

1955

Raymond A. Kelly and Mildred C. Kelly v. Wendell Scott et al : Brief of Appellants

Utah Supreme Court

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Lewis S. Livingston; Attorneys for Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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FEB 20 1956

RAYMOND A. KELLY and
MILDRED C. KELLY, Clerk, Supreme Court, Utah
Plaintiffs and Appellants,

— vs. —

WENDELL SCOTT, ANNE SCOTT,
and WILLIAM H. THAYNE, dba
THAYNE & COMPANY,
Defendants and Respondents.

Civil No.
8403

Appellants' Brief

LEWIS S. LIVINGSTON,
Attorney for Appellants

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Authorities

Statutes:

Rule 60(b) (5) (6) and (7).

Texts:

Am. Jur., Vol. 31, Sec. 430.

Am. Jur., Vol. 30, Sec. 208.

Barron and Holtzoff, Federal Practice, Sec. 1330, Sec. 1321.

Moore, Federal Practice, Vol. 6, Page 4020, Vol. 7, Sec. 60.26,
P. 275.

Williston on Contracts, Revised Edition, Sec. 887A.

Restatement of Contracts, Sec. 261.

Cases Cited:

Tozer v. Charles A. Krause Milling Co., 189 F. (2d) 242.

Klapprott v. U. S., 335 U. S. 601.

Butler v. Eaton, 141 U. S. 240, 11 S. Ct. 985, 35 L. Ed. 713.

Van Tassel v. Lewis, 118 U. 356, 222 P. (2d) 350.

Tucker v. Dougherty Roofing Co., 137 S. W. (2d) 884.

Murphy v. Schuster, 111 So. 427.

McIntyre v. Ajax Mining Co., 60 P. 552, 20 U. 323.

Bank of America v. Engleman, 225 P. (2d) 597.

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Appellants' Brief

STATEMENT OF FACTS

This is an action brought by the plaintiffs as sellers under a real estate sales agreement dated June 6, 1953 (admitted as an exhibit herein) wherein the defendants Scott are buyers and the defendant Thayne is the real estate agent. Pursuant to said agreement Scott entered into possession of the property on the 20th day of June, 1953, having made the down payment described in the

agreement. During the next three and a half months the buyer remained in possession and made certain alterations to the property including the installation of drapery rods, later removed. Prior to the entry of possession, plaintiff performed certain decorating to the special order of the buyer. About the middle of September 1953 the buyer having been unable to supply the balance of the purchase price as provided in said agreement, this action was originally started by the service of summons only. On October 1, 1953 the original complaint was filed asking for restoration of the premises, reimbursement for damage to the property during the term of possession, and damages for breach of the agreement including an \$800.00 real estate commission. The amounts paid by the buyer on the agreement were at all times held by the defendant Thayne. Subsequent to the entry of default judgment and issue of execution for restoration of the premises, plaintiff and defendant Scott entered into a stipulation dated November 11, 1953 whereby they agreed that plaintiff, seller, was entitled to \$115.00 per month for the period of the occupancy of the defendant Scott. It was further agreed that Thayne was authorized to restore to Scott all of the sums represented by the purchase price which it had held except the sum of \$800.00 claimed by it for real estate commission and by plaintiff as an element of damage and the further sum of \$500.00 claimed as damage by the seller, and to pay plaintiff the stipulated rental. The defendant Thayne was at this time made a party to the action by service upon him of an amended complaint, asking that he be required to set forth his

claim. This procedure was pursuant to stipulation between plaintiff and Scott. By answer to the amended complaint, Thayne admitted the obligation to pay the real estate commission and consented that judgment be entered in accordance with the prayer of the amended complaint. On March 4, 1954, the defendant, Scott, having failed to answer the amended complaint, upon motion of Thayne, judgment by default was entered awarding plaintiff judgment against Scott for \$1300.00 and awarding to defendant, Thayne, a judgment "over" in the amount of \$800.00 against the plaintiff Kelly, representing the real estate commission. On June 5, 1954, satisfaction of judgment was filed, the money having remained at all times in the possession of Thayne. On August 21, 1954, Scott filed a motion to vacate the default judgment on the theory that defendant, Scott, was not in fact in default, since by the amended complaint no new issues were made with respect to him and no answer was required. On February 7, 1955 the motion to vacate the default judgment was heard and order entered vacating said judgment. On March 9, 1955 the matter was tried (before a division of court not previously involved in any of the foregoing matters) and judgment entered in favor of defendants, Scott, against plaintiff for \$1300.00. Simultaneously judgment was entered in favor of plaintiff against Thayne for \$800.00 representing the real estate commission. On March 23, 1955 upon motion of Thayne an order was entered amending the previous order of February 7, 1955 to recite that the original default judgment was vacated only as to the defendant Scott on the theory that Thayne was never properly in

the law suit, since there was no issue as to him in the amended complaint. Later, upon motion of Thayne, the judgment of March 9, 1955 was amended to vacate the judgment of \$800.00 in favor of Kelly against Thayne on the theory that the original default judgment of March 4, 1954 constituted an adjudication of the issue of the real estate commission. Plaintiff appeals from the judgment against him of the full amount of \$1300.00, the order vacating the judgment in his favor against Thayne of \$800.00, and the order denying his motion to vacate the original default judgment of March 4, 1954.

POINTS RELIED UPON

1. Plaintiff was entitled to an order vacating the default judgment of March 4, 1954 in its entirety, that portion constituting a judgment "over" in favor of Thayne, being a judgment based upon a prior judgment which had been "satisfied, released, or discharged, or a prior judgment upon which it is based having been reversed or otherwise vacated, and it being no longer equitable that a judgment should have prospective application" within the meaning of rule 60b (6) *Utah Rules of Civil Procedure*.

2. The original sales agreement was a valid subsisting agreement not conditioned upon the obtaining of a loan for its discharge.

3. Plaintiff is entitled to damages for restoring the condition of the premises irrespective of the agreement.

ARGUMENT

POINT NO. 1. At the outset, there can be no argument but that the record clearly shows from the stipulation of the original plaintiff and defendant and the amended complaint that the whole purpose of bringing the defendant Thayne into the law suit was for the protection of the plaintiff respecting the issue of the \$800.00 real estate commission. The default judgment entered March 4, 1954 at the solicitation and instigation of Thayne must stand or fall in its entirety. That portion which purports to award a judgment "over" is based upon the other portions of the award within the meaning of rule 60b (6). The only reason Scott was thereafter able to obtain the vacation of this judgment subsequent to the running of the time permitted therefor was because the judgment was void, within Rule 60b (5). It is submitted the judgment was void in its entirety. Our rule, except for the addition of subsection (4) is the same as Federal Rule 60B and reference must necessarily be made to the Federal Rules for the construction thereof. The court, in denying plaintiffs' motion to vacate the original default judgment, was impressed with the fact that a year had transpired since the entry of the original default judgment and the motion to vacate the same. Appellant emphasizes that the period between the very novel and intricate procedure by which Thayne obtained his order correcting the order setting aside the default judgment to refer to just the portion thereof against Scott and the filing of the motion to vacate the default judgment in its entirety was little more than

sixty days, to-wit: 67 days. It is further submitted that the time interval to be used as a test for determining whether plaintiff moved for the vacation of the judgment within a reasonable time is this shorter period. That a reasonable time is the only test for the making of this motion reference is made to *Moore, Federal Practice*, Volume 7, Section 60.26, Page 275:

“Because of the basis for relief under clause (5) the rule quite naturally provides that the only time limitation under clause (5) is that it be made within a “reasonable” time. . . . The reasonable time should be applied to the end that substantial justice is done. This means that the movant should be given ample time under all the circumstances within which to make his motion.”

Clause (5) of the federal rule is our clause (6).

Construing this rule the case of *Tozer vs. Charles A. Krause Milling Company*, 189 F. (2d) 242 to the effect that rule 60 (B) should be given a liberal construction, says that any doubt should be resolved in favor of the petition to set aside the judgment so that the case can be heard on its merits. In the instant case the action was heard on its merits and a result contrary to the default was awarded. Clearly the whole basis of the judgment was subverted and rendered null and void. The entire foundation of that part of the judgment in favor of the plaintiff is, to the judicial knowledge of the court, without any validity force or effect and ought never to have existed. This is exactly the situation to which rule 60B is aimed. That this rule should be followed to do substantial justice and without regard to

strict construction of pleading (as to construe the amended complaint as authorizing a consent judgment) reference is made to the land-mark case of *Klapprott vs. United States*, 335 U. S. 601 at Page 614 where the Court denies the contention that rule 60B is abrogated by strict analysis of pleading and says:

“To accept this contention would introduce needless confusion in the administration of rule 60-B and would also circumscribe it with needless boundaries. Furthermore, 60-B strongly indicates on its face that courts no longer are to be hemmed in by uncertain boundaries of these and other common law remedial tools. In simple English, the language of the “other reasons” clause for all reasons except the five particularly specified vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”

This case suggests that relief from the original default judgment as to the portion not previously vacated should be given pursuant to *either* of the final two subsections of rule 60-B.

POINT NO. 2: The trial court was of the opinion that the description of the purchase price as being “cash to a maximum loan” rendered the contract unenforceable as being subject to a condition precedent to liability thereon. It is submitted that this phrase should not be so construed since the buyer was in effect agreeing to pay a given purchase price for the property by making a down payment thereon and agreeing to pay the balance in cash over and above such amount as he, the buyer,

might be able to raise by real estate mortgage loan. No particular amount was specified. Conceivably a loan of a very nominal amount would have been a "maximum" loan. It is submitted the clause in the contract was not an aleatory promise over which the parties had no control or over which the seller had any control but was rather wholly within the province of the buyer to negotiate. As pointed out in *Williston on Contracts, Revised Addition*, section 887A, a promise might be construed as a condition barring liability where the necessary event is peculiarly within the control and power of the promisee or where the cooperation of the promisee is required. It is submitted that in this case the evidence will show that although that cooperation was given, it was in fact the failure of the promisor only that was here involved. It is submitted that the fact that no words of condition, as usually considered, are present in this contract since the evidence shows (cross examination of Mrs. Scott) that buyer at all times material had the necessary resources to discharge the purchase price. It would not be fair to say that the parties intended the words to constitute a condition even though the contract might normally be considered to be conditional upon its face. The parties' intention would negative this conclusion. That this construction is justified see *Malden Knitting Mills vs. U. S. Rubber Company*, 16 N.E. (2d) 707. This court has held in the case of *VanTassel vs. Lewis*, 118 U. 356, 222 P. (2d) 350, that even use of the words "in consideration of" do not constitute a condition under appropriate circumstances. In the case of *Tucker vs. Dougherty Roofing*

Company, 137 S.W. (2d) 884 a contract for re-roofing cabins provided: "cash on completion subject to approval of loan being negotiated at present time." This contract was held not to be a conditional contract but merely a statement of terms as to mode of payment. It is submitted that this parallels our case. That courts favor such construction as opposed to conditions is apparent from the *Restatement of Contracts*, Section 261. This court in the case of *McIntyre vs. Ajax Mining Company*, 60 P. 552, 20 U. 323, held that a contract for payment of money "out of proceeds of ore sales, compromise or otherwise" was not conditional upon there being proceeds of ore sales or compromise. It is submitted that the contract with respect to mortgage loan is intended to define the time of payment only. A *reasonable* time must necessarily be implied. *Bank of America vs. Engleman*, 225 P. (2d) 597.

POINT NO. 3. It is submitted without argument that it was error not to award \$300.00 damages for restoration of the premises after possession was surrendered to plaintiff, since even if the contract was not enforceable as being subject to a condition or otherwise, the subsequent relationship between the buyer and seller, as even landlord and tenant, would demand that such award be allowed.

CONCLUSION

It is respectfully submitted judgment entered herein March 9, 1955 in favor of Scott for \$1300.00 and for

Plaintiff for \$800.00 be reinstated, or, in the alternative,
that the original judgment of March 4, 1954 be reinstated.

Respectfully submitted,

LEWIS S. LIVINGSTON,
Attorney for Appellants.