved a money charge and not an easement. This attempted distinction is invalid. Soderberg does an excellent job analyzing the law of the various states on this issue, and deals with much more than strictly the opinion by Judge Cooley in Post v. Campau, Liz Mich 90, 3 N.W. 272, (1879). The court then makes the general holding as Plaintiff has previously cited (p.6 of initial brief). The Court decided that the logical fabric of the law and equity would be better served to hold that a covenant against encumbrances does run with the land and thus a claim by a remote grantee is not barred with a valid claim. In addition, this court has further stressed that the true nature of the covenant against encumbrances is a covenant to indemnify. Pacific Bond and Mortgage Company vs. Ruhn, 101 U 335, 121P.2 635 (1942).

If this Court were to adopt Defendants' argument it would

in effect prevent a remote grantee that had no notice of an encumbrance from processing his claim against a grantor that had encumbered the transferred properly. Plaintiff submits that this court should adopt the position that a covenant against encumbrances runs with the land.

The District Court erred in granting summary judgment on this issue, due to the fact that the holding of the court is against the law in the State of Utah.

PART IV

IV. DEFENDANT GRANTED THE EASEMENT IN QUESTION PRIOR TO DEFENDANT'S CONVEYANCE TO PLAINTIFF AND SHOULD BE HELD TO THE CONSEQUENCES OF THEIR ACTS.

Defendants argue that since this claim did not come to light until after their conveyance to Plaintiff, they should not be held liable under the implied covenants of a Special Warranty Deed. Plaintiff fails to comprehend how the Defendant can come before this Court and argue, that even though they had conveyed this easement, resulting in a defect in Plaintiff's title to the subject property, they should not be held liable for these acts because they were prior to the conveyance to Plaintiff. (p. 16 of Defendants' brief.) The whole purpose of implying covenants in a deed is to protect a grantee from acts done by a grantor. Certainly, the Defendant should be held liable. Defendant , not a third party, made the conveyances which Plaintiff has alleged resulted in damage to him. For the Court to adopt Defendants' argument would abrogate the purpose of implied covenants all together.

CONCLUSION

The summary judgment should be reversed. Material issues of fact remain. There is no statute of limitations bar to Plaintiff's claim. An eviction took place giving rise to Plaintiff's claim. Defendants have effectively conceeded that the Marketable Record Title Act is not a bar to Plaintiff's claim.

Respectfully Submitted,

NEILS E. MORTENSON
Cohne, Rappaport & Segal
66 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

I hereby certify that I hand delivered a true and correct copy of the foregoing Brief of Plaintiff-Appellant to McKay, Burton, Thurman & Condie, Attorneys for Defendants-Respondents, 500 Kennecott Building, Salt Lake City, Utah this 5th day of January, 1979.