1980

Heglar Ranch, Inc. v. Leonard M. Stillman and Juanita P. Stillman : Brief of Plaintiff-Respondent

Utah Supreme Court

George N. Larsen, Lee W. Hobbs; Attorneys for Plaintif f-Respondents;Robert R. Brown; Attorney for Defendant-Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

HEGLAR RANCH, INC. an Idaho Corporation, Plaintiff-Respondent,	)	
vs.	)	Case No. 16830
LEONARD M. STILLMAN and JUANITA P. STILLMAN, husband and wife, Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM THE THIRD DISTRICT COURT

STATE OF UTAH

Honorable Homer F. Wilkinson, Presiding.

George N. Larsen
Lee W. Hobbs
1120 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Plaintiff-Respondent

Robert R. Brown
Attorney for Defendant-Appellant
431 South 300 East
Salt Lake City, Utah

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431 South 300 East
Salt Lake City, Utah
Attorney for Defendant-Appellant

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NATURE OF THE CASE

The Plaintiff-Respondent, Heglar Ranch, Inc., an Idaho Corporation, owned by one Max Gillette and his wife, Elva (R-17), brought this suit against the Defendants-Appellants, Mr. and Mrs. Stillman, for non-payment of a promissory note. Defendant-Appellant Stillman responded with an answer containing nine purported defenses and a counter-claim. For clarity and brevity, the Plaintiff-Respondent will be hereinafter referred to in this brief as "Heglar" and the Defendants-Appellants, Mr. and Mrs. Stillman, will be referred to as "Stillmans". References to the record will be as (R____). Following discovery, including depositions, interrogatories and affidavits filed by each of the parties, Heglar instituted a Motion for Summary Judgment. Heglar takes issue with the statement that the affidavits of the parties were conflicting and submits that

a review of the Stillman affidavits and their answers to interrogatories, more fully discussed following, were incompetent and immaterial as evidence and were not conflicting in any evidentiary sense.

DISPOSITION IN THE LOWER COURT

Based upon the affidavits filed by Heglar, the Answers to Interrogatories filed by the Stillmans and the depositions of the Stillmans, the Lower Court granted summary judgment to the Plaintiff Heglar in the sum of $25,000.00 upon the promissory note.

RELIEF SOUGHT ON APPEAL

Heglar seeks the affirmation of the summary judgment entered by the Lower Court.

STATEMENT OF FACTS

Plaintiff Heglar has no particular disagreement with the Statement of Facts as propounded by the Defendants Stillman except that it is incomplete and does not adequately explain the background of the negotiations which led to the execution of the promissory note and to the institution of this suit.

On May 12, 1978, Stillmans entered into an agreement (R. 141-143, Depos. of Juanita Stillman, Ex. P-1) together with an escrow agreement (R. 134-136, Depos. of Juanita Stillman, Ex. P-4) which together constituted an agreement and escrow for the purchase of real property in Salt Lake County by the Stillmans from Heglar. This agreement and escrow called for the deposit of $704,000.00 cash or certified funds into the escrow from Stillmans to Heglar,

at which time the Warranty Deed of Heglar, then in escrow, would be delivered to the Stillmans. Because of non-performance by the Stillmans, the escrow was dissolved and the deed of Heglar returned to it (R. 101). The transaction in total involved a three party exchange and included a Mrs. Woods of Salt Lake County, represented by Nolan Olsen, Esq., who are not parties to this action but were involved in a corollary escrow by which Woods would trade the Salt Lake County real property owned by them to Heglar at which time Heglar would make the sale to Stillmans for the agreed $704,000.00.

Stillmans totally failed to meet the conditions of the agreement and the escrow of May 12, but subsequently represented to the other interested parties, including Heglar, that they were now in a position to obtain the funds and wished to reinstate the escrow and proceed as previously planned. Accordingly, a "Supplement to Escrow Agreements" (R. 138-140, Ex. P-2, Depos. of Juanita Stillman R. 100) was executed by the parties, June 23, 1978. This document recited the execution of the previous agreement and escrow and the termination "by reason of the failure of Stillmans to deposit the said funds as agreed" (R. 138) and provided by Paragraph 3 (R. 139) that as a condition of such reinstatement, that the Stillmans would execute two promissory notes of $25,000.00 each, one being the promissory note subject to this action and the other payable to the third party, Mrs. Woods. The agreement further provided (Para. 4) that in the event that Stillmans failed to pay the escrow holders the agreed purchase

price on or before June 29, 1978, that all escrow documents including the promissory notes would be returned to Mr. George N. Larsen, Attorney for Heglar, as agreed and liquidated damages for non-performance by Stillmans. This "Supplement to escrow Agreement" was signed June 23 at the offices of McGhie Land Title Company by each of the Stillmans in the presence of their own counsel, Robert R. Brown, as well as the presence of W. C. McDermaid, Title Officer, whose affidavit appears (R. 55-56). Subsequently, the Stillmans again failed to meet the terms of the agreement or the escrow and to pay the purchase price as agreed and the notes were returned to Mr. Larsen who delivered Mrs. Woods note to her and whose office brought this action on behalf of Heglar to recover on the promissory note made to it according to its terms (R. 137, Ex. P-3, Depos. of Juanita Stillman R. 101).

ARGUMENT

POINT 1

THE PLAINTIFF IS ENTITLED TO THE JUDGMENT RENDERED ON THE PROMISSORY NOTE SINCE THE FACTS AS CLAIMED BY STILLMANS OWN EVIDENCE DO NOT AS A MATTER OF LAW SUPPORT ANY FINDING OF DURESS.

The "Supplement to Escrow Agreements" (R. 138-140, Ex. P-2, Depos. of Juanita Stillman) and the promissory note subject of this action (R. 137, Ex. P-3, Depos. of Juanita Stillman) were executed by Stillmans on June 23, 1978. Their Counsel was present at the time (R. 63, R. 146). The Defendants Stillman were aware of the requirement of the note two or three days prior to this

date, about June 21, 1978 (Defendant-Appellants Brief page 4, also R. 65-66, R. 67). The Plaintiff Heglar, following the depositions of the Stillmans, served interrogatories on Stillmans (R. 30-34). These interrogatories were answered by the Stillmans (R. 35-43). By these answers, the Stillmans appeared to have abandoned all of the nine defenses raised in their answer as well as their counter-claim, excepting only their claim that they did not sign the promissory note (R. 137) willingly, it being the claim of the Stillmans that they objected to the signing of the promissory note, but nevertheless signed it "so they could secure the contract papers from Mr. Larsen and deliver them to the bank" (Defendant-Appellants Brief Page 3). The Defendants cite the case of Fox v. Piercey, 119 Utah 367, 227 P 2d. 763 (Utah, 1951), where the modern rule concerning duress is approved by this Court. The rule is stated as follows (p. 766):

> "4. The modern rule that any wrongful act or threat which actually puts the victim in such fear as to compel him to act against his will constitutes duress." (Emphasis added)

Plaintiffs have no argument with this rule as adopted by the Court except that it has no application in the instant case. The rule as adopted by this Court is further discussed in Corpus Juris Secundum at Vol. 17 Contracts Paras. 168-179 inclusive wherein the Court states, inter alia, at page 946, (and citing Fox v. Piercey, supra):

> "likewise, duress does not exist merely because a party is induced to enter into a contract by reason of adverse circumstances, and accordingly, mere

> economic pressure or mere pecuniary distress, or fear of financial embarrassment, does not of itself amount to duress."

and again at page 967, paragraph 177:

> "business compulsion vitiating a contract induced thereby cannot be predicted on a demand which is lawful, or an insistence on a legal right, or on a threat to do what one has a legal right to do."

It is undisputed from the record that the Stillmans had entered into a previous contract which they totally and wholly failed to perform in any part. When they initiated steps to reinstate the contract, a condition was made, i.e. the promissory notes, of which they were well aware, and which they signed in the presence of their counsel. It is understandable that they would have preferred not to sign the promissory notes. However, faced with the condition required by parties who had already expended considerable time, trouble and substantial expense in a fruitless effort to complete this transaction on the first occasion, they chose to execute the notes with an outward show of complying with the condition, but apparently with some private reservation as to their intentions should they again fail to obtain their financing

It should be noted that the Court while adopting the modern rule set out above in Fox v. Piercey supra went on to state (P. 766)

> "it is obvious that applying this subjective test might theoretically degenerate to a point where a person desiring to avoid a contract might claim that practically any conduct of another put him in fear and overcame his will. It is necessary that there be some objective standard for determining when duress has been practiced. It must appear that the threat or act is of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of a threatened person, ...

> Notwithstanding the fact that we approve this modern and liberal rule as a test of whether or not duress has been practiced, under all of the authorities, ancient and modern, the act or threat constituting the duress must be wrongful." (Emphasis added)

It should also be noted in the case of Fox v. Piercey that the statements made by FireChief Piercey to Fox that unless Fox resigned he would be discharged and that his discharge would be accompanied by detrimental publicity, did not constitute duress as a matter of law.

Heglar submits that the requirement of the promissory note as a condition to renegotiating the contract while it might have appeared inconvenient or even onerous to Stillmans, was not a wrongful demand, but was within the legal rights of Heglar, was readily acceded to by Stillmans, who only objected to the signing when it became time to honor the promise as made.

POINT II

UPON THE EVIDENCE AS ADDUCED, IT WAS PROPER FOR THE DISTRICT COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF.

It is Heglar's contention that upon all of the evidence adduced by the Stillmans including their depositions (R.85-150), their answers to interrogatories (R. 35-42), and the affidavits of the Defendants, of their counsel and of Irene Strehle, heretofore discussed that they have failed to raise any material issue of fact which would or could constitute a defense of duress. (R.61-77). First as to the depositions, the defendants admitted the execution of Exhibits D-1, D-2, D-3 and D-4 (R. 91-92; R. 100-101, R. 145-146).

Defendants answers to interrogatories either completely evade the questions, as in interrogatory 1 and sub-interrogatories, (R.35), admit a lack of knowledge, interrogatory 2 and sub-interrogatories (R. 36-37) and reassert only the feeble excuse that the Stillmans preferred not to sign the note or did not want to sign the note or objected to signing the note. Nevertheless, to obtain the potential fruits of their bargain they signed the promissory notes apparently with some mental reservation as to their performance should they be unsuccessful in obtaining financing. Also, the affidavits of the Stillmans and their counsel and of Irene Strehle (R. 61-77) add nothing to the claim of Defendants Stillman, except that they preferred not to sign the note but were willing to sign it if it was necessary to obtain the possession of the closing papers which they did in fact obtain (Def. Answers to Interrogatories, 4C, R. 38).

The function of affidavits in the consideration of a motion for summary judgment has been considered in a number of Utah cases. See Preston v. Lamb 20 Utah 2d 260, 436 P 2d 1021, at page 1022, where the Court stated:

> "Now, for an affidavit to be of effective use in the determination of a motion for summary judgment, it must set forth such facts as would be admissable in evidence Rule 56E URCP. Here the tendered affidavit did not support the allegations of the complaint which had been put in issue by the answer of the defendant."

See also Montoya v. Berthaua Investment Company, 21 Utah 2d 37, 439 P 2d 853 at page 853 P 2d as follows:

> "By employing the discovery process under the rules, by affidavit and interrogatories directed to each party by the other, they developed a clear departure from pleading and proof, that precipitated no germane issue of fact, but one of law based on the evidence submitted by both parties before trial."

Also see Dupler v. Yates, 10 Utah 2d 251, 351 P. 2d. 624 where it is stated at page 367 P. 2d.

> "Where as in the instant case the materials presented by the moving party is sufficient to entitle him to a directed verdict and the opposing party fails either to offer counter-affidavits or other materials that raise a credible issue or show that he has evidence not then available, summary judgment may be rendered for the moving party." (Emphasis added)

See also, A & M Enterprises vs. Hunziker, 25 Ut 2d, 363, 482 Pac 2d 700.

There is one further aspect of the defendant's position and the evidence and the lack thereof supporting it which deserves attention. In the third defense of Stillman's Answer (R.8) they alleged that they had caused $10,000,000.00 to be made available to the Bank of Utah but that the bank refused to accept the funds. Questioned on this transaction by Heglar's Interrogatories No. 2-A to G inclusive, (R. 31) the defendants answered that the $10,000,000.00 dollars was made available to William Shaap, who was an officer of the Bank of Utah. However, in response to further questions they were unable to state (R. 36) (B) what officer, agent or employee of the Bank of Utah refused to accept the tender of $10,000,000.00 (C) whether the tender was conditional or contingent in any respect, (D) in what form the tender was made i.e. by Cashier's Check, transfer of certified funds, cash or otherwise, (E) whether any reason was given for the refusal of the tender or (F) the owner of the

$10,000,000.00 which was "made available" to the Bank of Utah, or even (G) the name and address of the persons representing the owner of the $10,000,000.00 supposedly made available. All of this conversation about high finance is aptly summarized in the affidavit of Bill Shaap (R. 50-51) when he states, inter alia (R.50)

> "Suddenly the telephone conversations took a different turn and a loan from the Bank of Utah became involved. A person from Texas was claimed to have substantial funds from a foreign source. It was proposed that this person place a substantial deposit in the bank as a compensating balance to induce the proposed loan, however, on inquiry the persons involved refused to pledge this proposed deposit as security for the loan. Accordingly, the request was immediately and unequivocally denied. No deposit was ever tendered to the Bank as such but only a conversation indicating that the deposit would be tendered if the loan was made. The Bank, of course, would not refuse tender of any legitimate deposit, unless there were unsatisfactory conditions made a part of the tender."

Apparently what this caller with the proposed funds was proposing was a deposit in the Bank of Utah, a very substantial loan from the Bank of Utah, with the right reserved in the depositor to withdraw his deposit without any pledge of the same as security for the loan. The potential for loss (if not outright fraud) in this situation is so apparent that it is hard to imagine that any person would hope to find a banker naive enough, or so eager for a deposit, as to accept such a potentially dangerous transaction, practically custom made for a substantial and devastating loan by a small bank and in fact a situation ripe for fraud.

CONCLUSION

It is respectfully submitted that the Defendants Stillman with the Affidavits filed, their answers to interrogatories and their depositions, have not established any wrongful act on the part of the plaintiff Heglar and have only established that they preferred not to sign a promissory note-or as events developed, if they signed it, to avoid payment. It is further shown that under the law as adopted by the State of Utah there must be a wrongful act or threat which puts the victim in such fear as to compel him to act against his will. Such was clearly not the case under the evidence adduced. The Stillmans acted, according to their evidence, reluctantly and under terms other than those they preferred, but nevertheless willingly in the hopes that their plans would somehow be approved and they would obtain an unsecured loan from the Bank of Utah.

It is further submitted that the evidence adduced by Stillmans is incompetent and irrelevent to prove any material issue of fact bearing on the ultimate issue of duress which is attempted to be raised.

Respectfully Submitted,

LEE W. HOBBS
1120 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Plaintiff-Respondent, first-class, postage prepaid, to:

Robert R. Brown
Second Floor
Metropolitan Law Building
431 South Third East
Salt Lake City, Utah 84111

this 13th day of May, 1980.

Lee W. Hobbs