1980

Olaf Theodore Stevensen And Barbara Ann Stevensen v. Bailey Bird And Virginia Bird : Brief of Plaintiffs-Cross-Respondents

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

OLAF THEODORE STEVENSEN)
and BARBARA ANN STEVENSEN,
)
Plaintiffs and)
Cross-Respondents,)
)
vs.)
)
BAILEY BIRD and)
VIRGINIA BIRD,
)
Defendants and)
Cross-Appellants.)

Case No. 16347
Case No. 16416

BRIEF OF PLAINTIFFS-CROSS-RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, THE HONORABLE G. HAL TAYLOR, JUDGE

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BRIEF OF PLAINTIFFS-CROSS-RESPONDENTS

STATEMENT OF NATURE OF CASE

This is a cross appeal by Cross-Appellants (Bird) from that part of the declaratory judgment below interpreting provisions of a written lease executed in 1961 between the parties and holding Bird has no rights whatsoever in certain of lessees' (Stevensen) property located near leasehold property subject to such lease.

DISPOSITION IN LOWER COURT

This case was tried to the court which found Stevensen had the power under the lease to arrange the parking on the leasehold property so long as he complied with the other provisions of the lease and found that Stevensen could relocate the accessway to such parking to any convenient location including its original loca-

tion on Goddard Court. The court below also found that the lease did not grant any right whatsoever to Bird in Stevensen's property and held that Stevensen could remove the accessway and the parking stalls reserved and used by Bird from separate property owned by Stevensen to their original locations on the leasehold property.

RELIEF SOUGHT ON APPEAL

Cross-Respondents (Stevensen) seek affirmance of that portion of the Declaratory Judgment below, its Findings of Fact and Conclusions of Law, pertaining to the parking area of the leasehold property, Stevensen's separate property and to the provisions of the lease concerned with the parking arrangement thereon.

STATEMENT OF FACTS

Cross-Respondents dispute the statement of facts contained in Cross-Appellants' brief and therefore submits the following statement of facts:

1. In 1961 Cross-Appellants (Bird) and Cross-Respondents (Stevensen) entered into a lease of the upper two floors of the premises located at 251 and 253 East 200 South, Salt Lake City, Utah, the parking area to the rear of the building at said address (to the north of the lessors' buildings) and the alley way 10.84 feet wide to the east of such buildings (the alley way is also known as Goddard Court). (Plaintiff Exhibit "P-1"). See plat attached hereto as Exhibit "A".

2. The lease between Stevensen and Bird is Exhibit "P-1" and provides in pertinent part as follows:

(a) Paragraph 5 of the lease on page 4 grants Stevensen the right to grade and blacktop the parking area and to mark and designate the same for the parking of motor vehicles. Paragraph 5 also reserves the first 26 parking stalls which can be entered on the leasehold property by Bird and his tenants.

(b) Paragraph 7 provides as follows:

> Lessee shall have the right during the term of this lease or any extension thereof, to relocate the accessway to the rear of Lessors' buildings from its present location, Goddard Court, to any other convenient location, provided only that Lessee shall at all times make available a suitable and adequate access to the rear of Lessors' buildings and shall keep a lane of traffic available for smooth and efficient inflow and outflow of traffic to the ramp at the rear of Lessors' buildings . . . Lessee shall so arrange the parking area as to not unnecessarily interfere with the efficient and proper use of the loading facilities as now established at the rear of Lessors' buildings.

(c) Paragraph 10 of the lease provides as follows:

> Lessors convenant that Lessees shall have the quiet enjoyment of the premises demised herein and shall have the right to, at Lessees' own expense, construct fences or other suitable boundary markers to limit the parking area . . .

3. Stevensen had previously acquired Lorenzo Smith & Sons property just east of Goddard Court to facilitate expansion of his athletic club facilities which included a right of way over Goddard Court (Plaintiffs' Exhibit "P-1", R.243) See plat attached as Exhibit "A". (This property was referred to below as the Smith property).

4. Prior to the lease and for the first few years thereafter,

Bird and his tenants parked behind his buildings on the leasehold property. (Defendants' Exhibits 12, 13, and 14; R.240)

5. Over a period of three years after execution of the lease, Stevensen constructed a swimming pool facility on the north portions of the Smith property and the leasehold property, he razed Lorenzo Smith & Sons buildings, and he graded and blacktopped the leasehold property and the remaining portion of the Smith property for parking and access. (R.243-44) After improvements, Stevensen moved some of Bird's parking from the rear of his buildings onto the Smith property to meet needs existing at that time. (R.240, 251)

6. Thereafter, Stevensen used portions of the Smith property and a small portion of the Bird leasehold property for athletic club facilities and has used the remaining portion of the Smith property and most of the Bird leasehold property for various parking arrangements as needed or required by various circumstances existing in the area from time to time. (R. 303, 308, 309, and 312

7. As the downtown business area grew and construction of improvements on real property limited the availability of parking in the immediate area, disputes over parking and particular locatio between Stevensen, Bird, Bird's tenants, and their patrons grew to the point where such disputes were a regular occurrence jeopardizin persons and property in the area. (Bird, et al v. Stevensen, T.57, 58, 92, 94, and 95)

8. Stevensen, as lessee of the leasehold property, attempt to resolve the parking problems as they developed to facilitate

management of the parking, but was prevented from doing so by the lack of cooperation of Bird, his other tenants, and their patrons. (Bird, et al. v. Stevensen, T.57, 58, 92, 94, and 95)

9. Stevensen determined that the solution to the parking difficulties was to separate access to the parking from the street entrance at Second South so patrons entering either the leasehold or Stevensen's property would know at the point of entrance where they were permitted to park. Such separation would necessitate relocating Bird's parking stalls and accessway from Stevensen's separate property arranging them on the leasehold property, but would not diminish the number of parking stalls or the accessway. (Bird, et al. v. Stevensen, T.95)

10. As Stevensen began to exercise his powers under the lease and attempted to alter the parking arrangement, confrontation continued between himself and Bird resulting in the present action for declaratory relief to interpret the lease and declare the rights of the parties in such lease so that Stevensen could rearrange the parking and alleviate the parking problems.

ARGUMENT

POINT I

THE LOWER COURT'S DECISION INTERPRETING THE LEASE TO GIVE STEVENSEN THE POWER TO ARRANGE PARKING, ERECT FENCES AND RELOCATE THE ACCESS-WAY IS THE CORRECT DECISION BECAUSE THE LEASE IS CONTROLLING.

It is commonly accepted that a lease must be construed with reference to the intentions of the parties. Powerine Co. v. Russell's

Inc., 135 P.2d 906 (1943). In finding the intent of the parties the terms of the lease, however expressed, if unambiguous, are to control the construction and operation of the lease. 51 CJS, Landlord-Tenants § 232(2). Consequently, the clear and unambiguous language of the lease is controlling and the lower court's construction of the agreement in this case is proper.

In clear and unambiguous language the 1961 lease grants Stevensen the right to rearrange the parking configuration on leasehold property and to erect fences to facilitate management of the parking area. Paragraph 5 of the lease permits Stevensen to blacktop the leasehold and mark it for parking so long as an adequate access is maintained and 26 parking stalls are reserved for the Lessor. Paragraph 7 grants Stevensen the right to relocate the accessway to any convenient location, and paragraph 10 gives Stevensen the "right to erect fences and other suitable boundary markers to limit the parking area."

The lower court's judgment is consistent with the express terms of the agreement. By confirming Stevensens' right to erect fences on the leasehold property and by confirming Stevensens' righ to rearrange the parking and accessways to the original configurations the court has reached the proper decision required by the lease.

POINT II

CROSS-APPELLANTS AND THEIR TENANTS DO NOT HAVE A RIGHT IN STEVENSENS' SEPARATE PROPERTY BECAUSE THE LEASE GRANTS NO SUCH RIGHT.

Prior to execution of the Stevensen-Bird lease in 1961,

and at all times subsequent thereto, Stevensen has owned property adjoining Goddard Court on the east (Goddard Court being 10.84 foot right of way running north and south directly east of Birds' building), and a 1/2 interest in the 10.84 foot right of way over Goddard Court. (Plaintiffs' Exhibit "P-1", R.243) By the 1961 lease, Stevensen acquired from Bird the other 1/2 interest in the right of way over Goddard Court. (Plaintiffs' Exhibit "P-1")

Nowhere in the 1961 lease or anywhere else has Stevensen granted to Bird a right in his property. Nevertheless, Cross-Appellants argue that Stevensen is prevented from relocating the parking and accessway thus requiring Stevensen to utilize his own property for Cross-Appellants' parking and Cross-Appellants' access to their parking. Such argument is contrary to reason and law.

The court below specifically held in paragraph 6(a) of the Conclusions of Law as follows; "The lease does not grant defendants any right or interest in the Smith property". (R.189) The lower court's judgment granting Stevensen the power to arrange the parking, relocate the accessway, and erect a fence to separate the parking also recognizes that Cross-Appellants have no right in the Stevensen property referred to as the Smith property. The pertinent portion of the Judgment is as follows:

> 1. Plaintiffs are entitled to and are hereby granted a declaratory judgment declaring the meaning of the lease between plaintiffs and defendants to grant plaintiffs the right to rearrange the parking configuration and also to move all parking from the Smith property to the rear of Lessors' buildings so long as plaintiffs comply with the other provisions of the lease between the parties.

2. The lease between the parties authorizes plaintiffs to relocate the accessway extending from Second South to the rear of defendants' buildings to any convenient location including its original location within the confines of Goddard Court so long as the plaintiffs comply with the other provisions of the lease between the parties.

3. The lease between the parties authorizes plaintiffs to erect fences which limit and define the parking areas and access thereto so long as plaintiffs comply with the other provisions of the lease between the parties. (R.183-84)

POINT III

THE COURSE OF DEALING BETWEEN THE PARTIES WAS NOT AN ISSUE TRIED BELOW AND CANNOT BE RAISED ON APPEAL BY CROSS-APPELLANTS.

Cross-Appellants did not plead, submit evidence on, or argue the issue of the course of dealing between the parties in the trial below and such issue cannot be raised now on appeal. Radley v. Smith, 313 P.2d 465 (Utah 1957). The issues below involve the interpretation of the lease and not the course of dealing between the parties.

In addition, Cross-Appellants seek to create an ambiguity in the written terms of the lease where none exists. If there is no ambiguity, the lease itself controls. Denver Plastics, Inc. v. Snyder, 416 P.2d 370 (Colo. 1966).

There is no ambiguity in the provisions of the lease which leaves any doubt that Stevensen has the power to erect fences to limit the parking especially where such fences are on his own property. (See paragraph 10 of plaintiffs' Exhibit "P-1")

Certainly any convenient location includes its original location on Goddard Court.

There is no ambiguity in the lease which can be construed to create a right or interest in Cross-Appellants to the separate property of Stevensen. (See plaintiffs' Exhibit "P-1") Stevensen has not given Bird a right in his property and no course of dealing between them can create such a right.

There is certainly no ambiguity in the lease as to Stevensens' power and right to arrange the parking on the leasehold property a fortiori when such arrangement is to remove the parking from his property.

Cross-Appellants seek to create an issue of law on appeal which was not tried below based on ambiguities that do not exist. Such is clearly improper and a telling point is that Cross-Appellants' arguments are based on no argument, fact, or pleading cited to this court in the record below.

In addition, if the course of dealing between the parties shows anything, it is that the parking arrangement has been changed several times and that Stevensen has the authority to change the parking as the conditions require. (R.303, 308, 309, and 312)

POINT IV

THE LEASE BETWEEN THE PARTIES AS IT CONCERNS THE LOCATION OF THE PARKING ARRANGEMENT AND THE LOCATION OF THE ACCESSWAY THERETO HAS NOT BEEN MODIFIED AND WAS NOT SO HELD BY THE COURT BELOW.

The court's Findings, Conclusions, and Judgment below do not hold that defendants' Exhibit "D-4", the 1975 description of parking stalls, was a modification of the lease nor would such holding be correct. In effect, the court below ruled that Stevensen has the power, independent of the lease, to remove parking reserved by the lease between the parties from his separate property to the leasehold property.

Defendants' Exhibit "D-4" cannot be a modification of the lease as to the arrangement of parking stalls and the location of access because by its own terms, it is simply an agreement on the assignment of stalls to Cross-Appellants' tenants as of a particular date. The language on the bottom portion of Exhibit "D-4" is as follows:

> This rough sketch is made again at the instance of Ted Stevensen, Midtown Auto Parts, and Church of Scientology to show stalls assigned to various tenants. Each tenant will be given a copy of the sketch.

Thus, the Exhibit by its own terms was to clear up confusion as to which parking stalls were assigned to the various tenants as of a particular date. It was not to modify the lease as to Stevensens' right to relocate the access and parking stalls entirely from his separate property.

Such a modification would also require explicit unambiguous language which Exhibit "D-4" does not conatin. Popplewell v. Jones, 211 P.2d 283 (OKLA. 1949). In addition, Cross-Appellants have not shown mutual assent or consideration for the modification.

Bamberger Prodictions v. Certified Productions, 48 P.2d 489 (Utah 1935).

POINT V

THE DECISION OF THE THIRD DISTRICT COURT IN KATSANEVAS V. STEVENSEN, CIVIL NO. 226232 IS NOT RES JUDICATA OF THE ISSUES TRIED BELOW NOR DOES SUCH DECISION HAVE THE FAR REACHING EFFECT ARGUED BY THE CROSS-APPELLANTS.

Cross-Appellants have misapplied the principle of res judicata when they argue that the decision in Katsanevas v. Stevensen, Third District Court, Civil No. 226232, bars the decision of the lower court in the present appeal. The principle of res judicata is only available when a judgment on the merits of a court of competant jurisdiction determines identical rights, facts, or issues between the same parties or their privies. Richards v. Hodson, 485 P.2d 1044 (Utah 1971); Dillard v. McKnight, 209 P.2d 387 (Cal. 1949).

The Katsanevas case was between Cross-Respondent Stevensen and Steve and Mike Katsenavas, two of Cross-Appellants' lessees. Cross-Appellants were not parties to that case and have not obtained nor have they been conveyed any right in such case. The issue of the Katsanevas case was whether Stevensen had the right to certain of the 26 reserved parking stalls when such were "untenanted" as defined by the lease. The provisions of the lease between Stevensen and Bird covering Stevensens' powers to arrange parking and relocate the accessway were not at issue nor was the location or particular arrangement of any particular parking stalls an issue. The issue

of Stevensens' right to erect fences was also not an issue.

Thus, the parties being different had the issues being different, the principles of res judicata do not apply to bar the lower court decision.

Cross-Appellants own argument best illustrates the weakness of their position when he argues on page 11 of his brief that,

> Lessee remains under a permanent injunction from the Court from rearraging the parking on the leased premises unless Lessee can demonstrate to the court an extreme good cause for doing so. (Emphasis added).

Even if Judge Sawaya's order in Katsanevas v. Stevensen affected the arrangement of the parking on the leasehold premises in some way, such order does not prevent Stevensen from removing the 26 reserved parking stalls and the accessway from his own separate property. To state that the Katsanevas order and the lease requires Stevensen to provide Bird and his tenants with parking on Stevensens' own property is unfounded in fact, unfounded in the law, and unfounded in reason.

On several occasions in the trial below, counsel for Cross-Appellants argued that Katsanevas v. Stevensen prevented Stevensen from rearranging the parking. (R.171, 205, 206, 223, 377, and 378 referring to opposition to Stevensens' motion for Summary Judgment). Certainly if Judge Taylor were required to find extreme good cause, he did so by implication in his Findgins of Fact, Conclusions of Law and Judgment.

CONCLUSION

That portion of the lower court decision relating to Stevensens' powers to arrange the parking, relocate the accessway and erect fences should be affirmed because such powers are clearly found in the lease and because in any event Stevensens can remove such stalls and accessway from their separate property and erect a fence on the property line.

Respectfully submitted this 30th day of January, 1980.

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the foregoing Brief of Plaintiffs Cross-Respondents to E. Craig Smay, Berman & Giauque, 500 Kearns Building, Salt Lake City, Utah, this 30th day of January, 1980.

Michael G. Welch