1979

Lola H. Mitchell v. Gary A. Mitchell : Brief of Respondent

Utah Supreme Court

C. DeMont Judd, Jr.; Attorney for Appellant;
Stephen W. Farr; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

LOLA H. MITCHELL,

Plaintiff and Appellant,

vs.

GARY A. MITCHELL,

Defendant and Respondent.

Case No. 15790

BRIEF OF RESPONDENT

Appeal from the Judgment of the
District Court of Weber County, Utah,
Honorable Don V. Tibbs, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

An action of divorce was filed by the Appellant and first heard by the Court on April 28, 1976, and resulted in the Lower Court granting a Decree of Divorce to both of the parties, which decree was issued by the Court on January 6, 1976.

As related by the Appellant in the Brief before the Court, the Appellant has caused hearings to be held by a number of lower court Judges and several of the Interum on Appeals to the Supreme Court of Utah.

The present Appeal before this Court is based upon a

denial by the Honorable Don V. Tibbs in ruling upon an Order to Show Cause, and that the Order to Show Cause in effect sought a modification of a decree of another lower District Court Judge, who having rendered a previous Judgment in the divorce matter before the Court, ruled that a Petition to Modify had been untimely filed in accordance with the Rules of Civil Procedure governing the rights of the parties in the District Court, and in addition, the Petition for the Order to Show Cause was denied for failure to state with particularity the grounds upon which relief was being sought. It was further decreed that the Court could only consider a modification of Judgment based on change of circumstances since the rendering of the verdict by the previous court, and that such change of circumstances was not shown.

RELIEF SOUGHT ON APPEAL

The Respondent seeks upholding of the Judgment of the lower District Court for the previously rendered Judgment in this matter.

STATEMENT OF FACTS

Respondent cannot accept as factual the Statement of Facts set forth by the Appellant, in that there is no reference to the record except as to two specific statements set forth in the Statement of Facts; and as to those items attributed to a record by reference, the references referred to was an

opinion, not that of an expert, who testified as to the value of the 4-plexes alleging their value to be $84,000.00 each, when the record shows that the witness was not a member of any qualified appraisal organization or group (T-22), has never done any veteran administration appraisals (T-23), examined only one unit of the four units (T-23), was asked only to give a rough estimate of the value, did not measure the square footage of the property premises (T-23).

The best testimony before the court is that of the Respondent who states the property was worth a maximum of $60,000.00 per 4-plex, for a total of $240,000.00 (T-32), and that the property is not marketable unless a cash buyer can be found, in that there is a first mortgage on the property, in addition thereto there is a second mortgage in the amount of $31,000.00 at 18 percent interest, and the conversion of the property into a sale requires a cash position for any equity as well as the second mortgage (T-32), and that banks and loaning institutions have not been loaning on rental unit property for a number of years unless it is a single rental unit type of 4-plex where the purchaser would also be residing therein (T-32). The Respondent stated that the appraisal of the property was a sham appraisal, in that no appraiser can properly appraise property without examining the property and studying the method of construction, taking into consideration the quality of the construction of

the premises (T-33).

The Court found both of the parties at fault and granted both a Decree of Divorce and set a subsequent period for determination of the distribution of the marital estate (T-18). The Court awarded the Uintah properties originally to the Appellant and granted to the Respondent a Judgment lien of $20,000.00. The Uintah property had a balloon payment that was past due in the amount of $51,000.00, together with $3,500.00 due on the lot to a second party (T-255). In addition there was a bank note due and owing in the amount of $10,000.00 and a note to the bank for landscaping in the amount of $3,000.00, all past due. (T-265) The Respondent testified that he had no way to refinance the Uintah property nor to make the payments on it (T-266), and that the four 4-plexes had income just approximately sufficient to make the mortage installments due for the indebtedness on them (T-267), and, therefore, were of no income value as to the Respondent.

The Court awarded the Uintah home to the Appellant and ordered the Respondent to pay the total indebtedness against the home and in addition to pay child support of $150.00 per child and alimony of $200.00 a month (T-272), when the maximum income of the Respondent was $12,000.00 a year (T-36), which resulted in the foreclosure and loss of the Uintah property.

An Order to Show Cause was brought before the Honorable

Calvin Gould alleging the wilful failure of the Respondent to comply with the Order of the Court (R-286).

The plight of the loan set forth in a letter from Walker Bank and Trust to the Respondent (R-294), and the Lower Court referred the matter back to the original hearing Judge to enforce its own Order if it deemed it was possible for the Respondent to so perform. The original hearing Judge ordered and decreed that the Respondent, while in violation of the Court Order, was not subject to punishment as the violation was not wilful (R-307), and the Court further found that the filing of a Supersedeas Bond by the Respondent could not constitute contempt, in that it was the finding of the Court that the Defendant did not have the ability to comply with the Order (R-309).

On August 31, 1977, the Honorable J. Duffy Palmer rendered Judgment upon an Order to Show Cause on a Petition to Modify made by the Appellant and rendered the Court's Judgment denying same on September 30, 1977 (R-330).

On September 30, 1977, a Motion and Petition for a Rehearing was filed by the Appellant on the matter previously decided on August 31 by the Court. (R-331)

The Court denied the Motion for Rehearing as a matter of law and the Court stated it did not have jurisdiction to enter the Order because of the untimely filing by the Appellant. (R-343)

Upon a subsequent Petition for Rehearing before the Honorable Don Tibbs, the Court denied the Motion of the Appellant, in that a Motion for Redistribution of the Property held before the Honorable Judge Tibbs was an attempt to have the Court overrule and modify the Judgment of another Lower District Court Judge, which the Court denied and dismissed. (R-358)

ARGUMENT

POINT I

APPELLANT'S MOTION FOR REHEARING WAS DEFECTIVE AS A MATTER OF LAW.

Under Rule 52(B) of the Utah Rules of Civil Procedure, it specifically provides that the time after the entry of a Judgment, the Court may amend the findings or make additional findings and may amend the Judgment accordingly, and the period provided for such amendment or making of additional findings is set forth as ten (10) days.

Also in accordance with Rule 59(E) of the Utah Rules of Civil Procedure, it places a limitation upon the time for filing Motions such as that of the Appellant's made before the Honorable Don Tibbs to ten days for the filing of an Affidavit and a Motion for a New Trial which shall be calculated from the time the Judgment is entered and requires that the Motion to alter or amend the Judgment shall be served not later then ten days after entry of the Judgment.

The record before the Court shows that the original

matter came on for hearing on August 31, 1977, before the Honorable J. Duffy Palmer, and that the Court entered its findings on August 31, 1977. It is further evidenced that the findings and orders were made in open Court and mailed to Appellant's attorney on September 9, 1977, and were executed by the Court on the 13th day of September, 1977. (R-337)

The record shows that the Appellant's Affidavit and Motion for a Rehearing were not received by the Respondent's attorney until October 5, 1977, and was not filed by the Court until October 5, 1977. (R-337)

Under Rule 52(B) of the Utah Rules of Civil Procedure provides the ten-day period for amending of the findings or amending of the Judgment, was an Order which was an adjudication of a party's rights and constituted a Judgment as provided for under Rule 52(B) of the Utah Rules of Civil Procedure, and is, therefore, subject to both Rule 52(B) and 59(E). It is, therefore, evident that the Appellant's Motion for Rehearing was properly denied in accordance with the Rules of Civil Procedure of the Court.

POINT II

ACTIONS OF TRIAL COURT AND JUDGMENT HAVE A PRESUMPTION OF VALIDITY.

The Appellant's invocation of the words of St. Luke

in Chapter 18, verses 1-7, and allegations of the failure of Judges Gould, Christoffersen, Wahlquist, Palmer, Tibbs, and the Supreme Court of Utah, all having failed to pass the test in the granting of equity to a Petitioner, is an interesting philosophical view and the Respondent would adopt the words of St. Luke wherein he stated, "Yet, because this widow troubleth me, I will avenge her, less by her continual coming she weary me", makes even more important that equity shall not be based upon the view of the Lord but rather upon the conscience and desire of men of law, not to render Judgments based on becoming weary from continuously invoked litigation, but based upon the concept of law founded upon a codification of the conduct of individuals in society to abide by the adopted laws and rules of society and not become weary from continued litigation, in that litigiousness itself does not constitute equity.

In Searle v. Searle, 522 P.2d 697 (Sup.Ct. of Ut., May 16, 1974), the Court had before it an action for divorce wherein the parties were given numerous hearings and communications over a period of two years, and the Trial Court attempted to accommodate the parties and provide for an equitable distribution. The Supreme Court held that it is both the duty and the prerogative of the Supreme Court in a case of equity to review the facts as well as the law,

Article VIII, Section 9, Constitution of Utah, the Trial Judge has considerable latitude of discretion in adjusting the financial and property interest in a divorce case, and the actions of a Trial Court are indulged with a presumption of validity with the Appellant having the burden to prove a serious inequity as to the manifest and clear abuse of discretion.

It is submitted to the Court, that the previous Judges who heard the matter before the Court, and specifically the review of the record of Judge Christoffersen by Judge Palmer, was an attempt to give a conscientious and judicious consideration to all of the matters before the Court, and it is submitted that this Court would be hard pressed to find that the Trial Court had abused its broad discretion in arriving at the findings which the Lower Court made in this matter.

It is further submitted to the Court, that the failure of Judge Wahlquist, Judge Palmer, and Judge Tibbs to modify the verdict of Judge Christoffersen in a manner suitable only to the Appellant, does not per se manifest any unconscionable conduct or abuse of discretion on the part of the District Court Judges in not following the mandate of the Appellant.

CONCLUSION

The Respondent respectfully submits to this Honorable Court, that there was no abuse of discretion in the conduct

of the Lower Courts in the handling of the matter now before it, and that the Judgment of the Lower Court should be affirmed.

Respectfully submitted this 17 day of February, 1979.

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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellant, C. DeMont Judd, Jr., 2650 Washington Boulevard, Suite 102, Ogden, Utah 84401, on this 17 day of February, 1979.

Jeannine Stowell, Secretary