

1986

Kathleen S. Pusey v. Robert O. Pusey : Brief of Appellant

Utah Supreme Court

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Robert O. Pusey, Pro Se; Attorney for Respondent.

Valden P. Livingston; D.R. Chambers; Parsons, Behle & Latimer; Attorneys for Appellant.

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UTAH

1986 20934

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHLEEN S. PUSEY,

Appellant,

VS.

ROBERT O. PUSEY,

Respondent.

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Case No. ~~20365~~

20934

BRIEF OF APPELLANT
KATHLEEN S. PUSEY

APPEAL FROM ORDER REMOVING LIS PENDENS
OF THE SECOND JUDICIAL
DISTRICT COURT FOR DAVIS COUNTY
THE HONORABLE DOUGLAS CORNABY, JUDGE

ROBERT O. PUSEY, pro se
1100 North 200 West
Bountiful, Utah 84010

Attorney for Respondent

VALDEN P. LIVINGSTON

D. R. CHAMBERS

PARSONS, BEHLE & LATIMER

185 So. State Street ~~77~~ Suite 700

Salt Lake City, UT 84147-0898

Attorneys for Appellant: JAH

JAN 17 1986

Clerk, Supreme Court, Utah

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KATHLEEN S. PUSEY,)	
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Appellant,)	Case No. 20365
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ROBERT O. PUSEY, pro se
1100 North 200 West
Bountiful, Utah 84010
Attorney for Respondent

VALDEN P. LIVINGSTON
D. R. CHAMBERS
PARSONS, BEHLE & LATIMER
185 So. State Street, Suite 700
Salt Lake City, UT 84147-0898
Attorneys for Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

In accordance with a motion of defendant Robert O. Pusey (Robert) the Honorable Douglas Cornaby, Second Judicial District Court Judge in and for Davis County, State of Utah, entered an order removing lis pendens on September 16, 1985 which ordered the removal of the lis pendens recorded by plaintiff Kathleen S. Pusey (Kathy) on real property located at 251 Edith Avenue and 1248 South 300 East, Salt Lake City, Utah. In the prior appeal by Robert from the divorce decree in these proceedings, Case No. 20365, Kathy claims that on remand she may be awarded a right, title and interest in said real property. Kathy therefore appeals the Order Removing Lis Pendens and requests that the court reverse the same so that her lis pendens may remain as an encumbrance upon said real property during the pendency of these divorce proceedings, including all appeals, protecting her interest therein against the claim of good faith purchasers.

DETERMINATIVE STATUTES

Utah Code Ann., § 78-40-2 (1953) and the cases cited in appellant's brief are determinative in resolving this appeal. Such statutory provision provides as follows:

In any action affecting the title to or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file

for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and the description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

STATEMENT OF THE CASE

On October 12, 1983, Kathy filed a Complaint for Divorce in the above-entitled action against Robert in the Second Judicial District Court for Davis County, State of Utah. The Complaint requested that the Court grant Kathy a divorce and that the trial court make an equitable distribution of the assets of the parties. After conducting discovery in such divorce proceedings, Kathy learned that record title to real property owned by Robert and located at 1248 South 300 East, Salt Lake City, Utah and 251 Edith Avenue, Salt Lake City, Utah, was in the name of Robert's nominees, Fun Fair, Inc. and Virla O. Woolstenhulme. Fun Fair, Inc. is a corporation owned and controlled by Robert and Mrs. Woolstenhulme, his mother.

In order to put any potential good faith purchasers on notice of her claim of an interest in said real property, by way of these divorce proceedings, Kathy recorded a lis pendens on each parcel of real property on May 25, 1984. Each lis

pendens states that Kathy seeks to have a Divorce Decree entered in her favor against Robert, making an equitable distribution of Robert's real property located at the above addresses. The lis pendens further states that Robert is the equitable fee owner of said real property and that the same is titled in another person or entity in name only and that they hold the same for Robert. True and correct copies of said lis pendens are attached hereto as Exhibits A and B and incorporated herein by this reference.

At the trial of this action, the Court heard testimony showing that Robert and Kathy lived at the home at 251 Edith Avenue for about four years during the marriage and made significant repairs and improvements thereto from marital assets. (Tr. Vol. II at 35-37, 45 and 24-26.)¹ Kathy testified that record title to said home was in the name of Robert's mother, but it was controlled and operated by Robert. (Tr. Vol. II at ¶ 39-40.) He made all significant decisions with respect thereto. (Id.) The real property owned by Fun Fair, Inc. was operated as a nursery during and subsequent to the marriage. The tenant who operated the nursery during the marriage, and

¹References herein are to the transcript of the divorce trial included as part of the record in the appeal therefrom, presently before this Court as Civil No. 20365.

marriage, and who continues to operate the same, was located by Kathy. The tenant found by Kathy contributed significant income to Fun Fair during the marriage. (Tr. Vol. II 16-17 and 42-44.)

During the marriage, Kathy was employed by Fun Fair, Inc. and served as a secretary and officer of the same. (R. at 267, ¶ 12, Tr., Vol. II at 37, 42 and plaintiff's Exhibit 20.) Kathy's expert witness at the trial testified that two-thirds of the value of the real property, as of the date of trial, located at 248 South 300 East, Salt Lake City, Utah and 251 Edith Avenue, Salt Lake City, Utah, was attributable to appreciation during the marriage, caused by inflation. (Tr., Vol. II at 13-18.)

In making an equitable distribution of the marital estate, the court did not award any of the appreciation in value of said real property to Kathy. The Court determined that all of the stock in Fun Fair, Inc. was owned wholly by Robert and his mother and that the real property located at 251 Edith Avenue was owned wholly by Robert's mother. This was in spite of the fact that (1) Kathy and Robert had made significant improvements to such real property which increased its value, (2) such real property was controlled and operated by the parties during the marriage; and (3) said real estate appreciated in value during that time period. In holding that said real property was owned by Fun Fair, Inc. and Robert's

mother, the Court failed to award any of its value to Kathy. In spite of the fact that the Court held that Robert and his mother owned all of the stock in Fun Fair, Inc., the Court did not award Kathy any interest in said stock. Instead, the Court awarded Kathy an interest in real property located in Bountiful, Utah known as the old Western General Dairy facility.

Subsequent to entry of the Divorce Decree, Robert filed an appeal to the Utah Supreme Court seeking a "modification of the property distribution to deduct the value of money traceable to his separate assets, with only the net value, i.e., the value traceable to the marriage, to be divided between the parties." (Appellants Brief at 2.) By the appeal, Robert seeks to reduce Kathy's interest in the real property in the Dairy facility in Bountiful. Kathy does not contest the property distribution made by the lower court and feels that the same was fair and equitable but, "if this case is remanded for a re-evaluation of the property division, it should also be remanded to allow Kathy an opportunity to put on evidence and argue that she should have received more of the value of the assets of the parties. Specifically, the remand should allow consideration of awarding Kathy part of the appreciation in value, during the marriage, of certain assets which was disregarded by the trial court" in light of its award to Kathy of an interest in the Western General Dairy facility. (Respondents Brief in the appeal from the Divorce Decree at 21.)

SUMMARY OF ARGUMENTS

(1) The property encumbered by Kathy's lis pendens was improved during the marriage with marital assets and appreciated during the marriage of the parties. The lower court failed to award Kathy an interest in said real property but instead, awarded her an interest in other real property acquired by the parties during the marriage known as the Western General Dairy facility in Bountiful, Utah. Robert has appealed that portion of the divorce decree granting Kathy an interest in the dairy facility. If Robert is successful on appeal, the court, on remand, may grant Kathy an interest in the real property encumbered by the lis pendens to compensate her for loss of her present interest in the dairy facility. Because these proceedings may be finally resolved with Kathy having an interest in the real property encumbered by the lis pendens, she should be able to give notice of said claim to protect herself against good faith purchasers who may acquire an interest therein. Judge Cornaby's order should therefor be reversed.

(2) At the end of the divorce trial, the lower court specifically found that Robert was the alter ego of three corporations operated by him during the marriage. One of those corporations holds record title to the real property encumbered by Kathy's lis pendens. As part of the Divorce Decree, Kathy was given a judgment against Robert for \$40,293.00. If Kathy

is ordered to release the lis pendens presently of record, she should be allowed to record a new lis pendens giving notice that Robert is the true owner of the real property titled in that corporation's name and presently encumbered by Kathy's lis pendens.

ARGUMENT

POINT I

THE LIS PENDENS SHOULD REMAIN DURING THE
PENDENCY OF THESE PROCEEDINGS TO GIVE NOTICE
TO GOOD FAITH PURCHASERS

Utah Code Ann., § 78-40-2 (1953) provides for the recording of a lis pendens where litigation affects title to real property as follows:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

In commenting upon this section of the Utah Code, the Utah Supreme Court has held that the sole purpose for recording

a lis pendens is to give constructive notice of the pendency of litigation to all persons who may be interested in acquiring an interest in real property affected thereby. Hansen v. Kohler, 550 P.2d 186 (Utah 1976); Boyce v. Boyce, 609 P.2d 928 (Utah 1980). Recordation of a notice of lis pendens does not create any interest in real property but merely gives notice of a claim therein which may be resolved in pending litigation. (Id.)

In the Hansen case, Hansen recorded a lis pendens on October 19, 1971. Hansen was unaware that the real property covered by the lis pendens had been conveyed to a third party and that the deed had been recorded on October 18, 1971--one day prior to recordation of the lis pendens. Because the lis pendens was recorded after the deed conveying such real property to a third party, it was ineffective, and the defendant sought damages against Hansen for slander of title. In holding that Hansen had an absolute privilege to record the lis pendens, even though his claim may have been defeated by a prior recorded deed to a good faith purchaser, the Utah Supreme Court stated at 189-90 as follows:

The contention of Hansen is the recording of the lis pendens was privileged; and, therefore, Pierce had no claim for slander of title. This contention is well made.

Restatement of Torts, Section 638:

A party to a private litigation . . . has an absolute privilege to disparage another's

property in or the quality of his land, chattels, or intangible things in the institution of or during the course and as a part of a judicial proceeding in which he participates if the disparagement has some correlation thereto.

Comment C. of Section 638, refers to the Comment of Section 587, wherein it is stated, at page 231:

a. The privilege stated in this section is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney, it is absolute. It protects a party to a private litigation or a private prosecutor in a criminal prosecution from a liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity. One against whom civil or criminal proceedings are initiated may recover in an action for the wrongful initiation of the proceedings, under the rule stated in § 674 to 680, if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose.

The sole purpose of recording a notice of lis pendens is to give constructive notice of the pendency of the proceeding; its only foundation is the action filed--it has no existence independent of it. Our statute authorizing the use of lis pendens, concludes by saying, "From the time of filing such notice for record only shall a purchaser or an encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

The clear weight of authority describing the office of a lis pendens is well stated in Albertson v. Raboff, wherein the court reasoned that since the effect of a lis pendens is to give constructive notice of all the facts apparent on the face of the pleadings, the recordation of a notice of lis pendens is, in effect, a republication of the pleadings. Since the publication of the pleadings is absolutely privileged, the republication thereof by recording a notice of lis pendens is similarly privileged. The court said:

. . . It would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets anyone know that he has brought it, [citation omitted] particularly where he is expressly authorized by statute to let all the world know that he has brought it. . . .
[At page 409 of 295 P.2d.]

In the instant action, Hansen's recordation of a lis pendens was absolutely privileged and the action of Pierce for slander of title cannot be sustained. . . .

In the present case, Kathy showed at the trial that the real property located at 251 Edith Avenue and 1248 South 300 East was in fact owned by Robert during the marriage, that substantial improvements were made to such real property during the marriage from marital assets, that substantial appreciation to the property resulted during the marriage and that even though record title to said real property was in the name of an entity or person other than Robert, he continued to control and manage the same and make all decisions with respect thereto. On appeal, Robert seeks to have the property distribution made

by the trial court modified, resulting in reduction of Kathy's interest in the dairy facility. If Robert is successful, Kathy should be awarded an interest in the Salt Lake real property to compensate her for any reduction in her share of the Bountiful dairy property. Her claim is based on appreciation of those assets during the marriage, equitable title to said real property being in Robert, and the improvements made thereto with marital assets which increased their value. In light of these claims, recordation of a lis pendens is appropriate and Kathy should not be ordered to remove the same.

POINT II

A LIS PENDENS ON THE SALT LAKE PROPERTIES IS
APPROPRIATE TO REFLECT HER INTEREST THEREIN
BY WAY OF THE JUDGMENT AGAINST ROBERT

The lower court specifically found in the Divorce Decree and in the Findings of Fact and Conclusions of Law that Robert was the alter ego of Fun Fair, Inc., JOC, Inc. and Load Alert, Inc. and that to observe those corporate entities in these divorce proceedings would work an injustice as follows:

There was a unity of interest and ownership between defendant and Fun Fair, Inc., JOC, Inc. and Load Alert, Inc. such that the separate personalities of defendant and those corporations no longer existed and such corporations were, in fact, the alter egos of defendant. The observance of the corporate form of those corporations in these proceedings would promote an injustice and result in inequity in division of the marital estate between defendant and plaintiff. The income, assets, business and debts of such corporations were managed and

cared for as if they were defendant's personal assets, business and obligations.

Paragraph 6 of the Amended Conclusions of Law and paragraph 5 of the Amended Decree of Divorce.

As part of the Decree of Divorce Kathy was given a judgment against Robert for \$40,293.00. Amended Decree of Divorce at paragraph 11. If Kathy is ordered to release the lis pendens presently of record, she should be allowed to record a new lis pendens giving notice that Robert is the real owner of the real property titled in the name of Fun Fair, Inc. and that the \$40,293.00 judgment constitutes a lien thereon. Utah Code Ann. § 78-22-1 (1953).

It is anticipated that Robert will argue at the hearing in this matter that he is entitled to release of the lis pendens and damages as against Kathy in accordance with Utah Code Ann., § 78-40-4 (1953) as follows:

If the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

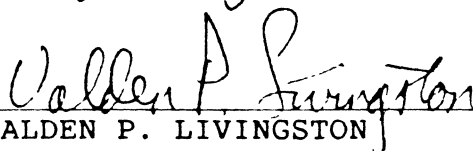
This provision of the Utah Code is wholly irrelevant in this situation. That section has to do with quieting title to real property where the plaintiff claims some right, title or interest therein. If it is determined that the plaintiff had no interest in said real property then damages may be awarded

for wrongfully withholding said real property. In this action, Kathy does not have possession of said real property and she is not wrongfully withholding the same. All she has done is record a notice of lis pendens indicating that because of these divorce proceedings she may be awarded an interest in said real property. As set forth above, she is absolutely privileged in recording said lis pendens and no damages should result therefrom in favor of Robert. If Kathy were required to release her lis pendens at this point, she would have no way of notifying persons seeking to acquire an interest in said real property of her claim. In that situation, her claim would evaporate if said real property were sold to a bona fide purchaser, without notice.

CONCLUSION

For the foregoing reasons, Kathy respectfully requests that the Court reverse Judge Cornaby's Order Removing Lis Pendens and deny Robert's motion regarding the same.

DATED this 16th day of January, 1986.



VALDEN P. LIVINGSTON
D. R. CHAMBERS
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Kathleen S. Pusey
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLANT KATHLEEN PUSEY to each of the following on this 17th day of January, 1986:

Kathryn Schuler Denholm
Attorney for Robert O. Pusey
660 South 200 East, Suite 100
Salt Lake City, Utah 84111

Robert O. Pusey
1100 North 200 West
Bountiful, Utah 84010

Valdant. Livingston

8408M