

1950

Mike Dragos and Milka Dragos v. Teddy G. Russell and Manilla Russell : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MIKE DRAGOS, and MILKA DRAGOS,
his wife,

Plaintiffs and Respondents,

— vs. —

TEDDY G. RUSSELL, and MANILLA
RUSSELL, his wife,

Defendants and Appellants.

BRIEF OF RESPONDENTS

FILED

DEC 30 1950

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Case No. 7568

BRIEF OF RESPONDENTS

STATEMENT

The Statement of Facts in appellants' brief is so argumentative and full of unwarranted inferences, and certain facts are unduly emphasized and the important facts are disregarded to such an extent, that the respondents are compelled to briefly restate the facts in this case.

The action was instituted by the plaintiffs to compel the defendants to remove from their land an encroachment consisting of a row of buildings and sewer line

erected by the defendants. The defendants answered and denied that they encroach upon plaintiffs' premises and set up an affirmative defense of adverse possession, claiming that the line between the parties' properties was fixed by a fence, and that the building and sewer line was on their side of the fence.

It appears from the evidence that the defendants' predecessor, Edward B. McCabe, built a number of wooden cabins on the north line of the property now belonging to defendants in the year 1928, at a point about 150 feet west from State Street. These cabins were from three to four feet away from the fence. McCabe sold the property to the defendants in 1943, and thereafter the defendants removed these cabins and began the erection of new cabins made out of cinder blocks. Prior to the construction of these new cabins, the defendants tore down the fence, beginning at a point approximately 150 feet from State Street, pulled out trees, and cleared out brush growing along both sides of the fence. The defendants told the plaintiffs that the fence belonged to the defendants, and they promised the plaintiffs that they would erect a new fence. Defendants used some of the lumber from the old fence as sheeting in their cabins.

Surveys made by both parties established the fact that the new cabins erected by the defendants were located on the property of the plaintiffs and encroached upon their property from one inch to two feet seven inches, and the sewer line installed by the defendants protruded from six to eighteen inches on the plaintiffs'

property for a distance of 240 feet. Therefore, the defendants' cabins and sewer line are encroaching upon the plaintiffs' property at some points exceeding four feet.

A portion of the fence, beginning from State Street and going west for approximately 150 feet is still in existence. This fence was a part of the fence which was torn down by the defendants. This portion of the fence is on the legal boundary line dividing the two properties.

The bulk of the defendants' evidence introduced at the trial was introduced for the purpose of establishing the location of the old fence. The court, after hearing both sides, found and determined that the old fence was located on the legal boundary line dividing the properties of the parties, and found further that the defendants' cabins and sewer line encroached on plaintiffs' property. That these findings are amply supported by the evidence will be hereinafter discussed, and the controlling facts pointed out to the court.

ARGUMENT

POINT I.

THE COMPLAINT STATES A CAUSE OF ACTION.

Appellants' first contention is that they do not believe that the complaint states a cause of action, upon the ground and for the reason that it is alleged in the complaint that prior to the commencement of this action plaintiffs were and are now owners and in possession of

the lands claimed by the plaintiffs. The allegations of the complaint describe the lands by metes and bounds. Plaintiffs further allege that defendants have encroached on a part of their land and want the encroachments removed. These allegations state a cause of action in trespass. The plaintiffs are in possession of all the land that they own, as they have never voluntarily parted with any part of it, and the fact that the defendants have encroached upon a portion of it does not necessarily defeat their right of possession. We do not believe that defendants are serious in the contention that the complaint does not state a cause of action, nor do we believe that the issue has any merit.

POINT II.

THE COURT PROPERLY GRANTED PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' COUNTERCLAIMS I AND II TO PLAINTIFFS COMPLAINT.

Defendants' counterclaim I and II were actions in tort against the plaintiffs' claim. The Utah Rules of Civil Procedure were not adopted until January 1, 1950, and, therefore, have no application in this case, which was tried in December, 1949. The counterclaims were not permissible under Section 104-9-2 (1), Utah Code Annotated, 1943, as they did not arise out of the same transaction and were counterclaims of a tort against a tort. Such counterclaims have been rightfully stricken upon a motion.

Smith v. Alvord, 31 U. 346, 88 P. 16;
Marks v. Tompkins, 7 U. 421, 27 P. 6.

POINT III.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE COURT.

Appellants' contentions III, IV, V and VII attack the findings of the court, the judgment, and the sufficiency of the evidence to support the same.

There is no dispute over the fact that defendants' cabins and sewer line encroach on the land of the plaintiffs. The defendants contend that the old fence, at the point where the defendants began the erection of the new cabins, veered to the north, and that the defendants built the new cabins and sewer line at least six inches away from the imaginary fence. The plaintiffs contend that the destroyed fence had been on the legal boundary line that divided the lands of the parties. The plaintiffs' contention was upheld by their own testimony and the testimony of the witnesses placed on the witness stand in behalf of the defendants.

There are three significant facts that stand out in the evidence that completely answer and defeat the claims of the defendants. They are as follows:

1. The existing fence, beginning from State Street and going west for 150 feet, is on the legal line dividing the lands of the parties.
2. The cabins built by McCabe were three to four feet away from the old fence.

3. The fence was not attached to the telephone pole located about 165 feet away from State Street, but was located approximately eighteen inches to two feet south from the pole.

The defense of adverse possession is an affirmative defense and the burden of proof is upon the party making such defense. The defendants testified that the old fence was nailed on to the telephone pole located about 165 feet west from State Street, and on plaintiffs' land, and that they built their cabins on the old McCabe foundations. Appellants, in their brief at page 5, state:

“In 1928, Edward B. McCabe and Mary McCabe, who then owned the State Tourist Court property, constructed a line of tourist cabins along and against the old fence.”

This is a misstatement of fact. Edward B. McCabe was called as a witness and in reference to this matter testified as follows:

“A Yes, I remember the pole, but it never meant anything to me.

“Q Was that near the fence?

“A If I remember right it is pretty hard to say, but I would say it was about twenty inches north, sixteen to twenty inches north.

“Q How long was that pole line in there, was it in there the entire time you had the property?

“A Yes.” (R. 197)

“Q The telephone pole was not part of the fence, was it?

“A No.” (R. 200)

Hyrum Hendricks, another witness for the defendants, stated in reference to the telephone pole:

“Q It wasn’t part of the fence, was it?

“A No, it would be on the north.” (R. 182)

Mr. Hendricks also testified in reference to the location of the cabins when he stated that the cabins were away from the fence line:

“A Yes, there was cabins then, I don’t know but approximately three feet in between there and then this board fence.

“Q This board fence?

“A I used to get in there and clean it out, maybe two to three times a year for Mr. McCabe, cleaned it out.” (R. 178)

On cross-examination, this witness further testified:

“Q Now, between the fence and the cabins, there was about three feet you would say?

“A I would say approximately three feet. I used to get in behind there and clean them out.

“Q So the cabins weren’t up against the fence?

“A No sir.

“Q They were away from the fence?

“A Yes sir, they were away from the fence, south of the fence.” (R. 181)

C. Earl Alsop, another witness for the defendants, also testified in reference to the location of the cabins, and stated:

“Q How far were the cabins away from the fence?

“A Well, I always figured between two and three feet.” (R. 189)

No witness, whether a former owner of defendants' property or otherwise, has testified that the fence was not on the boundary line; as a matter of fact, all of them testified that they thought the fence was or should be on the line. There is no evidence that at any time there was a dispute between the adjoining owners as to the location of the boundary line, nor was the line in any way uncertain, but was capable of being readily ascertained. There is no evidence that there was any acquiescence on the part of the owners of the respective properties that the fence would be considered the boundary line, if it were established that it was not on the survey line. That being the case, the defendants have no cause to complain with the ruling of the court.

Tripp v. Bagley, 74 U. 57, 269 P. 912;
Willie v. Local Realty Company, 110 U. 523,
 175 P(2) 718.

Under the circumstances, the court was justified in finding and concluding that the defendants be required to remove all of their newly constructed improvements from the plaintiffs' premises. The defendants did not act in a prudent manner in constructing their cabins and sewer lines. They knew at least as early as 1947 when they surveyed the property where their lines were located, but in spite of such knowledge, they continued to build throughout and into the year 1948. (R.

187-8) Defendants, at no time until after the judgment was entered against them, made no contention concerning awarding of damages to cover the value of the portion of the land occupied by the encroachment, but raised this matter for the first time upon appeal. Even had this issue been raised at the trial, the court would be justified in denying them such relief. We do not believe that any court would allow another party to take away his property by such a procedure. The property is located in a commercial district, and is valuable for business purposes.

POINT IV.

PLAINTIFFS' ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Defendants contend that plaintiffs' cause of action is barred by Sections 104-2-5 and 104-2-6 of Utah Code Annotated, 1943. Defendants, however, overlook Section 104-2-12, which reads as follows:

“In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.”

The plaintiffs have at all times paid taxes upon their property, and having done so, the statutes of limitations cited by the appellants do not apply. Further, the improvements made by defendants upon the plain-

tiffs' property were in the nature of a continuing trespass or nuisance. Defendants could only prevail if they had these improvements on the plaintiffs' property for more than twenty years, if they held said property adversely to the plaintiffs. There is no evidence on the part of the defendants that they made such a claim.

CONCLUSION

The factual situation surrounding this case is so strongly in favor of the plaintiffs that the findings of fact, conclusions of law, and judgment of the court are more than amply supported by the evidence. Defendants' motion for a new trial was properly overruled. The defendants' argument, presented in their brief, is based upon the false assumption that the fence was located at a different place than where it actually was. The testimony of defendants' own witnesses, and the witnesses of the plaintiffs, and the testimony of the plaintiffs themselves is contrary to this assumption.

We submit that the judgment and decree of the court should be affirmed.

Respectfully submitted,

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