1980

Bailey Bird et al v. Olaf Theodore Stevensen : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF

BAILEY BIRD, MIDTOWN
PARTS, STEVEN SUHRE
THE ATHENIAN

Plaintiffs

vs.

OLAF THEODORE

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BAILEY BIRD, MIDTOWN AUTO PARTS, STEVEN SURREY, and THE ATHENIAN RESTAURANT,)

Plaintiffs-Respondents,)

vs.)

OLAF THEODORE STEVENSEN,)

Defendant-Appellant.)

Case No. 16647

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, THE HONORABLE JAMES S. SAWAYA, JUDGE.

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Plaintiffs-Respondents,	)	Case No. 16647
vs.	)	
OLAF THEODORE STEVENSEN,	)	
Defendant-Appellant.	)	

BRIEF OF DEFENDANT APPELLANT

STATEMENT OF KIND OF CASE

This is an action to determine whether Stevensen has the power under a written lease and pursuant to a previous lower court judgment to arrange parking on the leasehold property and to erect a fence on his own property.

The written lease giving rise to this action was executed in 1961 when Stevensen originally leased the parking area and access thereto from respondent Bailey Bird who reserved 26 parking stalls on the leasehold property for himself and other of his tenants.

DISPOSITION IN LOWER COURT

This case was tried to the court which held that Stevensen did not have the power to rearrange the parking configuration and to erect a fence on his own property notwithstanding provisions of the lease and rulings of a prior court decision to the contrary. The lower court also held that respondents had standing to sue even though there was no testimony or document introduced to show proper standing. Further, the Court prohibited certain Mt. Fuel Supply Co. employees from using the leasehold property even though such employees were patrons of Stevensen. The lower court also dismissed Stevensen's counterclaim even though the court had ordered during trial and on previous agreement of counsel to reserve the counterclaim to a future proceeding.

RELIEF SOUGHT ON APPEAL

Stevensen seeks a reversal of the lower court's determination that Stevensen does not have the power to arrange the parking or move the accessway from his own property to the leasehold property. In the alternative Stevensen seeks a reversal of the lower court's determination that respondents have standing to sue and an order directing the lower court to dismiss respondent's

case. Stevensen also seeks a reversal of the court's judgment that his counterclaim be dismissed.

STATEMENT OF FACTS

1. In 1961 Respondent Bird and Appellant 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 10.84 feet wide to the east of such buildings (the alley way is also known as Goddard Court). See plat attached hereto as Exhibit "A".

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

(a) Paragraph 5 of the lease on page 4 grants Stevensen the right to grade and black-top 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 for 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' building 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 Lessee's own expense, construct fences or other suitable boundary markers to limit the parking area . . .

3. Stevensen had previously acquired the 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. (T. 90, 98; Defendant's Exhibit D-18, page 1, paragraphs 7 and 8). See plat attached as Exhibit "A".

4. Since execution of the lease Stevensen has 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. (T. 27, 46, 112, 113).

5. 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 locations between Stevensen, Bird, Bird's tenants and their patrons grew to the point where such disputes were a regular occurrence jeopardizing persons and property in the area. (T. 57, 58, 92, 94, 95).

6. Parking problems persisted notwithstanding appellant's efforts to control the situation. As a result of these problems, two tenants of the lessor, Mike and Steve Katsanevas, sued appellant to establish their right to certain of the 26 parking stalls reserved for the lessor under the 1961 lease.

7. The court in the Katsanevas action recognized the Katsanevases right to some of the 26 reserved parking stalls and ordered the appellant to make such available to them, but did not determine the physical location of such stalls or Stevensen's power to rearrange their location. (Katsanevas v. Stevensen, Civil No. 226232, judgment p. 2, paragraph 1).

8. Appellant Stevensen thereafter sued the lessor (Bird) for a determination of his rights under the

lease. In that action, Stevensen v. Bird, Civil No. 243475, the court concluded that "the lease does not grant defendants (Bird) any right or interest in the Smith property (property Stevensen had purchased from Smith), (p. 4, paragrah 6(a) of Findings of Fact and Conclusions of Law in Stevensen v. Bird, Civil No. 243475), and held that

> 1. Plaintiffs (Stevensen) are entitled to and are hereby granted 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 at the rear of lessors' building 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' building to any convenient location including its original location in the confines of Goddard Court so long as 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.

(Judgment in the case of Stevensen v. Bird, Supra, at pages 1 and 2).

9. Pursuant to the provisions of the lease and said declaratory judgment appellant erected a fence on his own property line east of Goddard Court, rearranged the parking configuration so that lessor had the requisite

stalls, and relocated the accessway over Goddard Court. (T. 99-100).

10. As a result of appellant's actions, respondents brought this suit to force appellant to rearrange the parking to a configuration on both the leasehold property and appellant's own property, to remove the fence from appellant's own property, and to relocate the accessway over appellant's property rather than Goddard Court.

ARGUMENT

POINT I. THE LOWER COURT ERRED IN FAILING TO RECOGNIZE THAT DEFENDANT'S RIGHTS UNDER THE BIRD-STEVENSEN LEASE WERE ADJUDICATED IN A PRIOR LAWSUIT AND ARE RES JUDICATA TO THE PLAINTIFFS IN THIS ACTION, AND IN ITS ULTIMATE CONSTRUCTION OF STEVENSEN'S RIGHTS UNDER THAT LEASE.

It has long been the rule that the final judgment of a court of competent jurisdiction is conclusive between parties and their privies in a subsequent action involving the same subject matter. Dillard v. McKnight, 34 C.2d 209, 209 P.2d 387 (1949). Parties are in privity if there is a mutual or successive relationship to some property right, or such identification in interest with one person or another as to represent the same legal right therein. Tanner v. Bacon, 136 P.2d 957 (Utah 1943). Because respondents Midtown Auto Parts, the Church of

Scientology, and The Athenian Restaurant are all lessees of Bird, they succeed to the rights and limitations of Bird in the Stevensen and Bird lease. Bird's tenants` are therefore in privity with Bird and any adjudication of the Bird-Stevensen lease is necessarily an adjudication of their interest in that lease and the rights and limitations that grow out of such lease. Indeed, defense counsel recognizes such. (See T. 87).

By declaratory judgment in Stevensen v. Bird, Supra, the Court construed the Stevensen-Bird lease as giving Stevensen the following authority:

> 1. Plaintiffs are entitled to and are hereby granted 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 lessor's building so long as plaintiffs comply with the other provisions of the lease between the parties.
>
> 2. The lease between the parties authorizes plaintiff to relocate the accessway extending from Second South to the rear of defendant's building to any convenient location including the 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 the plaintiff 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.

(Judgment in the case of Stevensen v. Bird, Civil No. 243475, at pages 1 and 2). The court also held that Bird had no right in Stevensen's separate property. (Conclusions of Law, paragraph 6).

Notwithstanding this adjudication of Stevensen's rights under the Bird-Stevensen lease, the court below permanently enjoined appellant from erecting fences on his own property line and ordered him to return the parking configuration to that existing immediately prior to erection of the new fence on Stevensen's property. The judgment of the court below is obviously inconsistent with the Stevensen v. Bird resolution of the identical issues. Because Bird's tenants are in privity with Bird on the lease, the lower court clearly erred in not recognizing that the issues resolved in Stevensen v. Bird are res judicata to the parties in this action.

It is clear that respondent Bird in this case is attempting to effectuate a horizontal appeal of an issue resolved in a prior lawsuit. Bird cannot in this action get a redetermination of Stevensen's rights under the 1961 lease. Such a determination has already been made by a court of competent jurisdiction and an appeal on the issues there resolved can only be taken from that court. Consequently, this court should reverse the judgment of the

lower court purporting to redetermine Stevensen's rights under the 1961 lease and in his own separate property.

Not only did the lower court err in failing to hold the issues here in dispute as res judicata to the respondents, but its construction of the lease was contrary to established legal principles.

It is commonly accepted that a lease must be construed with reference to the intentions of the parties. Powerine 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 should have controlled the lower court's construction of the agreement in this case.

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 patently inconsistent with the express terms of the agreement. By ordering Stevensen to remove the fence on his property and enjoining him from erecting similar fences in the future (Bird v. Stevensen, Judgment p. 5, paragraph 1) the court not only affected property not covered by the lease, but effectively read paragraph 10 out of the lease. Furthermore, by requiring Stevensen to rearrange the parking and accessways to a previous configuration the court completely nullified the effect of paragraphs 5 and 7 of the lease.

Additionally, the obvious purpose for Stevensens entering the 1961 lease was to utilize the leasehold property in the conduct of his adjoining business. Notwithstanding such a purpose, the lower court's judgment erroneously restrained Stevensen from allowing Mountain Fuel employees to use the leasehold property irrespective of whether or not they are on the premises as patrons of Stevensen.

Because the language of the Bird-Stevensen lease is clear and unambiguous with respect to Stevensen's rights thereunder, the lower court erred in failing to

enforce the lease by its express terms and in construing the agreement inconsistently with its clear language.

POINT II. THE LOWER COURT ERRED IN HOLDING THAT RESPONDENTS HAD STANDING TO BRING THE PRESENT ACTION.

It is widely recognized that a party seeking relief must show a clear legal or equitable right and a well grounded fear of immediate invasion of that right to bring suit. State Ex Rel Hays v. Wilson, 17 Wash. 2d 670, 137 P.2d 105 (1943). When suing on a prior judgment, therefore, a party must demonstrate that it is owner of the judgment either by title appearing on the record or by some formal transfer. If a party can demonstrate no such interest in the prior judgment it cannot maintain suit on the judgment. 50 CJS, Judgments, § 857. Thus, in Data Processing Financial and General Corp. v. IBM Corp., 430 F.2d 1277 (8th Cir. 1970), a nonparty to a prior suit could not bring an action asserting defendant's violation of the prior consent decree, and in Prusa v. Hejduk, 238 P.2d 304 (Okl. 1951), the heirs of a deceased judgment creditor could not maintain an action on decedent's judgment because that right had succeeded to the personal representatives.

Respondents' cause of action in this case is essentially an action to enforce the judgment in Katsanevas v. Stevensen, Supra. Respondents have failed, however, to

present any evidence that they were parties to the Katsanevas action or that Katsanevas has assigned to them any rights in that judgment. Indeed, none of the respondents had any part in the Katsanevas action. Consequently, respondents do not have standing to sue on the judgment and the lower court erred in failing to dismiss the complaint.

Additionally, Rule 17 of the Utah Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest. A real party in interest is one who owns the right being enforced and is in a position to discharge the defendant from liability asserted in suit. State Farm Mutual Automobile Insurance Co. v. Foundation Reserve Insurance Co., 78 N.M. 780, 427 P.2d 662 (1967). Only Mike and Steve Katsanevas have such an interest in the Katsanevas judgment that they could alter defendant's liability thereunder. It is clear, therefore, that the Katsanevases are the only real parties in interest and without them as plaintiffs, the present action cannot be maintained.

POINT III. THE COURT'S DETERMINATION THAT DEFENDANT STEVENSEN DID NOT SHOW SUFFICIENT CAUSE TO ERECT A FENCE AND REARRANGE THE PARKING CONFIGURATION WAS ERRONEOUS AND CONTRARY TO THE WEIGHT OF EVIDENCE.

The lower court in its Findings of Fact and Conclusions of Law found that Stevensen changed the parking configuration without sufficient cause thus violating the court's order entered in the case of Katsanevas v. Stevensen. The evidence presented to the Court below is to the contrary.

Under the Bird-Stevensen lease, Stevensen is to provide 26 parking stalls on the leasehold property for Bird and his tenants. (Defendant Exhibit "18"). It was, therefore, incumbent upon Mr. Stevensen to control the parking facility so that Stevensen's patrons did not deprive Bird or his tenants of their rights under the lease. Inspite of Mr. Stevensen's efforts to regulate the parking facility, the evidence at trial demonstrates that parking conditions were intolerable prior to erection of the fence on Stevensen's property. (T. 91). Patrons of Bird's tenants constantly parked in Stevensen's stalls, and Stevensen's patrons ofter parked in the stalls reserved for Bird and his tenants. (T. 38, 48, 57).

The situation caused much anxiety and dismay to Mr. Stevensen and his employees. Mr. Stevensen was often threatened for asking patrons of Bird's tenants to remove their cars from his stalls. (T. 94, 95). Likewise, Mr. Kerr, one of Stevensen's employees, was constantly

harrassed for patroling the parking lot, and on occasion was the subject of particularly violent threats. (T. 57, 58). As a result of these difficult parking conditions, many of Stevensen's guards and subordinates left his employ. Respondents did not object to the untenable parking arrangement because they accepted no responsibility to control the parking and because without a separation barrier their patrons had use of Stevensen's parking stalls. (T. 30, 47-50, 93).

Because of these intolerable parking conditions, and to better facilitate management of the lot, Stevensen erected a fence on his property to separate the parking of Bird and his tenants from that of his own. Separation of the accessways necessitated erection of a fence and rearrangement of the parking configuration. The rearrangement does not deprive Bird or his tenants of any of the 26 parking stalls reserved for Bird in the 1961 lease, it only changes their location. Each relocated stall is 8'6" wide, consistent with the Stevensen v. Bird order, and the rearrangement is consistent in all other respects with the particulars required by the lease and prior court orders. (T. 98). Since making these modifications the parking problems referred to above have subsided considerably. Patrons of Bird's tenants generally park on the west side

of the fence now and Stevensen's patrons park on the east side. (T. 59, 115).

Plaintiff's contention that the present parking configuration is inconvenient is not sufficient to overcome defendant's overwhelming evidence indicating that the new configuration resolves the parking problems and complies in whole with previous court orders. The realligned accessway is 10.84 feet wide, the original width of Goddard Court, and (T. 99), sufficiently wide for use by any truck complying with the 8 foot Utah width limitation. Indeed, the evidence indicates that delivery vans, a large garbage truck, and a large linen truck negotiate the accessway almost daily. (T. 60, 61, 69-70, 85, 106). Mr. Kerr, an experienced truck driver, testified that he could take a tractor with a 26' trailor down the accessway, turn around behind Bird's building, and then exit again. (T. 63-64).

In light of this and other evidence submitted at trial, it is clear that Mr. Stevensen had extreme good cause to erect the fence and rearrange the parking configuration, and that such action is consistent in whole with prior court orders. Defendant respectfully submits that the lower court erred in finding otherwise.

POINT IV. THE LOWER COURT ERRED BECAUSE ITS ORDER EXPANDED THE RIGHTS OF THE RESPONDENTS TO INCLUDE RIGHTS IN STEVENSEN'S PROPERTY NOT COVERED BY THE LEASE.

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 Bird's building, see plaintiff's Exhibit "11"), and a 1/2 interest in the 10.84 foot right of way over Goddard Court. (Defendant's Exhibit "18", pp. 1-2; T. 90). By lease agreement dated November 21, 1961, Stevensen acquired from Bird the other 1/2 interest in the right of way over Goddard Court. (T. 90, 106-108). Neither the 1961 lease nor any other document grants plaintiff Bird any interest in defendant Stevensen's adjoining property.

Furthermore, the court in Stevensen v. Bird, stated in its Conclusion of Law that, "The lease does not grant defendants (Bird) any right or interest in the Smith property (property Stevensen purchased from Smith)." (p. 4, paragraph 6(a) of Findings of Fact and Conclusions of Law in the case of Stevensen v. Bird, Supra). Indeed, the judgment of that court specifically recognized that Bird had no interest in Stevensen's property by permitting

Stevensen to remove all parking and accessways from his own property and relocate them on the leasehold property. (p. 1, paragraph 1 of Judgment in the case of Stevensen v. Bird, Supra.). Neither can it be argued that the Court in Katsanevas v. Stevensen granted Bird or his tenants any rights in Stevensen's own property. The order in Katsanevas was concerned solely with Stevensen's alleged encroachment on the Katsanevas parking stalls covered in the lease, not with the physical location of the stalls. (Katsanevas v. Stevensen, Civil No. 226232, order dated March 21, 1975 and July 1, 1975).

It is hornbook law that a lessee cannot acquire any greater rights in the leasehold property than are held by the lessor. Smith v. Woolsey, 137 N.E.2d 632 (Ohio Appls. 1955). Bird is the only respondent in this action in contractual privity with Stevensen. The plaintiff tenants of Bird, therefore, cannot succeed to any greater rights in the Stevensen-Bird lease than plaintiff Bird possesses. Consequently, because Bird has no rights in Stevensen's property by the lease, none of the other respondents have any such right by the lease.

Notwithstanding respondents' lack of interest in Stevensen's adjoining property, the court below ordered Stevensen to remove the fence located completely on his own property (Findings of Fact, Conclusions of Law and

Judgment, p. 5, T. 99-107), and to rearrange the parking to its previous configuration, thereby mandating Stevensen to utilize his own property for Bird's parking and accessway. (See judgment p. 5 and Exhibit "A" to the judgment; defendant's Exhibit "19").

The lower court has gone far beyond merely construing the Bird-Stevensen lease or enforcing a prior judgment. By requiring Stevensen to remove his fence and rearrange the parking configuration the lower court has impliedly granted respondents a right to Stevensen's property not heretofore vested in them. In doing so, the lower court erred and should be reversed as a matter of law.

POINT V. THE LOWER COURT ERRED IN DISMISSING THE DEFENDANT'S COUNTERCLAIM WITH PREJUDICE AFTER STIPULATION OF THE PARTIES AND ORDER OF THE COURT ITSELF DEFERRING TRIAL OF THE COUNTERCLAIM FOR ANOTHER HEARING.

Prior to trial of the instant case, the court and counsel for both parties, in chambers, agreed to defer trial of Stevensen's counterclaim to a future date. The stipulation was confirmed at trial and preserved in the record as follows:

> The Court: . . . the question involved -- involving damages and those raised by the counterclaim, I suppose, can be reserved -- deferred until another hearing, is that correct, Mr. Smay?

Mr. Smay: That is correct, your Honor.

The Court: Mr. Neider?

Mr. Neider: That is correct, your Honor. (T. 2).

The court's judgment, however, dismissed Stevensen's counterclaim with prejudice. Inclusion of the order dismissing the counterclaim in the judgment is clearly a clerical error. Appellant objected to the error when opposing counsel submitted the proposed judgment, but to no avail. Counsel for appellant would have sought correction of the error pursuant to Rule 60(a) of the Utah Rules of Civil Procedure except that the judgment provided for injunctive relief within five (5) days thereby necessitating an instant appeal. Consequently, the error should be corrected by this court reversing the lower court's judgment dismissing Stevensen's counterclaim.

CONCLUSION

The lower court's order recognizing respondents' standing to sue should be reversed and the suit dismissed because no respondent was a party to the order which they seek to enforce nor do they have any legal or equitable interest therein. If the Supreme Court finds for the respondent on the standing issue, the judgment of the lower court ordering appellant to remove the subject fence and

rearrange the parking to its previous configuration should be reversed and judgment entered for the appellant for any of the following reasons:

1. Appellant's rights respecting erection of fences and rearrangement of parking configuration on the subject premises were decided in Stevensen v. Bird, Civil No. 243475 and are res judicata to respondents.

2. The lower court erroneously construed the lease contrary to terms which clearly and unambiguously grant Stevensen the right to rearrange parking configuration and accessways and to erect fences.

3. The lower court's verdict was premised on a finding that appellants did not have sufficient cause to rearrange the parking which finding is contrary to the evidence.

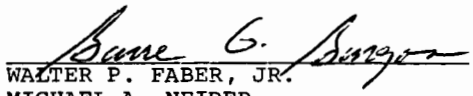
4. The lower court's order goes beyond respondents' rights under the lease and any previous court order, and grants to them rights in appellant Stevensen's property which are non-existent.

Additionally, the lower court's judgment dismissing appellant's counterclaims should be reversed because the court itself ordered deferral of hearing

on the counterclaim pursuant to agreement of counsel for both parties.

Respectfully submitted this 30th day of January, 1980.

WATKINS & FABER



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CERTIFICATE OF DELIVERY

I hereby certify that I delivered two (2) copies of the foregoing brief of defendant-appellant to E. Craig Smay, 500 Kearns Building, Salt Lake City, Utah, this 30th day of January, 1980.

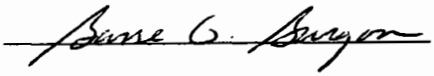

EXHIBIT "A"