

1952

Glen L. Nicewinter v. David H. Nicewinter and Geneva C. Nicewinter and Marie M. Diner : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

GLEN L. NICEWINTER,
Plaintiff and Respondent,

vs.

DAVID H. NICEWINTER and
GENEVA C. NICEWINTER,
Defendants and Appellants.

MARIE M. DIENER,
Defendant.

APPELLANTS BRIEF

FILED

JUL 13 1981

Clerk, Supreme Court, Utah

**SKEEN, THURMAN & WORSLEY
and WILLIAM T. THURMAN**

Attorneys for Appellants

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MARIE M. DIENER,
Defendant.

Case No.
7669

APPELLANTS BRIEF

STATEMENT OF FACTS

On September 25, 1947, the appellants, David H. Nicewinter and Geneva C. Nicewinter, his wife, entered into a contract (R. 19) to purchase from Marie M. Diener for the total sum of \$11,500.00 the following described property:

Commencing at a point 2 rds. North of the Southwest Corner of Lot 5, Block 18, Plat "A", Salt Lake City Survey, and running thence North 4 rds.; thence East 10 rds.; thence South 4 rds.; thence West 10 rds. to the place of beginning.

The contract designated the purchasers as joint tenants and not as tenants in common, with full rights of survivorship. Situated on the property is a nine unit apartment house building.

Subsequently, one of the appellants, David H. Nicewinter, and his brother, Glen L. Nicewinter, the appellee, discussed the possibility of admitting appellee into the apartment house venture, with each to contribute funds, services and materials, and each to participate in the distribution of profits, if any, arising out of the venture. An understanding was reached as a result of these discussions on or about the 23rd day of February, 1948, and the two brothers commenced operating, repairing and renovating the apartment house together at about that time.

Disagreements subsequently developed between them, and in order to obtain an adjudication of his alleged claims, the appellee brought suit against David H. Nicewinter, Geneva C. Nicewinter and Marie M. Diener, the vendor of the property. As a result of this action, findings of fact (R. 6) and conclusions of law (R. 8), and decree (R. 4), were entered on April 29, 1950. This decree adjudged, among other things, that the plaintiff and the defendant David Nicewinter "have

a joint venture in the purchase, improvement and sale” of the above described real property. No mention was made in the decree of the interest in the business of the defendant, Geneva Nicewinter. This decree also provided (R. 5), that the profits and increase of value of said premises should be divided share and share alike upon sale thereof (though no mention is made as to the parties who shall share in such division); that each of said brothers (presumably Glen L. and David H. Nicewinter) should have reasonable living quarters out of the premises pending sale thereof, and that within a reasonable time said premises should be sold, and an accounting be rendered (though the language of this portion of the decree is uncertain by virtue of omitted words); that in such accounting, each of the brothers should receive credit for an equal amount of work between February 23, 1948, and November 30, 1949, and that Glen L. Nicewinter should be repaid all monies and property put into the enterprise in the event the sale did not produce enough to repay the contributions of said venturers. No mention is made of the interests of either Geneva C. Nicewinter or Marie M. Diener.

While it is true that this previous judgment, rendered April 29, 1950, is not the one here involved, the findings of fact, conclusions of law and decree were pleaded in the suit which is the subject of this appeal, and proper consideration of the problem presented by the decree herein, must necessarily refer to this previous decree.

Following the adjudication of this initial case, a second action (R. 1), was filed by the same plaintiff against the same defendants, and a decree (R. 30) in the second action was made and entered on February 21, 1951. It is with such second decree that this appeal is directly concerned.

Appellants freely confess that it is most difficult to present the facts underlying this case, because in a literal sense of the word, there was no evidence introduced in this action, and the matter was submitted to the trial court for decision upon a stipulation (R. 20), which is limited in extent and by no means clear, as will be pointed out in the argument. It is with extreme reluctance and hesitancy that appellants refer to matters outside the record, but unfortunately, there would seem to be no alternative.

Subsequent to the time that this case was at issue, the written stipulation was presented to the court, which stipulation reads in essential part as follows:

“IT IS HEREBY STIPULATED AND AGREED that said contract shall be delivered to the clerk of Judge Ray Van Cott’s court by attorney Franklin Dunn Richards on or before the 13th day of February, 1951, and that the above entitled court by said Judge may sell said property and all interest therein to the highest bidder as between plaintiff Glen L. Nicewinter and David H. Nicewinter as defendant.”

So far as we are now advised, at the same time that the written stipulation was presented, there were some informal discussions between counsel of record at that time for all parties, and the court, in regard to the case. The record, however, is silent as to the effect or substance of these informal discussions, and there seems to be no order based thereon other than the ultimate decree (R. 30), which was made and entered on February 21, 1951.

This decree provided that the premises involved should be sold at the courtroom of the trial court at 9:15 A.M. on Friday, March 9, 1951, and that notice of such sale be given by serving upon appellants' attorney a five-day notice prior to sale. The premises described included not only the real property, but also the furniture, furnishings and appliances located therein. The decree further provided that the property be sold only to the highest bidder as between appellee, Glen L. Nicewinter, and one of the appellants, David H. Nicewinter, and that the liquidated sum of \$8,000.00 due the said Glen L. Nicewinter, as allegedly adjudged by previous decree of court dated April 29, 1950, might be applied as cash by appellee in bidding at said sale. The decree further provided that within five days after sale, the unsuccessful bidder vacate and deliver up possession of the property to the successful bidder, and that proceeds of sale be deposited with the Clerk of Court for disposition in accordance with an account to be subsequently adjudicated.

At the time of the sale on March 9, 1951, at 9:30 A.M., present counsel for the appellants moved for a continuance of the sale until 1:30 P.M. the same day, a request made subsequent to a previous request to the court to withhold sale until disposition of a prospective motion for a new trial (R. 48). The trial court granted the continuance to 1:30 P.M., and, in the interim, this appeal was perfected.

At the time of the hearing on the sale of March 9, 1951, at 9:30 A.M., appellee called to the witness stand Marie M. Diener, the owner of the real property, who testified as to details of the contract of sale between herself as seller and David H. and Geneva C. Nicewinter, as buyers, and the then existent balance due thereon of \$2,900.00 (R. 47). At this time also, the contract of sale, Exhibit "A", was introduced in evidence. This brief testimony and exhibit constitute all of the testimony and the exhibit introduced in the case.

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

Appellants rely upon the following points:

POINT No. 1

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 1 OF THE DECREE (R. 30, 31), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

POINT No. 2

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 11 OF THE FINDINGS OF FACT (R. 23), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

POINT No. 3

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 1 OF THE CONCLUSIONS OF LAW (R. 23), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

POINT No. 4

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 2 OF THE DECREE (R. 31), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

POINT No. 5

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 4 OF THE CONCLUSIONS OF LAW (R. 24), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

POINT No. 6

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 5 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

POINT No. 7

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 7 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

POINT No. 8

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 8 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

POINT No. 9

THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 9 OF THE FINDINGS OF FACT (R. 23), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

ARGUMENT

Points Nos. 1, 2 and 3

Paragraph 11 of the findings of fact (R. 23), paragraph 1 of the conclusions of law (R. 23), and paragraph 1 of the decree (R. 30, 31), upon which the above points are based, are concerned with essentially the same matter, and will be argued together. For the convenience of the court, these paragraphs are set forth as follows:

Findings of Fact

“11. That said decree further provided that plaintiff should be repaid all monies and property which he has put into said enterprise in the event there was not enough to repay both of them for all their contributions thereto, and said monies and property to be repaid has been determined by Decree of this court to be adjudicated to be a sum of \$8,000.00 to be repaid in the event there was not even enough to repay both of them for all their contributions thereto.”

Conclusions of Law

“That all interest of Glen L. Nicewinter and David H. Nicewinter and Geneva C. Nicewinter in and to the hereinafter described real property together with the contract for the purchase thereof from Marie M. Diener should be sold to the highest bidder of the said Glen L. Nicewinter and David H. Nicewinter in open court for cash and that the liquidated sum of \$8,000.00 due to the said Glen L. Nicewinter may be applied as cash in the bidding at said sale, and * * *”

Decree

“IT IS HEREBY ORDERED ADJUDGED AND DECREED that all interest of Glen L. Nicewinter and David H. Nicewinter and Geneva C. Nicewinter in and to the real property located in Salt Lake County, State of Utah, and described hereinafter be sold to the highest bidder as between the said Glen L. Nicewinter and David H. Nicewinter in open court for cash, and that the liquidated sum of \$8,000.00 due to the said Glen L. Nicewinter as adjudged by this court by Decree dated the 28th day of April, 1950, may be applied by him as cash in bidding at said sale, and * * *”

Although it does not so specify, paragraph 11 of the findings probably refers to the decree in the previous action (R. 25), dated April 29, 1950. That previous decree, however, does not contain a single word as to the fact that the sum of \$8,000.00 was due to the said Glen L. Nicewinter, or that such a sum was “to be repaid in the event there was not even enough to repay both of them for all their contributions thereto.” It is

difficult to conceive how any court could enter such finding, as there is not a scintilla of evidence in the record to support the same.

Paragraph 1 of the decree not only repeats this error, but compounds the same. In addition to finding that the sum of \$8,000.00 is due, the decree goes on to provide that this amount might be used at the courtroom sale by appellee as a cash credit. Again, appellants assert that there is no basis in law or fact upon which such a provision could be based. Paragraph 1 of the conclusions of law is to the same effect.

The parties involved are individuals of limited means, and the vital importance of this provision is apparent. Presumably both appellee and appellant, David H. Nicewinter, placed substantial sums of money into the reconstruction and improvement of this apartment building, which investments consumed the available assets of both individuals. David L. Nicewinter asserts that his investment is in excess of \$12,000.00. The net effect of the order, however, is to allow appellee a credit for a claimed investment of \$8,000.00, but appellant, David H. Nicewinter, whose interest should be of greater or at least equal standing, has no credit of any kind available. Thus, at the sale, the appellee was in a position to bid the sum of \$8,000.00 or even a lesser amount, and it is entirely probable that appellant, David H. Nicewinter, could not by any stretch of the imagination exceed this amount. In net effect, therefore, the

likelihood was that appellee, with a bid of \$8,000.00 or less without any cash, would not only acquire a property worth upwards of \$20,000.00, but at the same time would wipe out an equity of the appellant, David H. Nicewinter, of at least \$12,000.00. There is certainly nothing contemplated in the stipulation between the parties (R. 20) which would permit in any way such a result, and the finding, conclusion and the decree most certainly violate the most primitive concepts of justice. Appellants' objections (R. 33) were entirely ignored. Although the decree clearly contemplates a later and ultimate accounting, and in no part of the proceedings has there ever been such an account, the net effect of this decree is a partial accounting, not based upon evidence, granting to appellee an unjustly advantageous position at time of sale.

It is also noted that the decree provides that there shall be only two bidders at the sale, appellee, Glen L. Nicewinter, and appellant, David H. Nicewinter. The contract of purchase of the property (R. 19), however, vests the equities of the same in Geneva C. and David H. Nicewinter as joint tenants. Throughout the proceedings and particularly this provision of the decree, the one-half interest of Geneva C. Nicewinter, appellant, has been completely ignored. It is again inconceivable that any court could in effect wipe out such an interest without any foundation to do so, either in fact or in law.

It may be claimed by the appellee that the stipulation (R. 20) justifies the action of the court. As has been indicated above, the decree and findings of the court extend far beyond the scope of this stipulation, which says nothing as to the finding of \$8,000.00 due appellee, nor of the existence of a credit in this amount available to him at the sale. Moreover, it is extremely doubtful as to whether the stipulation refers to the same contract as that introduced in evidence as it refers to "that certain Uniform Real Estate Contract dated September 25, 1947, between Marie M. Diener as seller and David H. Nicewinter and Glen L. Nicewinter as purchasers * * *." Examination of the only contract in the record, Exhibit "A" (R. 19), shows that it is not the same as that above described. The purchasers under this exhibit are not David H. Nicewinter and Glen L. Nicewinter, but Dave H. Nicewinter and Geneva C. Nicewinter, his wife, as joint tenants. Again, emphasis on the fact that the proceedings completely ignore appellant Geneva C. Nicewinter. In this connection, we point out that this stipulation is not executed by the parties, but only by counsel of record, and further that Marie M. Diener, party defendant, is not in any way connected with or party signator on the stipulation, nor is there anything to show that she was even aware of its existence. As vendor and title holder to the real property involved, she most certainly has a direct interest in the proceedings, which appellee recognized at the outset of the case as she was made a party defendant.

Applicable law in regard to the necessity of evidence upon which to base a finding of fact is well established by this court. In *Hathaway v. United Tintic Mines Co.*, 42 Utah 520, 132 P. 388, at page 522 the Court states:

“The finding of facts and entering of judgments are solemn acts, and no court should permit itself to make a finding of fact where the record is conclusive, as in this case, that there is absolutely no evidence to support such finding.”

The relation between conclusions of law and findings of fact is well stated in *Parrott Bros. Vo. v. Ogden City*, 50 Utah 512, 167 P. 807, at page 515:

“It is fundamental that the conclusions of law must be predicted upon and find their support in the findings of fact, and the judgment must follow the conclusions of law; and where, as here, the conclusions of law are so palpably at variance with the findings, there is no alternative but to order and require the lower court to set aside its erroneous conclusions of law and substitute conclusions that will entitle the appellant to, and enter, a judgment in accordance with its express findings of fact.”

See also *Friedli v. Friedli*, 65 Utah 605, 238 P. 647; *Needham v. First National Bank of Salt Lake City*, 96 Utah 432, 85 P. (2d) 785.

We believe it is apparent under the authorities that there is absolutely no foundation upon which the decree

and the conclusions can be based, either in the evidence itself, which is in reality non-existent, or the findings of fact. These errors are extremely prejudicial, and place appellant, David H. Nicewinter, in a wholly untenable position. Moreover, and as we have indicated above, it ignores the interest of Geneva C. Nicewinter, and the actual owner of the property, Marie M. Diener.

Points Nos. 4 and 5

Paragraph 2 of the decree (R. 31), and paragraph 4 of the conclusions of law (R. 23, 24), are concerned with essentially the same matter, and since they are the paragraphs upon which the above points are based, will be argued together. For the convenience of the court, these paragraphs are set forth as follows:

Decree

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said sale shall be conducted in the courtroom of Judge Ray Van Cott, Jr., at 9:15 o'clock A. M. on Friday, the 9th day of March, 1951, and that notice of said sale shall be given by serving upon the said Franklin Dunn Richards, attorney, a notice thereof at least five days prior to said sale, and that the property and premises herein referred to are described as:

Commencing at a point 2 rds. North of the Southwest Corner of Lot 5, Block 18, Plat “A”, Salt Lake City Survey, and running thence North 4 rds.; thence East 10 rds.; thence South 4 rds.; thence West 10 rds. to the place of beginning, subject to and to-

gether with a contract dated September 25, 1947, with Marie M. Diener, seller, and together with all furniture, furnishings and appliances appertaining to said joint venture premises, and”

Conclusions of Law

“That the property and premises herein referred to are located in Salt Lake County, State of Utah, and particularly described as:

Commencing at a point 2 rds. North of the Southwest Corner of Lot 5, Block 18, Plat “A”, Salt Lake City Survey, and running thence North 4 rds.; thence East 10 rds.; thence South 4 rds.; thence West 10 rds. to the place of beginning, subject to and together with a contract dated September 25, 1947, with Marie M. Diener, seller, and together with all furniture, furnishings and appliances appertaining to said joint venture premises.”

The above portion of the decree places the time of sale at 9:15 A. M. on Friday, the 9th day of March, 1951, and provides for service of notice thereof upon counsel for appellants. The paragraph also proceeds to describe the property involved in the sale by metes and bounds, and then adds, “together with all furniture, furnishings and appliances appertaining to said joint venture premises *”. For the first time in these proceedings and litigation, the personal property located in this apartment house comes to light in this order of sale. No mention is made of this personal property in the

complaint (R. 1), nor in the answer (R. 10), nor in the so-called answer to counterclaim (R. 13). No mention is made of this personal property in the previous decree (R. 26), nor in the findings upon which such previous decree was based, and particularly paragraph 2 thereof (R. 27). Paragraph 4 of the findings in the instant case describes the property (R. 22) as being solely real property, without mention of any personality or furnishings. Nor is such mention made elsewhere in the findings of the instant case, upon which the conclusions of law and the decree are based. In other words, the court has suddenly included in the subject of litigation and order of sale, personal property not heretofore mentioned or involved. It is impossible to understand by what right or authority the trial court ordered the sale of this personal property, and to do so is highly and irrevocably prejudicial to the appellants herein. For all that appears in the record, this may involve property, for example, of the appellant, Geneva C. Nicewinter, used in her personal apartment, or it may involve property on the premises owned and belonging to the seller, Marie M. Diener. There is clearly cause, upon this ground alone, to remand this case for a new trial.

Point No. 6

Paragraph 5 of the findings of fact (R. 22) reads as follows:

“5. That said property is being purchased from defendant Marie M. Diener and that defendant Geneva C. Nicewinter is the wife of David

H. Nicewinter and has some statutory interest in defendant David H. Nicewinter's interest therein."

As we have previously pointed out, the appellant, Geneva C. Nicewinter, under the terms of contract of purchase of the property here involved, Exhibit "A" (R. 19), was one of two purchasers in joint tenancy, and presumably as a result of this written contract, she had a one-half interest in the real property. Notwithstanding this evidence, which cannot be contradicted, this finding recites that her interest is "some statutory interest in defendant, David H. Nicewinter's interest therein." This is a manifest error, and constitutes a concrete illustration of the manner in which the findings and decree have ignored a very definite property interest. Not only, moreover, has this interest been ignored, but the finding in net effect sets up a vague interest which it is submitted does not exist. The importance of this error lies not only in the fact that this property interest has been ignored, but also in the fact that it indicates one of the premises by which the court has totally ignored the rights of appellant Geneva C. Nicewinter insofar as division of proceeds of sale and profits from the venture are concerned.

Point No. 7

This point is concerned with paragraph 7 of the findings of fact (R. 22), which paragraph reads as follows :

“7. This court further found that each of said brothers and his wife shall have reasonable living quarters out of said premises pending sale thereof and further ordered that within a reasonable time said premises shall be sold to the best advantage and thereupon an accounting shall be made between them in accordance with the terms of this order, and;”

Paragraph 7 of the complaint alleges that the court, in the preceding case, found that the parties “shall have reasonable living quarters out of said premises pending the sale thereof.” This is denied in paragraph 2 of the answer (R. 10). The above finding of fact repeats the allegation of the complaint, and yet there is not a scintilla of evidence in this record upon which such finding could be based. Again, there is an illustration of the manner in which the lower court has followed the allegations of the complaint which had been denied, and thereby placed in direct issue, without any foundation upon which it could do so.

Point No. 8

This point is concerned with paragraph 8 of the findings of fact (R. 22), which reads as follows:

“8. That a reasonable time has now expired but said premises have not been sold.”

As in regard to Point No. 7 above, this is an instance where the complaint, in paragraph 8 (R. 2), makes an allegation of fact which is denied by the answer, and

again, there is not a scintilla of evidence in the record upon which any such finding could be predicated, and to make such a finding is again manifest error.

Point No. 9

This point is concerned with paragraph 9 of the findings of fact (R. 23), which reads as follows:

“9. That defendant David H. Nicewinter received approximately \$400.00 per month gross rentals from said premises, for which he has made no accounting to plaintiff, notwithstanding plaintiff’s demand therefore and notwithstanding that said business is a joint venture.”

Paragraph 9 of the complaint (R. 2) alleges that appellant, David H. Nicewinter, received approximately \$400.00 per month gross rentals from said premises, which allegation is denied in the answer. Once again, there is no evidence in the record to support this finding of fact, it is clearly error, and is again indicative of the manner in which the trial court has followed the allegations of the complaint in its findings, without any foundation of fact or stipulation upon which to do so. Moreover, since the decree contemplates an ultimate accounting between these parties, such a finding, which we are advised is contrary to the facts, may ultimately prove of substantial importance, as it definitely fixes an

income and receipt of monies from the property. The finding is moreover vague, because it fails to specify the period during which this sum is allegedly received by appellant, David H. Nicewinter, and again may be of importance because this joint venture was established for a defined and limited period.

CONCLUSION

Appellants are fully cognizant of the limited citation of authority for the assertions contained in the argument. The principles of law, however, would seem to be so well established and free from ambiguity that further authority would be merely surplusage.

It is submitted that the seriousness and frequency of prejudicial error which has occurred in this action, not only makes it utterly impossible to determine with any degree of accuracy the rights and respective positions of the parties, particularly Geneva C. Nicewinter, but that these proceedings are so thoroughly confused that there is only one possible solution. A new trial should be granted, which will necessarily give, and in reality for the first time, all parties concerned an opportunity to present adequate evidence in support of their respective positions and rights, to attain an equitable account-

ing of this joint venture, and if deemed advisable, a sale of the premises and definition of property involved in the sale, which will be consistent with justice.

We submit that more than any case within our experience, however limited that experience may be, this case is one wherein a new trial should be granted.

Respectfully submitted,

SKEEN, THURMAN & WORSLEY
and WILLIAM T. THURMAN

Attorneys for Appellants