1959

Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Petition for Rehearing, Brief of Respondents

Utah Supreme Court

George B. Stanley; Richard L. Maxfield; Attorneys for Plaintiffs and Respondents;

IN THE SUPREME COURT

of the State of Utah.

MAX E. BIRCH and FONTELLA BIRCH, his wife,

Plaintiffs and Respondents,

-vs-

FORREST W. FULLER and JUDITH HYDE FULLER, his wife; KENNETH W. JUDD and RUBY F. JUDD, his wife,

Defendants and Appellants.

Case No. 8822

BRIEF OF RESPONDENTS

on

PETITION FOR REVIEW

GEORGE B. STANLEY

Attorney for Respondents.

of the State of Utah

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MAX E. BIRCH and FONTELLA BIRCH, :
his wife, :
Plaintiffs and Respondents, :
vs. : Case No. 8822
FORREST W. FULLER and JUDITH :
HYDE FULLER, his wife, and :
KENNETH W. JUDD and RUBY F. JUDD, :
his wife, :
Defendants and Appellants. :

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BRIEF OF RESPONDENTS
PETITION FOR REVIEW

In order to make a concise statement of the facts in this case, and to make an orderly argument against the matters alleged in the brief of appellants, the respondents will argue the two points set out in the brief in reverse and will answer POINT II first.

THE JUDGMENT OF THE TRIAL COURT SHOULD STAND.

In their brief under Point II, pages 4 to 7, the appellants base their entire argument upon a claim under Exhibits "A", "C" and "I" in evidence in the case. At the trial, they made no such claim, but claimed adversely to these exhibits.

Let us examine the record and see what it actually shows.

As to pleadings, the record shows that plaintiffs filed an action in two causes, the first alleging slander of title by the filing of a lis pendens with no subsequent action following, and without any right or title whatsoever, and the second alleging trespass without right (Record 1-4).

As to the first cause of action, the defendants answered denying all allegations except that the lis pendens had been filed by them. As to the second cause of action, defendants denied all of the allegations "except that they admit they are in possession pursuant to an agreement made by the Plaintiff's to sell the property which the defendants are occupying to the defendants Forrest W. Fuller and Kenneth W. Judd."

It is to be noted that the alleged agreement was between the plaintiffs and the defendants Forrest W. Fuller and Kenneth W. Judd.

There was a pretrial held (Transcript Birch-D-5).

Quoting from the transcript starting on page 5:

"MR. HYDE: I think, after the pretrial discussion we have had in Chambers, the point of beginning this matter would be sometime in February at the time they entered into this $7500.00 agreement. Everything prior to that would be of no materiality in this action.

"THE COURT: I think as far as this proceeding is concer[illegible] the entry of any of the

defendants onto the land and anything they did on the land, and the damages that might have been sustained that you claim.

"MR. STANLEY: Your Honor, may I make this observation, that for the record there should be certain stipulations entered in the record so that we might proceed to show our damage under those stipulations; otherwise, the record will be entirely void of any basis for any damage.

"THE COURT: We can make a record of the matters that were discussed at the pretrial.

"MR. STANLEY: That is right.

"THE COURT: So that you may proceed from the standpoint of the entry of any of the defendants on to the land and any damages that may have been sustained.

"MR. STANLEY: Shouldn't the stipulations we made before Your Honor be entered in the record?

"THE COURT: Yes, they should be entered in the record but we don't need to do that at this present time. We can go ahead and take the evidence."

No record was ever made of such stipulations as were made at the pretrial.

The appellants claimed under a $7500.00 agreement entered into sometime in February. The original purported Uniform Real Estate Contract (Exhibit A) is dated January 31st, 1957, prior to the date of the alleged $7500.00 contract which is not in the record and upon which no testimony is in the record. Birch testified that the "$7500.00 only applied at the time I talked with Fuller, if he would have the money within a week." (Transcript Birch--D-12). Later in his testimony, Birch testified "Ther agreement ever entered

into?

Sather claimed no interest under the Uniform Real Estate Contract (Exhibit A) as is set forth on page 39 of the transcript, and did not contend that any payment had been made on such contract, and that the $2,000.00 advanced on the mortgage (Exhibit C) was not to be a down payment on Exhibit A. Sather claimed nothing for his option (Exhibit E) after June 1st, 1957, and admits that nothing was paid on this option (Transcript, Birch-D-41).

At pages 39 and 40 of the transcript, the following appears:

"MR. STANLEY: It was claimed at the other hearing, very definitely, that the $2,000.00 that was advanced on this mortgage was claimed to be a down payment on the purchase of the property.

"MR. HYDE: No, our contention is simply this, that the initial agreement was superseded and modified by another agreement that they entered into pursuant to that agreement.

"THE COURT: Entered pursuant to a subsequent agreement?

"MR. HYDE: A subsequent agreement.

"THE COURT: Subsequent to the original agreement made.

"MR. MAXFIELD: January 21st.

"MR. STANLEY: We, of course, claim that up until this time, that claim has never been modified at all.

"THE COURT: As far as I understand it, no claim was made that anything whatever has been paid on the subsequent contract?

"MR. HYDE: With the exception of the $290.00.

"THE COURT: However, that was paid before there was any st[illegible] can't claim that.

"MR. HYDE: No, the $7,500.00 contract was made before Mr. Sather entered into any option and the $290.00 was paid pursuant to that agreement.

"THE COURT: Very well. I will let all the Exhibits in, then, if that is the claim."

Again, on pages 107 and 108 of the transcript the appellants made the following stipulations:

"THE COURT. Yes, the premises have been viewed by the Court. Now you have another matter that you wish to place in the record?

"MR. HYDE: Yes. Our witnesses, if called, would testify that the defendants were relying upon an agreement with the plaintiff for the purchase of the property. The $290.00 here was paid pursuant to the agreement nominated Exhibit I.

"MR. STANLEY: That $290.00 was paid before Exhibit I was made. Exhibit I was the last option that Sather had, as I remember.

MR. HYDE: And that they have, at all times, believed and taken the position that they were on the property pursuant to purchase agreement and not under the Sather option but were claiming ADVERSE TO THE SATHER OPTION AND THE AGREEMENTS IN EVIDENCE IN THIS CASE." (Emphasis ours.)

The above quotations are made to show the claim of the appellants at the trial. The $7,500.00 agreement was alleged to be entered into sometime in February, 1957 (Transcript Birch-D-5). The $290.00 was paid on the mortgage which was dated March 27th, 1957 (Plaintiffs' Exhibit C). The $7,500.00 agreement is not in evidence, nor is there any oral testimony as to its terms or anything else about it. The $7500.00 agreement is the entire defense of the [illegible] they did not claim under

Plaintiffs' Exhibits A, B, C, E, or I, BUT CLAIMED ADVERSELY TO THEM. Max Birch testified that no $7,500.00 agreement was ever entered into. The court believed Max Birch. No evidence in the record disproved his testimony.

On page 108 of the transcript it is shown as follows:

"MR. MAXFIELD: It was my understanding on the stipulation that all testimony, either by the plaintiff or the defendants, concerning the contracts, would not be relevant and would not be given because the only question would be damages.

"THE COURT: Well, we agreed, I thought, that we were going to stipulate to those matters, so the only testimony introduced in open court would be as to damages."

The question of damages was heard by the court, he viewed the premises, and from the evidence and his viewing of the premises he entered his findings, conclusions and decree. There is sufficient evidence in the record to support the findings of the court. There is nothing in the record to show that from a preponderance of the evidence the findings of the court were in error. The findings, conclusions and decree must therefore stand (Beezley v. Beezley, 206 P.(2d) 274, 277. (Utah Supreme Court, 1956.)

II

THE FACTS STATED IN THE OPINION OF THIS SUPREME COURT ARE TRUE.

As to Part I of appellants brief, shown at pages 2 and 3

The appellants in their brief at page 2 state that respondents "finally admitted to the Court that the facts set forth in their brief were not supported by the record." This is not true. The respondents stated that there may be some facts in their brief that were not supported by the record made at the trial but that all of them were supported by testimony given in the hearing in the order to show cause.

At page 3 of their brief, appellants list four matters which they claim are not supported by the record. The answer to this is that Plaintiffs' Exhibit F is a letter from Forrest W. Fuller, one of the defendants, to the respondents. This letter answers most of the four items in their regular order as follows:

1. Forrest W. Fuller was the attorney for respondents.

2. He retained $50.00 "out of your proceeds in my account."

3. The lease to the "Standard Oil" is mentioned, as is the $290.00 payment on the mortgage.

The answer of the defendants admits the entering and "possession" of the lands involved in the action. The Court reviewed the premises and could see for himself the extent of the damage without further testimony.

Exhibit F also shows the malice which the defendant Forrest W. Fuller had for the respondents.

The appellants in their brief contend that the facts

set forth in their original brief by the respondents are false, and that this Supreme Court was misled by them. The record shows no such thing. What there is in the record bears out the truth of the statements. There is nothing in the record to disprove them. If the statements are true, then this Supreme Court could not have been deceived by them.

The writer conducted the hearing on the order to show cause. The writer made an investigation into the facts in the case. To the writer's own knowledge, the statements of fact made by this Supreme Court in its opinion are 100% true and correct. This statement is made in answer to the claim of falsity made by the appellants.

CONCLUSION.

The appellants in their brief are taking a new stand that was not taken in the Court below, one that is completely adverse to what is set out in the record. Their claim of falsity in the record is unfounded and is not supported by the record. Their petition for review should be denied.

Respectfully submitted,

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