

1982

John R. Jenner and Marjorie E. Jenner v. Real Estate Services et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN R. JENNER and MARJORIE
E. JENNER, his wife,

Plaintiffs/Respondents,

vs.

REAL ESTATE SERVICES, a Utah
corporation, JOSEPH C. FRANICH
and CAROLYN M. FRANICH, his
wife; and LARRY J. NIELSON and
KAY NIELSON, his wife,

Defendants,

RONALD JOHNSON,

Intervenor/Appellant.

CASE NO. 18100

BRIEF OF RESPONDENTS

Appeal from a Final Order of the Third Judicial District Court
In and For Salt Lake County, State of Utah
Honorable G. Hal Taylor, District Judge

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Clerk, Supreme Court, Utah

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	:	
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and CAROLYN M. FRANICH, his	:	
wife; and LARRY J. NIELSON and	:	
KAY NIELSON, his wife,	:	
	:	
Defendants,	:	
	:	
RONALD JOHNSON,	:	
Intervenor/Appellant.	:	

NATURE OF THE CASE

The respondents obtained a Default Judgment against defendants cancelling a Uniform Real Estate Contract after entry of which appellant sought to intervene in the action as a party defendant and to set aside the default judgment.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court denied the motions to intervene and to set aside the default judgment brought by appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to obtain the right to intervene, to set aside the default judgment and to assert a defense to the plaintiffs' complaint.

STATEMENT OF FACTS

Since no testimony was taken in the trial court except with respect to attorney's fees in connection with the default judgment, the parties to this appeal rely on the statement of evidence (R. 65 ff) jointly agreed upon. The record in the lower court establishes the chronology of events. After serving all named defendants with a Notice to Quit pursuant to the Utah unlawful detainer statute, Title 78-36-6, U.C.A., 1953, as amended, plaintiffs proceeded by complaint for cancellation of the Uniform Real Estate Contract, forfeiture to sellers of payments theretofore made as liquidated damages for nonperformance, for a Writ of Restitution and other relief.

In view of appellant's contention that he timely sought to intervene in the action, it should be noted that the Notice to Quit was served on appellant's co-venturer, Joseph C. Franich, on August 8, 1981 (see paragraph 4 of complaint). The complaint was filed August 19, 1981, more than five (5) days after the service of Notices to Quit on all known defendants. The Court shortened the time for answer as provided in Title 78-35-8, U.C.A., 1953, as amended, to five (5) days (R. 10) and a copy of the summons and complaint was served on Joseph C. Franich, co-venturer of appellant, on September 11, 1981. September 23, 1981, the default period of five (5) days having run as against all named defendants, plaintiffs appeared through their counsel before the District Judge and upon demonstrating the default, producing the documents evidencing the Uniform Real Estate Contract and its assignment and giving evidence of a reasonable attorney's fee,

the Court entered Findings of Fact and Conclusions of Law and Judgment granting the relief prayed for in the complaint with the exception of the amount sought as delinquent installment payments and taxes. The Court interpreted paragraph 16A of the Uniform Real Estate Contract as an alternative remedy the election of which constituted a waiver of both delinquent installments and any obligation to pay taxes.

Thus, by the time default judgment was entered on August 23, 1981 no payment had been made under the terms of the Uniform Real Estate Contract since May 14, 1981 (see paragraph 3 of Complaint R.3), a period of over four months. A Writ of Restitution immediately issued and was served upon appellant's co-venturer, Joseph C. Franich, on September 24, 1981 (R. 22).

Appellant filed his Motion to Intervene October 6, 1981, accompanied by his Affidavit. Exhibit "A" (R. 25, 26) attached to the Motion to Intervene is an agreement entered into the 27th of March, 1979 between appellant, Ronald Johnson, and defendant, Joseph C. Franich. That agreement includes the following provisions:

2. It is understood that the purpose of the agreement is for real estate investment purposes.
3. The intent is to be long term investments, however, some shorter term investments may be necessary at times depending on the character of the property invested in.

* * *

5. Franich will be responsible for all management, collection of rents, and maintenance.

6. Franich is to invest the monies in a prudent manner but, provides no guarantees, except of return of principle amount of \$11,000.00 and 1/2 of profit.
7. Franich is to receive 10% percent of all rents collected as compensation for time, gas and management.
8. All monies received from properties will be divided between Franich and Johnson on a 50-50 basis after expenses.

* * *

12. Depreciation and expenses will be shared on a 50-50 basis for tax purposes.

The Uniform Real Estate Contract involved in this action was executed October 31, 1978 between plaintiffs and defendant Real Estate Services. The assignment of that contract to defendants Joseph C. Franich and Carolyn M. Franich and Larry J. Nielson and Kay Nielson occurred October 30, 1979, three days after the agreement of appellant and Franich referred to above and is claimed to be one of the "long term investments" contemplated by the Franich - Johnson agreement (see paragraphs 2 and 3 of appellant's affidavit, R. 27). Appellant was never a party to any contract or assignment, nor was the existence of a silent partner indicated by the documents executed by Franich.

The appellant received a Quit Claim Deed from Joseph C. and Carolyn M. Franich September 15, 1981 (R. 28) and recorded it the same date in the office of the Salt Lake County Recorder. The parties have agreed in the Statement of Evidence that "intervenor's interest was not known to the plaintiffs nor any of the other defendants in the lawsuit (with the obvious exception

of Joseph C. Franich) and not of record until the 15th day of September, 1981," (the "knowledge" of plaintiffs or other defendants on that date being assumed from the fact of recordation). On September 25, 1981 intervenor determined through a realtor friend, that "a foreclosure action had commenced on one of the properties and that there were some problems with the delinquency on the property included on the above suit" (see paragraph 2, appellant's affidavit, R. 28). Appellant contacted plaintiffs' attorney and for the first time made known his alleged interest in the property on September 30, 1981 (see paragraph 7, appellant's affidavit, R. 28), six days after the Writ of Restitution was served.

Thereafter, appellant tendered the delinquency on the contract together with costs and attorney's fees to plaintiffs but the tender was refused.

As shown by the Uniform Real Estate Contract (R. 6) the properties were sold by plaintiffs to defendant Real Estate Services for \$86,600.00, \$1,600.00 of which was paid by buyer assuming a note due December 1, 1979 and the balance payable at \$760.49 per month commencing December 1, 1978. The sum forfeited, therefore, included the \$1,600.00 note payment and \$760.49 paid each month until May 14, 1981. Defendant Real Estate Services or its assignee, Joseph C. Franich, had possession of the property from November 1, 1978 through September 24, 1981, a period of thirty-two (32) months and twenty-three (23) days. Assuming that payments were made for each month through May, 1981 and commencing December 1, 1979

there would have been twenty-nine (29) payments at \$760.49 each for a total of \$22,054.21 paid on the contract (including interest) and an additional \$1,600.00 paid on the note referred to as a down payment, for a total of \$23,654.21 during nearly thirty-three (33) month's occupancy. Although the amount of the forfeiture is not an issue at this time, it appears that the buyers of the three (3) rental units paid a total of \$716.79 per month for that occupancy.

The motion of appellant to intervene in the action following judgment and to set the default judgment aside was heard by the District Court October 14, 1981 and following argument the motion to intervene was denied. It is believed that the minute entry is incorrect in stating that "the Motion to Intervene was considered moot since the Motion to set aside Default Judgment was denied" (R. 51). If the Court considered one of the motions "moot" it would obviously be the Motion to Set Aside Default Judgment, since appellant would have no standing to set aside the default judgment until he was permitted to intervene.

ARGUMENT

POINT I

PROPOSED INTERVENOR IS ESTOPPED FROM CLAIMING AN INTEREST IN THE PROPERTY THE SUBJECT OF THE UNLAWFUL DETAINER ACTION AS AGAINST PLAINTIFFS.

Since the agreement between appellant and Joseph Franich of March 27, 1979 was not a matter of public record nor

did plaintiffs have any knowledge of such agreement until the Motion to Intervene was filed by appellant in the District Court, it is submitted that the proposed intervenor's "interest" was a secret or dormant interest and remained so until at least the 15th day of September, 1981 when the Quit Claim Deed was placed of record. The agreement between appellant and Franich is, on its face, an agreement of joint venture or partnership. Appellant's conduct in permitting the ostensible partner or co-venturer to enter into an assignment whereby he (together with his wife and two other parties) acquired an interest in a Uniform Real Estate Contract in their own names is such conduct as estops appellant from asserting any interest in the property as against plaintiffs. At C.J.S., Partnership, Section 176, Undisclosed and Dormant Partners, Notice and Demand, appears the following:

"Dormant partner is estopped from asserting his real interest as against those who have in good faith acted on the appearance of the acting partner's sole ownership."

The C.J.S. annotation quotes In Re Flynn's Estate, 43 P.2d 8, 181 Wash. 284 (1935) in which the Court stated:

"Where one partner is permitted to assume sole charge and superintendence of the property of an undisclosed or dormant partnership and to deal with it as his own, the property, though actually belonging to the partnership is, so far as innocent third persons are concerned, to be regarded as the sole property of the active partner, and the dormant partner is estopped from asserting his real interest therein as against those who have, in good faith, acted upon the appearance of the active partner's sole ownership (citing cases)."

This same principal is set forth at C.J.S. Partnership, Section 36A, Dormant or Secret Partners as follows:

"Where dormant partner permits the business world to believe that the ostensible partner is the owner of the business, he has been held to be estopped from claiming to the contrary against those who have in good faith acted on such appearance."

By permitting the ostensible partner (Franich) to take an interest in real property in his own name, appellant Johnson placed Mr. and Mrs. Jenner in a position where they were entitled to act on appearances given by the ostensible partner and deal with him as though he were the only partner having an interest in the "partnership property". The "appearance" is further compounded by the addition of Mrs. Franich and the Nielsons on the Assignment document (R. 3).

As set forth in 46 Am. Jur. 2d, Joint Venture, Section 17, Purchase and Sale of Real Property:

"Such property may be acquired and owned jointly by a joint venture although the title may be taken in the name of only one of the co-venturers."

Such an arrangement results in innocent third parties having to deal with the co-venturer and others named in the property transaction as though they were the only parties having an interest. Mr. Johnson's remedy would appear to be a partnership accounting with Mr. Franich and, perhaps, as a result of the transaction wherein he acquired the Quit Claim Deed, an action for misrepresentation and recovery of the cash paid in exchange for the deed. Certainly there was a duty on the part of Franich, who acted in a fiduciary capacity with his co-venturer, to divulge that the Uniform Real Estate Contract had been declared in default and that an unlawful detainer action was then pending seeking possession of the property, cancellation of the contract,

and a determination that all monies paid were to be considered liquidated damages.

POINT II

NOTICE IN THE FORM OF BOTH THE NOTICE TO QUIT AND THE SUMMONS WERE NOTICE TO APPELLANT WHO WAS A CO-VENTURER OF THE PARTY SERVED.

58 Am. Jur. 2d 506, Notice, Section 25, sets forth generally the law regarding notice to "co-owners" of real property. It is there stated:

"Where two persons enter into a joint transaction for joint benefit, notice of a fact to one of them is also notice to both so far as that transaction is concerned."

Among the cases there cited is Sweet Sixteen Company v. Sweet "16" Shop, 15 F2d 920 (8th Cir.) in which the federal court quotes 20 R.C.L. 355 to the effect that: "Notice to one partner is notice to other partners."

It follows, therefore, that appellant Johnson had notice of the default in the payment of the Uniform Real Estate Contract on the date that Joseph C. Franich received the Notice to Quit, August 8, 1981. It further follows that notice that plaintiffs sought cancellation of the contract, restoration of possession, and forfeiture of all payments made under the contract as liquidated damages, was given again in the form of a summons served on Joseph C. Franich September 11, 1981.

Appellant Johnson is in the position of one who received notice of the delinquent condition of a real estate contract and waited 53 days (period between August 8,

1981 and September 30, 1981) to take any action with respect to remedying the default. In the meantime, an unlawful detainer action had been commenced by the filing of the complaint, summonses had been served on all named defendants, the default judgment had been entered, and the Writ of Restitution had been issued and served. Plaintiffs were thereafter in a position of dealing with the property as they saw fit having no obligation to convey to Mr. Franich and the other assignees.

Although appellant may have been duped by his business partner and may have, as an individual, acted in good faith, he has permitted Franich to deal with the property of the joint venture in a manner affecting innocent third parties and the burden of any loss should be borne by appellant who still has his legal actions against his co-venturer.

POINT III

THE MOTION OF THE APPELLANT TO INTERVENE AFTER THE ENTRY OF A DEFAULT JUDGMENT IN AN UNLAWFUL DETAINER ACTION UNDER THE CIRCUMSTANCES OF THIS CASE IS NOT TIMELY.

Rule 24(a), Utah Rules of Civil Procedure, provides:

"Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

Appellant argues that he is in the situation contemplated by number (3) above.

Even if it were conceded that appellant is one whose situation is contemplated by the group designated (3) in our rules, the application of the proposed intervenor must be "timely".

Although there are many cases wherein intervention after the entry of a judgment has been permitted, a reading of the cases annotated in United States Code Annotated (Title 28), Rule 24, establish that:

"There is considerable reluctance on the part of courts to allow intervention after action has gone to judgment" (McClain v. Wagner Electric Corp., C.A. Mo. 1977, 550 F2d 1115); "motions for intervention made after entry of final judgment will be granted only upon strong showing of entitlement and of justification for failure to request intervention sooner" (U.S. v. Association Milk Producers, Inc. C.A. Mo. 1976, 534 F2d 113, cert. denied, 97 S. Ct. 355, 429 U.S. 940, 50 L. Ed 2d 309); "post judgment interventions are generally disfavored because of the assumption that they will prejudice rights of existing parties and interfere with the orderly processes of the court (Brown v. Board of Education of Topeka, Shawnee County, Kansas, D.C. Ka. 1979, 84 F.R.D. 383); "intervention after entry of final judgment will not be allowed unless a strong showing is made or where unusual or compelling circumstances are demonstrated" (Com. of Pennsylvania v. Rizzo, D.C. Pa. 1975, 66 F.R.D. 598, aff. 530 F.2d 501, cert. denied 96 S. Ct. 2628, 426 U.S. 921, 49 L. Ed. 2d 375); "interventions after judgment have a strong tendency to prejudice existing parties to litigation or to interfere substantially with further legal process of court" (U.S. v. U.S. Steel Corporation, C.A. Ala. 1977, 548 F2d 1232).

In Rains v. Lewis, 579 P2d 980, 20 Wash. App. 117 (1978) the Court stated:

"If (intervention is) permitted after judgment, it must be only on a strong showing after taking into consideration all circumstances, including

prior notice of the lawsuit and circumstances contributing to the delay in making the motion. To this we would add a showing of substantial prejudice if permission to intervene is denied."

Commenting on post-judgment intervention, the annotation at 37 A.L.R. 2d 1306 "Time for Intervention" states:

"Subject to certain limitations, it is the general rule that, ordinarily, intervention will not be allowed after the final judgment or decree has been entered. (citing cases)"

The Court in Brown v. Board of Education of Topeka, Shawnee County, Kansas (supra) held that:

"Determination as to time limits of an intervention motion is a flexible one and must be made on a case-by-case basis taking into account all the appropriate circumstances."

In Wilson v. Harris, 302 S.W. 2d 86, 227 Ark. 808 (1957), intervenors were not named as defendants in an original quiet title action and sought to intervene more than one month after a decree was entered. The Court upheld the refusal to allow such intervention. In Stern G. Investment Co. v. Danziger, 206 Cal. 456, 274 P. 748 (1929) it was held in a quiet title action that the intervenor's claim being "only from or under" that of defendants already in default, this precluded intervention as a matter of right.

In Martin v. Lawrence, 156 Cal. 191, 103 P. 913 (1909), the Court barred intervenor from entering the action where he took title from a party in default after the recording of a Lis Pendens. Respondents in the instant case contend that the notice given appellant by service of both the Notice to Quit and the Summons on his co-venturer is as effective in barring intervention as though there had been a Lis Pendens recorded.

Both are forms of constructive notice and should be equally effective.

POINT IV

THE MOTION OF THE APPELLANT TO SET ASIDE THE
DEFAULT JUDGMENT IS MOOT IF HE IS NOT PERMITTED
TO INTERVENE AND WAS PROPERLY DENIED.

A motion to set aside a judgment is to be considered and decided by the trial court in the exercise of its discretion and its decision should be overturned on appeal only if it plainly appears that it has abused its discretion. Haller v. Wallace, 573 P.2d 1302 89 Wash. 2d 539 (1978), Pamlen Industries, Inc. v. Sheen - U.S.A., Inc. 622 P.2d 1270 95 Wash. 2d 398 (1981). Under the circumstances here the district court judge properly exercised his discretion. He correctly ruled that the appellant was not entitled to intervene, and the matter of setting aside the default judgment thereby became moot.

Even if appellant were not faced with the problem of intervention, it has been held that in discussing the proper exercise of discretion by a trial court in permitting the vacating of a judgment, there are several factors which should be considered including: (1) the moving party must show substantial evidence to support, prima facie, a defense to the claim; (2) failure to appear must be due to mistake, inadvertence, surprise or excusable neglect; (3) the moving party must have acted with due diligence after notice of entry of default; (4) there should be no substantial hardship result to the opposing party if the judgment is set aside; see White v. Holm, 438 P.2d 581, 73 Wash.

It appears that appellant is unable to show a prima facie defense to the claim since all parties admit that the contract was delinquent and the forfeiture of the sums paid by the buyers was not out of proportion to the reasonable rental value of the property during its occupancy. Although the record is silent on what hardships might result to plaintiffs if the judgment is set aside, the appellant has failed to show that no substantial hardship would result to plaintiffs if their motion was granted.

CONCLUSION

The appellant being a silent or dormant partner or co-venturer with defendant Franich is held to have received the same notice as did Franich. He should not be permitted to intervene in the unlawful detainer action following entry of judgment and issuance of Writ of Restitution not only for the reason that his application to intervene was not timely under the circumstances but he is estopped by virtue of his silent partnership status to claim an interest in the real property the subject of the unlawful detainer action.

DATED this ____ day of March, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that I served appellant's counsel, Lee Rudd, of Hunt & Rudd, two copies of the foregoing Respondents' Brief by mailing to said attorney at 311 South State Street, Suite 440, Salt Lake City, Utah, 84111 this ____ day of March, 1982.
