1981

Dan Siegel v. Salt Lake County Cottonwood Sanitary District : Brief of Defendant-Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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DAN SIEGEL,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 17181
	)	
SALT LAKE COUNTY COTTONWOOD SANITARY DISTRICT,	)	
	)	
Defendant-Respondent.	)	

BRIEF OF DEFENDANT-RESPONDENT

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NATURE OF THE CASE

The Appellant fairly states the Nature of this case, and such statement is accepted.

DISPOSITION OF THE TRIAL COURT

The trial court determined that the "character" of this case is "condemnation," and the date of taking possession as November 8, 1977; that just compensation consisted of the value of the strip of land taken, or $8,333.00, less the benefit to the land not taken, i.e., the sewer facility, or $4,000.00, leaving a balance of "just compensation" of $4,333.00.

STATEMENT OF THE FACTS

The Appellant's statement of facts substantially are accepted and accurate, absent those implying bad faith or assertion of concealment of the respondent Sanitary District's methods in construction of the sewer, and also aside from the fact they have been selected somewhat out of context and generally

in favor of the Appellant only. A casual examination of the transcript, however, will reflect the good faith efforts of the District to negotiate amicable terms for purchase of the easement sought, without resort to formal condemnation.

However, the Appellant accepted the findings of the trial court, without objection, so that insufficiency of the evidence is no issue in this appeal. Only the "method" of calculating damages and interest are urged on appeal, as evidenced by Appellant's three designated Points on Appeal.

RELIEF SOUGHT ON APPEAL

Affirmance of the lower court's judgment in toto.

ARGUMENT

As a preliminary matter, it appears that the Appellant has no standing to present his arguments to this Court, and that his appeal should be dismissed for that reason, because at no time did he present any of his Points on Appeal to the trial court, but does present them to the Supreme Court for the first time on this appeal.

The trial court, on April 1, 1980, subscribed to a minute entry at the close of the trial, taking the case under advisement (Tr. 68), and another on April 8, 1980, which found an amount of $4,333.00 as damages in favor of Siegel, after deducting from the $8,333.00 value of his property, the enhanced value of his remaining or severed property, as a result of the installation of the sewer facility by the

Sanitary District, in the amount of $4,000.00

As a result of the minute entries above, Mr. Allen, Appellant's counsel, prepared and presented Findings of Fact, Conclusions of Law and Judgment dated two months later on June 4, 1980, (Tr. 69-72), which paraphrased and included the last minute entry's substance as follows:

3. On the state of the pleadings on the date of trial, the issues were reduced to (1) determination of just compensation for the taking of the easement, Plaintiff having then consented thereto, and (2) determination of Plaintiff's damages, if any, for Defendant's wrongful entry upon the Tract and occupation without right before asserting right of eminent domain.

4. The value of the .33 acres taken by Defendant in the exercise of its power of eminent domain was $16,666.00.

5. The value of the rights in the said .33 acres remaining in Plaintiff after the same were subjected to Defendant's easement constituted 50% of the total value of the said acreage.

6. The installation of the sewer across the Tract imparted a value of $4,000.00 to the portions of the Tract which were not subjected to the easement.

The findings were followed by a judgment that "Defendant is to pay Plaintiff, as just compensation for the taking of the easement and right of way, the sum of $4,333.00."

Between the Minute Entry and the Judgment, the

Appellant filed no objection whatever to the Minute Entry, nor was any request or motion filed for the purpose of amending it to give the trial court an opportunity to do exactly what the Appellant claims for the first time on appeal, what the court should have done.

After the Findings and Judgment were entered, the Appellant did not file a motion for a new trial, nor any objections to either before he filed his Motion of Appeal about a month later, on July 3, 1980.

The Utah decisions are numerous and dispositive in saying that matters such as urged by Appellants here, are not reviewable for the first time by the Supreme Court, if they were not presented to the trial court for, at least, the purpose of correcting any error the Appellant and Plaintiff now claims the trial court should have corrected without anyone asking him to do so.

One of the most recent of the many Utah cases enunciating the procedural rule above is Battistone v. American Stand, 607 P.2d 837 (Utah), 1980, which says:

> "These issues (reformation and mistake) were not raised below and plaintiff cannot be heard to raise them for the first time on appeal," citing Hanover v. Fields, 568 P.2d 751 (Utah 1977).

Another Utah case, Hamilton v. S. L. County Imp. Dist., 15 U.2d 216, 390 P.2d 235 (1964), says:

> "We need not canvass matters raised for the first time on appeal," citing No. Salt Lake v. St. Joseph Water Co., 118 U. 600, 223 P.2d 577 (1950).

Another case repeats the rule in the following language:

> The contention relating to strict liability is an attempt to inject that doctrine into this case for the first time on appeal. It was dealt with neither in the plaintiff's complaint, nor in the pretrial conference, nor at the trial. It is therefore not appropriate to address such a contention to this court. Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

Under the authorities above, the Supreme Court is warranted fully in either a dismissal of this appeal, or an affirmance.

In addition to the above, counsel for Respondent contends that the Points raised by Appellant are without merit, and respectfully answers them seriatum as follows:

I. The trial court correctly considered the enhanced value of Siegel's remaining property in calculating the judgment amount.

Appellant relies on Sec. 78-34-10, (2) and (4) to claim error in the Court's deduction of $4,000.00 from the conceded value of the land retained or severed from that taken.

The statute reads as follows:

> 78-34-10. Compensation and damages--How assessed.--The court, jury or referee must

hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

(4) Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the damages assessed under subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

(5) As far as practicable compensation must be assessed for each source of damages separately.

Those sections are not controlling in this case since the Appellant consented and agreed to plenary authority in the trial court to determine, "just compensation for the taking of the easement," without mentioning any statutory formula. Since the Court found there were no damages based on Plaintiff's complaint of trespass and prayer for damages--the basis of

of Plaintiff's claim--the Court proceeded under the stipulated authority to assess damages. The Court found actual damages by deducting from the value of the land taken, the enhanced value of the adjacent land, by way of increased equity, which would have then had a market value of $16,333.00 plus $4,000.00, or $20,333.00, representing an actual windfall to the Appellant of $4,000.00 in the market value asset.

The $4,333.00 judgment, therefore, plus the $4,000.00 gain to Appellant, represented the actual value of land taken, namely $8,333.00.

Sub-sections (2) and (4) show that in order to invoke them as a formula to assess damages, a condition precedent is an award for damages to the remaining property. The lower court held here that there was no damage to such property from which a possible "benefit" could be deducted, consequently, the court apparently being fully aware of the inapplicability of the statutory formula, and having been authorized to do so, applied the established market value principle.

The case cited by Appellant upon which he relies, Automotive v. Provo, 28 U.2d 358, 502 P.2d 568 (Ut. 1972) appears inapplicable under the particular facts of this case.

The Appellant, at no time before Notice of Appeal, complained about or objected to the manner in which the $4,000.00 was to be applied in the process of arriving at the "net" and "actual" damage that Appellant claimed he suffered. This, together with the fact that Appellant did not raise the point

before his Notice of Appeal, fully warrants a conclusion that his Point I is without merit.

II. The Court did not err in failing to award inter

The Appellant in his complaint alleged that the Respondent installed a sewer in the role of "trespasser," with resultant damage, praying for restitution of the property to its status quo, together with "such damages as the Court shall determine will adequately compensate Plaintiff for the damage to the tract."

This complaint was never amended. No prayer for "accrued interest" under any statute, condemnation or otherwis was prayed for, and the case progressed throughout on the same basis. The question of interest was never raised by anyone, and no one excepted or objected to any failure of the Court to award interest, before, during or after trial and before Notice of Appeal.

The arguments presented above as preliminary to answering the three Points on Appeal are as cogent, or moreso to Appellant's Point II, as they were to this case generally, and the citations there are equally germane to this Point II, and the Supreme Court equally is as warranted in refusing to review this Point, or affirming the trial court as before.

III. An award of damages for wrongful entry and occupation may or may not be awardable, but at best could be but nominal.

The above statement is debatable only if the Supreme

Court deigns to review it, which Respondent urges should not be done for the reasons stated above and the authorities cited having to do with refusal to hear issues not raised in the lower court. The trial court found no damages and the Appellant did not ask the court to reconsider, reassess or amend its judgment, and consequently, the Appellant's Point III is without merit.

CONCLUSION

The case should be dismissed, failing which, the judgement affirmed.

Respectfully submitted,

FRED E. FINLINSON
Attorney for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of January, 1981, true and correct copies of the above and foregoing Brief of Defendant-Respondent were mailed, postage prepaid, to Mr. Frank J. Allen, Attorney for Plaintiff-Appellant, 200 American Savings Plaza, 77 West Second South, Salt Lake City, Utah, 84101.

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January 27, 1981

Geoffrey J. Butler
Clerk of the Supreme Court
State of Utah
323 State Capitol
Salt Lake City, UT 84114

RE: Siegel vs. Salt Lake County Cottonwood Sanitary District
Case No. 17181

Dear Mr. Butler:

A few days ago, I filed in the above entitled matter a Brief on behalf of the Defendant-Respondent, Salt Lake County Cottonwood Sanitary District. In reviewing my brief, I discovered that I had omitted to give the citation for a quotation from a Utah case.

I would like to furnish the citation at this time. Near the top, on page 5 of the Brief, the first quotation commencing with the words, "The contention relating to strict," was cited from the Utah case of Stephen Simpson vs. General Motors Corp., 24 Utah 2d 301; 470 P. 2d 399. It would be appreciated, if in some way, in said Brief, it could be indicated that the said quotation was from the Utah case as hereinabove set forth, and that the same should be added to the Table of Authorities cited on Page ii thereof. I am enclosing 10 copies of this letter.

Yours very truly,

Fred L. Finlinson
of
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Attorney for Defendant-Respondent

dm

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