1979

Florence Gillmore v. Edward Leslie Gillmor : Reply Brief of Appellant

Utah Supreme Court

James B. Lee; Kathlene W. Lowe; Attorneys for Plaintiff-Respondent;
E. J. Skeen; Skeen & Skeen; Attorneys for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * *

FLORENCE GILLMOR, Plaintiff-Respondent,	)	
v.	)	CASES NOS. 16023 and 16221
EDWARD LESLIE GILLMOR, Defendant-Appellant.	)	

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This reply brief is confined to a discussion of the following points argued in the respondent's brief on the consolidated appeals:

POINT I

BOTH SUMMARY JUDGMENT AND FINAL JUDGMENT WERE PROPERLY ENTERED IN PLAINTIFF'S FAVOR BECAUSE THE RENEWAL PROVISION IN ALL THREE LEASES WAS A COVENANT PERSONAL TO EDWARD LINCOLN GILLMOR, PLAINTIFF'S FATHER.

(Respondent's Brief, both cases - page 13)

POINT IV

THE TRIAL COURT DID ALLOW EVIDENCE OF SURROUNDING CIRCUMSTANCES AT TRIAL, SO DEFENDANT'S CONTENTIONS ON THAT ISSUE ARE DEVOID OF MERIT.

(Respondent's Brief, both cases - page 29)

The other points argued by the respondent are covered fully by the Appellant's two briefs and it would be repetitious to further argue them here.

ARGUMENT

1. The Renewal Provision was not a covenant personal to Edward Lincoln Gillmor, but was a covenant running with the land.

It is stated by the respondent in her brief on the consolidated cases that the Appellant had cited no Utah decisions in support of his contention that a covenant to renew leases always runs with the land. See pages 18 and 19 of the respondent's brief in the consolidated cases.

Cases in point involving covenants to renew leases decided by the Supreme Courts of California, Connecticut, Massachusetts and Virginia were cited in the Appellant's brief in Case No. 16023, at pages 6 and 7. The Utah case of First Western Fidelity v. Gibbons and Reed Co., 27 Utah 2d 1, 4, 492 P 2d 132, 134, cited and relied upon by the respondent is not in point because it did not involve a covenant to renew a lease, but involved a provision in an agreement for the removal of sand and gravel. The facts and circumstances in that case are not at all similar to those in this case and the statement of the rule quoted by the respondent has no application to a renewal provision in a lease.

The case of Taylor v. King Cole Theaters, 183 Va. 117, 31 SE 2d 260 is directly in point on the facts and the law.

2. The Trial Court erred in excluding evidence of surrounding circumstances in Case No. 16221.

It is stated on page 7 of the Respondent's brief that,

> "***It is true that plaintiff sought to exclude evidence of surrounding circumstances, but the trial court sustained no objections by plaintiff's counsel to such evidence. Plaintiff introduced little evidence on those surrounding circumstances, not because of any rulings by the court below, but only because none of the parties were able to recall those circumstances in response to questions by defense counsel."

On page 29 it is further stated;

> "***As noted in the preceeding factual discussion, however, the trial court did allow defendant to present all his evidence on such surrounding circumstances, a fact which review of the trial transcript references cited by the defendant will easily bear out, and so this argument by defendant is totally without merit.....It is true that defendant was unable to introduce much evidence on any such surrounding circumstances, but his lack of success in presenting such evidence was simply a result of all parties' lack of recollection of those circumstances, and not of any rulings by the trial court. Even defendant himself, who apparently urged the introduction of such evidence because he thought it would help his position, was unable to recall any of the negotiations leading to execution, not only of the current leases signed in 1969, but also of the 1953 and 1957 predecessor leases."

It is apparent from the respondent's argument that she believes the "surrounding circumstances", as that expression is used in the rule regarding ambiguous language, refers only to what the parties said during the negotiation of the leases. The appellant believes that "surrounding circumstances" has a much broader meaning and includes such things as the situation of the parties and the facts and circumstances surrounding the making of

the leases and the purposes of their execution. This rule is well stated in Continental Bank and Trust Co. v. Stewart, 4 Utah 2d 228, 291 P 2d 890. We quote:

> "It is true that the express terms of an agreement may not be abrogated, nullified or modified by parol testimony; but where, because of vagueness or uncertainty in the language used, the intent of the parties is in question, the court may consider the situation of the parties, the facts and circumstances surrounding the making of the contract, the purpose of its execution, and the respective claims thereunder, to ascertain what the parties intended."

An effort was made to get the facts and circumstances in the record by asking a preliminary question about the livestock business. We quote the question, the argument of counsel, and the ruling of the court:

> Q. And are you the only member of the Gillmor family--by that I'm referring to the Edward L. Gillmor, your uncle's family, your family, you and Frank engaged in the livestock business--.
>
> MR. LEE: Your Honor, objection to that. I don't know what that has to do with the lease that's presently before the Court.
>
> THE COURT: The objection will be--.
>
> MR. LEE: It's extraneous.
>
> MR. SKEEN: Pardon me; I didn't hear your ruling.
>
> THE COURT: I was going to sustain the objection.
>
> MR. SKEEN: Now, I might state, your Honor, that we take the position in this case that there are ambiguties in the lease in question, and we're seeking to show background material and surrounding circumstances which have bearing on the construction of the lease.
>
> Now, if counsel is submitting the case on the question as to whether the lease--on the theory that the lease is unambiguous, of course, this sort of evidence would be inadmissible in relation to the claim.

We take the position on the other hand that there are ambiguities in it, and we're seeking to show the surrounding circumstances.

THE COURT: Well, the objection will be sustained to the last question."

This ruling was made by the trial court after it had admitted evidence offered by the respondent as to the surrounding circumstances. See testimony of Stephen T. Gillmor and the respondent. (Transcript, pp. 259, 262-264.) The Court, later in the trial, admitted such evidence offered by the respondent. (Transcript 278-287, 290-292.)

It was evident to counsel for appellant after arguing admissibility on the ground of ambiguity that the court had decided to exclude all evidence of "....background material and surrounding circumstances". No further efforts were made to get such evidence before the court because it had held squarely that there was no ambiguity and that evidence of purposes and surrounding circumstances was, therefore, inadmissible.

The Court found that there was no ambiguity in any lease, although it had only the Salt Lake County lease before it. (Trial 180)

CONCLUSION

Both consolidated cases should be reversed with directions to admit testimony of the situation of the parties, surrounding circumstances, and the purposes of the transaction.

Respectfully submitted,

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