

1952

Robert T. Wagner and Rebecca L. Wagner v. Joseph A. Anderson : Brief of Appellants

Utah Supreme Court

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Faux, Rich & Kirton; Attorneys for Appellants;

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ROBERT T. WAGNER and
REBECCA L. WAGNER, his
wife,

Appellants,

-vs-

JOSEPH A. ANDERSON,

Respondent.

Civil No. 7761

BRIEF OF APPELLANTS

FILED

JAN 11 1952

----- PAUX, RICH & KIRTON
Clerk, Supreme Court, Utah

Attorneys for Appellants

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STATEMENT OF FACTS

Appellants commenced this action against respondent on the 11th day of August, 1951. In their complaint, they alleged that the parties entered into a contract for the sale of certain real property, appellants as sellers and respondent as buyer; that appellants tendered the property to respondent demanding the purchase

price according to the terms of the agreement and that respondent refused to perform. Appellants further alleged that they suffered certain special damages by reason of the defendant's refusal to perform; that the contract sued upon provided, inter alia, should either party fail to carry out the terms and conditions of their agreement, that such party should pay all expenses of enforcing the agreement, including a reasonable attorney's fee; that appellants had been required to employ counsel in prosecuting this action and should be entitled, under the contract, to recover a reasonable attorney's fee. The allegations of appellants' second alternative cause of action are not material.

Within the time allowed by law, respondent filed various motions, the only one of which, here before the court, is respondent's motion to dismiss as amended.

Thereafter, on the 25th day of August, 1951

respondent served appellants with notice that he intended to proceed with the contract and also tendered the purchase price. That tender, it will be noted, was limited to the purchase price covering the sale of the real property. There was no tender made for attorneys' fees or damages.

As set out in appellants' affidavits (Tr. 14-17) when the notice and tender was served, respondent was notified that appellants would be willing to proceed with the closing of the sale of the real property, provided the other matters complained of by them in their complaint, viz: attorney's fees and special damages be reserved for the determination of the court. Further, appellants' counsel there said that the parties ought to enter into a stipulation setting forth the reservation of the appellants' right to have the court hear and determine the said matter of attorney's fees and special damages.

Respondent's counsel thereupon stated in substance that such a stipulation would be unnecessary for the reason that the action was not being dismissed by the parties in proceeding to perform their said contract, and that these matters would, therefore, under the complaint filed by appellants be reserved for determination by said court. Further, on more than one occasion thereafter, in negotiations by and between the parties, counsel for appellants informed respondent's counsel that in accepting the "performance" of respondent, appellants were expressly reserving the right to have the court hear and determine the matter of attorney's fees and special damages sought by their complaint and on each of said occasions counsel for the respondent expressly agreed that the contract was being performed with reservations to the appellants of their right to claim attorney's fees and special damages.

As to the facts related above respondent is in substantial agreement. He admits he executed the contract and thereafter refused to perform it; that suit was filed and that he thereafter served notice upon appellants that he was willing to proceed with the purchase of the property described in the contract and that he tendered the purchase price. His version of what followed is that he was told appellants would not dismiss this action. Whereupon, recognizing that the action still remained pending, respondent's counsel said if the action were not dismissed the parties would have to have the matter heard and determined by the court.

On or about August 31, 1951, the sale of the real property was consummated — the purchase price being paid by respondent and appellants conveying their interests.

Thereafter, respondent's motion to dismiss as amended came on for hearing. Respondent argued

to the court that when the parties performed that part of the contract pertaining to specific performance, the court was ousted of jurisdiction to hear the matter of attorney fees and damages. (He claims this is what he meant when he stated to counsel that the court would have to hear and determine the matter of attorney's fees and damages.) The court accepted this theory, ruled that it had no jurisdiction to further hear the case and sustained respondent's motion to dismiss. Thereafter, appellants filed a motion for rehearing and in support thereof filed the affidavits referred to which before that time were not before the court. Thereafter, respondent filed his counter affidavit and the matter was re-argued. The court again took the view that performance of that portion of the contract pertaining to the sale of the real property ousted it of jurisdiction to hear the question of attorney's fees and damages and denied appellants' motion for rehearing.

STATEMENT OF POINTS

1. The trial court erred in sustaining defendant's (respondent) motion to dismiss plaintiffs' complaint.

2. The trial court erred in refusing to grant plaintiffs' (appellants) motion for a rehearing.

ARGUMENT

POINTS NO.1 AND NO. 2

The sole question to be determined upon appeal is whether the court is without jurisdiction to hear the question of attorney's fees and damages on the merits. Bearing upon this question appellant believes there are several salient, undisputed facts before the court. From the affidavits of counsel herein and the counter affidavit of counsel for respondent, it is clear that there has been no dismissal or settlement of this lawsuit. In his counter affidavit, respondent admits he did not require nor

did he ever even so much as request that the lawsuit be dismissed. Nor does he anywhere claim the parties got together and settled their lawsuit. He expressly states that appellants refused to dismiss their lawsuit when tendered only the purchase price covering the sale of the real property. From these facts he argued that the court is without jurisdiction to hear the question of attorney fees and damages.

The fact being undisputed that both parties recognized the existence of the lawsuit after the sale of the real property was consummated, the question now is, did all substance to appellants' claim for attorney's fees and damages disappear by reason of the sale? The court below stated that because it could no longer consider the question of specific performance it could not consider the question of attorney's fees and damages.

Counsel has been unsuccessful in trying to find cases directly in point and to date no such authority has been furnished by opposing counsel.

By way of analogy, it seems pertinent, however, to point out that the law is well established that although the court may be unable, for various reasons, to decree specific performance, it may, nevertheless, award such damages as the parties may be entitled to recover. *Riverside, Hand, etc. v. Sawyer*, 134 P. 1011; *Stramel v. Haws*, 154 P. 232; *Baumgartner v. Corlies*, 131 N.W. 638; *Heron v. Peisch*, 144 S.W. 413; *McCart v. Johnston*, 246 P. 259; *Craine v. Miller*, 218 N.W. 355; *Jewell Realty Co. v. Dierke*, 18 S.W. 2nd 1043; *Columbus Club v. Simons*, 236 P. 12; *McFarlane v. Dixon*, 187 N.W. 671.

It would appear that if the court, although unable to grant specific performance, may nevertheless award such damages as the parties are entitled to recover, the attorney's fees and damages in the case at bar are not so bound up with the specific performance as to be removed from the consideration of the court when the court no longer has the question of specific performance before it.

Similarly and seemingly very instructive on the problem before the court is the case of *Hall v. Great American Insurance Company*, 252 N.W. 763. In that case, suit was instituted on a fire insurance policy covering fire damage to a dwelling house, barn and household furniture including jewelry in use. The action was dismissed with prejudice as to all items covered in the policy except the claimant "reserved the right to make a claim for diamond stud." A second action was commenced to recover, under the policy, for the loss of a diamond stud. The court there said:

"Appellant argues that the dismissal contained in the stipulation of settlement dismissed with prejudice any claim which appellee might have against appellant growing out of the loss of the diamond. The stipulation itself indicates no such intention on the part of the appellee. A reading of the entire stipulation clearly shows that the appellee had no thought whatever of dismissing with prejudice or waiving any claim he had under the policy for the loss of said diamond, and the stipulation should not be given a

contrary effect unless legal rules compel such a construction. Appellant claims that the appellee's claim for the loss of the diamond was necessarily dismissed with prejudice along with the other claims of the appellee against the appellant, because the claim of the loss of the diamond was a part of the cause of action asserted by the appellee, and he cannot divide his cause of action and prosecute it piecemeal. It is true that a party cannot split his cause of action and prosecute it for different items included in it by separate actions. He could not dismiss a part of his cause of action and retain the right to again prosecute it, while continuing to prosecute the part of such cause of action which was not dismissed while continuing to prosecute another part thereof. This, however, is something different from what was done in this case. We know of no law, and appellant has cited us no authority, which would prevent the appellant from dismissing with prejudice all of his cause of action except his claim for the loss of the diamond. This would not be splitting his cause of action and prosecuting it piecemeal, because the part thus dismissed with prejudice could not again be prosecuted. If he could do this, we see nothing to prevent him from later dismissing his action for loss of the diamond without prejudice to begin a new action thereon. If he could dismiss part of his cause of action with prejudice and the remainder without prejudice, by separate dismissals, why cannot he do it by one instrument clearly showing his intention. We think the stipulation and dismissal in this

case clearly show that the intention of the appellee was to dismiss with prejudice all items going to make up his cause of action, with the exception of his claim for the loss of the diamond, and that this was dismissed without prejudice. We, therefore, think that appellant's complaint against the court's instruction No. 11, which the court told the jury 'You are instructed that the dismissal of said action and payment of costs is not a bar to the bringing of the present action,' was a proper instruction under the facts and circumstances of this case;"

As in the foregoing case, the record here shows appellants did not dismiss with prejudice nor waive their claim for attorney's fees and damages. The respondent, here, however, claims that while expressly saying that they would not dismiss their lawsuit nor waive their right to attorney's fees and damages, appellants did just that when the sale of the property was consummated.

While respondent has not, to this point contended that appellants are trying to split their cause of action, the writer has been at a loss to know what other legal principle he contends operated in this case to divest appellants of their

right to attorney's fees and damages.

We think the reasoning in the Hall case is sound and applicable here. When respondent notified appellants he would not go through with his contract, it was necessary for them to employ counsel to enforce it. They started their action and the result was "performance" by respondent. By reason thereof appellants became entitled to recover a reasonable attorney's fee and any other lawful damages. As stated in the Hall case, there being no indication in the record that appellants here intended to waive or dismiss these rights, the court should not hold otherwise unless legal rules compel such a construction. We know of no such rule, and believe no such rule exists.

CONCLUSION

Appellants earnestly submit that the rulings of the trial court, from which this appeal is made, are contrary to the facts and the law. Wherefore,

appellants pray that said rulings and judgment be reversed, and that the case be remanded for further hearing for determination of the attorney's fees properly allowable to appellants under all the facts and circumstances.

PAUX, RICH & KIRTON

Attorneys for Appellants