1999

John Collins and June Collins v. Sandy City Board of Adjustment and Sandy City Corporation: Reply Brief

Utah Court of Appeals

Franklin L. Slaugh; Attorney for Appellants.
Steven C. Osborn; Attorney for Appellees.

IN THE UTAH COURT OF APPEALS

Appeal No. 991068-CA

JOHN COLLINS AND JUNE COLLINS,

Petitioners and Appellants,

v.

THE SANDY CITY BOARD OF ADJUSTMENT AND SANDY CITY CORPORATION, A MUNICIPAL CORPORATION,

Respondents and Appellees

REPLY BRIEF OF APPELLANTS

Appeal from a final order of the Third Judicial District Court for Salt Lake County, Judge Timothy R. Hanson

District No. 980912601

Steven C. Osborn
10000 Centennial Parkway
Sandy, Utah 84070
Attorney for Respondents
Tel. (801) 568-7170

Franklin L. Slaugh
880 East 9400 South, Suite 103
Sandy, Utah 84094
Attorney for Appellants
Tel. (801) 572-4412

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AN INTERVENING DECISION THAT ALTERS THE EXISTING SITUATION IN A CASE PRECLUDES THE APPLICATION OF THE PRINCIPLES OF RES JUDICATA AS A BAR TO THE LATER CASE.

A. Legal principles governing this case have significantly changed between the time the 1996 case was decided and the time the 1998 case was decided.

Even if this Court were to agree with Sandy City's argument that the issues litigated in the 1998 case are identical to the issues litigated in the 1996 case, the law in Utah is well settled that the Court must make the two additional inquiries set forth in *Norman v. Murray First Thrift & Loan Company,* 596 P. 2d 1028, 1032 (Utah 1979) before applying the principles of collateral estoppel:

> 1. Whether the controlling facts or legal principles have changed significantly since the prior judgment.
>
> 2. Whether other special circumstances warrant an exception to the normal rules of preclusion.

In the instant case, the legal principles governing the litigation changed significantly between the 1996 case and the 1998 case when this Court decided *Brown, et. al. vs. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah,* 957 P. 2d 207 (Utah App. 1998). Sandy City argues that this is not the type of "change" that would warrant disregarding the general rules of res judicata. It is, however, difficult to imagine a change in controlling legal principles that would be more applicable than in this case. *Brown,* supra, involved the precise issue of whether Sandy City's zoning ordinances could or should be interpreted to prohibit short-term rentals within Sandy

City. The "legal principles" applied in the petitioners' 1996 case prompted a ruling by the District Court that the ordinances could be interpreted to prohibit such use. The ruling in *Brown,* i.e., that the Sandy City ordinances then in effect did not prohibit such use, changed the legal principles to be applied in interpreting the relevant Sandy City zoning ordinances. Based upon that change in controlling legal principles, the petitioners in this case had the right to petition the court for non-conforming use status with respect to their properties located in Sandy City. This appeal should not therefore be barred by collateral estoppel.

B. The federal cases cited by the Appellee are not controlling in this case.

Sandy City cites a number of federal case authorities in its brief to support its argument that principles of res judicata should bar the Petitioners' appeal in this case. While those authorities are persuasive in the federal arena in cases involving federal questions, they are not controlling in this case where no federal questions or federal jurisdictional issues are presented for review. In any event, the inquiry set forth in *Norman v. Murray First Thrift & Loan Company,* supra, would still be required to be made and would, as argued above, result in the conclusion that principles of res judicata should not operate as a bar in this case.

The general rule enunciated by the U.S. Supreme Court in *State Farm Mut. Auto Ins. Co. v. Duel,* 324 U.S. 154 (1945), i.e., that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation, has not been overruled by *Federated Dept. Stores v. Moitie,* 452 U.S. 394 (1981), as suggested by Sandy City.

(*Federated Dept. Stores v. Moitie,* supra, held that accepted principles of res judicata determine the preclusive effect of a federal court judgment. 452 U.S. at 401.) In fact, in the case of *Arizona v. California,* 460 U.S. 605 (1983), the U.S. Supreme Court, citing *Federated Dept. Stores v. Moitie,* supra, stated that "[Judgments] are subject to the general principles of finality and repose, *absent changed circumstances or unforeseen issues not previously litigated.*" [emphasis added] *Arizona v. California,* 460 U.S. 605, 619(1983)

II. IT SHOULD BE PRESUMED THAT THE PROPERTY OWNERS WERE USING THEIR PROPERTIES AS SHORT-TERM RENTALS AT THE TIME OF THE CEASE AND DESIST ORDER.

In this case, where Sandy City issued its Cease and Desist Order (R. 28) demanding that Mr. and Mrs. Collins cease using their real properties located in Sandy City as short-term rentals, it can logically, and should in fairness, be presumed by this Court that in fact the Petitioners were using their properties for that purpose prior to the issuance of the Cease and Desist Order. Mr. and Mrs. Collins never at any time denied that this was the use being made of the properties owned by them. In fact, evidence was introduced at the Board of Adjustment hearing in 1996 that Mr. and Mrs. Collins were utilizing all of their properties as short-term ski rentals. Mr. Collins testified that he began doing ski rentals in 1994. He further testified that he owned two properties when he started the ski rental business in 1994 and that he purchased the other two properties afterward. (R. 350) This testimony was not controverted. The burden should, therefore, be properly shifted to Sandy City at this juncture to prove that the Petitioners were not in fact using their properties for short-term rentals on the date of the Cease and Desist Order in March, 1996. Admittedly,

this places Sandy City in the somewhat awkward position of alleging that it had no grounds for issuing that order in the first place.

III. THE VESTED PROPERTY RIGHTS OF THE APPELLANTS ARE SUPERIOR TO RIGHTS CREATED BY THE SANDY CITY ZONING ORDINANCES.

Zoning ordinances are in derogation of a property owner's common law right to unrestricted use of his or her property. *Patterson v. Utah County Board of Adjustment,* 893 P. 2d 602, 606 (Utah App. 1995). As previously argued in the Appellant's Brief, preexisting, lawful uses of property existing prior to zoning ordinances are generally considered to be vested rights that zoning ordinances may not abrogate. These rights are grounded in constitutional law. Sandy City argues that the property rights of other property owners would be adversely affected if this Court were to not impose the bar of res judicata in this case. This is speculation on the part of Sandy City, however, and does not provide a valid reason for violating the constitutional rights of Mr. and Mrs. Collins to continue a valid use of their properties, subject to existing laws governing their use and maintenance of those properties in the community of Sandy City.

IV. THE SANDY CITY BOARD OF ADJUSTMENT ISSUED ITS DECISION WITH RESPECT TO ALL PROPERTIES OWNED BY THE PETITIONERS SITUATED IN SANDY CITY.

Sandy City alleges in its Brief of Appellees (p. 22) that Appellants have not identified any evidence in the record showing that the Maison Drive property was used for short-term rentals at any time. In fact, an examination of the Minutes of the Board of Adjustment dated August 8, 1996 indicates that the Board of Adjustment

considered, and listened to testimony respecting, all four properties, including the property at 9255 South Maison Drive. (R. 348, 351). Testimony was specifically elicited from residents living on Maison Drive. (R. 358, 359) In the 1998 proceedings before the Sandy City Board of Adjustment, testimony was again elicited from concerned residents, including a resident living on Maison Drive. While Sandy City is correct that Mr. Paul Harris expressed his opinion that the renters in the house [on Maison Drive] had longer leases, he also stated that he had noticed an ad placed by Mr. and Mrs. Collins in a travel magazine advertising the house as a ski rental. (R. 235) It should be noted that none of the testimony taken in the 1996 or 1998 board of adjustment hearings was under oath or subject to any cross-examination by the Petitioners' Attorney. No foundation for the testimony was required nor was relevancy a concern of the Board. The testimony elicited in 1998 was not limited to facts pertaining to time periods when the properties owned by Mr. and Mrs. Collins were in fact being used as short-term rentals (prior to March 26, 1996). In fact most, if not all, of the testimony heard was unrelated to that subject. (R. 232-235)

CONCLUSION

The Petitioners hereby request this Court to reverse the decision of the District Court granting the Respondent's Motion for Summary Judgment and to declare that the Petitioners established a valid, non-conforming use with respect to

their properties owned and held by them, situated in Sandy City, prior to the enactment of a valid ordinance prohibiting such use, and that such use may continue until otherwise terminated by law or abandonment by the Petitioners.

RESPECTFULLY SUBMITTED this _____day of September, 2000.

_____

Franklin L. Slaugh
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Reply Brief of Appellant were mailed, first class postage prepaid, this _____day of September, 2000 to the following:

Steven C. Osborn
Sandy City Attorney
10000 Centennial Parkway
Sandy, UT 84070

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