

1981

In The Matter of the Estate of Gertrude Frandsen Shepley, Deceased v. Paul J, Barton, et al. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the Estate of)
GERTRUDE FRANSDEN SHEPLEY,)
deceased,)
)
Respondent,)
vs.) Case No. 17618
)
PAUL J. BARTON, et al.)
)
Petitioners-)
Appellants.)

BRIEF OF RESPONDENT

Appeal From Orders of the Third Judicial
District Court in and for Salt Lake County
The Honorable James S. Sawaya, Judge

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Case No. 17618

BRIEF OF RESPONDENT

NATURE OF THE CASE

By motion, Appellants sought an order from the Probate Division of the Third Judicial District Court in and for Salt Lake County (the "Probate Court") directing the Respondent to reserve \$10,000 to pay attorney's fees and other expenses in the event the Seventh Judicial District Court in and for Carbon County (the "Carbon County Action") should award such fees and expenses in favor of Petitioners in a declaratory judgment, specific performance, and damage action therein pending; or, in the alternative, an order granting them an extension of time in which to commence a proceeding in the Probate Division to contest disallowance of such fees and expenses. R. 47.

LOWER COURT DISPOSITION

By order dated January 21, 1981, and minute entry dated February 25, 1981, Judge James S. Sawaya denied Appellants' motions.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the lower court's orders.

STATEMENT OF FACTS

The Respondent disagrees with the Appellants' statement of facts in several material respects. The controlling facts in Respondent's view are set forth below.

On November 10, 1979, Charles R. Shepley, as attorney in-fact for Gertrude Frandsen Shepley, executed an Earnest Money Receipt and Offer to Purchase (the "Earnest Money Agreement") in favor of Steve Wright, Paul Barton, tr, et al. The property to be sold was described as:

80 Acres (SW 1/4 of the SW 1/4 of Section 23T 14 South R10 East and all of the SE 1/4 of the SE 1/4 of Section 22T 14 South R10 East along with all water shares belonging to said property.)

Lines 45 to 48 of the Earnest Money Agreement award the prevailing party its expenses, including a reasonable attorney's fee, in any action to enforce the terms of the Earnest Money Agreement. R. 42.

Gertrude Frandsen Shepley died December 1, 1979. R. 1. Charles R. Shepley was appointed the personal representative of the estate on February 11, 1980. R. 18. On February 15, 1980, the personal representative of the estate caused notice to creditors to be published. R. 21.

The Uniform Real Estate Contracts submitted by the

Appellants to the personal representative for execution to close the transaction did not follow the terms of the Earnest Money Agreement. The Uniform Real Estate Contracts, among other things, included in the description of property being sold, 46.6 shares of stock in Price River Water Users Association. This stock is not described in the Earnest Money Agreement. R. 42. A revised Uniform Real Estate Contract was submitted to Appellants, which by letter of April 1, 1980, they rejected. R. 44. This letter notified the personal representative that Appellants would resort to court action.

We will close with this contract as to the other sellers and sue for specific performance as it pertains to your client. We believe under the terms of the original earnest money agreement signed by your client that he will be responsible for the additional costs we incur in settling this matter. (Emphasis added) R. 44.

By letter dated June 17, 1980, the personal representative, through his attorney, reaffirmed his position, "which was communicated to Mr. Barton prior to his April 1, 1980, letter that the 46.6 shares of Price River Water Users Association stock were not included in the Earnest Money Receipt and Offer to Purchase." The letter further indicated the writer's belief that the Earnest Money Agreement was unenforceable.

On or about September 22, 1979, Appellants sued the Respondent, and the personal representative, individually, in the Carbon County Action, seeking declaratory relief, specific performance, and other relief. Thereafter, on December 22, 1980,

for reasons known only to the Appellants, they filed a Petition for Order Requiring Reservation of Funds and Petition For Extension of Time to Contest Disallowance which denials are the subject of this appeal. R. 47-48. These petitions were denied on January 21, 1981. R. 49. A Motion for Clarification of Ruling was then filed. R. 51-52. This motion was also denied R. 57.

SUMMARY OF ARGUMENT

POINT I. The Probate Court Properly Denied the Petition for an Order Requiring Reservation of Funds.

POINT II. The Probate Court's Denial of the Petition for Extension of Time to Contest Disallowance was correct.

ARGUMENT

POINT I.

THE PROBATE COURT PROPERLY DENIED THE PETITION FOR AN ORDER REQUIRING RESERVATION OF FUNDS

A. The Presentment Of A Claim Pursuant To Utah Code Ann. 1953, § 75-3-804 Is A Prerequisite To The Payment Of Contractual Attorney's Fees and Litigation Expenses.

The terms of the Earnest Money Agreement call for the Appellants to pay to the Respondent the sum of \$80,000 for the Respondent's 1/4 interest in the property being sold. This presumes that Appellants will be successful in the lawsuit for declaratory judgment, specific performance, and damages now pending in Carbon County Action. The only consideration received by Respondent is a check for \$1,500, which remains uncashed.

pending resolution of the foregoing lawsuit.

It is indisputable that Appellants' contractual rights for payment of a reasonable attorney's fee in the Carbon County action stem from the Earnest Money Agreement. This is the same agreement which forms the basis of their declaratory judgment, specific performance, and damage action in Carbon County, Utah. Historically, contractual attorney's fees are considered part of the general damages award.

On July 1, 1977, the Utah Uniform Probate Code became effective. Utah Code Ann. 1953, § 75-8-101. As a result of this enactment, the "Probate Court has jurisdiction over all subject matters relating to: (a) Estates of decedents" Utah Code Ann. 1953, § 75-1-302(1)(a). An estate includes the property of the decedent, Utah Code Ann. 1953, § 75-1-201(11), both real and personal, or any interest therein, "and means anything that may be the subject of ownership." Utah Code Ann. 1953, § 75-1-201(33).

In order to quickly facilitate the administration of decedent's estates, Utah Code Ann. 1953, §§ 75-3-801 through 815 contemplates the publication of Notice to Creditors and the filing by creditors of claims for obligations due them. A limitation on the time for presenting claims is set forth in Utah Code Ann. 1953, § 75-3-803(1). It states:

All claims which arose before death . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limita-

tions, are barred against the estate . . . unless presented as follows:

(a) within three months after the date of first publication of notice to creditors.

The time for filing claims expired on May 15, 1980. R. 21.

The Utah Uniform Probate Code recognizes that certain claims are not subject to the claims procedure set forth in Utah Code Ann. 1953, § 75-3-801, et. seq.

The definition of a claim reads in pertinent part:

. . . the term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

Utah Code Ann. 1953, § 75-1-201(4). It is also undisputed that the personal representative may maintain an action to recover possession of property or to determine the title thereto. Utah Code Ann. 1953, § 75-3-708.

This Court has previously ruled under the former probate code in In Re Estate of Sharp, 537 P.2d 1034 (Utah 1975), that:

[t]he term claim found in 75-9-4 [Repealed] does not include a claim for specific performance, but refers to debts or demands against the decedent which might have been enforced in his lifetime, by personal actions for the recovery of money; and upon which only a money judgment could have been rendered. . .

537 P.2d at 1037.

This holding was reaffirmed in Forsyth v. Pendleton, 617 P.2d 358 (Utah 1980), which dealt with a claim for specific performance under the former probate code. It was further contended in this action that an award of attorney's fees was

inappropriate. The court held:

If it is concluded that there is no abandonment, then the contract is still in force and the contractual provisions which pertain to attorney's fees apply.

This holding does not resolve whether, under the new Uniform Probate Code, a contingent claim for attorney's fees and litigation expenses based on a contractual provision must be filed in accordance with the Utah Uniform Probate Code claims provisions. As it pertains to this matter, only title disputes, not disputes regarding contractual entitlement to attorney's fees and litigation expenses are excluded.

B. No Claim Was Presented For Contractual Attorney's Fees And Litigation Expenses.

In order to constitute a valid claim, the written communication must indicate "its basis, the name and address of the claimant, and the amount claimed . . ." Utah Code Ann. 1953, § 75-3-804(1)(a).

The buyers shown on the Earnest Money Agreement are "Steve Wright, Paul Barton, tr, et. al.," all of whom appear to be individuals. R. 42. The April 1, 1980, letter purports to be a claim on behalf of an unnamed partnership comprised of unnamed principals. R. 44. Although the personal representative asked for documents and other information showing that a partnership had succeeded to the contract rights of the buyers named in the Earnest Money Agreement, nothing has ever been received.

It also is unclear from the letter who the claim is

against. Nowhere is the Respondent estate, Charles R. Shepley, or the heirs of Gertrude Frandsen Shepley, mentioned by name. This letter then asserts contractual entitlement to "Price River Water Users Shares" which is nowhere mentioned in the Earnest Money Agreement; and by inference that Charles R. Shepley "will be responsible for the additional costs we incur in settling the matter." R. 44.

This Respondent has not located any decisions of this Court which have held that litigation costs taxable under Rule 54(d) of the Utah Rules of Civil Procedure include contractual attorney's fees. To the contrary, Alexander Dawson, Inc. v. Hydroponics, Inc., 535 P.2d 1251 (Utah 1975) held:

Costs are statutory and the award of attorney's fees is contractual--or statutory,--if, in a given case they are awarded by statute. Such fees are not awardable as costs, since they are not included in our statute as such.

535 P.2d at 1251. Furthermore, all claims for "costs" are subject to the approval of the court in accordance with Utah Code Ann. 1953, § 75-1-310.

A fair reading of this letter also leaves any reasonable reader with the conclusion that the claimant is seeking something less than an award of attorney's fees and contractual litigation expenses referred to in lines 45-48 of the Earnest Money Agreement. If the claimant, by virtue of this letter, was seeking complete reimbursement of its anticipated litigation expenses, it would have been a simple matter to say "expenses

including attorney's fees," or simply to have quoted the contract language upon which the claim was based.

C. If Appellants' April 1, 1980, Letter Constitutes A Claim," Respondent's June 17, 1980, Reply Letter Constitutes A Claim Denial.

If the Court reads Appellants' April 1, 1980, letter liberally, holding that it is indeed a claim for litigation expenses including a reasonable attorney's fee, it should likewise apply the same liberality to the June 17, 1980, letter holding that it is a rejection of such a claim. A denial of the primary claim certainly includes any collateral claim for costs, the entitlement to which is dependent on the validity of the Appellants' primary claim.

D. If Appellants Have A Valid Claim For Contractual Attorney's Fees And Litigation Expenses It Should Be Offset Against The Purchase Price Due Respondent.

Appellants have not parted with any part of the purchase price called for by the Earnest Money Agreement, yet they seek to restrict the personal representative's rights to use or dispose of other assets in the estate, not the subject of the Carbon County Action. It is inherently unfair and no equity is done by allowing Appellants to tie up estate assets over which they have no claim.

If they are entitled to specific performance of the Earnest Money Agreement in every respect for which they contend, they will owe the estate \$80,000 together with interest thereon at 11 percent per annum. Any award made by the court in the

Carbon County Action against the estate for attorney's fees and costs could and should be offset against this sum. Until Appellants have parted with and delivered to the Respondent the money owed pursuant to the Earnest Money Agreement there is no need for granting the petition.

Since an award of attorney's fees and costs in the Carbon County Action could be offset against the purchase price due and owing Respondent, Appellants' recovery of their litigation expenses will be fully secured. They will never have parted with that portion of the purchase price which is equivalent to such expenses.

POINT II.

THE PROBATE COURT'S DENIAL OF THE PETITION FOR EXTENSION OF TIME TO CONTEST DISALLOWANCE WAS CORRECT

Appellants' argument under Point II overlooks the fact that no mention is made in their April 1, 1980, letter of a claim for attorney's fees or expenses. Objectively viewing this letter it, in all probability, was not intended as a claim. If it had been, prudence would have dictated that the claim contain wording very similar to that used in lines 45-48 of the Earnest Money Agreement. It was drafted by experienced counsel, who in all likelihood was thinking in terms of traditional litigation in which litigation costs are awarded pursuant to Rule 54 of the Utah Rules of Civil Procedure, and each party bears its own attorney's fees. If this were the case, Respondent received no claim for attorney's fees, and was not required to deny a claim

for items not clearly stated. No advantage or deceptive practice was engaged in, for on its face Appellants' April 1, 1980, letter makes no claim for attorney's fees or expenses.

If Appellants had been as concerned about their claim for attorney's fees and litigation expenses as this appeal intimates, prudence likewise dictates that they not wait five or six months after the June 17, 1980, letter, written on Respondent's behalf, was received to petition the Probate Court for allowance of claimed attorney's fees and litigation expenses pursuant to either Utah Code Ann. 1953, § 75-3-804(2) or § 75-3-806.

CONCLUSIONS

THE PROBATE COURT'S REJECTION OF APPELLANTS' PETITION FOR AN ORDER RESERVING FUNDS SHOULD BE UPHELD

Appellants failed to file a claim for contractual attorney's fees and litigation expenses as they were required to do pursuant to Utah Code Ann. 1953, § 75-3-804(1)(a). If the Court finds that a claim was filed, it should likewise find that the claim was denied. And, by virtue of the fact that Appellants have not parted with the contract purchase price, any claim they have is 100 percent secured since it can be offset.

LIKewise, THE PROBATE COURT'S REJECTION OF APPELLANTS' PETITION FOR AN EXTENSION OF TIME TO CONTEST DISALLOWANCE SHOULD BE AFFIRMED

The letter which Appellants treat as a claim nowhere mentions attorney's fees or litigation expenses. Appellants by their petition treat the letter of June 17, 1980, written on

Respondent's behalf, as a rejection of their claim, and they have waited too long to petition the Probate Court for allowance of their claim.

Respectfully submitted this 27 day of July, 1981.

CHRISTENSEN, JENSEN & POWELL

By Elwood P. Powell
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CERTIFICATE OF SERVICE

This is to certify that on the 27 day of July, 1981, two true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, to:

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