

1952

Glenn Briggs v. F. W. Hess and Alice Hess : Brief of Respondent

Utah Supreme Court

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CIVIL CASE NO. 7818

In The Supreme Court
of the
State of Utah

GLENN BRIGGS,

Plaintiff and Respondent

vs.

F. W. HESS and ALICE HESS,
his wife,

Defendants and Appellants

BRIEF OF RESPONDENT

FILED

JUL - 2 1952

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLENN BRIGGS,

Plaintiff and Respondent

vs.

F. W. HESS and ALICE HESS,

his wife,

Defendants and Appellants

STATEMENT OF FACTS:

On the 10th day of May, 1947, Laura Tree also known as L. Tree and as L. T. Zitting filed a suit to quiet title in the District Court of Box Elder County, State of Utah, (Civil No. 6586, defendant's exhibit No. 1) against one F. W. Hess and Alice Hess, his wife, and others. On the 8th day of May, 1948, the said F. W. Hess and Alice Hess, his wife, executed a warranty deed to Glenn Briggs, the plaintiff and respondent herein, for a valuable consideration. This deed was duly recorded in the office of the County Recorder of Box Elder County, Utah, on the 28th day of May, 1948, in Book 57 of Deeds at page 364. On November 19th, 1949, the District Court of Box Elder County in the suit re-

ferred to above, entered a judgment quieting title to the lands in controversy herein, in Laura Tree also known as L. Tree and L. T. Zitting, a certified copy of said decree being recorded in the office of the County Recorder of Box Elder County, Utah, on the 20th day of December, 1949, in Book 1 of Miscellaneous Deeds, page 357 (see exhibits B and 1).

That after plaintiff learned that said decree had been entered, declaring the title of his said grantors, the defendants herein, invalid, that he made demand upon his grantors, the defendants herein, that they repurchase said lands and make good their warranty. That the defendants failed to purchase said property and make good their warranty; that the plaintiff, in order to protect said property and keep possession thereof, had to repurchase it from the other parties and sue the defendants herein for the damage that he suffered.

The defendant admitted all of the allegations in plaintiff's complaint except paragraphs 6 and 7 and denied these paragraphs for lack of knowledge. At the hearing and particularly the pre-trial, attorney for defendant (R.25) admitted that the amount claimed paid by plaintiff for the purchase price was correct.

Consequently the only issue raised by the pleadings was whether or not the defendants failed to clear the title so as to make good their warranty deed and the amount of the attorneys fees. The evidence offered before the court (R.27) showed that Mr. Briggs paid \$484.68 to get the title back and the evidence offered as to reasonable attorneys

fees (R.33) was \$125.00. The only evidence offered in rebuttal was the tax deed (R.33) offered by Mr. Mason and the file in the previous case between Hess and Laura Tree, (R.34) which previous action determined that Mr. Hess had no title to the property. There was a discussion about the pleading (R.35) where the attorney for plaintiff made the statement to the court, that the Quit Claim Deed from Box Elder County and the Civil Case No. 6586 of Laura Tree et al vs. Hess, offered by the defendants, was admitted by plaintiff for the purpose of showing that the matter had been litigated and Hess determined to have no title and that all parties claiming under him were estopped from claiming their title through him and were not admitted for the purpose of showing any affirmative defense, as none was pleaded. There was no proof offered by defendants as to the circumstances under which Hess sold the property to the plaintiff Briggs, that is, whether or not he knew there was a suit pending; whether or not he had paid any taxes since the deed was originally issued to him by the defendant Hess; and whether or not Briggs claimed to be a bona fide purchaser for value without knowledge of the suit. On the 11th day of August, 1951, Briggs in order to protect said property and after notice being given to Hess that he could not afford to lose said property and would have to repurchase it if Hess did not, purchased the said property and brought the suit for damage.

STATEMENT OF POINTS:

POINT I. THE MATTER RELIED ON BY DEFENDANTS IN THIS APPEAL FOR THE FIRST TIME, TO-WIT,

THAT NO LIS PENDENS WAS FILED AND THAT THE PLAINTIFF BRIGGS WAS A BONA FIDE PURCHASER FOR VALUE, IS RAISED FOR THE FIRST TIME ON APPEAL AND IS AN AFFIRMATIVE DEFENSE AND MUST BE SPECIALLY PLEADED.

POINT II. THAT IF AN AFFIRMATIVE DEFENSE COULD BE RAISED NOW, FOR THE FIRST TIME, WHICH PLAINTIFF DENIES, THEN THE DEFENDANT IN SAID AFFIRMATIVE DEFENSE MUST BEAR THE BURDEN OF PROVING THAT PLAINTIFF WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT KNOWLEDGE OF THE LITIGATION, THEN PENDING AT THE TIME OF PURCHASE, AND THAT THE DEFENDANT HAD GOOD TITLE AND THAT THE SAME PASSED WITH HIS CONVEYANCE.

POINT III. THAT WHEN THE DISTRICT COURT IN CIVIL SUIT No. 6586 (DEFENDANT'S EXHIBIT No. 1) DECLARED THE TAX TITLE OF F. W. HESS, NULL AND VOID, THAT HIS WARRANTY OF TITLE THEN FAILED. THAT ANY GRANTEE OF HESS, WHETHER HE CLAIMED TO BE A BONA FIDE PURCHASER OR NOT WOULD NOT HAVE ANY BETTER TITLE THAN HESS, AND HESS HAD NONE. UNDER SUCH CIRCUMSTANCES THE COURT DID NOT ERR IN GRANTING JUDGMENT FOR PLAINTIFF AND RESPONDENT.

ARGUMENT:

POINT 1. THE MATTER RELIED ON BY DEFENDANTS IN THIS APPEAL FOR THE FIRST TIME, TO-WIT, THAT NO LIS PENDENS WAS FILED AND THAT

THE PLAINTIFF BRIGGS WAS A BONA FIDE PURCHASER FOR VALUE, IS RAISED FOR THE FIRST TIME ON APPEAL AND IS AN AFFIRMATIVE DEFENSE AND MUST BE SPECIALLY PLEADED.

The Utah Rules of Civil Procedure, Rule 8, Sub-paragraph C, reads as follows:

“Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.”

This Court is invited to review again the pleading (R. 1 to 23) to see if it is possible to construe that an affirmative defense of this nature has been pleaded. There is nothing but a general denial of a part of the original complaint.

Plaintiff and Respondent submits that such affirmative matter cannot now be raised for the first time before this court.

POINT II. THAT IF AN AFFIRMATIVE DEFENSE COULD BE RAISED NOW, FOR THE FIRST TIME, WHICH PLAINTIFF DENIES, THEN THE DEFENDANT IN SAID AFFIRMATIVE DEFENSE MUST BEAR THE BURDEN OF PROVING THAT PLAINTIFF WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT KNOWLEDGE OF THE LITIGATION THEN PENDING AT THE TIME OF PURCHASE AND THAT THE DEFENDANT HAD GOOD TITLE AND THAT THE SAME PASSED WITH HIS CONVEYANCE.

It is appellant's contention that if no lis pendens was put on record by the party plaintiff, suing the present defendant in a previous suit, that then any person so long as that lis pendens was not on record would be a bona fide purchaser and would be free from the effect of the litigation then pending before the court. In Thompson on Real Property, Volumn 8, Article No. 4510, page 398, we have the following:

" - - - . On the other hand, one who purchases with actual notice of the pendency of a suit affecting the land can not object that statutory notice of the pendency of the suit was not filed."

The cases cited in support of this are numerous.

Consequently under this great array of decisions, the appellant if he has asserted such affirmative defense must also prove every step and one is, that even in the absence of a lis pendens being filed he must also show that the present plaintiff, Briggs, had no actual notice of the pendency of the suit between his grantor and Laura Tree et al. The record is absolutely silent upon this point. Our section 104-5-16 Utah Cide Annotated 1943 is taken from the California Civil Code and is practically the same word for word. I refer you at this time to 16. Cal. Jur. page 647 under the general heading of Lis Pendens, and we have,

" - - - . As already intimated, one who with actual notice of the pendency of a suit purchases the property involved in an action from a party thereto is concluded by a judgment against the party he derived title from, irrespective of the filing of notice of lis pendens."

Then a copy of the California Code is set out on page 648 of said volume. Utah has followed this same theory and

in the Whittaker vs. Greenwood, 17 Utah, 333, 53 Pacific 736 referred to by appellant, and set out in the foot notes under our Section 104-5-16, Utah Code Annotated 1943. We find on page 736,

“ - - - . It does not in any way change rule of law relating to actual notice thereof nor effect of such actual notice on parties dealing with or obtaining possession or title to land in litigation.”

In that case the party had actual notice, but claimed the right to ignore the decision of the court because of failure to file lis pendens, but the Supreme Court held otherwise. Under Article 4 of the same foot note of the annotator we have constructive notice had as a result of filing of notice of lis pendens, is the equivalent of actual notice. Dupee v. Salt Lake Valley Loan and Trust Co. 20 U. 103, 57 P. 845, 77 Am. St. Rep. 902. This last case is cited by appellant, but his quotation falls short of the meat of the decision. The complete quotation found on page 847 is as follows:

“The object of notice of lis pendens is to keep the subject of the suit, or res, within the power and control of the court until judgment or decree shall be entered, so that courts can give effect to their judgments, and the public shall have notice of the pendency of the action. Lis pendens may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action, and until its final judgment therein. This constructive notice of filing the complaint as required by the statute is equivalent to actual notice.”

The facts of the above case are not similar to ours, their being a partial mortgage foreclosure and the lis pendens being filed and setting said matter out so that anyone purchasing under the partial foreclosure took title subject

to another and superior lien. They did however say that the *lis pendens* is nothing more than a form of constructive notice, equivalent under the law to actual notice.

Appellant contends, page 5 of this brief, that the District Court lost jurisdiction over the property because of the fact that the previous owner, the defendant in this action, had conveyed the property away while the suit was in litigation. The cases cited to support this doctrine are just *Whittaker vs. Greenwood* 53 Pac. 736, *Dupee vs. Salt Lake Valley Loan and Trust Co.* 57 Pac. 845 and *Doris Trust Co. vs. Quermback et al* 133 Pac. 2d 1003. I have searched these cases carefully and not one of them had the question of **jurisdiction** over the subject matter being lost, on account of failure to file a *lis pendens*, before the court. The last case cited by appellant being *Doris Trust Co. vs. Quermbach et al* 133 Pac. 2d 1003, in the majority opinion had nothing whatever to say about a *lis pendens* and in Justice Wolfe's concurring opinion on page 1006 he referred to a recorded notice that had been placed on the record and discussed whether it could be considered as a purported *lis pendens* and determined it could not be. Under appellants theory any party being sued to determine rights in real property, could connive with a buyer if no *lis pendens* had been filed and defeat the court of its jurisdiction over the subject matter. I can find nothing in the law that would even intimate such a doctrine and on the contrary I find in 16. Cal. Jur. page 652 under the heading of Actual Notice, which is as follows:

"Article 8. Actual Notice.

Actual notice of the pendency of an action is as effective as constructive notice under the statute. It is a general rule that notice of facts sufficient

to put one on inquiry is notice of all facts to which inquiry would lead. The notice need not be in writing."

Again we have on page 657 of 16 Cal. Jur. under the title Operation and Effect:

"Article 12. In General.

Although the old maxim of the civil law from which the modern doctrine of lis pendens evolved was phrased in the Latin words "pendente lite nil innovetur," the doctrine has never been held, in cases to which it has been applied in California, to have the effect of rendering conveyances made pendente lite absolutely null and void. It simply holds the interest of the losing party subservient to the relief sought by the plaintiff, and charges all persons with constructive notice of the suit and warns them that any dealings or meddlesome interference with the subject matter of the action during the pendency thereof will avail them nothing in the event of a judgment or decree against their grantor. The effect of a lis pendens is to make a subsequent purchaser from a party a mere volunteer, who takes subject to any judgment that may be rendered in the action of the pendency of which notice is given. The purchasers or encumbrancers pendente lite are bound by the result of the judgment or decree precisely as their grantors are, or would have been bound. Purchasers pending a mortgage foreclosure suit, not made parties thereto, are, however, bound by the decree against their grantors only to the extent of the property described in the complaint, decree and lis pendens."

The case cited by appellant on page 7 of this brief being Alpha Stores Limited et al vs. Nobel et al 135 Pac. 2nd 625, is not in point with the facts in this case, as the plaintiff Alpha Stores Limited et al got their title as an execution purchaser which is an independent source of title, while in the present case the plaintiff and respondent got

his title through the defendant and appellant, and can never have any better title than his grantor, Hess. When the court declared the tax title of Hess null and void, regardless of whether Briggs had notice of Hess's litigation with Tree or not, or whether we term him a bona fide purchaser for value, his title is no better than Hess's was. A suit by Briggs with Tree can avail Briggs absolutely nothing as he gets his title from Hess, Hess got his from void tax proceedings and a Court of Jurisdiction has so declared. The warranty has absolutely failed and Briggs is entitled to his damage. Defendant further contends that in the prior case of Laura Tree vs. Hess (page 7 and 8 of his brief), that the District Court was without jurisdiction to enter its decree in said matter. He claims the reason is that Laura Tree had not filed her lis pendens. At the same time in his brief, he shows that an action was filed by Laura Tree against F. W. Hess, but at the time the action was filed Hess was listed as the owner of the property under a tax proceeding and Tree the owner under a legal chain of title. During the period while the issues were being formed the defendant Hess sold the property and did not raise this issue before the Court during the litigation that followed. The court found that Hess's tax title was invalid and he now says that his decree in another matter is void and of no force and effect. It is in substance and effect a collateral attack, if anything, on a prior judgment where the parties are not the same.

POINT III. THAT WHEN THE DISTRICT COURT IN CIVIL SUIT No. 6586 (DEFENDANT'S EXHIBIT No. 1) DECLARED THE TAX TITLE OF F. W. HESS, NULL AND VOID, THAT HIS WARRANTY OF TITLE THEN FAILED. THAT ANY GRANTEE OF HESS, WHETHER

HE CLAIMED TO BE A BONA FIDE PURCHASER OR NOT WOULD NOT HAVE ANY BETTER TITLE THAN HESS, AND HESS HAD NONE. UNDER SUCH CIRCUMSTANCES THE COURT DID NOT ERR IN GRANTING JUDGMENT FOR PLAINTIFF AND RESPONDENT.

The District Court entered its decree (plaintiff's exhibit "B" and defendant's exhibit "1") and did therein declare that the title of the defendants, F. W. Hess and wife, was void and of no force and effect and that the rights of any person claiming under him were of no force and effect. The record further shows that the plaintiff Biggs, if he had any title, had to obtain the same under the defendants, F. W. Hess and wife. The Warranty Deed of conveyance through which Briggs took his pretended title warranted that Hess was lawfully seized of the premises and that they had a good right to convey the same; that they guaranteed the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free and clear from all encumbrances and that the grantors, their heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever, (Utah Code Annotated 78-1-11). The decree entered by the court, in effect proved the destruction of the warranty made by the defendant Hess.

The first covenant referred to above was the Covenant of Seisin and the right to convey. Thompson on Real Property, Volume 7, Article 3687 page 169 reads:

" A " covenant of seisin" is defined to be "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey," and extends not only to the land

itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land. It is a covenant in praesenti, which is broken, if at all, as soon as made. The covenant of seisin does not extend to a title already vested in the grantee but is broken only by a paramount title existing in a third person. Such covenant, "is, when broken, a chose in action, not assignable at common law, and this rule still obtains" in North Carolina. In North Dakota, however, by virtue of statute, the cause of action for breach of a covenant of seisin is capable of assignment. It embraces possession and the right to convey. It is breached if a good title in fee-simple absolute, with right of possession, is not in the grantor when the deed is delivered. It is broken if there is a material deficiency in the quantity of land called for by the deed. It is broken, also, if the grantor has not substantially the very estate he undertakes to convey. If he undertakes to convey the whole estate in fee absolutely, the covenant of seisin is of course broken if he has no estate; and it is broken if there is an outstanding estate in another, such as the estate of a life tenant; but it is not broken by the existence of easements or encumbrances not striking at the technical seisin of the grantee, and a mortgage or an expectant right of dower does not affect the covenant. This covenant does not extend to a title already existing in the grantee, but only to title existing in a third person.

This covenant is in legal effect a covenant of title as well as a covenant of possession, and is broken unless the grantor's deed vests in the grantee an indefeasible estate in the land conveyed.

The covenant of right to convey is practically synonymous with the covenant of seisin. This covenant, like the covenant of seisin, is one in praesenti and, if broken, the breach occurs at the moment of its creation, the covenant in effect being that a particular state of things exist at that time."

Briggs immediately called upon his grantor to make

good his warranty by purchasing from Laura Tree et al the said property for the benefit of Briggs, the plaintiff. That notice and demand went unheeded. Briggs, on the other hand, is entitled to rely upon his warranty and sue for his damage thus suffered, because of the failure of Seisin and right to convey has been established by the decree in Tree vs. Hess Supra. On the other hand if he should have attempted to litigate said matter he must lose said litigation, as his grantor's title came from a tax title and had been declared void. His pretended title, having come from a void tax sale, even if it could be proved that he was a purchaser for value from Hess, he has no better title than Hees had and Hess's title originates from a void tax proceeding. Consequently the court did not err when in substance and effect it said to Mr. Hess: "You sold property under a written warranty." "Your written warranty was broken at the time you gave your deed, and was so proven by the suit brought against you by Mrs. Tree." "You were given an opportunity to make good the warranty and you failed." "Your grantee had to pay out \$484.68 because your warranty failed and as a consequence your grantee is entitled to his damage."

CONCLUSION:

1. As a conclusion from the foregoing, plaintiff and respondent contends under the pleadings and issues under which said matter was tried, that the judgment should be confirmed.

2. That any affirmative defense must be specially pleaded and that the same, having not been pleaded cannot be raised in the Supreme Court for the first time.

3. That the warranty of title by Hess failed when he issued his deed and the fact was proven when judgment was entered against him in Civil Suit No. 6586, between Tree and him and plaintiff and respondent was then entitled to his damage as determined by the court.

Respectfully Submitted,

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