1953

Rennold Pender v. S. W. Dowse and Pearl Dowse et al : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

RENNOLD PENDER,
Plaintiff and Respondent,

— vs. —

S. W. DOWSE and PEARL DOWSE, his wife, JAY E. TREADWAY, and MARION MAVE TREADWAY, his wife, and A. C. WHITAKER,
Defendants and Appellants.

Case No. 7949

BRIEF OF APPELLANTS TREADWAY

RICHARDS AND BIRD and
KEITH JAY HOLDSWORTH
Attorneys for Appellants
TREADWAY

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STATEMENT OF FACTS

All of the defendants have appealed from a decree of the Third District Court setting aside a sheriff's sale

and deed issued upon an execution to S. W. Dowse and mortgage and deed executed by him to defendants Treadway and Whitaker (R. 249-251).

The action arose indirectly out of a suit to quiet title and for slander of title entitled *S. W. Dowse v. Rennold Pender,* Defendant, Case No. 86895 in the Third District Court for Salt Lake County (Findings of Fact, 4, R. 240). The respondent S. W. Dowse obtained a small judgment for costs in that case, had writ of execution issue, published notice of execution sale, and held an execution sale on March 14, 1950 (Findings 8, R. 241). The respondent Dowse, who was the plaintiff, and the judgment creditor in that case, bid in all of the property at that sale for the sum of $47.46 (Finding 8, R. 241). The regularity of that sale, and the question of its voidability are two of the points raised by the appellants Dowse in this case, have been adequately covered in their brief, and will not be argued herein.

The property sold in the execution sale was in three tracts, all in the North Columbia Subdivision in Salt Lake County. In Block 8 the tract covered lots 1, 2, 3, 4, and 13 to 21. The Block 6 tract comprised Lots 1, 19 and 20, and the Block 4 tract comprised Lots 2 and 3, 6 and 7 (Complaint R. 1, Finding 2, R. 239). The Sheriff's Deed issued six months and a day after the sheriff's sale, and was dated September 16, 1950 (Ex. 4, p. 42). Thereafter, and on October 19, 1950, the respondents Dowse executed a special warranty deed to respondents Treadway cover-

ing all of Lots 2 and 3, Block 4 of North Columbia Subdivision, for which the respondents paid $1,000 cash (Finding 21, R. 244; Ex. 6).

Findings 22, 23 and 24 (R. 245) recite that the Treadways had an agreement for warranty deed with Dowse, that they had notice from their abstract (Ex. 4) of the amount of property sold at the execution sale for $47.46, that the sale was accompanied by irregularities in that the levy was excessive, the sum paid was grossly inadequate, that the sheriff's return failed to cite an attempt to sell personal property, and that the property was sold en masse, and not in separate parcels, also that the Treadways were apprehensive about the regularity of the sale and made some inquiries of Mr. Dowse's attorney and that defendants Treadway did not go to the source of plaintiff's title by contacting the plaintiff or his attorney, further, that defendants J. E. Treadway and Marion Mave Treadway, his wife, were not bona fide purchasers without notice.

By amendment to the pretrial order it was provided that if the Court should find that defendants Treadway are innocent purchasers for value, there would be the question whether the respondent is entitled to judgment against appellant Dowse for the sum of $1,000 paid by the appellants Treadway for the two lots they purchased, or to the fair market value of those lots (R. 47 and 54).

Milton V. Backman was attorney for Pender in case No. 86895 (R. 58) and that case was settled without a

trial (R. 60). Mr. Backman testified that he recieved the findings and decree in that case providing for costs (Exhibit A, R. 62), and subsequent to the entry of the decree he and Mr. Duncan arranged for a quit claim deed covering property in dispute (R. 63). Mr. Backman had free and open dealings with Mr. Duncan in that matter and had known him over a long period of years; he relied on Mr. Duncan in settling that case and relied on Mr. Duncan, without anything in writing, to satisfy the judgment for costs (R. 63, 65 and 66). Mr. Backman understood that the cost judgment was to be satisfied and was surprised when he learned of the execution sale and told Mr. Duncan he had assumed that if they were going to press the judgment for costs it would have been mentioned (R. 68), and told Mr. Duncan it was a violation of their agreement for him to proceed with execution sale (R. 69).

Mr. LeCheminant, a qualified appraiser, testified that the two lots purchased by the appellants Treadway were worth $1080.00 (R. 81).

Mr. Backman testified on cross examination that he personally received the findings and decree in case No. 86895 on November 4, 1949 (R. 90) and that he received the Salt Lake Times (R. 89). Mr. Bleak, deputy sheriff, testified that the notice of execution sale was published in this paper on February 17th and for four weeks (R. 142). Mr. Backman further testified that he had relied on Mr. Duncan in that case and that it is his practice to

rely on attorneys "and I assumed by the same token I was dealing with a brother attorney who would treat me fairly in this matter" (R. 97 to 98), and for that reason paid no attention to the mention of costs in the judgment nor to whether a cost bill was served on his office (R. 98).

Mr. Pender testified that he had known Mr. Dowse for many years and had had many business transactions with him and that Mr. Dowse had represented him (R. 103 to 104). He considered Mr. Dowse a close friend (R. 106, 134).

Mr. Bleak, Deputy Sheriff, testified that he held the sheriff's sale on February 14, 1950 and that only Mr. Duncan and Mr. Dowse were present to bid on the property and that he offered it for sale in bulk and not in separate parcels and that there was no request for separate sales (R. 139, 140). He made no effort to locate personal property belonging to Mr. Pender prior to the sale of real property (R. 141).

Mr. Duncan testified that the property was sold in three parcels, the lots in each block being a parcel (R. 184 to 185) and that he bid separately on each parcel (R. 185). He further testified that in his opinion there was a judgment for $3,086.44 against Pender, which would be a lien against all of Pender's property (R. 191). And on cross examination again testified that the property was offered in three separate parcels (R. 195, 196). He also testified that he did not feel kindly toward Mr. Backman because of the settlement in Case No. 86895,

which Mr. Backman forced, and that he had no trouble with Mr. Backman until that (R. 199, 200).

Mr. Pender was recalled and testified that most of the deals he had been in with Mr. Dowse were quite questionable and that he would check the titles before deals were consummated (R. 224).

The evidence which specifically concerned the appellants Treadway was stipulated including Exhibit 3 (an earnest money receipt), Exhibit 4 (Abstract of Title), Exhibit 5 (Title Opinion, written by Richard L. Bird, Jr.), and Exhibit 6, (a special warranty deed, dated October 20, 1950) (R. 158). It was stipulated that the price paid was $1,000 for lots 2 and 3, Block 4 (R. 154). It was stipulated that Mr. Rich, real estate broker, handled this purchase for the appellants Treadway and sent Mrs. Nagle to the office of Mr. Dowse for the deed which was recorded by her and did not know until after the commencement of this action that the deed given was a special warranty deed and not a general warranty deed, (R. 154-155) and that Mr. Treadway would testify that he did not know that fact until after the action was commenced, and both of them understood that the deed called for by the earnest money receipt was a general warranty deed (R. 154-155).

It was agreed in the pretrial order that the appellants Treadway had no notice of defects in the execution sale procedure except such as were revealed by the abstract to the property (R. 34, paragraph 11).

STATEMENT OF POINTS RELIED ON

POINT ONE

THE EXECUTION SALE WAS NOT WHOLLY VOID.

POINT TWO

THE BOND FIDE PURCHASE OF LOTS 2 AND 3, BLOCK 4, BY THE TREADWAYS CUT OFF RESPONDENT'S RIGHT TO DEFEAT TITLE OF S. W. DOWSE.

ARGUMENT

POINT ONE

THE EXECUTION SALE WAS NOT WHOLLY VOID.

It is our position that after the time for redemption had passed, the respondent could no longer attack the deed of the purchaser at execution sale. And if the sale were voidable only, facts do not exist in this case to permit the respondent to avoid the sale. These appellants rely on the brief and the position of the appellants Dowse as to this matter.

POINT TWO

THE BOND FIDE PURCHASE OF LOTS 2 AND 3, BLOCK 4, BY THE TREADWAYS CUT OFF RESPONDENT'S RIGHT TO DEFEAT TITLE OF S. W. DOWSE.

The statement of Point 2 assumes that the sale on execution was voidable at the instance of Pender on direct attack. This question is argued by appellants Dowse and these appellants rely on said brief and said position.

See also: *33 C. J. S. 589; 1 A. L. R. 1442; 31 Am. Jur. Title, Judicial Sales, Sections 83, 235, 238, 241.*

We assume further that the right to avoid the sale survived after the lapse of the six months period for redemption. Generally speaking, expiration of the period of redemption cuts off the right to avoidance and the right would survive only by reason of special facts which respondent has not here shown, or by reason of the fact that the sale was entirely void. This sale was not void, but voidable, only. *1 A. L. R. 1442-1443.*

We, therefore, take the position that the appellant Dowse conveyed to the Treadways a better title and a stronger position than he himself enjoyed by reason of the purchase at execution sale. This is the usual rule where the doctrine of bona fide purchaser is applicable. The bona fide purchase generally cuts off rights of cancellation or to set aside sale. *24 Am.Jur. 272-274; 55 Am. Jur. 1119-1120.*

The Treadways, in this case, were bona fide purchasers for full value. The price they paid for Lots 2 and 3 of Block 4 North Columbia Subdivision was $1,000.00 (R. 244). Mr. LeCheminant testified that in his opinion the fair value of these lots, assuming marketable title could be given, was $1080.00 (R. 81), which is a slight differential. This was no bargain and both the price and the agreement for warranty deed indicate that a good title was bargained for (Ex. 3).

The record of the sale, as shown in Exhibit 4, pages 40, 41, 42 and 43 discloses no irregularity and only that

the amount of the judgment was small as compared with the value of the property sold.

In the argument before the District Court the respondent contended that the sheriff's certificate of sale and the sheriff's return of sale reflect no effort to find personal property belonging to the respondent and contain no proof that the amount of the judgment was not bid for a single parcel of land.

The same abstract discloses the sheriff's sale on execution by which the respondent initially acquired his title to this property. The original execution is at page 29 of Exhibit 4 and is in exactly the same form as page 40. The difference is that the amount of the judgment in that case was larger. The certificate of sale at page 31 is the same as the certificate at page 41 except that less property was sold, and the Sheriff's Deed at page 38 was issued shortly after six months from the date of sale had expired in the same manner that the deed on page 42 was.

The sheriff's certificate at page 41 does not disclose whether the property was sold in separate parcels or whether there was no bid for separate parcels and the sheriff was compelled to sell all of the land to obtain a bid, or whether the sheriff offered all of the land for sale initially, in an improper manner.

The record shows that the attorney for the Treadways examined Exhibit 4 and wrote an opinion thereon which was Exhibit 5, which refers to inquiry made of Mr. Duncan, the attorney for the judgment creditor who was present at the sale, to determine whether the sale was

lawfully conducted. Exhibit 5 discloses that Mr. Duncan answered that the property was sold in separate parcels and that the total of the separate pieces was the amount recited in the certificate. The record further shows that Mr. Treadway and his agent, Mr. Rich, relied on this opinion and this information and had no knowledge of any irregularity in the sale (R. 155, 156).

Such inquiry was reasonable and the making of the inquiry, as well as the answer received, establish the good faith of the Treadways. The only reasonable assumption is that Mr. Duncan who brought this sale about would have a better recollection of its conduct than the Sheriff's Office which conducts many sales. This was a proper and sufficient inquiry within the rules noted at *55 Am. Jur. 1080-1081.*

Respondent argued in the District Court, and will probably argue here, that we shouldn't have made inquiry of, or relied on Mr. Duncan. The information needed was how the sale was conducted. Neither Mr. Backman nor Mr. Pender was present at the sale and neither could give any help.

We relied on an attorney in good standing — an officer of the Courts.

Mr. Backman relied on Mr. Duncan in much the same manner that we did. Respondent takes this position: His attorney got him in this mess by relying on a fellow attorney in the settlement of the earlier case (*Dowse v. Pender,* No. 86895). He did this despite the fact that he had actual, personal notice of judgment for costs (R.

62, 90, Ex. A) and his office received the memorandum of costs (R. 98). He received the Salt Lake Times (R. 89) wherein the notice of sale was published (R. 142), and yet did nothing by way of inquiry to protect his client and confirm his understanding of the settlement.

Despite all this reliance on Mr. Duncan, despite the warnings that the two attorneys had different understandings of the settlement, the respondent and Mr. Backman asked the equity court for relief from their own carelessness *and got it!*

These appellants, who had no notice that anything was wrong, ask only that their reliance on the same person (Mr. Duncan) be protected in like manner as an act of good faith.

Mr. Backman set the stage by relying on Mr. Duncan and should not be heard to say to us that Mr. Duncan was unreliable.

CONCLUSION

Our analysis of the authorities supports the execution sale against this belated attack. And regardless of the holding on the main issue of the case the court should protect appellants Treadway as bona fide purchasers for full value without notice of irregularities in the sale.

Respectfully submitted,

RICHARDS AND BIRD and
KEITH JAY HOLDSWORTH
Attorneys for Appellants
TREADWAY