

1950

The Commercial Bank of Utah v. Leonard A. Madsen v. Bob Jeppsen : Brief of Appellant on Appeal

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Commercial Bank of Utah v. Madsen*, No. 7584 (Utah Supreme Court, 1950).
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Case No. 7584

IN THE SUPREME COURT
of the
STATE OF UTAH

THE COMMERCIAL BANK OF
UTAH, a corporation,
Plaintiff and Appellant,

vs.

LEONARD A. MADSEN and
ARDETH MADSEN, his wife, also
known as Ardith Madsen,
Defendants and Respondents,

vs.

BOB JEPPSEN,
Purchaser and Co-Respondent.

FILE
OCT 27 1950

Clerk, Supreme Court,

APPELLANT'S BRIEF ON APPEAL

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Case No.
7584

APPELLANT'S BRIEF ON APPEAL

INTRODUCTION

This is an appeal by plaintiff from an adverse decision and order of the District Court of the Seventh Judicial District in and for Sanpete County, State of Utah, Hon. L. Leland Larson, Judge.

STATEMENT OF CASE

In this action a judgment was rendered for plaintiff against the defendants named in the sum of \$4,121.19, and a decree of foreclosure of a mortgage which was security for the amount of \$1950.00 of said judgment given by defendants and covering "Lots 1 and 2 of Block 28, Plat "A" of Manti City Survey," in Sanpete County, Utah (Rec. page 21). An Order of Sale and Certified copy of Decree was handed to the Sheriff of Sanpete County. The Sheriff noticed the sale, purportedly made a sale, and filed his return (Rec. pp. 27 to 33), showing the property as having been sold in one parcel and for only the sum of \$501.00 to the named purchaser.

The plaintiff filed an application for vacation of the sale upon the grounds (1) that the sale was not made of the property in two parcels; (2) that the proceedings of the sheriff were irregular and he abused his discretion; and (3) that the sale price accepted by the sheriff was grossly incommensurate to the fair market value of the property sold; and submitted therewith its bid of \$1950.00 for the property (Rec. pp. 24 to 26).

After hearing on the application the Court rendered its decision dated August 7, 1950, denying the application (Rec. p. 46). From this decision and order the plaintiff appeals.

THE EVIDENCE

The Sheriff, Ulysses Larsen, testified that he was handed typewritten notices by the attorney for the Bank and was instructed to fix the time of sale at 11 o'clock A.M., which would give plenty of time for the interested parties to be over to bid on the property; the plaintiff's place of business being at Nephi, 43 miles distant. And that it was the understanding that he, the sheriff, make the time for sale at 11 A.M., but that he forgot. He further testified that he never notified the attorney for, or any officer of, the Bank that the sale was set for 10 A.M. instead of 11 A.M. that before 11 A.M., one, Hanson, representing the Bank appeared and said that he thought the sale was at 11 A.M. That at the time of sale the sheriff stated to the bidders that the property was worth about \$1000.00 (Tr. pp. 3-6).

Witness C. H. Beal, a disinterested real estate broker, testified that there was a fence dividing lots 1 and 2, and he saw it the morning he testified; that the improvements were on lot 1, and lot 2 was vacant; and that the property was worth from \$1400 to \$1500, market value (Tr. pp. 8-10).

POINTS RELIED ON FOR REVERSAL ON APPEAL

The appellant relies upon the following points for a reversal of the decision and order appealed from:

POINT I.

THAT THE SALE WAS NOT MADE OF THE PROPERTY IN TWO PARCELS AS REQUIRED BY UTAH RULES OF CIVIL PROCEDURE 69(e) 3, RESULTING IN GROSSLY INADEQUATE BIDS, TO THE PREJUDICE OF PLAINTIFF.

POINT II.

THAT THE PROCEEDING BY THE SHERIFF IN FAILING TO NOTICE SALE AT ELEVEN O'CLOCK A.M., AS INSTRUCTED BY PLAINTIFF AND AS UNDERSTOOD BY PLAINTIFF AND SHERIFF, AND HIS FAILING TO NOTIFY PLAINTIFF OF HIS FAILURE TO COMPLY WITH THE INSTRUCTION AND CONFORM WITH SUCH UNDERSTANDING AND THEREBY PRECLUDING PLAINTIFF FROM BEING PRESENT, RESULTED IN GROSSLY INADEQUATE BIDS AND SALE PRICE OF THE PROPERTY, AND CONSTITUTED A PREJUDICIAL IRREGULARITY.

POINT III.

THAT THE SALE PRICE ACCEPTED BY THE SHERIFF WAS GROSSLY INCOMMENSURATE TO THE FAIR MARKET VALUE OF THE PROPERTY SOLD.

ARGUMENT

POINT I.

THAT THE SALE WAS NOT MADE OF THE PROPERTY IN TWO PARCELS AS REQUIRED BY UTAH RULES OF CIVIL PROCEDURE 69(e) 3, RESULTING IN GROSSLY INADEQUATE BIDS, TO THE PREJUDICE OF PLAINTIFF.

Utah Rules of Civil Procedure 69(e) 3 provides that when the sale is of real estate, consisting of several known lots or parcels, they must be sold separately. The description lots 1 and 2 is indicative of there being two known parcels. In this case there was a fence divid-

ing the lots; the improvements were on one lot and the other lot, lot 2, was vacant. To say that only one parcel was comprised by lots 1 and 2 would be tantamount to saying that a sale could not have been made of the area in two parcels, that it would have been necessary to have divided one parcel to have sold lot 1 to A and lot 2 to B.

Section 104-55-1 U.C.A. 1943, was retained under the rules, and it is therein provided that in foreclosure the order of sale should direct the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and the rule above referred to applies in this case.

42 C.J. 200, holds:

“Constitutional or statutory directions. The sale must also conform to directions contained in a constitutional or statutory provision applicable to the foreclosure, as, for example, that where the sale is of real property and consisting of several known lots or parcels, they must be sold separately * * *.”

Our contention is supported by *Cole vs. Canton Mng. Co.*, 59 Utah 140, 202 Pac. 830, which was a mortgage foreclosure.

The plaintiff cannot be held to have waived the requirement of the statute or rule by not being present at the time of sale in that the reason it was not represented was due to excusable inadvertence due to the mistake of the Sheriff. And, as will appear hereinafter,

the interests of the plaintiff creditor are taken into account as well as the debtors. As to the purchaser the rule of caveat emptor applied.

“The rule of caveat emptor applies to purchases at judicial sales, and the purchaser of said property took it subject to all the infirmities of the proceedings of sale.” Kimball et al. vs. Salisbury, et al., 19 Utah 161 at page 177, 56 Pac. 973.

POINT II.

THAT THE PROCEEDING BY THE SHERIFF IN FAILING TO NOTICE SALE AT ELEVEN O'CLOCK A.M., AS INSTRUCTED BY PLAINTIFF AND AS UNDERSTOOD BY PLAINTIFF AND SHERIFF, AND HIS FAILING TO NOTIFY PLAINTIFF OF HIS FAILURE TO COMPLY WITH THE INSTRUCTION AND CONFORM WITH SUCH UNDERSTANDING AND THEREBY PRECLUDING PLAINTIFF FROM BEING PRESENT, RESULTED IN GROSSLY INADEQUATE BIDS AND SALE PRICE OF THE PROPERTY, AND CONSTITUTED A PREJUDICIAL IRREGULARITY.

The Sheriff's own testimony indicates that he understood plaintiff intended being present to bid at the sale. He stated that was given as a reason to fix the time at 11 A.M., to give plenty of time to interested parties to be over there to bid on that property. He knew that he should have fixed the time of sale at 11 A.M. instead of 10 A.M., but he forgot. Then having failed to conform to the instruction and understanding he failed to notify the plaintiff of such failure. And, having failed in those two respects, and on receiving no bid higher than half of what he considered the property to be worth, and

knowing plaintiff intended coming over to bid on the property, he failed to exercise any discretion by postponing the sale until 11 A.M., which he could have done by a simple proclamation to that effect.

Under U.R.C.P. 69(e) 2 it is provided:

“If at the time appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interests of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the same from time to time * * *.”

The conduct of the sheriff was so irregular under the circumstances of this case that prejudice to the plaintiff cannot be doubted. It cannot be said that such conduct on the part of a sheriff could be expected and should have been anticipated by plaintiff. No, the sheriff has a higher responsibility and duty to the Courts, litigants and public than to permit of such theory or rule.

POINT III.

THAT THE SALE PRICE ACCEPTED BY THE SHERIFF WAS GROSSLY INCOMMENSURATE TO THE FAIR MARKET VALUE OF THE PROPERTY SOLD.

The sheriff knew that the price sold for was grossly incommensurate to the fair market value, because he announced to the bidders that he considered the property worth about one thousand dollars. The broker witness said it was worth fourteen to fifteen hundred dollars. Plaintiff submitted a bid with its application of \$1950.00.

In point on the subject we submit the following authoritative statements:

In *State vs. Harrower* (Okla.), 29 Pac. 2nd 123, the case of *Duncan vs. Eck*, et al. (Okla.), 166 Pac. 121, wherein the rules applicable to this matter are condensed and crystallized, is cited and in part set out, and I quote therefrom:

“As a general rule mere inadequacy of consideration is not sufficient ground for setting aside a sheriff’s sale, but all of the authorities hold uniformly that when gross inadequacy of consideration, coupled with very slight additional circumstances, is sufficient to set aside such sale, and that where the consideration is so grossly inadequate as to shock the conscience of the court, or is very great, it is alone sufficient.” (Citing authorities.)

“It is the duty of the court in confirming or setting aside a sheriff’s sale to protect all parties concerned, the owners and creditors of the owners as well as the purchaser.

“Whether the sale should be confirmed is a matter within the sound discretion of the court; but it is a discretion that must be exercised reasonably and not arbitrarily, and if abused is subject to review on appeal. The sale must appear to be in all essential respects fair and proper, or it will not be confirmed, and the simple fact that confirmation would sacrifice the interests of those entitled to the protection of the court is sufficient ground for a refusal to confirm. The court will

not, however, be astute to find objections, and if there is no evidence of unfairness, deception, or impropriety the sale is properly confirmed."

In *State vs. Harrower*, supra, the case of *Fowler vs. Krutz*, 38 Pac. 808, is cited and the syllabus therefrom quoted as follows:

"Inadequacy of price, taken alone, is seldom, if ever, sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case slight additional circumstances only are required to authorize the setting aside of the sale. * * * And in the present case it is held that the circumstances under which the sale was made, and the irregularities therein, in connection with the gross inadequacy of price, are sufficient to sustain the ruling of the court in setting aside the sale."

One further quotation which is applicable to the matter before the Court taken from *Suring State Bank vs. Giese*, et al. (Wis.), 246 N.W. 556, 85 A.L.R. 1477, at page 1479:

"The court may decline to confirm the sale where the bid is substantially inadequate. While it has been said that mere inadequacy of consideration is not a ground for setting aside a foreclosure sale, this rule has been rather carefully circumscribed by the court. In *Griswold vs. Barden* (Wis.), 130 N.W. 952, 953, this court speaking through Mr. Chief Justice Winslow, said: 'It has been said by this court that it is settled practice

of courts of equity to refuse a resale for mere inadequacy of consideration, and that this court will not depart from that rule where no other cause exists.' Meehan vs. Blodgett, Wis. 57 N.W. 291. This is doubtless a correct statement of the rule, but it seems from the argument in the present case that it may be easily misunderstood. It must be strictly confined to cases where there is absolutely no fact appearing, except that the price is inadequate. Whenever other facts appear, such as mistake, misapprehension, or inadvertence on the part of the interested parties or of intending bidders, as a result of which it seems to the court the failure to obtain a fair and adequate price for the property was due in whole or in part to such mistake, misapprehension, or inadvertence, the court will readily refuse to approve the sale. No fraud is necessary to justify the court in so withholding its approval. The question simply is, Is the sale under all the circumstances one of which the court in justice to all parties should approve?"

The right of the creditor to realize as much from the value of the property is of as great a dignity as the right of the debtor to obtain a fair value and credit for the property sold. If it were the debtor applying under similar circumstances and factual matters the Court would not hesitate to set aside the sale.

The writers do not intend to impute malfeasance on the part of the sheriff in this instance. But will it be wise on the part of this Court to affirm the dereliction on the part of this sheriff and set a precedent?

In this case we have as argument and grounds for reversal not just one proposition, but three: (1) Failure to sell the two parcels of real estate in two separate parcels; (2) Prejudicial irregularities on the part of the sheriff; and (3) Gross inadequacy of the sale price.

So, the question simply is, "Is the sale under all the circumstances one of which the court in justice to all parties should approve?" *Suring State Bank vs. Giese, et al., supra.*

We submit that the decision and order appealed from should be reversed and the court make an order setting aside and vacating the purported sale so made and directing that the bid of plaintiff be accepted and approved.

Respectfully submitted,

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