1979

Antonnette Battistone v. American Land and Developemtn Co. et al : Brief of Respondents on Appeal

Utah Supreme Court

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George B. Handy; Attorney for Plaintiff and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

ANTONNETTE BATTISTONE,

Plaintiff -- Appellant,

-vs-

AMERICAN LAND & DEVELOPMENT CO., a corporation, ROYAL GARDENS, a limited partnership, and DAN A. CLARK,

Defendants -- Respondents.

No. 16527

RESPONDENTS' BRIEF ON APPEAL

Appeal from the Judgment of the Second District Court for Weber County, the Honorable Calvin Gould, Judge.

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NATURE OF THE CASE

Action in the Second Judicial District Court for Weber County, State of Utah, seeking removal of improvements on plaintiff's real property and restoration thereof or damages for trespass, or in the alternative, damages for value of the land taken.

DISPOSITION OF THE CASE IN THE LOWER COURT

A non-jury trial was held before the Honorable Calvin Gould. After conclusion of the trial, Judge Gould ruled that plaintiff had failed in her burden of proving a cause of action against defendants and that defendant Royal Gardens acquired good and sufficient title to the disputed property.

RELIEF SOUGHT ON APPEAL

Defendants seek to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

Defendant Royal Gardens and Cummings* entered into an agreement in which Cummings agreed to sell and defendant Royal Gardens agreed to buy 20 acres of real property in Kanesville, Utah. (R 33, 39-40 Ex 6-D) Cummings was to take the necessary steps to obtain title from Mr. and Mrs. Hales (hereafter Hales), the record owners. Hales had obtained the property by a conventional warranty deed from plaintiff-appellant (hereafter plaintiff) in 1968. (R 50, Ex 1-D) The property conveyed by plaintiff to Hales was bordered by a street on the west and by a line parallel to a fence on the east but about 70 feet on its western side. (Ex 1-D) There was no evidence that plaintiff owned the land between this line and the fence.

Although defendant Royal Gardens paid Cummings for the property, Cummings conveyed about 10 acres only. (R 41, Ex 4-D) Defendant Royal Gardens developed this land into a subdivision. (R 44, Ex 8-D) To obtain the remaining acres, defendants Royal Gardens filed suit against Cummings. (R 42) In order to reach a settlement, Cummings (with Hales approval) promised to convey the remainder of the property to the fence on the east

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*The transaction apparently involved four people named Commings -- L.J. Commings, La Jean Commings, Stephen A. Cummings and Sherrie M. Cummings. However, for simplicity they will be referred to collectively as "Cummings".

for a total of 20.68 acres together with an additional parcel in exchange for defendant Royal Gardens' promise to pay $160,000. (R 42-43) Defendant Royal Gardens paid this money to Western States Title Company which insured the title and acted as escrow. (R 43)

Thereafter, plaintiff filed suit against defendants seeking removal of improvements from plaintiff's property and restoration thereof or damages for trespass, or alternatively, damages for the value of the land taken. (R 3) After a non-jury trial, Judge Gould ruled that plaintiff had failed to prove a cause of action against defendants and that defendant Royal Gardens had acquired good and sufficient title to the property. (R 17) Judgment was entered accordingly. (R 19-20) Plaintiff then filed this appeal, raising issues of mistake and reformation for the first time. Plaintiff now seeks reformation only and has dropped any claim for damages. (Plaintiff's Brief, 7)

ARGUMENT

POINT

A REVIEW OF THE RECORD BELOW IN LIGHT OF THE STANDARD OF REVIEW USED BY THIS COURT SUGGESTS THAT THE RULING OF THE TRIAL COURT WAS CORRECT AND SHOULD BE SUSTAINED.

At the outset it should be noted that the findings and judgment of the trial Court benefit from a presumption of correctness. As this Court wrote, "We shall not disturb the findings and judgment (of the trial Judge) unless they

are clearly against the weight of the evidence." Ream v. Fitzen, 581 P2d 145, 147 (Utah) The reasons for such deference are that "the trial judge is in a far better position to judge the credibility of witnesses, to observe their demeanor, and to weigh the respective merits of the case in light thereof." Ibid. Accordingly, the findings and judgment of the lower court in the instant case are entitled to this degree of deference.

A. THE TRIAL JUDGE CORRECTLY RULED PLAINTIFF FAILED TO PROVE A CAUSE OF ACTION AGAINST DEFENDANTS

Plaintiff argues that since defendant Royal Gardens entered into an agreement with Cummings to buy 20 acres but ultimately received 20.68 acres, defendant Royal Gardens must convey the excess to plaintiff. This argument is based on the assumption that defendant Royal Gardens received the disputed .68 acre as a windfall. This assumption is unsupported. While it is true that defendant Royal Gardens originally agreed to purchase 20 acres, Cummings failed to convey part of the acreage, thereby triggering a lawsuit. The lawsuit was settled: Cummings (with Hales' approval) promised to convey the remainder of the property to the eastern fence for a total of 20.68 acres in exchange for defendant Royal Gardens' promise to pay $160,000. (R 42-43) Thus, the settlement for 20.68 acres supplanted the original contract for 20 acres. Accordingly, the disputed .68 acre was conveyed as part of a settlement and not as a windfall.

Even if defendant Royal Gardens had received the disputed acreage as a windfall, there is no evidence in the record the plaintiff ever owned the .68 acre. The testimony at trial conclusively established that the .68 acre must be on the eastern portion of the property, yet the record is devoid of evidence that plaintiff ever owned this land. It is therefore evident that even if defendant Royal Gardens received excess acreage plaintiff has not met her burden of showing that she is the person entitled to the excess.

Plaintiff also argues that defendant Royal Gardens had knowledge that the deed from plaintiff to Hales (Ex 1-D) was nothing more than a security instrument, and therefore, that defendant Royal Gardens knew plaintiff was the actual owner of the property. This argument ignores the absence of any evidence in the record that defendant Royal Gardens either knew that Hales was only a constructive mortgagee or that plaintiff was the actual owner. The most that can be made from the record on these points is a bare inference that Dan Clark, defendant Royal Gardens' general partner, knew that plaintiff had some connection to the property because he knew that Cummings was dealing with the plaintiff (R 36) and that Hales gave a quit claim deed to plaintiff for the western part of the property. (R 51 The transaction involving the western portion occurred before Clark became the general partner of defendant Royal Gardens. (R 34) Thus, the extent of Clark's

knowledge is a far cry from knowledge that plaintiff was the actual owner of the property and Hales merely the constructive mortgagee.

Furthermore, plaintiff's suit is directed against the wrong party. Since plaintiff argues that Cummings, with the assistance of Hales, conveyed too much to defendant Royal Gardens, it is apparent that plaintiff's real dispute is with Cummings and/or Hales and not with defendant Royal Gardens. This is particularly true in view of the following: defendant Royal Gardens did not obtain the disputed .68 acre by windfall; it had no dealings whatsoever with plaintiff, it lacked knowledge that plaintiff owned the property, and it was simply relying on the record.

In summary, plaintiff argues that since defendant Royal Gardens received a .68 acre windfall, it should convey this acreage to the plaintiff. This argument fails, however, for several reasons: defendant Royal Gardens did not obtain the .68 acre as a windfall, but paid valuable consideration for it. Moreover, even if defendant Royal Gardens had received it as a windfall, there is no evidence in the record that plaintiff is the person to whom it should be conveyed. The record is also devoid of evidence that defendant Royal Gardens had knowledge that plaintiff was the real owner of the property or that the warranty deed, regular on its face, was a disguised security instrument.

If plaintiff has a claim to the .68 acre, this claim should be directed against Hales and/or Cummings but not against defendant Royal Gardens.

B. PLAINTIFF ON APPEAL RAISES ISSUES OF MISTAKE AND REFORMATION FOR THE FIRST TIME. THESE ISSUES ARE NOT TIMELY RAISED AND THEREFORE SHOULD NOT BE CONSIDERED BY THIS COURT.

Although the brief of plaintiff does not precisely identify and develop the theory upon which her appeal is based, it appears that plaintiff seeks reformation of the deed from Hales to defendant Royal Gardens on the grounds of mutual mistake. Before discussing the substance of this argument, it should be emphasized that plaintiff is raising issues of mistake and reformation on appeal for the first time. Since plaintiff failed to raise these issues at the trial level, they cannot be considered on appeal. As the Pennsylvania Supreme Court stated,"Issues (of mistake and reformation) having been raised for the first time on appeal will not now be considered by this Court." Pennsylvania General Insurance Co. v. Barr, 257 A2d 550, 552. Also see Hanover Ltd. v. Fields, 568 P2d 751, 753 (Utah).

Furthermore, plaintiff failed to comply with Rule 9(b), Utah Rules of Civil Procedure. This Rule provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . .

Since plaintiff's complaint is devoid of allegations of "the circumstances constituting . . . mistake," it is evident that

the complaint does not comply with Rule 9(b). Thus, the issue of mistake was not properly raised below and cannot be considered by this Court.

Not only did plaintiff fail to raise the issue of mistake, but she failed to pray for reformation in her complaint. As a result, plaintiff is not entitled to reformation because "great particularity of averment is necessary to authorize reformation of a deed for mutual mistake." Collier v. Collier, 145 So2d 821, 823 (Alabama) Since "great particularity" is required, it is apparent the plaintiff's catch-all prayer "(f)or such other and further relief as to the Court is deemed proper in the premises" (R 3) is not sufficiently particular. The Supreme Court of Pennsylvania concluded that a prayer almost identical to plaintiff's prayer "cannot be deemed to have properly presented the issues of mistake and reformation to the court below." Pennsylvania General Insurance Co., op cit. Therefore, plaintiff's prayer for relief does not adequately request reformation, and accordingly, it cannot be considered on appeal.

Moreover, plaintiff is not entitled to reformation of the deed from Hales to defendant Royal Gardens because Hales is not a party to this lawsuit. As this Court stated, "In order to grant (reformation) . . . all the parties to the deed who are affected immediately or consequentially by the mistake should be made parties, as they are entitled to be heard upon

any matter that might affect their rights under the decree." Center Creek Water and Irrigation Co. v. Lindsay, 60 P 559, 560 (Utah) To the same effect is Houser v. Smith et al., 56 P 683, 685 (Utah): "Courts have no right to dispose of and adjudicate upon the property rights of persons who are not parties to the case. . . ." Thus, under Utah precedent, Hales would have to be a party for reformation of his deed to defendant Royal Gardens to be available.

Further, plaintiff is not entitled to reformation under general equitable principles. Since an "attempt to reform a deed is a proceeding in equity," equitable principles apply. Jacobsen v. Jacobsen, 557 P2d 156, 158 (Utah) One such principle is that "a court of equity will not assist one in extricating himself from circumstances which he has created." State v. Oklahoma City, 522 P2d 612, 619 (Oklahoma) To the same effect are Pacific Metals Co. v. Tracy-Collins Bank and Trust Co., 446 P2d 303, 306 (Utah) and Buell v. State, 581 P2d 465 (Oklahoma). As detailed in the Statement of Facts, plaintiff conveyed the property to Hales by warranty deed. Hales properly recorded the deed, so he was the record owner. Thus, plaintiff is solely responsible for putting Hales in a position to convey the property to defendant Royal Gardens. Plaintiff created the situation of which she now complains, and as a result, a court of equity will not provide assistance.

In support of her argument for reformation, plaintiff cites two cases: McMahon v. Tanner, 249 P2d 502 (Utah) and Janke v. Beckstead, 332 P2d 933 (Utah). Although the Court decreed reformation in both cases, the plaintiff in each sought reformation of a deed between the plaintiff and the defendant. In the instant case, however, plaintiff seeks reformation of a deed not between plaintiff and defendant but between defendant and a third person who is not even a party to the lawsuit. Moreover, in McMahon and Janke, presumably issues of mistake and reformation were properly raised in the lower court, whereas in the instant case they were not. For these reasons, the cases cited by plaintiff are inapplicable.

In summary, plaintiff seeks equitable relief in the form of reformation of the deed from Hales to defendant Royal Gardens on the grounds of mutual mistake. This position should be rejected for several reasons: plaintiff did not properly raise the issues of mistake and reformation at the trial level, so this Court cannot adjudicate them on appeal. Furthermore, plaintiff failed to join Hales as a party even though plaintiff seeks reformation of his deed to defendant Royal Gardens. In addition, plaintiff is not entitled to equitable relief because she created the situation of which she now complains. For these reasons, it is submitted that reformation should not be granted.

CONCLUSION

A review of the record in light of the standard of review used by this court suggests that the judgment of the trial Court was correct. On appeal plaintiff argues for the first time that the deed from Hales to defendant Royal Gardens should be reformed on the grounds of mutual mistake. These issues were not timely raised and therefore should not be considered by this Court. Even if these issues are considered, however, it is submitted that a decree of reformation would be improper in the instant case. For these reasons, the judgment of the lower Court should be affirmed.

DATED this 12 day of September, 1979.

Respectfully submitted,

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