1952

Joseph LeRoy Peterson and Kathryn Pedersen Peterson v. Cumorah S. Eldredge : Brief of Respondents

Utah Supreme Court

McCullough, Boyce & McCullough; Attorneys for Respondents

7768

IN THE SUPREME COURT
of the
STATE OF UTAH

JOSEPH LeROY PETERSON and KATHRYN PEDERSEN PETERSON,
Plaintiffs and Respondents,

— vs. —

CUMORAH S. ELDREDGE
Defendant and Appellant,

Case No. 7768

RESPONDENTS' BRIEF

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STATEMENT OF FACTS

We shall refer to the parties as they appeared in the court below. It is felt necessary to present a more complete and accurate statement of facts than appears in the defendant's brief so the court may have this information before it.

On the northeast corner of 7th Avenue and D Street in Salt Lake City is located a large house which faces south onto 7th Avenue with 55 ft. frontage on 7th Avenue. Back of the house is a triplex which faces west onto D

Street. The two properties occupy 165 feet on D Street. The house property was purchased by the parents of the plaintiff, Joseph LeRoy Peterson, in April, 1935. The Petersons moved into and occupied the house as the family home (R. 34). In 1938 the parents of the plaintiff, Joseph LeRoy Peterson, purchased the triplex. R. 35. The back yard of the house, including the strip in dispute was all in lawn when the Petersons purchased the house. R. 70. They rehabilitated the lawn and during the three-year interval from 1935 to 1938 and thereafter the Peterson family used and cared for, as the back yard of said house, the ground to the edge of a sidewalk which runs along the south side of the triplex and around to the rear of the triplex. R. 17, 42. A wooden fence running east and west, extending from the east property line a short distance west so as partially to separate the two properties existed when the house was purchased by the Petersons in 1935. R. 18, 19. Sometime during the period of 1935 to 1937 the Petersons installed a sprinkling system in the back yard, which watered the back yard area up to the edge of the sidewalk along the south side of the triplex. R. 18. The plaintiff, Joseph LeRoy Peterson, lived in the large house from July, 1935, until February, 1937, and the plaintiff, Kathryn Pedersen Peterson, was a frequent visitor at the home during this same period of time. Both of them became acquainted with the yard as it existed at that time and as is described herein.

In 1944 the plaintiffs purchased the house and triplex from the mother of the plaintiff, Joseph LeRoy Peterson, and moved into the house as their family home. The

triplex was rented as income property. Also in 1944, plaintiffs built a new fence running from east to west completely separating the house from the triplex and continuing so as to enclose the back yard of the house. *The new fence was placed immediately south of the sidewalk which runs along the south end of the triplex and in line with the old section of wooden fence which was replaced by the new fence.* R. 19-22, 43, 44. The fence was constructed of 6 ft. "T" iron posts extending 4½ ft. out of the ground with wire stock fencing 4 ft. high fastened to the posts. R. 22. After that it was necessary to go around the fence to get from the house to the triplex.

On February 23, 1949, plaintiff, Kathryn Pedersen Peterson, listed the house and triplex for sale separately with Inland Realtors. R. 46. The listing cards were made out by the realty company salesman, who obtained information from the plaintiff, Kathryn Pedersen Peterson. These listing cards indicated the house property as being approximately 80 ft. along D Street and 60 feet along 7th Avenue and the triplex as having approximately 50 feet frontage along D Street and a depth of approximately 60 feet. The defendant inspected the triplex property on two occasions and on March 5, 1949, signed an earnest money agreement which agreement contained no mention of the size of the lot. R. 62, Ex. C. The 4 ft. fence separating the properties was there when she made her inspections and she saw it. R. 58, 59. The fence at that time completely separated the properties except that at the extreme east end of the fence the fencing had been pushed or tramped down so that it was easy to get across the fence at that point.

Later in March, 1949, plaintiffs as sellers, and defendant as buyer, executed the uniform real estate contract which is the subject of this action. Ex. 1. When the defendant purchased the triplex she had not considered the size of the lot at all. R. 60, 63. She was interested in the size of the rooms, and when she signed the real estate contract was the first time she saw any legal description of the property, and even at that time she did not pay any attention to the frontage she was buying. R. 62, 63. Defendant had no reason to believe her property extended south of the fence because it had been represented to her otherwise. R. 63. Sometime in June, 1949, defendant asked the plaintiffs to sell her three or more feet south of the fence but they declined. R. 61. In January, 1951, almost two years after executing the contract, defendant first learned that the fence line did not correspond with the property as described in the contract. R. 60. It was only after making this discovery that the defendant ever made any claim to the property south of the fence. R. 64. Plaintiffs, during the summers of 1949 and 1950, used as a back yard for lawn and flowers the area up the south side of the wire fence. Vines and morning-glories planted by the plaintiffs along the fence covered most of the fence area. R. 26, 27, 45. Defendant at no time objected to plaintiffs' use of the yard. R. 27, 62. Plaintiffs first learned the description in the contract and the fence line did not correspond about January 19, 1951, which was subsequent to defendant's discovery of this fact. R. 23, 24, 47. The real estate contract, in fact, described a strip 11 feet 9 inches wide,

south of the fence running from the east to the west property lines. R. 32.

Plaintiffs were in Blanding, Utah, when they signed the real estate contract which was prepared by the Brockbank Real Estate Company, which company made the sale. The description used in the contract was taken from an abstract of the triplex property. R. 36, 76.

Plaintiffs have four children and their house is large. The only part of the yard which is level and a safe place for the children to play, and not bordered by a high retaining wall, is the back yard of the house, including the strip in dispute. To give the defendant this 11 ft. 9 in. strip leaves the house with virtually no back yard and without a safe area for the children to play. R. 32, 33, 51.

STATEMENT OF POINTS

POINT I. THE MISTAKE OF FACT WAS MUTUAL. BOTH PARTIES ENTERED INTO THE CONTRACT, THE SUBJECT OF THIS ACTION, UNDER THE BELIEF THAT THE PROPERTY PLAINTIFFS WERE SELLING AND DEFENDANT WAS BUYING WAS THE TRIPLEX WITH THE GROUND NORTH OF THE FENCE WHICH SEPARATED THE HOUSE FROM THE TRIPLEX.

POINT II. PLAINTIFFS WERE NOT NEGLIGENT IN THE EXECUTION OF THE CONTRACT, OR, IF THEY WERE GUILTY OF ANY NEGLIGENCE, THE COURT DID NOT ERR IN CONCLUDING AS A MATTER OF LAW THAT SUCH NEGLIGENCE WAS EXCUSABLE.

ARGUMENT

POINT I. THE MISTAKE OF FACT WAS MUTUAL. BOTH PARTIES ENTERED INTO THE CONTRACT, THE SUBJECT OF THIS ACTION, UNDER THE BELIEF THAT

THE PROPERTY PLAINTIFFS WERE SELLING AND DEFENDANT WAS BUYING WAS THE TRIPLEX WITH THE GROUND NORTH OF THE FENCE WHICH SEPARATED THE HOUSE FROM THE TRIPLEX.

In the brief of the defendant, six statements of error are assigned and argued separately. Plaintiffs will answer defendant's Points One to Five under Point I in this brief.

Plaintiffs agree with defendant that "the law is well settled in this jurisdiction that a written contract will be reformed to express the real intention of the parties only where proof of the mistake is clear, definite and convincing and where the party seeking reformation is not guilty of negligence in drawing the contract nor of laches in making timely application for the reformation." *George v. Fritsch Loan & Trust Co.*, 69 Ut. 460, 256 P. 400. Defendant makes no claim that plaintiffs were guilty of laches in making application for the reformation, therefore, the court need consider here the questions of (1) whether the mistake was mutual and the proof thereof is clear, definite and convincing, and (2) whether plaintiffs were guilty of negligence in the execution of the contract.

Plaintiffs contend earnestly that the mistake was mutual and that the proof of the mistake is clear, definite and convincing.

Both plaintiffs testified that when they executed the contract they intended to sell only the property north of the fence. R. 36, 46, 47. Plaintiffs first learned that the property described in the contract did not correspond

with the fence line in January, 1951. The fence completely separating the house and triplex was standing when the contract was executed by the parties in March of 1949. Throughout the summers of 1949 and 1950 plaintiffs continued to use and occupy all the ground up to the fence as they had done in the past. They cared for lawn in that area and planted and cared for flowers in a garden in said area. A sprinkling system, which had been installed sometime from 1935 to 1937, which watered all the ground up to the fence was continued in use.

When the defendant, soon after the execution of the contract, asked plaintiffs to sell her three or more feet south of the fence, plaintiffs declined and told her they did not have enough back yard as it was. Certainly plaintiffs' use and care of all of the ground south of the fence during 1949 and 1950 and their refusal to sell any of that ground to the defendant establishes beyond question that they intended in the real estate contract to sell the defendant only the property north of the fence.

So much for what the plaintiffs intended. Now let us consider the defendant's intention when she executed the contract. Defendant inspected the triplex property twice before executing the earnest money agreement, which preceded the signing of the uniform real estate contract. The 4 ft. wire fence on steel poles separating the house from the triplex was standing when defendant inspected the triplex, and she saw that fence. R. 58, 59. Defendant signed the earnest money agreement early in March, 1949. This agreement contains no mention of

the size of the lot. R. 62, Ex. C. Defendant's testimony is that when she purchased the triplex she hadn't considered the size of the lot at all. R. 60, 63. That she was interested in the size of the rooms and that the first time she saw any legal description of the property was when she signed the real estate contract and even at that time she did not pay any attention to the frontage she was buying. R. 62, 63. Her testimony further is that she had no reason to believe her property extended south of the fence because it had been represented to her otherwise. R. 63. Further, defendant testified that it was not until January, 1951, that she discovered the contract included land south of the fence. R. 60. And that it was not until after she made this discovery that she ever made any claim for any property south of the fence. R. 64. In approximately June of 1949, which was not more than three months after the execution of the contract and about two months after defendant moved into the triplex, she asked plaintiffs to sell her three to six feet south of the fence. R. 28, 29, 78. Certainly the defendant would not have attempted to purchase any of this ground from the plaintiffs if she believed she was already purchasing it under contract. At no time during the summers of 1949 or 1950 did defendant object to plaintiffs' use and care of all of the property south of the fence. R. 27.

Certainly the defendant cannot now be heard to say in oppositon to all this conclusive evidence that when she executed the real estate contract she believed she was buying land south of the fence or that the fence did