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The Southland Corp v. Gail C. and Lori Potter : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE SOUTHLAND CORPORATION, a Texas corporation,

Plaintiff-Appellant and Cross-Respondent,

v.

GAIL C. POTTER AND LORI POTTER, his wife,

Defendants-Respondents and Cross-Appellants.

Case No. 860413

88-0089-CA

APPELLANT'S REPLY BRIEF AND CROSS RESPONDENT'S BRIEF

Appeal from the Judgment of the Second District Court
in and for Salt Lake County
The Honorable James S. Sawaya, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-appellant and cross respondent, The Southland Corporation ("plaintiff"), hereby replies to the respondents' brief of defendants-respondents, Gail C. Potter and Lori Potter, his wife ("defendants").

Although no cross-appellants' brief as such was filed, the issue was treated in their respondents' brief and will be responded to herein.

STATEMENT OF ISSUES PRESENTED ON APPEAL

There appears to be little dispute between the parties as to the issues presented on the appeal of this matter, except for the manner in which the issue on the cross-appeal was framed by defendants. It implies that there was a continuing trespass by plaintiff on defendants' property,

which plaintiff emphatically denies.

STATEMENT OF FACTS

Although most of the facts are also not seriously in dispute, plaintiff strongly disagrees with several of the statements made by defendants in their respondents' brief.

First, defendants allege that plaintiff has "160 feet of access on a Salt Lake County road." This is just not true. The evidence established that as a condition to obtaining its building permit, plaintiff was required to install high-back curbing, landscaping and sidewalk along all but 30 feet of said distance along 6200 South Street (Ex. 8). And even that limited drive entrance is subject to being shut off by West Jordan City (R. 191; Ex. 3). As will be noted below, these facts bear heavily upon several of the issues presented for review, including the intent of the original parties.

Second, defendants contend that the contracts between plaintiff and its grantor do not make any mention "of any easement, purchase, grant, or rights of ingress or egress or other rights of access over any property other than that specifically described in the agreements." Again, this is just not true. The original contract (Ex. 1) clearly indicated that there would be "open access" between the

7-Eleven store property and the rest of the shopping center. The amended contract (Ex. 2) which was entered into so that the entire shopping center area could be rezoned, indicated that the property in question would be "open parking." In addition, there was a specific written agreement (Ex. 3) that the parties' predecessor in title would allow two accesses off Dixie Drive.

Next, defendants cite Mr. Bowles' testimony that it was never Big Six's intent to grant 7-Eleven access across the parcel in question. The answer related only to Mr. Bowles' intent, not Big Six's. Besides, that intent is immaterial and it conflicts with other evidence, including the testimony of Mr. Bowles himself. Moreover, Mr. Bowles testified only that there had been some talk about installation of gasoline pumps (R. 206). There was no testimony that Big Six ever actually intended to so use the property. All of the testimony is in fact to the contrary. It was to remain open for common use.

In their brief, defendants make various objections to the letter agreement (Ex. 3), but they have little materiality. The statement that Mr. Buchanan, the former City Planner, never saw the document in the city's file is in error. He stated (R. 194) "I also have seen this letter in

a file which the engineers for the city at the time had--so, I have seen it twice."

There is no evidence to support the assertion that plaintiff continually trespassed on defendants' property. Plaintiff has acknowledged that its customers and suppliers drove across part of the property, all in accordance with the terms of its agreement with both West Jordan City and Big Six. However, defendants' statement that "Southland was utilizing the property continually for parking, selling cars and in fact painted lines on the ground" is completely unsupported by the evidence. 7-Eleven stores are not in the business of selling cars and plaintiff believes that judicial notice of this fact can be taken.

ARGUMENT

POINT I

The evidence established that there was an agreement between plaintiff and the parties' common predecessor in title that it would have access over the property in question, which agreement ran with the land; and the fact that defendants own the property in fee simple is not controlling.

Throughout these proceedings, defendants' principal defense has been reliance upon the fact that there was no

actual "conveyance" within the meaning of Section 57-1-6, Utah Code Annotated, 1953, to plaintiff of any interest in the property. That is not, however, the only way that interest in real property, or at least the right to use someone else's real property, can be obtained. That, plaintiff submits, is clearly pointed out in its appellant's brief and it would serve no useful purpose to repeat the arguments made therein. Several contentions made by defendants in response to that point do, however, deserve reply. For one, the statute of frauds (Section 25-5-3, U.C.A., 1953) is simply not applicable. Neither are the two cases cited under Point I of their respondents' brief. Gold Oil Land Development Corp. v. Davis, 611 P.2d 711 (Utah 1980), merely reaffirmed the long-standing doctrine that consideration and delivery are both necessary for the validity of a deed. Another case cited by them, Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967), is not, so far as plaintiff can perceive, relative in any way to the issues involved in this action. The other case, Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973), is relevant to some extent; but to such extent, it supports plaintiff. Here the property which was to remain open for common use by plaintiff and other occupants of the shopping center, is

clearly established on the ground. It was blacktopped by plaintiff at the very beginning and with the concurrence of the common predecessor in title. It was also noted on the contracts of sale (Exs.1 and 2). Defendants in fact have had no trouble throughout these proceedings or in their brief identifying the parcel in question, even though it was part of a much larger parcel conveyed to them in one deed and by one description.

Plaintiff has acknowledged that there was no actual written "conveyance" to it of any interest in such property. It does contend, however, and it believes this contention is supported by the authorities cited in its appellant's brief, that there was an agreement running with the land that access to the 7-Eleven store over such property would not be entirely shut off. Defendants were aware of the use being made of the property at the time they purchased it (as admitted on page 7 of their brief) and all of the elements necessary to constitute an agreement running with the land were present. Thus, they are bound by it and cannot now totally deprive plaintiff of all access over such property.

Defendants have also consistently argued that there was no consideration paid for such use. It takes only a cursory examination of the events leading up to the purchase of

plaintiff's property and the construction of its store to dispel such notion. It is not, as defendants contend, "attempting to obtain, for free, that which they never purchased."

From the evidence as a whole, a picture emerges of plaintiff working with Big Six (the common predecessor in title) to establish a small shopping center. Plaintiff purchased the lot in the shopping center and Big Six was happy to sell it because, as Mr. Bowles testified, they needed money. Plaintiff then worked closely with Big Six to have the property rezoned so that the shopping center could be established. Plaintiff reoriented its building to accommodate Big Six, which is something that would not have been accomplished if it felt that the promise to provide access would be reneged upon and that it would later be fronting upon someone else's property rather than the street. Few businesses, let alone a convenience store, could survive under such circumstances. Plaintiff's accommodation even required it to purchase more property from Big Six than would originally have been needed. Hence, defendants' claim that plaintiff is trying to get something for free is clearly erroneous.

Defendants have argued that the West Jordan City

Planning Commission has only advisory powers and has even attached portions of the Planning Act as an addendum to their brief. As noted in appellant's brief, plaintiff's are no where contending that the Planning Commission had authority to impose an easement upon defendants' property. However, anyone who attempts to obtain a building permit for commercial property knows that the action of a Planning Commission can make or break a project. In the present case, the actions of the West Jordan City Planning Commission has been relied upon by plaintiff to show the circumstances under which the agreement reached with Big Six came about. That action bears heavily upon the intention of the parties in arriving at the agreements which turned the 7-Eleven store away from facing 6200 South and motivated Big Six into signing the agreement that access would be provided off Dixie Drive to the store.

POINT II

The evidence was sufficient to establish that plaintiff gained an implied easement over the property in question.

In their respondents' brief, defendants equate "implied easement" with "ways of necessity." Although these terms are sometimes confused, as shown by the cases and particularly by the Restatement of Property cited in appellant's

brief, an implied easement may arise even in the absence of an absolute necessity. Here, plaintiff believes, the easement is plainly implied from the circumstances surrounding the purchase of the property by plaintiff from the parties' common predecessor in title.

Plaintiff does not contend that either Savage v. Nielsen, 114 Utah 22, 197 P.2d 117 (1948), nor Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947), are factually identical. They were cited for the proposition that Utah does recognize the difference between a way of absolute necessity and an easement by implication which is based on reasonable necessity. In both cases this court recognized that absolute necessity was not required to establish an easement by implication. Plaintiff submits that all of the tests set forth in both cases have been met in the present case and an easement by implication should be found.

In any event, defendants' discussion of the Savage case is only pertinent where the claimant is the conveyor not the conveyee, but an easement by implication may be found in favor of either. Further, defendants' repeated assertion that plaintiff has 160 feet of public access is clearly unreasonable. As noted above, such access is attainable only through legally allowed curbcuts or drive entrances.

In this case, on 6200 South there is only one 30-foot entrance for both ingress and egress to the store and gasoline islands and most of the 160 feet is to the side or to the rear of the store itself, which would also make access unreasonable.

The reason for the citation by defendants of the factors delineated in Restatement of Property, § 476, is unclear. That section merely notes that those are some of the factors to be considered in determining whether an easement by implication has been established. That section continues:

> The list of factors here stated is not exhaustive. The circumstances through which the implication of an easement may arise are varied. The factors relevant to the determination of the implication are numerous. Those here considered are those more commonly occurring.

The Rationale for the factors--particularly appropriate here--is quoted at page 21 of appellant's brief. It is appropriate because plaintiff believes that if the parties had given further thought to the subject, a document creating an express easement would have been created. However, neither party realized that the situation over a period of years would change so drastically. Thus, one additional sentence from that Rationale deserves quotation:

> In the latter aspect, the implication approaches in fact, if not in theory, crediting

> the parties with an intention which they did not have but which they probably would have had had they actually foreseen what they might have seen from information available at the time of the conveyance.

Finally, defendants' statement (p. 11) "that they have never asserted [the easement] until now" is perplexing. Plaintiff, at the time of construction of the building, filled and blacktopped the area in question, installed curb and gutter and landscaping and there have been no complaints regarding its use until the present case was brought. At that time, the claim was immediately asserted.

POINT III

The Findings of Fact are inadequate, unsupported by the evidence and insufficient to support the trial court's judgment and the fact that plaintiff did not file an objection before the trial court does not prevent it from raising the issue here.

Plaintiff has pointed out in its appellant's brief (1) that the findings are totally inadequate and on many material issues there is no finding at all and (2) that neither the Findings of Fact nor the Conclusions of Law are sufficient to support the trial court's judgment. Despite defendants' proclaimed confusion, the deficiencies are set forth in appellant's brief.

The fact that no objection was made before the trial court does not help defendants. Rule 52, U.R.C.P., clearly allows a challenge to be made in this Court whether or not the party raising the question had made an objection to such findings in the District court.

Defendants also appear to be saying that since the findings are as long as the principal allegation in the complaint, they are sufficient. However, this just does not follow. Under Rule 8, U.R.C.P., the complaint shall only "contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." However, such a short statement may involve a number of material factual issues. Rule 52 and the pertinent cases require that on a case tried to the court without a jury Findings of Fact must be made on all such material issues.

RESPONSE TO CROSS-APPEAL

Defendants filed a cross-appeal in this matter challenging the action of the trial court in dismissing their claim for damages on the basis that damages were not support by the evidence. They have not, however, filed either a cost bond in connection with such cross-appeal or a cross-appellants' brief. However, the issue was raised in their respondents' brief and without waiving the position

that the cross-appeal should not be heard, plaintiff hereby responds to those contentions made therein.

The trial court's ruling that defendants have not established a claim for damages is supported on a number of grounds. First, the only evidence offered concerning supposed damages was as to the alleged rental value of the property in question. This testimony was elicited from defendant Potter and (apart from being questionable on its face as will be pointed out below) it was never raised by the pleadings.

In their counterclaim, defendants' only averment or demand (relating to damages) was for--

> . . . an accounting and judgment against the plaintiff in a sum equal to $1 for every automobile using, crossing or occupying space upon the defendants' property.

The first claim for rental value did not occur until the trial hereof. There was no amendment to the counterclaim, no motion to amend the counterclaim to confirm with the evidence and objection was in fact made to the testimony. Defendants should not be allowed to set up a demand which was not only speculative, unprovable and without foundation, and then at the trial switch to a different measure of damages.

Second, the testimony of defendant Potter as to the

rental value was so ambiguous, implausible and in conflict with the facts, that it need not have been accepted by the trial court even though no opposing testimony as to rental value was introduced. When he was asked as to whether he had "the value" (sic) as to the rental value and following objection, he replied that "the high value of that property would be $4,000 a month. The low figure would be around 20 to $2,500."

Even assuming that the figure "20" means $2,000, there is still a 100 percent variance in the range. This is too speculative and insufficient to enable the trier of fact to place a rental value upon the property. Moreover, even the rate of $2,000 per month would place a value of the corner parcel at approximately $240,000 (assuming a ten percent return). This is more than half of the total purchase price for the full 5.92 acres (R. 241) and ten times the cost of the 7-Eleven store property (which is twice as large) ten years earlier (Exs. 1 and 2). Thus, even though there was no contradictory testimony, the court was not obligated to accept defendant Potters' testimony.

Apart from the above, defendant Potters' testimony regarding the supposed rental value of the property was nothing more than that. No where is there any testimony as

to how this relates to his alleged damages. Defendant Potters' own testimony would indicate that the property was used by others than plaintiff. Thus, even assuming that defendant Potters' testimony regarding the rental value could be accepted, there is absolutely no evidence as to the amount of damages sustained by defendants as a result of its partial use by plaintiff's customers and suppliers.

Third, defendants' claim as to the rental value of the property is based on the alleged use of the property by plaintiff. Yet, the only testimony by defendant Potter relates to used cars parked on the corner for sale. Thus, defendant Potter testified (R. 217):

> Q. Okay, you have seen what kind, what kind of use is going on?
>
> A. A combination of used car lot sales.
>
> Q. What do you mean?
>
> A. Well, there have consistently been parked the times I have seen it, numerous cars parked on the strip with for sale signs on them. As of yesterday when I came by there, there were five or six parked on there with for sale signs on it, so they have been using it.

The simple fact of the matter is that plaintiff does not engage in used (or new) car sales and the use defendant Potter observed was by unknown third parties. This use cannot be charged to plaintiff.

Fourth, there is no evidence that defendants have been in any way damaged by whatever use of the property occurred. The property in question was filled, blacktopped and landscaped by plaintiff in 1979, all at the insistence of West Jordan City and with the express approval of Big Six. Any use since that time by plaintiff's customers and suppliers, has at least been permissive. It was acquired in June 1984 by defendants and no objection was made to such use for eighteen months. Mr. Potter testified that the first time he put 7-Eleven on notice that he felt they were trespassers was at the time of the construction of the fence in January 1986 (R. 219). Thus, even if it should be established that plaintiff has no rights over the property by virtue of the agreements with Big Six or as the result of an implied easement, its use was at least with the permission of the owners until January 8, 1986. Even then, following the hearing on January 20, 1986, it was agreed that the use could continue for a period of two more months. The fence was again reinstalled in August 1986 and has not been used by anyone since that time. Hence, even if defendants were entitled to any damages for the rental value of the property, it would only be for a few months in 1986 after any permissive use was withdrawn.

Moreover, it was stipulated at the hearing on the Motion for Temporary Injunction (R. 144-5) that defendants had no immediate use for the property and that the sixty-day delay would have no harmful effect. Thus, they cannot not reasonably argue that whatever use was made of the property by plaintiff's customers and suppliers that they have in any way been damaged.

Defendants conclude their brief with a statement that plaintiff is "trying to grab property which they never owned, for nothing, from an innocent third party. The attempt itself is reprehensible."

That statement is complete nonsense. If anything is reprehensible, it is defendants' refusal to allow use of any of the property even though they were aware when they purchased the entire tract that it was essential to the operation of the 7-Eleven store which had nothing but a narrow side access without it, and even though they were then put on notice of the earlier agreements between plaintiff and their seller. Their efforts have reduced to marginal profitability a store which was previously highly successful and which had cooperated with the parties predecessor in an effort to make both that store and the entire shopping center profitable. Moreover, plaintiff is

not in any way seeking to prevent defendants from using the property but only in obtaining what they thought they were receiving from cooperative efforts with such predecessor--that is the right to have reasonable ingress and egress over such property in order to continue to function as a convenience store.

CONCLUSION

As to the reply portion of this brief, the relief sought by plaintiff is set forth in its Appellant's Brief. As to the cross-appeal of defendants, they have presented nothing which would establish that they are in any way entitled to damages even if it should be determined that plaintiff has no rights over the property. The evidence clearly established that even if such is the case, the use during the period involved is at least permissive and the trial court's judgment as to the counterclaim should be upheld.

RESPECTFULLY submitted this _____ day of January, 1987.

Ralph L. Jerman
B. L. Dart
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the _____ day of January, 1987, four true and correct copies of Appellant's Reply Brief and Cross-Respondent's Brief were served upon defendants by mailing copies thereof to Robert M. Felton, attorney for defendants, 5 Triad Center, Suite 585, Salt Lake City, Utah 84180, postage prepaid.

_____