

2009

Gordon Jones, an individual; and Richard Barney, an individual v. Allen Grazer : Reply Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

GORDON JONES, an individual; and
RICHARD BARNEY, an individual,

Plaintiffs/Appellees,

v.

ALLEN GRAZER, an individual,

Defendant/Appellant.

ALLEN F. GRAZER,

Counterclaim Plaintiff/Appellant,

v.

GORDON A. JONES; and RICHARD
BARNEY,

Counterclaim Defendants/
Appellees.

GORDON JONES, an individual; and
RICHARD BARNEY, an individual;

Third Party Plaintiffs,

v.

REPLY BRIEF OF APPELLANT

Appellate Case No. 20090983

FILED
UTAH APPELLATE COURTS
JUL 06 2010

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Plaintiffs/Appellees,

v.

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ALLEN F. GRAZER,

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v.

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BARNEY,

Counterclaim Defendants/
Appellees.

GORDON JONES, an individual; and
RICHARD BARNEY, an individual;

Third Party Plaintiffs,

v.

REPLY BRIEF OF APPELLANT

Appellate Case No. 20090983

R W DESIGN, INC., a Utah corporation;
ROBERT W. SPEIRS PLUMBING,
INC., a Utah corporation; SCOTT
SESSIONS, an individual; and
NU-TREND ELECTRIC COMPANY, a
Utah corporation,

Third Party Defendants.

ALLEN F. GRAZER,

Plaintiff/Appellant,

v.

GORDON A. JONES and LINDA G.
JONES, husband and wife and as
Trustees, Gordon and Linda Jones Family
Trust; CHERYL GUDMUNDSON, an
individual; G. SCOTT JONES, an
individual; JASON JONES; GS JONES
CONSTRUCTION, INC., a Utah
Corporation, J & J LIVESTOCK, L.L.C.,
a Utah limited liability company;
RICHARD H. BARNEY and RENAE
CARNON BARNEY, husband and wife;
RENAE CARNON BARNEY, Trustee
of the Renae Carnon Barney Trust;
RENAE CARNON BARNEY FAMILY
PARTNERSHIP; ROCHELLE C.
BARNEY; RICHILYN WOODIN; THE
LINDA G. JONES FAMILY
PARTNERSHIP; and JOHN DOES 1-20,

Defendants/Appellees.

Appellant, Allen F. Grazer (“Grazer and/or “Appellant”), pursuant
to Rule 24(c) of the Utah Rules of Appellate Procedure respectfully
submits this Reply Brief on Appeal.

PARTIES TO THE PROCEEDING

Plaintiff/Appellant

Allen F. Grazer (“Grazer”)

Defendants/Appellees

Gordon A. Jones

Linda G. Jones

Gordon Jones Construction, L.C., a Utah limited liability company

Richard H. Barney (Estate)

Renae C. Barney, Personal Representative of Richard H. Barney Estate

Ludvig D. Olsen and Jackie M. Olsen, Trustees of the Ludvig D. Olsen and Jackie M. Olsen Trust (the “Olsen Trust”)

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STATEMENT OF FACTS

Grazer incorporates his Statement of Facts as set forth in his Brief of Appellant. The salient facts in this case are as follows:

1. The period for redemption expired on July 15, 2008. *Utah R. Civ. P.*, Rule 69C(d).
2. On July 8, 2008, counsel for the Olsen Trust, attorneys experienced in the law who were, or should have been, familiar with the Utah Rules of Civil Procedure tendered the amount of \$210.00, the amount they claimed was the redemption price as of July 8, 2008 by a letter with documents they admit only “substantially complied” with the requirements of Rule 69C, *Utah R. Civ. P.* (R. 6463); *see also generally, Brief of Appellee.*
3. Counsel for Grazer rejected the tender on the grounds that the he was not authorized to accept the redemption attempt on behalf of Grazer and that the check was made payable to counsel rather than Grazer. Counsel for Grazer also reserved **objections** to the tender until the documents and check were properly served. The letter further indicated that “strict compliance” with the redemption provisions of Utah law would be required. (R. 6429).

4. On July 9, 2008, prior to the expiration of the redemption period and in accordance with Rule 69C(e), counsel for Grazer filed a Notice with the Salt Lake County Recorder showing amounts claimed as due under Rule 69C (the “Notice”). (R. 6431).

5. On July 10, 2008, despite the admonition of counsel for Grazer regarding strict compliance and again without complying with the provisions of Rule 69C regarding documents required for redemption, counsel for the Olson Trust submitted the same amount of \$210.00, although additional interest had accrued and the Notice regarding the amounts claimed for redemption was of record with the Salt Lake County Recorder. (R. 6932).

6. The second tender was rejected on July 14, 2008 for the reason that the redemption price was not accurate. (R. 6932).

7. Counsel for the Olsen Trust was aware of the Notice prior to the expiration of the redemption period.

8. No evidence was presented as to the appraised fair market value of the Property at issue. (R. 6941). While appellants cite to a Davis County tax assessment notice, no evidence was presented as to

encumbrances, charges, fees, costs of clean up or other comparable properties.

ARGUMENT

The issues in this appeal are very simple. Does Rule 69C require strict compliance with its requirements? If only substantial compliance is required, did the Olsen Trust substantially comply?

POINT I

The Olsen Trust did not substantially comply with the requirements of Rule 69C.

The right to receive the correct redemption price or, if the correct price is not paid, a sheriff's deed, for a property purchased at sheriff's sale is a substantive right under Utah law which requires strict compliance with the redemption requirements. *Huston v. Lewis*, 818 P.2d 531 (Utah 1991). Counsel for the Olsen Trust argue that it is "undisputed that at the time of the redemption attempt on July 8, 2008, the proper redemption amount was \$210.00 ..." *Brief of Appellee*, p. 16. This is belied by the fact that Grazer filed his Notice showing additional amounts due, as allowed under the Rule, prior to the expiration of the redemption period. (R. 6431). Even assuming, *arguendo*, that \$210.00 was the correct

amount on July 8, 2008, it was not the correct amount on July 10, 2008, when the attorneys for the Olsen Trust tendered the redemption price to the correct party, still without the necessary documents required under Rule 69C. Additional interest had continued to accrue. The July 10, 2008 tender also did not include any of the amounts due under the Notice, of which the attorneys for the Olsen Trust are deemed to have had constructive notice. *Utah Code Ann.* §57-3-102(1); *Crompton v. Jenson*, 78 Utah 55; 1 P.2d 242 (1931) (Person dealing with real property is charged with notice of what is shown by the records of the county recorder of the county in which the property is located.). The attorneys for the Olsen Trust were put on notice by counsel for Grazer that strict compliance with the requirements of the Rule 69C would be required (R. 6440-41). A cursory reading of Rule 69C would have revealed that the records of the Davis County Recorder should be checked prior to tendering a redemption price.¹

¹ Counsel for the Olsen Trust admit that they knew of the recording of the Notice at least by July 10, 2008, prior to the expiration of the redemption period. (*Brief of Appellee*, p. 22).

A party attempting to redeem property who encounters a dispute regarding the redemption requirements can avoid any such dispute by following the provisions of Rule 69C(f):

Dispute regarding price. If there is a dispute about the redemption price, the redemptioner shall within 20 days of the redemption pay into court the amount necessary for redemption less the amount in dispute and file and serve upon the purchaser a petition setting forth the items to which the redemptioner objects and the grounds for the objection. ...

Utah R. Civ. P., Rule 69C(f). The attorneys for the Olsen Trust made no such filing within the 20-day period as required by the Rule. As noted by the *Huston* Court, former Rule 69(f)(3) allowed a party to raise a dispute near the end of the redemption period “by paying ‘the amount necessary for redemption, less the amount in dispute, to the court...’ and filing ‘with the court a petition setting forth the item or items demanded to which he objects, together with the grounds for objection....’” *Huston v. Lewis*, *supra*.

The attorneys for the Olsen Trust further failed to strictly comply with the documentation requirements of Rule 69C which require the service on the purchaser of (1) a certified copy of the judgment which the redemptioner claims the right to redeem (*Utah R. Civ. P.* 69C(c)(1));

(2) an assignment of the redemption rights, if appropriate (*Utah R. Civ. P.* 69C(c)(1)); and (3) an affidavit showing the amount due on the judgment (*Utah R. Civ. P.* 69C(c)(1)). The Olsen Trust mailed a letter to the counsel who had acted for the purchaser in the underlying case, not the purchaser himself. Of the three documents required by the Rule, the letter contained only the assignment. Even when the documents were returned by counsel for the purchaser on the grounds that the purchaser needed to be served and stating clearly that strict compliance would be required, the subsequent service, by letter dated July 10, 2008, again contained only the assignment, not a certified copy of the judgment nor an affidavit showing the amount due on the judgment (R. 6932). Counsel for the Olsen Trust argue that the requirement of a certified copy of the judgment and the affidavit of amounts due are “technicalities,” and further claim that “[i]t would be illogical for the Olsen Trust to have provided Grazer with a copy of Grazer’s own judgment or to have secured an affidavit showing the amount Grazer claimed he was owed on his own judgment.” *Brief of Appellee*, p. 25. This is a deliberate misreading of the Rule which places the burden on the redemptioner [the Olsen Trust] “to serve on the purchaser” the three documents required under Rule 69C(c). It is more

“illogical” to argue that the Olsen Trust (the redemptioner) does not have to provide the three documents required under Rule 69C(c) to Grazer (the purchaser) in this instance. Such a reading gives subsection (c) of Rule 69C no meaning or purpose, a result contrary to the rules of statutory construction. Why is subsection (c) included in the Rule if its requirements are not necessary or to be followed in the redemption process? Significance and effect are to be accorded to every section, clause, word or part of a statute. *Dunn v. Bryan*, 77 Utah 604; 299 P. 253 (1931). Further, had an affidavit been provided by the Olsen Trust as required under the Rule at the outset, the dispute as to the redemption amount would have been joined on July 8, 2008.²

The attorneys for the Olsen Trust rely heavily on the cases of *United States v. Loosley*, 551 P.2d 506 (Utah 1976), and *Tech-Fluid Services, Inc. v. Gavilan Op. Inc.*, 787 P.2d 1328 (Utah Ct. App. 1990), in support of their argument that Rule 69C should be liberally construed

² In fact, the statute seems to contemplate that a dispute will arise about the amount due for redemption by allowing the amount claimed as the redemption price to be paid into court. Such a dispute did arise here as counsel for Grazer filed Grazer’s Notice of additional amounts due prior to the expiration of the redemption period.

and substantial compliance with the procedural requirements will be sufficient. *Loosley* and *Tech Fluid*, however can be distinguished. In both cases, the correct redemption amount was tendered and no objection was made to the amount. Neither are the case here. Further, the Olsen Trust had representation by legal counsel in making its redemption attempts – counsel who knew or should have known of the requirements of Rule 69C. Yet both the July 8 and the July 10 attempted redemptions were deficient as to documentation and amount, despite the warnings of Grazer’s counsel regarding strict compliance. Having both constructive and actual notice of additional amounts claimed for redemption, counsel for the Olsen Trust made no attempt to pay the redemption amount into court as allowed under Rule 69C(f) until August 19, 2008, more than a month after the rejection of the tender of the \$210.00. It was not until August 19, 2008 that the Olsen Trust paid into the Court the sum of \$2,465.00, “the amount necessary for redemption less the amount in dispute.” *Utah R. Civ. P.*, Rule 69C(f). At that time the Olsen Trust asserted the \$2,465.00 to be “the correct amount of the redemption price and is sufficient to redeem the Property under Rule 69C” (R. 6304). The

Olsen Trust thereby acknowledged that the initial tender of \$210.00 had been inadequate.³

POINT II

There were no irregularities in the conduct of the sale or by Grazer's counsel nor was there evidence of a "windfall" to Grazer.

Counsel for the Olsen Trust argue that a belated redemption should be allowed because there were "irregularities" such as to allow the Olsen Trust to redeem the property without paying the costs evidenced in the Notice and rejection of the redemption attempts would result in a "windfall" to Grazer. Both of these factors must be present in order to redeem a property beyond the expiration of the redemption period. *Pyper v. Bond*, 2009 UT App 331; 224 P.3d 713.

There were no irregularities in the conduct of the sale or in the conduct of counsel for Grazer. First, Mr. Hobbs, counsel for Grazer,

³ The Olsen Trust tendered to the Court a check "for the redemption price in the amount of \$2,465.00, which represents the \$191.00 purchase price of the Property, together with \$2,178.02 for the costs of the sheriff's sale, plus 6% annual interest on the total amount accruing since the date of the sheriff's sale, but does not include the additional \$2,750.00 claimed by Grazer." (R. 6304). The claim of the Olsen Trust that Grazer waived his right to claim such amounts ignores this subsequent tender and assertion by the Olsen Trust. In any event, the Notice evidencing such amounts was filed prior to the expiration of the redemption period and should be deemed valid.

clearly indicated that he did not have authority to accept service as Grazer had left the State of Utah (R. 6429). Secondly, counsel rejected the check as being “clearly not appropriate.” (*Id.*).⁴ Finally, the conduct of counsel was appropriate and in accord with the standards established under the Rules of Professional Conduct. Rule 1.2 “Scope of Representation and Allocation of Authority Between Client and Lawyer” provides:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Utah R. Prof'l. Conduct, Rule 1.2(a).

The comment to Rule 1.2 expands upon the scope of the representation of a client's interests by an attorney:

1] Paragraph (a) confers upon the client the ultimate authority to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to

⁴ The Olsen Trust's later acknowledgment that costs of the sheriff's sale were appropriate charges to be included in the redemption price indicates that it knew when it made the tender that the redemption price was not the correct price and that the Olsen Trust was attempting to gain its own “windfall” by avoiding the payment of the costs of sale.

communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

Id. Comment, 1.

Counsel for Grazer had an obligation to consult and confer with his client prior to accepting any redemption price, particularly a price he deemed to be inappropriate. In accordance with his obligations to fully and adequately represent the interests of his client, counsel for Grazer reviewed the provisions of Rule 69C and filed a Notice of amounts due for redemption prior to the expiration of the redemption period. There was nothing "troubling" about the recording of the Notice. The action was required of him in order to represent the interests of his client. Having consulted with Grazer, counsel then informed the Olsen Trust he was able to accept service. Contrary to the assertion of counsel for the Olsen Trust, there was no "final blow" by Mr. Hobbs' claiming the amount received from the Olsen Trust was inappropriate. The amount was, in fact, not appropriate, as belatedly acknowledged by the Olsen Trust. Mr. Hobbs made no representations to counsel for the Trust regarding amounts due. To the contrary, Mr. Hobbs affirmatively

informed counsel for the Olsen Trust that “strict compliance” would be required. Further, Mr. Hobbs was under no affirmative obligation to instruct counsel for the Olsen Trust on the correct procedure to redeem property. *See Pyper v. Bond, supra*. (“In light of rule 69C(f), we decline to recognize any duty on the part of a sheriff’s sale purchaser to affirmatively cooperative with an attempted redemption.”).

Finally, there is no evidence that Grazer will obtain a windfall. Despite several pages of argument about the alleged value of the Property, the Olsen Trust cites no evidence in the record as to a determination of an appraised fair market value of the Property. There was no evidence presented as to comparable properties, encumbrances, charges, costs of clean up or other items that could affect the fair market value of the Property. Although the Olsen Trust asserts that “the trial court found additional support for its ruling in the equities of the case, particularly the fact that Grazer would obtain a large and unjustified windfall” (*Brief of Appellee*, p. 26) if the Olsen Trust were not allowed to redeem the Property, the trial court, in fact, stated “While the parties presented no evidence regarding the appraised value of the Property, its value is clearly greater than the \$191.00 paid at the sheriff’s sale by Grazer.” (Emphasis


purported “windfall” should be disregarded as not supported by any evidence.

CONCLUSION

The Olsen Trust did not strictly nor substantially comply with the requirements of Rule 69C. The proper amount and documentation was not tendered or provided. There were no irregularities in the conduct of the sale or in the conduct of counsel for Grazer. There is no evidence in the record of a windfall to Grazer if the redemption is held to be invalid. The ruling of the trial court should be reversed and a sheriff’s deed should be issued vesting title in Grazer.

DATED this 6 day of July, 2010.

HOBBS & OLSON, L.C.



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CERTIFICATE OF DELIVERY

I hereby certify that on the 6th day of July, 2010, I caused true and correct copies of the foregoing to be mailed, first class, postage prepaid, to the following:

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