

1982

Naylor-Gross Inc et al v. Thomas K. Backman et al : Brief of Plaintiffs-Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NAYLOR GROSS, INC., a Utah
Corporation, GARTH L. NAYLOR
and TERRY GROSS,

Plaintiffs, Counter-
Defendants and
Respondents.

vs.

THOMAS K. BACKMAN and MILTON V.
BACKMAN, Trustee,

Defendants, Counter-
Claimant and Appellant.

Case No. 18218

Brief of Plaintiffs-Respondents

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Brief of Plaintiffs-Respondents

STATEMENT OF FACTS

For purposes of this brief, Plaintiffs will use the same reference to the record and transcripts as proposed on page 2 of Defendant's Brief.

On or about June 27, 1979, Plaintiffs entered into an agreement with the Defendant, Thomas K. Backman, whereby Plaintiffs were to sell to the Defendant real property known as the Old Rock Mill Farm. The Old Rock Mill Farm is located in Farmington, Utah, and a restaurant known as the "Heidelberg" is located on the property. The sale was to include substantial

personal proeprty used in furnishing and operating the Heidelberg (R 46-48).

Plaintiffs, Garth Naylor and Terry Gross, had reached the age of retirement and both were suffering from poor physical health. The property was sold to relieve the individual Plaintiffs of the burden of caring for the property and business and to provide each of them with sufficient income upon which to retire.

The record contains the obligations as agreed to by the parties (R 6, 7, 43-45, 51, 52). Plaintiffs concede that the obligations of the parties are substantially those found on page 3 of Defendant-Appellant's Brief but allege that the obligations relevant for purposes of this appeal are also found in the stipulation of September 9, 1981 (T1-1 to 19) and the discussions that accompanied it.

After Defendant, Thomas K. Backman, took possession of the property disputes arose between the parties as to their respective obligations.

Defendant, Thomas K. Backman, had not been making the \$3,000 monthly installments as per the agreement (R 6, 35, 44, 51) and was in breach of the agreement. Plaintiffs filed suit in the Second Judicial District Court in December of 1980. Plaintiffs alleged that the agreement was breached by Thomas K. Backman and sought to have the real and personal property returned to them (R 1-7). Defendant, Thomas K. Backman, answered

the Complaint and filed a counterclaim, alleging that Plaintiffs were in breach and denied his own breach (R 11-16).

The case proceeded through the discovery process during which time Defendant, Thomas K. Backman was less than cooperative and had to be compelled to respond to discovery (R 76-90).

The case was set for trial on September 9, 1981 before the Honorable J. Duffy Palmer. On that day Plaintiffs and their counsel met with Judge Palmer and the Defendant in the Judge's Chambers. Defendant had been advised to obtain counsel but had chosen not to obtain counsel (T2-11,12). The purpose of this meeting was to resolve the dispute without resorting to trial and the foundation of the discussions of that day was the idea that judgment would be entered if the settlement and stipulations of that day were not complied with. Based on that premise, Plaintiffs entered into settlement discussions with Defendant both on and off the record regarding the possibilities of settlement and stipulation. These on and off the record discussions were conducted both in and out of the presence of Judge Palmer. Much of what transpired that day was not recorded. At the conclusion of those discussions the parties had reached a settlement agreement which was stipulated into the record (T1-1 to 19).

The purpose of the settlement was to avoid the litigation scheduled for that day and to resolve the dispute without resorting to litigation at all. Though the penalties for viola-

tion of the stipulation were not expressly discussed on the record, Defendant expressly stipulated to judgment in the presence of the trial court judge, Plaintiff's counsel, and a representative of Plaintiffs that in the event of Defendant's failure to comply with the terms of the stipulation, and if Plaintiffs did comply, judgment should be entered accordingly. Defendant was fully aware of the penalties and was so informed during the discussions preceeding introduction of the stipulation into the record.

The essence of the stipulation (Tl-1 to 19) is that Plaintiffs would be liable for any debts or liabilities that existed at the time of the sale of the property in excess of \$110,000 based on Defendant's own figures. The parties were also to decide which debts or liabilities Plaintiffs would assume to limit Defendant's liabilities to \$110,000 and Defendant would make the payments and perform the obligations required by the earlier sale agreement.

Plaintiffs were at all times ready and willing to discuss with Defendant as to which debts Plaintiffs would relieve Defendant of liability. As during discovery, Defendant remained uncooperative (R 163), so Plaintiffs, through their counsel, submitted a letter (R 169-172) to Defendant informing him of which debts they would be willing to assume so that they could in good faith abide by the stipulation of September 9, 1981. Plaintiffs chose to assume these debts because this was consistent with the

discussions between themselves and the Defendant prior to the stipulation. The Defendant particularly induced Plaintiffs to assume the state sales tax that had accrued before the sale of the property to Defendant. The failure of Defendant to cooperate in helping finalize the full determination as to which debts Plaintiffs would assume is a breach of the September 9, 1981 stipulation (Tl 3,4) and the June 27, 1979 Sales Agreement (R 51).

As Defendant was aware, Plaintiffs, as retired individuals, were without substantial assets and income to pay the debts in excess of \$110,000 (R 220, 221, 224, 225) and were relying on the good faith efforts of Thomas K. Backman to fulfill his obligation to pay monthly installments as per their agreement, in order to provide Plaintiffs the required funds to pay the obligations in excess of \$110,000, although it was clearly agreed that assumption itself was sufficient.

The transcript of September 9, 1981 (Tl-3) evidences that Plaintiffs were to satisfy or assume any debts in excess of \$110,000. The stipulation is in the alternative, requiring Plaintiffs to satisfy or assume the debts and take upon themselves any future liability for certain debts to be agreed upon by the parties. Plaintiffs did assume all debts in excess of \$110,000 based on Defendants own records including the debt to the Utah State Tax Commission which Defendant had induced them to assume (R 219, 220), although Plaintiffs were unable to pay said debts in full until Defendant complied with the stipulation and

paid them the monies due and owing.

Plaintiffs did fulfill all that was required of them in the stipulation by assuming the debts in excess of \$110,000 though those debts have not yet been satisfied.

Defendant, Thomas K. Backman, did not abide by the stipulation and did not pay to Plaintiffs the required sums and was in breach of both the Sales Agreement and the stipulation. Judge Palmer ordered on October 8, 1981 that if Defendant did not comply with the stipulation and if Plaintiffs did, the interest of Thomas K. Backman in the Old Rock Farm and the personal property thereon or affixed thereto would be terminated (R 146, 147).

On December 24, 1982 the trier of fact, Judge J. Duffy Palmer, concluded that Defendant had indeed expressly stipulated to judgment in the event Plaintiffs complied with the stipulation and Defendant did not. The court found that Defendant did not comply, that Plaintiffs did comply, and that Plaintiffs were entitled to judgment. Judgment was entered for Plaintiffs (R 182-185).

DISPOSITION IN THE LOWER COURT

This action was set for trial on September 9, 1981 but the parties entered into a stipulation in lieu of trial. Each of the parties agreed to perform certain acts. Plaintiffs were to satisfy or assume certain debts and Defendant was to fulfill his

obligations as per the June 27, 1979 Sales Agreement between the parties. In effect, Defendant was to do what he was already bound to do. Plaintiffs were represented by counsel and Defendant was acting pro se, against the advice of Judge Palmer.

The trier of fact determined that Plaintiffs had complied with the stipulation and that Defendants had not. Judgment was entered for Plaintiffs pursuant to the stipulation of the parties before Judge Palmer, terminating Defendant's interest in the property. From that judgment Defendant takes this appeal.

RESPONSE TO DEFENDANT-APPELLANT'S ARGUMENT
POINT I

PLAINTIFFS WERE ENTITLED TO JUDGMENT. THEY
DID HAVE CLEAN HANDS AND DID COMPLY WITH THE
STIPULATION AND ORDER OF THE COURT.

On September 9, 1981, when the parties were before Judge Palmer, they stipulated that Defendant would satisfy or assume existing liabilities up to a sum of \$110,000. This was hardly a gracious concession on Defendant's part as Defendant was already obligated so to do as the "down payment" under the June 27, 1979 Sales Agreement (R 6, 51). The stipulation also required Defendant to bring his payments of \$3,000 per month current and continue them on a monthly basis. Defendant was already required by the Sales Agreement to perform all these acts.

Plaintiffs agreed to pay or assume all other debts of

the business sold to Defendant which exceeded that \$110,000 amount. The parties did agree pursuant to Defendant's suggestion and inducement that one such debt that Plaintiffs would assume was a tax liability of \$8,325.60 owed to the Utah State Tax Commission.

Plaintiffs did assume liability for the debts in excess of \$110,000 including the \$8,325.60 owed the State Tax Commission and thus complied with the stipulation. Plaintiffs were and are ready to hold Defendant harmless for the aforementioned debts. It should be noted that the stipulation was in the alternative, satisfy or assume the debts. In fact, Plaintiffs would have satisfied the debts if Defendant had complied with the stipulation and brought the monthly payments current and continued making the payments. As previously stated in the Statement of Facts, Plaintiffs had retired and the funds from the sale of the property were Plaintiffs only real source of income.

Defendant alleges in his brief that Plaintiffs failed to comply with the stipulation because they did not pay the tax obligation or obtain a release from the State Tax Commission. While it is true that Plaintiffs did neither, it is not true that the stipulation required those acts. Plaintiffs did assume the tax liability and were and are ready and willing to hold Defendant harmless and indemnify him against that liability. Further, Plaintiffs would have satisfied that obligation had the funds owed them, as set forth in the stipulation, been paid.

Defendant also argues that a Utah Statute, Utah Code Annotated, Section 59-15-10 prohibits Plaintiffs from assuming the tax debt of \$8,375.60 because the statute places the liability on Defendant. Having induced the Plaintiffs to assume this obligation and so agreed in formal stipulation, it is inconsistent and inequitable for Defendant to argue that statutory law prohibits enforcement of the stipulation. In fact, Defendant's position is not well taken in light of case law regarding the statute.

In Dayton v. Gibbons & Reed Company, 365 P.2d 801 (Utah 1961), this court construed the very sales and use tax provisions of the code which Defendant claims places the liability on him and make the stipulation ineffective. In construing Utah Code Annotated, Section 59-15-1 Et. Seq. through Section 59-16-1 Et. Seq. the court held:

In the absence of a statutory prohibition, there appears no reason why a party who is sui juris cannot contract to pay obligations for which a statute makes the other liable. Id. at 802.

The court held that the statute did not prevent the parties from contracting that as between themselves the seller will pay the taxes due.

It is clear that the parties are sui juris, and that Section 59-15-10 Utah Code Annotated, contains no prohibition against another assuming the tax liability in issue. Defendant's

argument that the statute prohibits shifting the tax burden is untenable in light of case law.

It is clear then that Plaintiffs need not satisfy the tax debt or get a release, but need only assume the obligation by contract as they have done. Plaintiffs' actions were consistent with the stipulation and the applicable case law.

Defendant claims that Plaintiffs do not have "clean hands" and cannot seek enforcement of the stipulation, order and judgment. Plaintiffs have over extended themselves to bring this dispute to an equitable solution. They assumed new responsibilities pursuant to the stipulation that were not imposed by the Sales Agreement. They assumed those debts that Defendant induced them to assume. They have been ready and willing to resolve this dispute in an amicable fashion.

The "clean hands" that Defendant argues should reverse the order and judgment below should be used to strangle Defendant's appeal to this court. Defendant entered and took possession of the property and has operated the property profitably. He has failed to pay the Plaintiffs for the property, (or even to pay the initial down payment which was to be paid by satisfying the \$110,000 of debts) as required by the Sales Agreement. He assumed no new responsibilities under the stipulation and did not comply with that stipulation. Here is a man who would keep Plaintiffs' property and not pay them for it (T2-11, 12).

It is respectfully submitted that the judgment of the District Court be affirmed.

POINT II

NOTICE HAD BEEN GIVEN TO DEFENDANT THAT JUDGMENT WOULD BE REQUESTED AND RELIEF SOUGHT THOUGH COPIES OF THE AFFIDAVIT AND JUDGMENT WERE NOT RECEIVED BY DEFENDANT UNTIL AFTER JUDGMENT HAD BEEN ENTERED.

Defendant would mislead this court into believing that he never knew that judgment would be requested upon the stipulation. The record conclusively demonstrates the bad faith of this argument. Defendant himself in a letter to Judge Palmer (R 140) affirms that he knew of the proposed Order and Judgment that would accompany it. A copy of the Motion to approve the Order was sent to Defendant on September 24, 1981 (R 155, 156). The October 8, 1981 Minute Entry (R 154) evidences that Defendant was present, again without counsel, and made objections to the judgment and order. A copy of that Order was mailed to Plaintiff on October 7, 1981 (R 146, 147). Defendant's argument then is that he did not know the precise date and time that judgment was to be entered and did not have an opportunity to appear and be heard on December 24, 1981, the day of the judgment itself. Plaintiffs submit that Defendant had sufficient pre-judgment opportunities to object to and raise defenses to the judgment of December 24, 1981. In addition, Defendant had post-judgment opportunities to present his case (T2, T3).

The constitutionality of the procedure used by Judge Palmer in handing down the judgment will be more fully discussed in the next succeeding response to Defendant's argument, but Plaintiffs submit that the judgment of the trial court was properly entered and should be affirmed.

POINT III

THE GRANTING OF THE DECEMBER 24, 1981 JUDGMENT
WAS NOT A DENIAL OF DUE PROCESS.

Plaintiffs concede that the United States and Utah Constitutions require due process before a deprivation of property may occur. Plaintiffs also concede that the judgment deprives Defendant of property. This deprivation in no way violates due process however.

In Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) this court stated:

"Due process" is not a technical concept with a fixed context unrelated to time, place and circumstances which can be imprisoned within the treacherous limits of any formula. Rather the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." Id. at 341.

When we view the instant action in light of time, place, circumstance and basic fairness, we find that there has been no due process violation.

Defendant knew months in advance that the judgment would

be sought by Plaintiffs if he did not comply with the stipulation. He personally appeared before the court on October 8, 1981 and had an opportunity to object that he had not stipulated to judgment (R 154). He also submitted a letter to the court objecting to the Order, Stipulation and Judgment (R 140). In addition, Defendant had two opportunities to present his views and have the judgment vacated (T2, T3).

The trier of fact, based on all of the relevant evidence and basic fairness ordered judgment in favor of Plaintiffs, finding that Defendant had not complied with the stipulation and in that event had stipulated to judgment (R 182-185).

The court was not without power to embody the stipulation into a judgment though Defendant denied that he stipulated to judgment, was recalcitrant and uncooperative [(see Bear v. Carlos, 445 P.2d 144 (Utah 1968)]. In any event, the judgment of the trial court did not become final until March 23, 1982 (R 258, 259) and Defendant had ample opportunity to present additional evidence to persuade Judge Palmer to vacate the judgment.

There was no due process violation resulting in deprivation of Defendant's property. Even had there been such a deprivation on December 24, 1981, the record is replete with examples of times, places and opportunities for the deprivation to have been cured. Plaintiffs were even attempting to settle with Defendant after judgment was entered (T2, T3) and have been more than equitable with the Defendant as has Judge Palmer of the

District Court.

The Order and Judgment of the District Court should be affirmed.

POINT IV

THE ISSUES OF FACT RELEVANT TO THIS CASE WERE
RESOLVED BY THE TRIAL COURT IN FAVOR OF THE
PLAINTIFFS.

In Point IV of Defendant's argument on appeal, he alleges that there were issues of fact which were not resolved and that judgment was thus improper.

Defendant apparently misunderstands the role of the trial court. Judge Palmer was the trier of fact and concluded that the facts warranted judgment in favor of the Plaintiffs. Though the Utah Constitution Article VIII, Section 9 authorizes this Court to review the law and the facts in equity cases, this Court in the case of Stone v. Stone, 431 P.2d 802, 803 (Utah 1967) held this this Court should take into account the advantaged position of the trial judge. By entering the Order and Judgment, Judge Palmer concluded that there were no unresolved factual disputes and that Plaintiffs were entitled to judgment. This judgment should not be lightly set aside based on the bare allegations of Defendant that there are still unresolved facts.

Defendant also argues under this point of his appeal that the procedure followed by the court below was similar to that of a Motion for Summary Judgment. How does that entitle

Defendant to relief? It does not. The case of Pioneer Savings & Loan Association v. Pioneer Finance & Thrift Co., 417 P.2d 121 (Utah 1966) is dispositive of the issue. In that case this Court held:

The trial judge not only can but should grant a motion for Summary Judgment if he feels certain that he would rule that way no matter what proof a party could produce in support of his contentions. Id. at 123

If the judgment was procedurally the same or similar to a Motion for Summary Judgment as Defendant alleges, it would have made no difference if Defendant had been allowed to present affidavits if Judge Palmer felt certain that Plaintiffs were entitled to Judgment. That Judge Palmer was certain that Plaintiffs were entitled to judgment is clearly evident by the judgment (R 182-185) and the Transcripts (T2-11, 12) (T3-3, 4).

The issues of fact have been resolved by the trier of fact and judgment was entered accordingly. The judgment of the District Court should be affirmed.

POINT V

THE ORDER ENTERED BY THE COURT ON OCTOBER 8, 1981 WHICH APPROVED OF THE WRITTEN STIPULATION DID NOT GO BEYOND THE AGREEMENT OF THE PARTIES AND WAS PROPERLY ENTERED.

As previously stated in this brief, the parties met on September 9, 1981 at the time the case was set for trial.

Discussions were held on and off the record, in and out of the presence of the court. The stipulation entered into was done for the purpose of avoiding trial altogether. This clearly was the intent of Plaintiffs and the understanding of the trial court (T3-3) (T2-12).

The thrust of Defendant's argument on this point is that he did not stipulate to judgment in the event of his failure to abide by the stipulation. It is true, as Defendant claims, that there is no clue in the September 9, 1981 transcript (T1-1 to 19) that judgment would be taken against the party failing to abide by the stipulation. But this court held long ago in Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., 195 P.2d 249, 254 (Utah 1948) that a stipulation entered into by parties to a suit is to be construed in light of the situation at the time of the execution of the stipulation.

The stipulation in the instant action should be construed in light of the circumstances of September 9, 1981. Trial was to be held that day. Defendant had been advised by the court to obtain counsel but failed to heed that advice, judging himself to be sufficiently astute to handle the proceedings of the day. It was clear to everyone but Defendant that judgment would be entered upon non-compliance with the stipulation as reaffirmed by the court in the hearing on that very issue on October 8, 1981 (R 154). In attempting in good faith and conscience to settle the dispute, Plaintiffs, through their coun-

sel, assumed new obligations. Defendant merely agreed to perform what he was already bound by contract to perform. Plaintiffs' counsel in no way attempted to take advantage of Defendant as Defendant alleges and to the contrary saw fit to have his clients assume new obligations relieving Defendant of certain liabilities.

If Defendant was in a disadvantaged position it was Defendant's own actions that placed him there. "A court of equity will generally not assist one in extricating himself from circumstances which he has created." Battistone v. American Land and Development Co., 607 P.2d at 839 (Utah 1980). Defendant's claims that the stipulation should be interpreted within the walls of the stipulation of record and that it should be construed against the party represented by counsel flies in the face of case law requiring stipulations to be construed in light of all the circumstances at the time of execution.

Plaintiffs should not suffer because Defendant misunderstood or chose to misunderstand the stipulation or because Defendant chose not to have an attorney advocate for his rights. It is submitted that the October 8, 1981 Order was properly entered by the court and did not exceed the stipulation of the parties. The judgment of the District Court in favor of Plaintiffs was entered by the trier of fact based on the relevant facts which were known to the trial court. That judgment should be affirmed and this court should not extricate Defendant from a position he has created.

CONCLUSION

Defendant has come before this court urging that equity should restrain enforcement of the judgment against him and alleging that Plaintiffs have unclean hands.

We can analyze the role of Defendant and Plaintiffs in this controversy to determine who is the party with unclean hands and to whom equity should grant relief.

Defendant refuses to acknowledge that he stipulated to judgment though Judge Palmer so found. Defendant merely stipulated to certain settlement terms which he was already obligated by contract to perform. Defendant induced Plaintiffs to assume certain tax obligations and now alleges that the stipulation is ineffective because Plaintiffs so assumed them. Defendant had to be compelled to respond to discovery and refused to cooperate with Plaintiffs in finalizing which obligations Plaintiffs would assume under the stipulation although Plaintiffs were willing to and did use all of Defendant's figures as to amounts that were owing. Defendant refused to obtain counsel though advised so to do by Judge Palmer and now alleges that Plaintiffs' counsel has exercised unfair advantage over him. Finally, Defendant has been in possession for more than three (3) years of property for which he has neither paid Plaintiffs nor in fact even paid the required down payment, and has used dilatory tactics to avoid making payments. To permit further retention by Defendant would

unjustly enrich Defendant and severely penalize Plaintiffs.

Plaintiffs have tried to settle this dispute amicably. They did not force Defendant to litigate the matter pro se on September 9, 1981 but rather agreed to assume new obligations and relieve Defendant of certain liabilities, while Defendant agreed to do only a portion of what he was already bound by contract to do. Plaintiffs assumed the debts agreed upon by the parties based on Defendant's own figures and are even now willing to fully indemnify Defendant against any liability as per the stipulation. Even after obtaining judgment the Plaintiffs have attempted to settle this amicably without strictly enforcing the judgment.

"As a predicate to equitable relief, a party must exercise reasonable efforts to discharge his own obligations." Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980). Plaintiffs have done so. Defendant has not.

It is Defendant that comes to this court with unclean hands. Equity and the law should enforce the judgment against the Defendant. It is respectfully submitted that the court should follow the instruction it gave in Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976) wherein it stated:

"It is... well established that because of the advantaged position of the trial court, we give considerable deference to his findings and judgment. It is inherent in the nature and purpose of equity that it will grant relief only when fairness and good conscience so demand. Correlated to this is the precept that equity does not reward one who is engaged in fraud or deceit in the business under consideration, but reserves its rewards for those who are themselves acting in fairness and good conscience, or as is sometimes said, to those who have come into court with clean hands." Id. at 158.

Plaintiffs come into this court with clean hands. Defendant does not. The judgment of the District Court should be affirmed.

Respectfully submitted this 28th day of September, 1982.

WOODBURY, BETTILYON AND KESLER

By:

Wallace R. Woodbury
Wallace R. Woodbury

MAILING CERTIFICATE

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Brief of Plaintiffs-Respondents in Case No. 18218, postage prepaid, this 29th day of September, 1982, to:

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