1982

Paul K. Bevan and Little Mountain Development v. George Buzianis and Twin Peaks, Inc. : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL K. BEVAN and LITTLE MOUNTAIN DEVELOPMENT COMPANY, INC.	:	
Plaintiffs-Respondents,	:	Case No. 17666
vs.	:	
GEORGE BUZIANIS and TWIN PEAKS, INC.	:	
Defendants-Appellants.	:	

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This is an appeal filed by the appellants seeking an order from this Court, reversing the judgment previously entered by the Honorable Homer L. Wilkinson following a bench trial in the Tooele County Division of the Third Judicial District Court.

RELIEF SOUGHT ON APPEAL

Respondents seek an order of this Court affirming the judgment of the trial and awarding the respondents' costs for the appeal.

STATEMENT OF THE ISSUES

1. Is the evidence presented to the lower Court at trial sufficient to support the Court's Findings of Fact numbers 1, 3, 5, 6 and Conclusions of Law numbers 1, 2, 3, 4 and the Judgment?

2. Did the lower Court err in denying defendants' motion to dismiss?

The defendants-appellants recite two further issues in their brief; however, a review of the same appears to indicate that it is a virtual restatement of defendants-appellants' Issue #1.

STATEMENT OF FACTS

This case, simply stated, is one of conversion. The plaintiffs maintain that on August 18, 1979, Mr. Gus Buzianis, the nephew and employee of the defendant, Mr. George Buzianis, did, at the defendant's request, proceed to an area located between 50 East to 150 East Skyline Drive, Tooele, Utah, and on the south side of said Skyline Drive, did load and take three dump truck loads of large sandstone rocks. (TR P. 146-149

The plaintiffs further maintain that the rocks taken on that date were rocks which belonged to them and in support of that contention introduced evidence as follows:

(a) That the majority of the large rocks were excavated from the construction of a Tooele City water line

which was constructed on plaintiffs' property and from which the rocks were placed on the south side of the excavation, placing the proximity of said rocks even further on plaintiffs' property (TR P. 26- , P. 33, P. 84; see also exhibits #15, #16, #17 and #18)

(b) That the plaintiffs' property line was 12 feet from the back of the south curb and extended the full length of the excavation from 50 East Skyline Drive through 200 East Skyline Drive. (TR P. 38-39 and exhibit #15; also TR P. 63, P. 71, P. 74, P. 78; also TR P. 180)

(c) That the property located 12 feet south and beyond from the back of the south curb on Skyline Drive was the property of the plaintiffs herein. (TR P. 192-195 and exhibit #25)

(d) That on August 18, 1979, the defendant, through his employee, did take three half dump truck loads of rock from the area in question. (TR P. 143-153; also exhibit #20)

ARGUMENT

I

IS THE EVIDENCE PRESENTED TO THE LOWER COURT AT TRIAL SUFFICIENT TO SUPPORT THE COURT'S FINDINGS OF FACT, NUMBERS 1, 3, 5 AND 6; AND CONCLUSIONS OF LAW NUMBERS 1, 2, 3 AND 4 AND THE JUDGMENT?

The appellants only objection to the Findings of Fact,

paragraph 1, is that it is meaningless and superfluous. Perhaps there is no necessity to argue its relevancy inasmuch as counsel's argument is only a conclusion. However, the appellants would point out that part of the appellants' defense was based upon a claim that the old Gordon fence line was the boundary between the City and the plaintiffs and further argued the doctrine of boundary by acquiescence. The particular finding in question was made in answer to that defense that the Court was convinced as a result of the testimony the the defendant failed in establishing that the old Gordon fence was a boundary of any sort and that defendants appellants failed in establishing their defense as further provided in Findings of Fact paragraph 2.

In respect to Finding of Fact paragraph 3, the defendants-appellants' arguments are based solely on the testimony of Mr. Dale James and the fact that he conducted a route survey rather than a metes and bounds property line survey.

First, the defendants-appellants do not in any way controvert the testimony of Mr. Richard Smith, a qualified title insurance agent and registered abstractor. Mr. Smith's testimony is important in two respects to Finding of Fact paragraph 3. First, he testified that Tooele City was deeded an 80 foot right of way for a roadway from Mr. Alvin Gordon on February 17, 1969.(TR P. 193-194; also see exhibit #25) Second , he testified that the present property owners

adjoining said deeded right of way is the plaintiffs-respondents. (TR 194, line 18 through P. 195, line 3)

Second, Mr. James', a licensed surveyor, testimony, was also uncontroverted particularly in one respect, that being his testimony that according to his route survey, the property line was located 12 feet from the back of the curb on the south side of Skyline Drive from 50 East through 200 East. (TR P. 180 and exhibit #15)

Counsel for defendants-appellants in their brief, attempt to confuse the testimony of Mr. James in two ways: First, by eliciting testimony that he did not perform a boundary line survey nor did he know in whose name the land adjoining the Tooele City right of way on Skyline Drive was presently titled. They consistently ignore the testimony that the boundary was located 12 feet from the back of the curb.

Second, there is an attempt to further misinterpret Mr. James' testimony in respect to the route survey. On page 9 of defendants-appellants' brief, they point out that there is a discrepency in respect to the route survey because of the assumption that the center line of the roadway is also the center of the right of way.

As counsel accurately pointed out, Mr. James testified that the roadway from back of curb to back of curb was 49 feet. (TR P. 80, lines 17-20) He also testified that the street is 7 feet narrower on the north side (meaning as

indicated in the mayor's testimony that it was originally contemplated that the road surface back of curb to back of curb was planned to be 56 feet) which in interpreting Mr. James' testimony means the North side of the roadway from the center line of the 80 foot right of way was 21 feet and the south side was therefore 28 feet. If you add 28 feet and 12 feet, you have 40 feet, which is precisely one-half of the designated right of way.

Mr. James, in doing his route survey, established the center line of the right of way, not the roadway and by so doing also established the outer boundaries of said right of way.

Therefore, it is submitted that the evidence supporting Findings of Fact paragraph 3 is not only uncontroverted but is conclusive that the property line on the south side of Skyline Drive between 50 East and 200 East is 12 feet from the back of the curb.

In respect to Findings of Fact paragraph 5 and Conclusions of Law, the defendants-appellants rest their entire arguments on two premises:

(1) That the only and exclusive evidence upon which the Court could determine that the rocks were taken from the plaintiffs-respondents' property would be a boundary line survey.

(2) That there were not sufficient facts before

the Court from which the Court could ascertain the weight of the rocks taken.

At the outset in response to argument #1, I would submit to the Court that the burden of proof required of the plaintiffs is that the plaintiffs must prove their case by a preponderance of the evidence as discussed in the Section on Evidence 32A Corpus Juris Secundum Section 1018-1020, pages 637-652. Such means "simply evidence of a greater weight or more convincing than that which is offered in opposition" and as pointed out further on page 645 supra, "the evidence is not required to exclude the truth of any other theory or reasonable conclusion or demonstrate the impossibility of every other reasonable hypothesis. The Jurors mind need not be freed from all doubt and plaintiffs is not required to present a perfect case to recover."

The plaintiffs in support of their burden on the issue of ownership has elecited the testimony of three witnesses.

Mr. Paul K. Bevan who testified as to his understanding that the boundary between the two properties was 12 feet from the curb line. Further that the excavation for the water line from the center of the pipe was 16½ feet give or take 1 foot from the curb, placing the excavation and line south of the 12 foot boundary. (TR P. 27-28; 65½ feet minus 49 feet equals 16½ feet; see also TR 67-69) I might add Mr. Bevan was the only party who testified as to exact measurements. He further

testified that the boulders excavated were upon his instruction placed south of the ditch which was even further onto the plaintiffs' property. (TR P.32, lines 6-17; also TR P. 290-291) His testimony to a large extent was corroborated by the defense witnesses, one of whom testified that the excavation was approximately 14 feet from the curb (TR 299) and to the other who testified that the excavation was next to the old fence line but expanded in width to some six feet in the area where large boulders were encountered. (TR P. 280)

Mr. Dale Jones, a licensed surveyor, testified that he conducted a road right of way survey on this particular section and that the boundary of the adjoining land owners to the south of Skyline Drive between 50 East and 200 East was 12 feet from the curb line. He further testified that such boundary line was the same farther east including the property subject to the exchange agreement.

Mr. Richard Smith, a title abstractor, testified as to the fact that the property deeded to Tooele City in February 1969 was for an 80 foot right of way and that ownership was vested in the same persons at that particular time. He further testified that the record owner at the present time of the property adjoining the south boundary of the Skyline Drive from 50 East to 200 East was the plaintiff herein, Little Mountain Development.

The defendants' witnesses did not contradict in any

manner the testimony of the plaintiffs' witnesses. The testimony recited by the defense related primarily to the issue of the fence and where such was located, how long it had been in existence and conversations as to the same constituting a boundary by the plaintiff, Paul K. Bevan.

I assume that the defendants rest their entire case regarding the boundary upon the argument that such can only be established by survey. Pursuant to the General Rule of Law as pointed out in Volume 32A Corpus Juris Secundum, Section 778, page 96, "The best evidence rule goes only to the competency of evidence not to its relevancy, materiality or weight. The Rule does not demand that the strongest possible evidence of the matter in dispute shall be given, nor that all evidence existing in the case be produced but requires simply that no evidence shall be given from which considering its own character and the nature of the transaction, an inference may arise that there is obtainable by the party other evidence more direct and conclusive and more nearly original in its source.

While secondary evidence cannot be admitted in substitution for primary evidence where evidence offered is primary or original in its character it cannot be excluded because there might have been introduced other evidence which is corroborative or stronger or more conclusive.

The defendants would have the Court believe that the only evidence which would be admissible as to the boundary would be

a proper survey of the boundary line. However, the above rule would only go to exclude evidence such as my client testifying that a survey was conducted and that based upon the survey he had knowledge that the boundary was 12 feet from the curb. In that instance his testimony would be secondary to the survey and the survey would be the best evidence. However, regardless of a survey, if a person testifies that they have conducted measurements on their own that they have some experience in surveying as Mr. Bevan did, then his testimony is clearly admissible and is not secondary, but original in source.

In researching the issue as to what type of evidence is competent to prove title, I would submit to the Court that I can find no case law which would exclude all competent evidence except a survey conducted by a licensed surveyor.

In actions of trespass and conversion, the burden of proving title and ownership is placed upon the party alleging the same. However, as stated in Volume 87 C.J.S., Section 96, page 1050, legal title may be shown by a chain or paper title, record title or by proof of possession. Furthermore, where the defendant relies upon title of ownership in himself, it follows that he has the burden to prove it by a preponderance of the evidence. Here we go one step further where the defendant claims title was vested in a third party and he has the burden of showing that title or ownership was vested in Tooele City at the time of the alleged taking. The Supreme Court of

Colorado in the case of Johnson v. Pavich, 451 P.2d 440, which is similar to the one before the Court, stated that the evidence consisting primarily of a chain or title and recorded deeds was sufficient to establish the finding of a boundary.

Counsel for defendants-appellants cites several cases as authority for their proposition; that only a boundary line survey would be competent evidence. However, in Barbizon of Utah, Inc. v. General Oil Co., 24 Utah 2d 321, the issue was not a question of the taking but a quiet title action. The Court held nothing more than the parties had an affirmative duty to show title to certain property which could have been accomplished any number of ways.

In Smith v. Moore Mill and Lumber Co., 536 P.2d 1238 given as authority by the defendants-appellants, the issue is the validity of a certain survey which was introduced by plaintiffs and which according to my reading appears to be the only evidence of ownership submitted. The Court held the survey did not meet the standard required, not that such is the only competent evidence of a boundary line or ownership of certain property.

I would submit that there is clearly ample evidence before the Court in terms of possession, ownership and title, not only to establish a prima facie case, but also by a clear preponderance of the evidence.

As to the second argument, there is ample testimony to support the Court's finding that two one-half dump truck loads were taken from plaintiffs' property.

First, Mr. Gus Buzianis, whom I might add was an adverse witness, testified that he was instructed by his Uncle, the defendant herein, to proceed to the area in controversy and load rocks. He stated he made three loads, (TR P. 145) that the dump truck was estimated for 17,000 pounds, (TR P. 145) and that the truck loads were at least one-half full. (TR P. 152) Granted Mr. Buzianis indicated that the loads were taken from close to the curb, but the Court has to weigh that testimony in conjunction with Mr. Beven's testimony that the large rocks from the excavation for the water line and the previous gas line excavation had been placed up further on the Gordon property (TR P. 32-35; also plaintiffs' exhibits #17 and #18; also TR P. 85-90) Furthermore, if the Court examines plaintiffs' exhibit #20 in conjunction with the testimony of Mr. Buzianis on TR 149-151, it is very clear he was well beyond the 12 foot boundary when loading the rocks on the last occasion when photographed.

It is further true that Mr. Bevan only observed the one truck load. However, he subsequently photographed three dumped loads of rock in the vicinity of the defendants' condominium project. (See exhibits #21 and #22 which match the general characteristics of the rocks located in the other photographs

exhibits #17, #18 and #20) Also, Mr. Mark Burnett, the plaintiffs' expert witness, personally examined the site of the retaining wall and testified in his opinion the smallest rock contained in the retaining wall would weigh at least 200 pounds plus. (TR P. 210)

In respect to Findings of Fact paragraph 6 and paragraph 7 and Conclusions of Law, the only evidence presented to the Court was the uncontroverted testimony of Mark Burnett. Mr. Burnett testified that in his opinion the value of the stone as it existed at the site was $40.00 per ton. (TR P. 203) The Court ascertained (and conservatively, I might add) that two one-half dump truck loads were taken from the plaintiffs totaling 17,000 pounds or 8½ tons, which would amount, at $40.00 a ton to $340.00. Furthermore, the defendants did not at any time object to costs of $210.20, bringing the total judgment to $550.20.

II

DID THE LOWER COURT ERR IN DENYING DEFENDANTS' MOTION TO DISMISS?

The appellants, in respect to the second issue, and their designated third and fourth issues, do nothing more than restate the same arguments previously made in respect to the Findings of Fact and Conclusions of Law.

The defendants-appellants contend that the plaintiffs-

respondents failed in two respects: (1) That we failed to show the place from where the rocks were removed, and (2) That the place from where the rocks were removed was owned by the plaintiff.

At the risk of sounding redundant, I would restate that the testimony of the plaintiff's three main witnesses was totally uncontroverted. Not only was there a clear preponderance of the evidence demonstrating that the property line deliniating the property of the plaintiffs was 12 feet from the back of the curb extending on the south side of Skyline Drive between 50 East and 200 East, but it is just as clear from looking at the various photographs taken prior to the taking of the rocks, particularly plaintiffs' exhibits #17 and #18 and #20 (taken on the date of the taking) that the large rocks were clearly located more than 12 feet south of the curb, which is consistent with the testimony of Mr. Bevan.

I think it further interesting to note that the defendant was well aware of the ownership of the rocks in that he requested permission from Mr. Bevan to take the rocks on July 28, 1979. (TR P. 44, 45, 46)

Furthermore, if any rocks previously located on City property were subsequently pushed onto the property of the plaintiffs in the course of excavating the right of way, then from Mr. Bevan's testimony, it appears not only was he given permission by Tooele City, but the rocks became the property

of the plaintiffs. (TR P. 85, line 12 through P. 90, line 23)

It is further interesting to note that the defendants-appellants' defense was based primarily upon the premise of boundary by acquiescence in that the old Gordon fence was the boundary between Tooele City and the plaintiffs. A review of the record would demonstrate that even though the fence line at certain points was in close proximity to the actual property line, it was never considered as a boundary and defendants' argument of boundary by acquiescence was totally rejected by the Court. (Refer to Trial Memorandum submitted subsequent to trial) Furthermore, whether the Tooele City Mayor Sagers mistakenly believed that the City owned up to the fence line is of no relevancy whatsoever in civil proceedings for conversion.

The defendant is liable for the fair market value of any property converted to his own or his corporation's use, regardless of a mistaken belief as to ownership.

Therefore, I would respectfully submit that not only is there a clear preponderance of the evidence demonstrating ownership and taking but the evidence also clearly preponderates in favor of the plaintiffs-respondents in respect to amounts taken and the value of the same. I would dare say that if the defendant was asked concerning the value of the subject rocks now existing in his condominium retaining wall that his estimate of value would far exceed that value established pursuant to the trial record.

CONCLUSION

It is respectfully submitted that this Court, to find for the defendants-appellants, must determine first, that in viewing the evidence in the light most favorable to the plaintiffs, that there is no reasonable basis upon which the trial Judge could find as he did and that said findings and denial of defendants' motion to dismiss was an abuse of the trial Court's discretion.

I would therefore submit that a thorough review of the record, exhibits and trial Memorandum would clearly demonstrate ample reasonable basis upon which this Court can sustain the findings and decision of the trial Court and further, that plaintiffs' evidence to a large degree is totally uncontroverted and it is therefore suggested that there is no abuse of discretion by the trial Court.

Wherefore, the plaintiffs-respondents respectfully request that this Court affirm the judgment of the trial Court and that costs be awarded the plaintiffs-respondents.

Respectfully submitted this 17th day of February, 1982.

MELVIN C. WILSON
Attorney for Plaintiffs-Respondents

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of February, 1982, I mailed a true and correct copy of the foregoing Respondents' Brief to Edward T. Wells and David K. Robinson of Robinson & Wells, P.C., 1220 Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid.