1956

Echo Ney, Trustee, Wasatch Homes, Inc. v. G. T. Harrison and Alda J. Harrison : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ECHO NEY, TRUSTEE,
WASATCH HOMES, INC.,
a corporation,
Plaintiff and Appellant,

— vs. —

G. T. HARRISON and
ALDA J. HARRISON,
Defendants and Respondents.

Case No.
8437

Brief of Respondent

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STATEMENT OF FACTS

This is an action to recover a real estate commission. The case arose out of the sale of certain real property located in Salt Lake City, Utah, known as the Snow Apartments.

On September 16, 1952, the defendants and respondents were the joint owners of an equity in the Snow Apartments. On that date, or shortly thereafter, respondents entered into an Earnest Money Agreement for the sale of this equity interest to one Einar Asp and

his wife. One Dean Perry, an agent of plaintiff and appellant Wasatch Homes, Inc., was instrumental in obtaining the signatures of respondents to the Earnest Money Agreement. (R. 114, 115)

Dean Perry, either individually or in his capacity as agent of Wasatch Homes, Inc., was not a party to the Earnest Money Agreement. A listing contract was never signed between respondents, or either of them, and Wasatch Homes, Inc. (R. 114, 115)

Subsequently, the Snow Apartments were sold to Einar Asp. The sale was later set aside by the Third District Court because of the default of Asp. (R. 115)

On November 12, 1953, appellants brought an action against the respondents for a real estate commission for the sale to Asp. It was alleged that Wasatch Homes, Inc., was entitled to a commission for procuring a purchaser for the Snow Apartments, and that Wasatch Homes, Inc., had assigned its claim to Echo Ney, Trustee. (R. 1, 2)

On December 9, 1953, a default was entered by the appellants against Alda J. Harrison, and on the same day the appellants obtained a default judgment against her for the entire amount claimed. (R. 3, 4)

On February 27, 1954, G. T. Harrison filed his answer to Appellants' Complaint.

On October 30, 1954, Alda J. Harrison made a motion, supported by her affidavit, to set aside the default and default judgment entered against her. (R. 15, 16) The motion was set for hearing. Counsel for both

appellants and respondents were present to argue the motion, but no evidence was offered beyond the affidavit of Mrs. Harrison.

On November 15, 1954, the court entered an order setting aside the default and default judgment. (R. 17)

On April 26, 1955, the cause was tried to the court on the Amended Complaint of the appellants, and on September 21, 1955, the court entered judgment in favor of the respondents, no cause of action. (R. 116)

Appellants now appeal both from the order vacating the default and default judgment and also from the final judgment.

The statement of points and argument will be divided into two sections. Section I will deal with the order vacating the default and default judgment; Section II will concern the Final Judgment.

SECTION I

STATEMENT OF POINTS

1. THE SUPREME COURT CAN ONLY REVIEW THE FACTS PLACED BEFORE THE TRIAL COURT IN DETERMINING WHETHER OR NOT THE TRIAL COURT ERRED IN SETTING ASIDE THE DEFAULT AND DEFAULT JUDGMENT ENTERED AGAINST ALDA J. HARRISON.

2. WHETHER OR NOT TO VACATE THE DEFAULT AND DEFAULT JUDGMENT ENTERED AGAINST ALDA J. HARRISON WAS WITHIN THE SOUND DISCRETION OF THE COURT.

ARGUMENT

1. THE SUPREME COURT CAN ONLY REVIEW THE FACTS PLACED BEFORE THE TRIAL COURT IN DETERMINING WHETHER OR NOT THE TRIAL COURT ERRED IN SETTING ASIDE THE DEFAULT AND DEFAULT JUDGMENT ENTERED AGAINST ALDA J. HARRISON.

In determining questions on appeal a reviewing court must decide the issues from the record that was before the trial court at the time of the error complained of. This is the rule followed in the overwhelming majority of the jurisdictions, including Utah. In 3 American Jurisprudence, Section 692, pages 284 and 285, the rule is stated as follows:

> "It is a well-settled rule of appellate procedure that all questions must be tried and determined by the record as certified to the appellate court. The record imports absolute verity and resort cannot be had to anything dehors the record for the purpose of contradicting it. (citations) In other words, the record is regarded as conclusive, (citations) and nothing can be assigned for error which contradicts the record. (citations)"

The same rule is applicable to interlocutory proceedings. In discussing the review which an appellate court may make of such proceedings, 4 Corpus Juris Secundum, Section 1160, page 1652, states as follows:

> "The action of the trial court upon interlocutory proceedings will not be reviewed on appeal unless the record sets out the motion and ruling thereon, and such facts with regard to such proceedings as will enable the appellate court to determine the

correctness and propriety of the decision of the trial court. (citations)''

In this respect the Utah Supreme Court, in the case of *United States Building & Loan Ass'n. v. Midvale Home Finance Corporation, et al.,* being case No. 5462 as docketed in the Supreme Court, and reported in 46 P. 2d 672, held that:

> ''Jurisdiction of Supreme Court is limited to reviewing case made in court below, and Supreme Court cannot determine questions not within pleadings and not heard or determined by trial court.''

The order vacating the default and default judgment against Alda J. Harrison was entered after notice and hearing. At the time of the hearing the only evidence presented to the court was the affidavit of Alda J. Harrison. Appellants' counsel was present at the hearing, but did not offer any counter affidavits or present any evidence for the consideration of the court. THE QUESTION OF WHETHER OR NOT THE DEFAULT AND DEFAULT JUDGMENT SHOULD OR SHOULD NOT HAVE BEEN VACATED WAS NEVER AGAIN BEFORE THE COURT.

The exhibits referred to by appellants in their brief were introduced after the hearing on the motion to vacate. They were introduced at the trial of the cause on the merits where the issue of the default and default judgment was not raised. The only issues raised at the trial of the cause went to the merits of the case. These exhibits cannot be used on appeal to prove error in vacating the default and default judgment when they

were not before the court when the order to vacate was entered.

The only evidence which this court can consider in determining whether or not the lower court committed error in vacating the default and default judgment is the evidence which was before the court when the issue of the default and default judgment was raised. The only evidence before the court at that time was the affidavit of Alda J. Harrison.

2. WHETHER OR NOT TO VACATE THE DEFAULT AND DEFAULT JUDGMENT ENTERED AGAINST ALDA J. HARRISON WAS WITHIN THE SOUND DISCRETION OF THE COURT.

The general policy of the law is that every man shall have his day in court. This policy has always been recognized by the Utah Courts, and our procedures have been formulated so that substantial justice may be encouraged and not obstructed by arbitrary rule. In the case of *Utah Commercial Bank v. Trumbo,* 17 Utah 198, 53 P. 1033, decided June 30, 1898, the court said, on pages 207 and 208 of the Utah Reports:

> "The power of the court to set aside judgments by default is recognized and conferred in section 3005, R.S. Utah, and should be liberally exercised, for the purpose of directing proceedings and trying causes upon their substantial merits; and where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits.
>
> * * *
>
> "No general rule can be laid down respecting the

> discretion to be exercised in setting aside or refusing to set aside a judgment by default. So it would be impossible to state what degree of negligence would justify the court in refusing relief in all such cases. Each case must necessarily depend upon its own peculiar facts and circumstances, but the discretion should always be so exercised as to promote the ends of justice."

Utah has now adopted the Rules of Civil Procedure. These rules continue the policy of seeking substantial justice between litigants and leave to the sound discretion of the trial court whether or not to set aside and vacate default judgments. Rule 55(c), Utah Rules of Civil Procedure, provides as follows:

> "Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Rule 60(b) provides a number of reasons which will justify a court in vacating and setting aside a judgment, and clearly indicates that the judge may exercise his sound discretion in the matter. Subsection (7) of Rule 60(b) provides that in addition to the reasons named a judgment may be set aside for

> "any other reason justifying relief from the operation of the judgment."

Under the provisions of these rules the holdings have consistently been that the trial court could vacate or refuse to vacate a default judgment at the exercise of his sound discretion. Such was the holding of *Warren v. Dixon Ranch Co.*, 260 P. 2d 741, which stated that:

> "Though an equity court no longer has complete discretion in granting or denying motion to vacate judgment, it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and Supreme Court on appeal will reverse trial court only where an abuse of such discretion is clearly shown."

In the matter of the discretion which may be exercised by the trial court see also: *Salt Lake Hardware Co. v. Nielson Land and Water Co.,* 43 Utah 406, 134 P. 911; *McWhirter v. Donaldson,* 36 Utah 293, 104 P. 731; *Cutler v. Haycock,* 32 Utah 354, 90 P. 897; *Nounnan v. Toponee,* 1 Utah 168; *Aaron v. Holmes,* 35 Utah 49, 99 P. 450.

As heretofore stated, the only evidence before the court at the hearing to set aside and vacate the default and default judgment was the affidavit of Alda J. Harrison. This affidavit set forth the following facts:

1. That Alda J. Harrison was divorced from respondent G. T. Harrison on May 11, 1953.
2. That the divorce decree in that action ordered G. T. Harrison to pay all commissions or costs which might arise in relation to the Snow Apartments.
3. That she believed that the divorce decree completely protected her from any action in connection with the Snow Apartments.
4. That she believed that by reason of the decree G. T. Harrison, alone, would be responsible for any claims arising from the sale of the Snow Apartments.
5. That she had no notice of judgment or of any court proceedings until she received a notice of garnishment proceedings.

6. That she did not willfully or intentionally ignore the summons and complaint with the intent of allowing the default and default judgment to be entered.

7. That she desired to enter an appearance in the action and to file an answer to the complaint. (R. 16.)

It is submitted that the affidavit presented sufficient facts to permit the trial court, in the exercise of its sound discretion, to vacate and set aside the default and default judgment. As was stated in the *Utah Commercial Bank* case, supra:

> "Each case must necessarily depend upon its own peculiar facts and circumstances, but the discretion should always be so exercised as to promote the ends of justice."

The case has now been tried on the merits. In that trial the court held that appellants had no cause of action against Alda J. Harrison. If this court were to reinstate the vacated default judgment the ends of justice would certainly not be served. Appellants would then have a default judgment against Alda J. Harrison when the trial court, in a trial on the merits, has held that no cause of action existed against her.

Respectfully submitted,

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SECTION II

STATEMENT OF POINTS

3. THE TRIAL COURT DID NOT ERR IN FINDING NO CONTRACT BETWEEN WASATCH HOMES, INC., AND RESPONDENTS.

ARGUMENT

3. THE TRIAL COURT DID NOT ERR IN FINDING NO CONTRACT BETWEEN WASATCH HOMES, INC., AND RESPONDENTS.

The trial court, in its Findings of Fact, found that the only contracts which were entered into by the respondents involving the sale of the Snow Apartments were an Earnest Money Agreement and a Uniform Real Estate Contract and that the only other parties to these contracts were Einar Asp and his wife. The court specifically found that "there is no admissible evidence as to the existence of a listing contract between either G. T. Harrison or Alda J. Harrison and Wasatch Homes, Inc." (Finding No. 5), and that Dean Perry "either in his own capacity or as an agent of Wasatch Homes, Inc., was not a party to the Earnest Money Agreement." (Finding No. 6) (R. 114, 115)

In its conclusions of law the trial court held that neither the above mentioned Earnest Money Agreement nor the Uniform Real Estate Contract between the Respondents and the Asps constituted a contract between Respondents, or either of them, and Wasatch Homes, Inc. (Conclusions 1, 2, 3, 4) (R. 115)

It is a fundamental principle of law that contracts

involving the sale of real estate, to be enforcible, must be in writing. Also, an agreement employing an agent or broker to purchase or sell real estate, to be enforcible, must be in writing. This is clearly set forth in the Statute of Frauds, Utah Code Annotated, 1953, Section 25-5-4, subdivision (5):

> "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
>
> "* * *
>
> "(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation."

The decisions under this provision of the code clearly indicate that an express oral contract to pay commissions to a real estate broker will not support a recovery unless there is an express contract in writing authorizing the broker to make the sale. Annotated under the above code provision is the case of *Case v. Ralph,* 56 Utah 243, 188 P. 640, which held that:

> "Under Comp. Laws 1917, Section 5817, requiring agreements authorizing brokers to purchase or sell real estate for compensation to be in writing, an express agreement to pay commissions will not support a recovery if there is no express contract authorizing the broker to make the sale."

and on page 641 of the Pacific citation the court states:

> "In view of our statute of frauds and the authorities hereinafter referred to, the only matters that can be considered by us arise upon the first cause of action, set forth in the complaint. The con-

trolling question therefore is: Does the complaint state a cause of action?

"Comp. Laws Utah 1917, Section 5817, so far as material here, provides:

" 'In the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith: * * * (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.' "

The court then cites a list of authorities in support of this proposition.

In the present controversy there was absolutely no written agreement between the Harrisons, or either of them, and Wasatch Homes, Inc. Nor was there any memorandum of any such agreement. As stated above, the only agreements presented to the trial court were agreements between the Harrisons and the Asps, agreements to which Wasatch Homes, Inc., was not a party.

The appellants, through random selection of statements in evidence, contend that there was a parol agreement between Mrs. Harrison and Dean Perry involving the sale of the Snow Apartments. Even were this true, a parol agreement will not support a recovery for a commission for the sale of real property. To this effect we call the court's attention to the cases of *Smith Realty Company v. Dipietro, et ux*, 77 Utah 176, 292 P. 915, and *Van Leeuwen v. Huffaker*, 78 Utah 521, 5 P. 2d 714, both of which specifically hold that a broker must both allege and prove an express contract of employment as a basis

of a broker's action to recover commissions, and that the document or documents transferring or purporting to transfer the properties between the buyer and seller are not a sufficient agreement to take the matter out of the statute of frauds.

CONCLUSION

The court having found no express contract between either of the respondents and Wasatch Homes, Inc., or between either of the respondents and Dean Parry as agent of Wasatch Homes, Inc., and having further found that the earnest money agreement entered into between the respondents and one Einar Asp and his wife did not constitute a contract between the respondents or either of them and Wasatch Homes, Inc., respondents submit that the decision of the trial court must be affirmed.

Respectfully submitted,

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