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Leroy Hawkins v. Lorene Perry et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEROI HAWKINS,

Plaintiff and Respondent,

vs.

LORENE PERRY, ALFRED T. PERRY,
and MRS. A. R. SCHIEVER, some-
times known as THELMA CATHERINE
SCRIEVER,

Defendants and Appellant.

Case No.

7786

APPELLANT'S BRIEF

FILED

MAR 25 1932

Clerk, Supreme Court, Utah

EARL D. TANNER,

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APPELLANT'S BRIEF

STATEMENT OF FACTS

On July 15, 1943, the defendant, Lorene Perry, and A. T. Perry, her then husband, entered into a uniform real estate contract with one J. F. Taylor, predecessor in interest to the defendant, Thelma Catherine Scriever, for the purchase of the property in dispute, a house with some apartments

in it. J. F. Taylor, the seller, contracted to sell the property to A. T. Perry and Lorene J. Perry, his wife, as joint tenants and not as tenants in common, for \$300.00 cash, the note of the buyers for \$400.00, and \$3,500.00 payable at \$40.00 per month, including interest. (See Exhibit A.) Thereafter, on March 14, 1950, the defendant, Lorene Perry, hereinafter called Mrs. Perry, obtained a divorce from A. T. Perry, hereinafter called Mr. Perry, under a decree which awarded her all the right, title and interest of Mr. Perry in the house. (Paragraph 7 of Amended Complaint, page 6, Record on Appeal, admitted by Answer, page 12, Record on Appeal. Please note that hereafter all reference to lines and pages, enclosed in parentheses, refer to Record on Appeal.)

Mr. and Mrs. Perry resided in the house from the date of purchase until early 1944, when

they moved out of the state (Pages 30, 43, 75, 78 and 82), and the plaintiff, LeRoy Hawkins, has resided in the house from about the date of purchase up to the present time. (Pages 30, 78, 80 and 81.) Since early 1944 the plaintiff has collected all the rents and made every monthly payment. (Pages 30, 40, 78 and 79.)

Shortly prior to the date of the contract of purchase, the plaintiff gave Mr. Perry \$300.00, consisting of \$200.00 of his own money and \$100.00 he had borrowed from Mr. Perry. (Pages 27, 52, 53, 63 and 70.) There is evidence in the record that Mr. Perry told the plaintiff he would use the \$300.00 for a down payment on the house, take title in his own name, and then deed it to the plaintiff when he reached his majority. (Lines 4-10, page 25; lines 18-27, page 26; lines 8, 9, 19 and 20, page 27; lines 1-5, page 29; lines 19-21, page 52; lines 6-8, page 53; lines 9-12, page 54; lines 6-9,

page 55; lines 14-18 and 25-27, page 62; lines 11 and 12, page 63; lines 10-17, page 64; lines 4-6, 16, 18, 24 and 25, page 69; lines 5, 6, 12 and 20-30, page 70; lines 5-16, page 71.) This evidence was ruled to be hearsay as to Mrs. Perry, the defendant herein (Pages 23 and 24; lines 28-30, page 25; lines 6-12, page 62), and the plaintiff's counsel agreed that the ruling was proper. (Lines 4-6, page 24.)

Thereafter, Mr. and Mrs. Perry entered into the contract mentioned above, paid the \$300.00 cash and signed a note for \$400.00. They paid that note by paying \$100.00 a month until the note was fully paid. That \$100.00 covered the \$40.00 payment on the contract as well as the payment on the note. (Pages 75, 76, 77, 79, 97 and 99.) There is no evidence that the \$300.00 actually paid on the contract was the money received by Mr. Perry from the plaintiff, and there is testimony of Mrs.

Perry that some of the money paid on the down payment was her own separate property and money obtained by a loan secured by the deeds to property owned by her. (Pages 75, 76 and 77.)

There is a direct conflict in the evidence as to whether the plaintiff was supposed to take care of the property and pay \$12.00 a month into a fund to be used for the expenses of keeping up the premises.

(Pages 33, 43, 44, 82 and 83.) There is a direct conflict as to whether the plaintiff ever paid rental money to Mr. Perry. (Pages 33, 84 and 85.)

There is no conflict in the evidence that Mrs. Perry left the handling of the property up to Mr. Perry until the divorce, and then took an active interest in it herself. (Page 105.) The evidence shows that Mrs. Perry had neither knowledge nor notice of any oral agreement between Mr. Perry and the plaintiff herein concerning the house, and the court so found. (Paragraph 5, page 152.)

In the complaint the plaintiff has asked that, in the event it is found that the plaintiff is not entitled to this property, he be reimbursed for expenses paid out by him personally for improvement and upkeep of the property. (Page 6.) Proof was not adduced on this proposition at the trial on the theory that it would be unnecessary if the plaintiff were held to be entitled to the property. (Page 34.) In the event the judgment of the lower court is reversed, it would be proper to have evidence adduced on this point in order to adjust the equities between the parties.

The trial court found in favor of the plaintiff and against the defendant, and entered its decree on June 7, 1951, awarding the beneficial interest in the property to the plaintiff. (Pages 115-119.) Pursuant to timely motion, amended findings of fact and conclusions of law and an amended decree were entered December 11, 1951, awarding the

beneficial interest in the property to the plaintiff, but requiring plaintiff to repay the defendant the \$400.00 paid by her or on her behalf as part of the down payment on the property, together with interest. (Pages 149-154.)

Defendant has appealed (Page 155) and plaintiff has cross-appealed. (Page 157.)

STATEMENT OF POINTS

I

The trial court has failed to make findings on certain material issues raised in the case.

II

The findings are insufficient to support the judgment.

III

The evidence is insufficient to warrant findings which would support a decree that the plaintiff is entitled to the beneficial interest

in the undivided one-half interest acquired by the appellant by virtue of the uniform real estate contract.

IV

The evidence is insufficient to warrant findings which would support a decree that the plaintiff is entitled to the beneficial interest in the undivided one-half interest acquired by the appellant by virtue of the decree of divorce from A. T. Perry.

ARGUMENT

1. The Law of Constructive Trusts.

We are dealing here with a situation where the plaintiff, if he is to recover at all, must recover on the proposition that equity requires the imposition of a trust on the interest of the Perrys in the home in dispute. The only possibilities are (1) the enforcement of an express trust, (2) the

enforcement of a purchase money resulting trust, or (3) imposition of a constructive trust, sometimes called a trust ex malificio.

The plaintiff does not seek the enforcement of an express trust because, if he did, he would be barred by the Statute of Frauds, Sec. 33-5-1, UCA 1943, requiring a writing for the establishment of a trust concerning real property.

The plaintiff must fail if he seeks to enforce a purchase money resulting trust for the reason that the courts will not impose a resulting trust where the property is taken in another name than that designated by the party paying the purchase money. Scott on Trusts, Sec. 440.1, pages 2242-2243. In the present case the plaintiff claims and testifies that he agreed with A. T. Perry to have this house purchased in A. T. Perry's name, but that the home was actually purchased in the name of A. T. Perry and Lorene Perry, as joint tenants. In a case

where the property is purchased in a manner other than agreed upon, the only remedy is the imposition of a constructive trust.

Since we are necessarily concerned with a constructive trust problem, let us examine the law where, as the plaintiff here claims, one person (A. T. Perry) takes the money of another (Hawkins) under an oral promise to purchase certain named property in his (Perry's) name, hold it for a specified time, and then deed it to the person paying the money or under an oral promise to hold the property for certain uses or purposes. This subject is discussed with some thoroughness in two Utah cases, Chadwick v. Arnold, 34 Utah 48, 95 P. 527, and Haws v. Jensen, 209 P. (2d) 229.

The law appears to be this:

If a person takes property in his own name under an agreement to hold it for another and later deed it to him (whether for a price already paid or

one to be paid as a condition to the deed), and, when the time comes, that person refuses to deed the property as promised, equity will impose a constructive trust if, and only if, there has been an element of positive fraud accompanying the promise by means of which the acquisition of the title by the malefactor was wrongfully accomplished. This is the rule of Chadwick v. Arnold, *supra*, as set forth in the following excerpt:

"The doctrine is well stated in volume 3, Pom. Eq. Jur. (3d Ed.) Sec. 1055, as follows: "A second well-settled and even common form of trusts ex maleficio occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." And

in section 1056: "The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." (Underlining ours.)

In Haws v. Jensen, supra, a widely accepted corollary rule, which could be called an exception to it, was pointed up. There it was stated that, even if there was no fraudulent intent at the time of the transfer of the property, the transferee will be held to be a constructive trustee where there is a fiduciary relationship and the transferee abuses the confidence reposed in him by failing to perform his promise to reconvey (or to hold for certain orally

agreed purposes). This point is discussed in 209 P. (2d) at page 232, as follows:

"Scott on Trusts, Vol. I, Sec. 44.2, states: "A constructive trust is imposed even if there is no fiduciary relationship such as that between attorney and client, principal and agent, trustee and beneficiary; it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest." Restatement of the Law of Trusts, Sec. 44, comment (c), accord. A constructive trust will be imposed even though at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. The abuse of the confidential relation consists merely in the failure of the transferee to perform his promise. Scott on Trusts, Vol. I, Sec. 44.2. A court of equity in decreeing a constructive trust, is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey property would result in unjust enrichment. 3 Bogert on Trusts and Trustees, Part 1, 1946 Ed., Sec. 171."

So, applying the law to the facts of this case, if the plaintiff can show (1) that the defend-

ant by a false or fraudulent verbal promise, induced him to agree that the home be taken in the name of the defendant to be deeded over to the plaintiff when he reached his majority, and (2) that the defendant has refused to do so, plaintiff is entitled to have a constructive trust imposed on the property in the hands of the malefactor.

Or, if the plaintiff shows (1) that there is a fiduciary relationship between plaintiff and defendant, (2) that the defendant, intending to perform when the time came, took the property in his own name under an agreement to convey to the plaintiff when he reached his majority, and (3) has breached that agreement, plaintiff is entitled to have a constructive trust imposed on that property. However, the plaintiff has failed to make out a case under either theory as will be pointed out later.

2. There are no Findings of Fact on Certain

Material Issues Raised in the Case.

The decree which is the final judgment in this case is the amended decree entered December 11, 1950, and findings and conclusions with which we are concerned are those of the same date supporting that decree. Let us examine those findings and see if they support the imposition of a constructive trust on all or any part of Mrs. Perry's interest. I say Mrs. Perry's interest because she is the only one of the Perrys who has been served with process or otherwise brought into the jurisdiction of the court, and because she is the owner of the interest of both the Perrys, having acquired an undivided one-half under the uniform real estate contract, and the other undivided one-half under a decree of divorce from Mr. Perry.

The facts found are essentially these:
(Pages 151 and 152, Record on Appeal.)

a. That A. T. Perry, husband of Lorene

Perry, had, prior to July 15, 1943, accepted \$300.00 from the plaintiff as down payment on the home in controversy.

b. That on July 15, 1943, A. T. Perry and Lorene Perry contracted to purchase the home from J. F. Taylor, the owner, for \$300.00 cash, a \$400.00 note, and payments of \$40.00 per month.

c. That the \$300.00 cash was paid (no finding as to who paid it), that the Perrys paid their note, that Hawkins made the monthly payments, and that the payments don't exceed the rental income from the property.

d. That Mrs. Perry, the only defendant herein save the legal title holder, had neither notice nor knowledge that Mr. Perry had accepted \$300.00 from Hawkins, or that Hawkins claimed an interest in the home, until several years after the contract to purchase it.

e. That part of the money used to pay

the promissory note which constituted a part of the down payment was Mrs. Perry's sole and separate property.

f. That both parties occupied the property until some time in 1944, and only the plaintiff since.

From these facts the trial court concluded that the plaintiff is the true and lawful purchaser of the property, and the defendant has no interest in it. (Page 153, Record on Appeal.) Since the contract shows the equitable interest to be in both the Perrys as joint tenants, and the decree gives Mrs. Perry all of Mr. Perry's interest, the only theory on which that conclusion, and the decree to the same effect, could be sustained, is the constructive trust theory. Hence, to support the decree that the beneficial interest is in Hawkins, it must be found as a fact:

(a) That there was a promise on the part

of the defendant or her predecessor in interest to hold the property for the plaintiff and deed it to him at a later time;

(b) That that promise was intentionally false or fraudulent (Chadwick v. Arnold, supra), or

(c) That a fiduciary relation existed between the plaintiff and the defendant or her predecessor in interest. (Haws v. Jensen, supra.)

It is to be strongly noted that none of the above essential facts were found. Without a finding of (a) above, coupled with a finding of (b) or (c), the plaintiff must be held to have failed to sustain a conclusion of law and decree that the plaintiff is entitled to the beneficial interest in this property. (Point I, Statement of Points.)

The failure to make findings of fact on material issues raised in the case is reversible error. See Piper v. Eakle, 78 Utah 342, 2 P. (2d)

909, and the many Utah cases cited therein at page 910 of 2 P. (2d). For this reason the judgment of the District Court should be reversed and the cause remanded for a new trial at respondent's costs.

Further, because of the failure to make findings of those essential facts, the findings necessarily fail to sustain a decree that the plaintiff is entitled to the beneficial interest in this property. (Point II, Statement of Points.)

3. The Evidence is Insufficient to Warrant Findings Which Would Support a Decree That Plaintiff is Entitled to the Beneficial Interest in This Property.

To discuss this point we must remember that the pleadings and evidence show that the interest with which we are dealing is the equitable title to the home, which equitable title was vested in A. T. Perry (usually called Mr. Perry herein)

and Lorene Perry (usually called Mrs. Perry herein) as joint tenants and not as tenants in common. (See Exhibit A.) Mrs. Perry took an undivided one-half interest in the home on July 15, 1943, under the contract which is Exhibit A. Thereafter, on March 14, 1950, she took the other undivided one-half interest from Mr. Perry by virtue of a decree of divorce.

First, let us examine the evidence relating to the undivided one-half interest obtained by virtue of the contract of sale which is Exhibit A. There is no evidence to show that Mrs. Perry was just put on the contract as a gratuitous party. Rather, the undisputed evidence (Pages 75-77 and 96-97, Record on Appeal) is that part of Mrs. Perry's own funds went to pay the down payment and the finding of fact of the court is to the same effect. (Finding No. 6, page 152, Record on Appeal.) The plaintiff testified that he paid no part of the

\$400.00 note which comprised the major part of the \$700.00 down payment. (See lines 26-30, page 30; lines 1, 2 and 3, page 31; lines 8-16, page 40; and lines 3-5, page 42, Record on Appeal.) Further, the evidence of both plaintiff and defendant is that Mrs. Perry never discussed the house with the plaintiff before 1950, never made any promise relative to the title, and did not know or have notice that plaintiff had or claimed any interest in it prior to 1950. The finding of the court (Finding No. 5, page 152, Record on Appeal) is to the same effect.

In short, there is no evidence in the record whatever to support the proposition that Mrs. Perry is not entitled to the undivided one-half interest she bought under the contract. Since she is entitled to one-half the rental income from the property and the court found that income to be not less than the \$10.00 monthly payment, she is

entitled to credit for one-half the payments made on the contract during the time the plaintiff occupied the premises, collected the rents, and paid the payments. She is further entitled to one-half the reasonable rental value of the apartment occupied by the plaintiff these many years. One-half the reasonable expenditures of the plaintiff made to keep the property heated and in good repair should be set off against the income computed as above.

Since there is no evidence in the record on which the above calculations can be made, the lower court should be instructed to take the necessary evidence.

Second, as to the undivided one-half interest which Mrs. Perry received from Mr. Perry under the divorce decree. If that interest was impressed with a constructive trust in favor of the plaintiff while it was owned by Mr. Perry, it

would still be impressed with the trust. Mrs. Perry took Mr. Perry's interest prior to the time she had knowledge or notice of plaintiff's claim, but all she took under the decree was "all of A. T. Perry's right, title and interest" in said property. She did not pay value for it, is not then a bona fide purchaser for value and does not cut off plaintiff's equity, if any he has.

But, even so, there must be evidence sufficient to sustain findings of fact, and findings of fact sufficient to sustain conclusions of law and a decree before that trust is impressed. As set forth above, the findings are insufficient to sustain the decree. Further, the evidence is insufficient to sustain necessary findings.

There is must testimony in the record that Mr. Perry received \$300.00 from the plaintiff and told him that he would take the \$300.00, use it for the down payment on the house, take the title

in his own name and deed it to the plaintiff when he became of age. All of this testimony was subject to a blanket objection to the admission of any statements made by Mr. Perry outside the presence of Mrs. Perry. Since Mr. Perry is not a party to this suit under the rules of evidence regarding parties, for the reason that jurisdiction was never obtained over him, the court ruled that all of that testimony was "hearsay" as regards Mrs. Perry, and hence was incompetent. (See lines 18-22, page 23; lines 2 and 3, page 24; lines 28-30, page 26, Record on Appeal.)

That this ruling is proper as to the hearsay objection was admitted by plaintiff's counsel (Lines 4 and 5, page 24, Record on Appeal.) but counsel felt they would be admissible as declarations against interest by a predecessor in interest. This would have been true had the declarations been made while Mr. Perry owned the property,

but the declarations were made before Mr. Perry obtained his interest. This rule is set forth in Jones on Evidence, 2nd Ed., at page 1673, as follows:

"The rule has often been stated that in such cases the declaration of the grantor against his title, while in possession of the premises, are always admissible, not only against him, but against those who claim under him. But the declarations of the grantor are not to be treated as admissions, and are not competent as such, if made before his interest in the property in question was acquired, or, generally, after he totally parted with his interest."
(Underlining ours.)

Excluding the statements of Mr. Perry as against Mrs. Perry excludes them for any purpose, for she is the only defendant they concern. Mr. Perry is not a party for he was never served. Thus there is excluded from this record all the testimony relative to the claimed oral promise of Mr. Perry to hold the property for the plaintiff and deed it to him when he reached his majority.

Without this testimony, there is no evidence that Mr. Perry agreed to hold the title in his own name until the plaintiff reached his majority and then deed it over. Without that evidence, the plaintiff's case against Mrs. Perry as to the undivided one-half interest she obtained from Mr. Perry via the divorce decree must fail, since it is the plaintiff's duty in such a case as this to prove his case by clear and convincing evidence.

The evidence is insufficient to sustain the imposition of a constructive trust on either undivided one-half interest in the house when the evidence is measured against the law of this state.

CONCLUSION

The appellant respectfully represents to this honorable court that the judgment of the lower court should be reversed for three reasons: first, that the trial court failed to make findings of

Without this testimony, there is no
 evidence that Mr. Perry acted to nullify the title
 and that until the plaintiff received his
 majority and then died it over, without that
 evidence, the plaintiff's case against Mr. Perry
 as to the undivided one-half interest was obtained
 from Mr. Perry vs. the divorce decree made final,
 which is the plaintiff's duty in such a case as
 this to prove the case by clear and convincing

The evidence is insufficient to sustain
 the imposition of a constructive trust on either
 undivided one-half interest in the house when the
 evidence is read against the law of this state.

CONCLUSION

The appellant respectfully represents to
 this honorable court that the judgment of the lower
 court should be reversed for three reasons: first,
 that the trial court failed to make findings of

fact on certain material issues raised in the case, second, that the findings made are insufficient to support the decree, and, third, that there is insufficient evidence to sustain a finding that the plaintiff is entitled to the beneficial interest in either the undivided one-half interest Mrs. Perry took under the uniform real estate contract of July 15, 1943, or the undivided one-half interest she took under the divorce decree of March 14, 1950.

The appellant should be awarded costs and this case should be remanded to the trial court for the purpose of ascertaining whether the plaintiff has expended money for the upkeep and maintenance of this home which should, in good conscience, be repaid to him by appellant.

Respectfully submitted,

EARL D. TANNER
Attorney for Appellant