

1953

C. Ed Lewis Company v. Mike S. Dragos : Brief of Respondent

Utah Supreme Court

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Case No. 8072

IN THE SUPREME COURT
of the
STATE OF UTAH

C. ED LEWIS COMPANY, a corporation,

Plaintiff and Appellant,

vs.

MIKE S. DRAGOS,

Defendant and Respondent.

FILED

OCT 19 1953

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

H. G. METOS,

Attorney for Respondent.

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IN THE SUPREME COURT
of the
STATE OF UTAH

C. ED LEWIS COMPANY, a corpo-
ration,

Plaintiff and Appellant,

vs.

MIKE S. DRAGOS,

Defendant and Respondent.

Case No.
8072

BRIEF OF RESPONDENT

STATEMENT OF FACTS

In its complaint the plaintiff alleged that it was a real estate broker and that prior to September 4th, 1952 the plaintiff had a signed listing agreement with one Ted Russell authorizing the plaintiff to sell property owned by him at 3114 South State Street, Salt Lake County, Utah, and that on September 4th, 1952 the plaintiff showed the property to one Ralph Brimhall, a prospective purchaser, who was willing to buy the property for \$52,500.00; that on September 4th, 1952 the defendant

“by threats made against said prospective purchaser and by untruths and false claims and misrepresentations caused said Ralph Brimhall to withdraw his offer to purchase said property” and thereby plaintiff lost its commission in the sum of \$2,625.00. Plaintiff prayed for said sum of \$2,625.00 together for \$5,000.00 punitive and exemplary damages.

The defendant in his answer denied the allegations of the complaint and alleged that for the past several years defendant and Ted Russell have been litigating and are now litigating in the District Court an action involving the southerly boundary line of defendant's property, and that said Russell and the plaintiff and his agents have endeavored by threats of violence and force to take over several feet of defendant's property, and that said plaintiff, as a broker, and Ted Russell made false representations to the prospective purchaser of the amount of property said Ted Russell owned.

The case was tried by the court sitting without a jury and, after hearing the testimony from the parties, entered its Findings of Fact, finding against the plaintiff and in favor of the defendant. Among other things the court found:

“That defendant and said Teddy Russell and his wife have been litigating and are now litigating in the above entitled court an action involving the southerly boundary line of defendant's property, and that the boundary line has not been

established, and that said Teddy Russell and his wife did not inform said plaintiff of this dispute at the time of said listing, and that the prospective buyer would not purchase said property for the reason that there is a dispute on the boundary line." (R. 119)

ARGUMENT

POINT I

THAT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S FINDINGS.

It appears that Ted Russell and his wife listed their sale with the plaintiff for property located on State Street which property adjoins the defendant's property on the south side. When the listing was given the plaintiff on July 10th, 1952 there was pending in the District Court an action between Russell and Dragos relative to the location of the boundary line between their properties. When the listing agreement was entered into the Russells did not mention to the plaintiff that there was a boundary dispute.

In the early part of September, 1952 Mr. Lewis showed the property to one Ralph Brimhall who became interested in the property and who offered to buy it for \$52,500.00. He gave the plaintiff \$1,000.00 earnest money but had not signed the earnest money receipt. On September 4th, 1952 Mr. Brimhall stated that he went to the defendant and had a conversation with him in regard to the Russell property. Under cross-examination Mr.

Brimhall stated as follows:

- “Q. You went down there and asked him what he thought about the property because he lived next door to it?
- A. That’s right.
- Q. Before he mentioned it, did you know that there was a dispute on the boundary line of those two properties?
- A. No, I hadn’t heard a thing about it.
- Q. Didn’t know a thing about it?
- A. No sir.
- Q. And he told you it was a good piece of property, didn’t he?
- A. Yes sir.
- Q. And thought the cabins were filled up. What led you to go out to the boundary line?
- A. Well, I—if I remember correctly, I went to his place to get a cup of coffee or something. I had that time on my hands there. I came down to find out what I could, and I was asking about it, and he says, “Come on here, and I will show you.” I didn’t know what he wanted to show me, and we got out there, and it was the boundary line that he wanted to talk about.
- Q. And what did he do, show you the peg on State Street? Is that where you stood?
- A. Well, it wasn’t on the street. It was back right at the corner of the cabin where this concrete block was.

- Q. Well, from what you saw there, you say you saw that the boundary line was running pretty close to the cabins. Is that right?
- A. That's right.
- Q. And if you were going to buy it, you would want plenty of room on the north side so you could move around those cabins, wouldn't you?
- A. Well, I surely would.
- Q. You assumed all the time there was three or four or five feet belonging to the Russells on the north side of the cabins, didn't you?
- A. I didn't make any assumption. I just supposed that it was a legitimate piece of property there and that the line had been established and that Mr. Russell's property was on his cabins, was on his own property.
- Q. Well, didn't you also assume that he owned some property north of the cabins themselves? Didn't you assume that?
- A. Well, I hadn't outlined it that way, no, but I suppose I assumed that there was room enough to walk on his own property there if he wanted to fix up one of his cabins.
- Q. Yes. Otherwise, you weren't interested in it, were you?
- A. Well, I wouldn't want to be interested in a problem of that kind, no.
- Q. In other words, assuming that Russell owned the cabins and owned the land the cabins stood on, still you would want ample room so

you could move around those cabins if you wanted to repair them or do something like that, wouldn't you?

A. That's right.

Q. And when Mike Dragos told you where this line was, why, he told you if you wanted some property there, ample property, he would sell some to you, didn't he?

A. I believe that was it.

Q. And was tickled to death to get somebody new over in that property? Is that right?

A. He seemed to be." (R. 69-70)

Mr. Brimhall from the following questions propounded by the court answered:

"THE COURT: Well, if there had been a dispute about where the sewer pipes were, would you have been interested in the property even if you had known that the houses were on the proper land?

A. That would have been a drawback. I think, however, that that wouldn't have been a serious consideration. The sewer pipe could be easily moved while you can't move a house so easily.

THE COURT: Would it have been such a drawback that it might have affected the amount of money that you would have offered for the place?

A. It may have." (R. 71-72)

It is apparent that Brimhall would not have offered to purchase the Russell property had he known the facts surrounding the same. It appears without dispute that the defendant never threatened the prospective buyer or endeavored to talk him out of buying the property; on the contrary, he offered to sell Brimhall sufficient land to meet his objections to the property. Defendant was anxious to see that a sale was made so that he could get rid of a bad neighbor and his feelings were amply expressed when he stated "I hope to Christ he buys." (R. 88).

Defendant's testimony is in direct conflict with the testimony of the plaintiff's witnesses. Defendant's evidence is in harmony with the findings of the Court. In view of Brimhall's testimony it is defendant's contention that he was entitled to a non-suit. Counsel for plaintiff seemed to lay considerable stress on the fact that defendant offered to sell Brimhall sufficient land around the cabin for \$3,000.00. It should be borne in mind that this was the sum recommended by Russell's attorney, Mr. Tuft, to procure the land (R. 63).

POINT II

THE COURT'S FINDING NO. 4 IS NOT CONTRARY TO LAW.

The plaintiff argues at some length that the decision of the Supreme Court, *Dragos vs. Russell*, definitely fixes the boundary line between the two lots of said

parties. This contension is not in accord with the decision as understood by the trial judge and as construed by the attorneys of Russell and Dragos. True, the Supreme Court states that the cabins are within the old fence line but how far and where was left for further determination. The question was determined by Judge Baker but an appeal was taken and is now pending in this Court. Plaintiff is attempting to argue the Russell case now pending in this Court and has gone completely off the issues involving its case. Plaintiff forgets that the reason that Brimhall did not buy the land was due to the fact that there was a dispute over the boundary line and that a portion of the cabins and sewer line were on the property of another. The Brimhall deal failed because he was not informed of the dispute. Had he known the facts in advance he probably would not have made an offer.

POINT III

Point III discussed in plaintiff's Brief does not appear to the defendant to be prejudicial to its case in any way and therefore submits the matter without further comment.

CONCLUSION

In conclusion we submit that there is substantial evidence to amply support the Findings of Fact, Conclusions of Law, and Judgment of the trial Court, and that the same should be affirmed.

Respectfully submitted,

H. G. METOS,
Attorney for Respondent.