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Gene W. Mower v. Etta Bohmke : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

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GENE W. MOWER,

Plaintiff and Respondent.

—vs.—

ETTA BOHMKE,

Defendant and Appellant

Clerk, Supreme Court, Utah

Case No.

8826

BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

GENE W. MOWER,

Plaintiff and Respondent,

—vs.—

ETTA BOHMKE,

Defendant and Appellant

Case No.
8826

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an appeal from the major portion of an Order (R-92,93) made and entered by the Third District Court of Salt Lake County on the 27th day of January, 1958, refusing to set aside and declare null and void the Sheriff's Sale of that certain tract of improved real property in Salt Lake County, Utah, designated as 981 Lincoln Street, Salt Lake

City, Utah, which took place on the 4th day of June, 1957 and the Sheriff's Deed issued thereunder on the 27th day of November, 1957. While the aforesaid Order of the District Court did hold that the Sheriff's Deed was improper and invalid, it nevertheless ruled that the Sheriff might issue a new deed and also that the defendant be granted a sixty (60) day period of redemption from the date of filing of any newly issued deed in the office of the County Recorder of Salt Lake County.

A brief summary of the entire case and the proceedings leading up to the challenged Order of the District Court giving rise to this appeal will help to focus attention on the errors made by the District Court.

On the 19th day of October, 1949, judgment (R-29) was made and entered by the District Court of Salt Lake County against Etta Bolmke, defendant and appellant herein, a woman presently of the age of 74 years. She, at that time, made an attempt to appeal that judgment to the Supreme Court of Utah, but, pursuant to a motion prosecuted by plaintiff and ^{APPELLANT} herein, this Court dismissed the appeal and issued its Remittitur (R-40) because the Notice of Appeal was filed more than 90 days after the motion for New Trial was denied. Nothing further was done about the aforesaid judgment until the 14th day of February, 1957, when, pur-

suant to a Writ of Execution, the Sheriff of Salt Lake County, attached and levied upon Etta Bohmke's property at 981 Lincoln Street. (R-42,43) The said property was thereafter advertised to be sold at Sheriff's Sale on the 21st day of May, 1957, at 12:00 o'clock noon. (R-44) Although the Sheriff' Return of Sale already on file ^{AND OF} ~~with the~~ ^{RECORD} ~~and filed~~ with the County Clerk showed that the sale had been made on the 21st day of May, 1957, at 12:00 o'clock noon, the sale did not actually take place until the 4th day of June, 1957. The Sheriff's Return of Sale already on file with the County Clerk however was not changed and corrected to show the actual date of sale until sometime later, namely, approximately a month prior to the 21st day of January, 1958. (R-56)

Although the testimony concerning the postponement of the sale as originally scheduled and advertised to be held on the 21st day of May, 1957, is a little confusing, there is no conflict whatsaever in the record that when the sale was actually held on the 4th day of June, 1957, the only notice to Etta Bohmke, defendant and appellant herein, or to her attorney, that the sale would be held on that date, was a telephone call made by a Deputy Sheriff of Salt Lake County to Etta Bohmke's attorney just 30 minutes before the actual sale of the property took place. (R-55,73)

At the time the actual sale took place on the 4th day of June, 1957, a Declaration of Homestead (Exhibit D-1) had been previously filed for record with the County Recorder of Salt Lake County on the 6th day of May, 1957 (Exhibit D-1, R-63). of this, both the Sheriff's Office of Salt Lake County and the Deputy Sheriff who conducted the sale of Etta Bohmke's property, had actual knowledge. (R-57,58) nevertheless, the sale was carried out without any consideration whatsoever given to the Declaration of Homestead or any proper determination made as to its efficacy.

Thereafter and on the 27th day of November, 1957, a date obviously less than six (6) months from the date of the ^{SHERIFF'S SALE THE} Sheriff's Deed was issued which said deed was recorded on the 29th day of November, 1957, in the office of the County Recorder of Salt Lake County. (R-66) Again, a period less than six (6) months from and after the Sheriff's Sale.

It is appellant's position that the obvious and glaring failure to comply with required procedures prescribed for execution sales with reference to the sale of Etta Bohmke's home at 981 Lincoln Street, Salt Lake City, Utah, rendered the said proceedings nugatory, and while the District Court did hold that the Sheriff's Deed arising out of the aforesaid proceedings was improper and

invalid, it erred in not setting aside and declaring null and void the Sheriff's Sale. It erred also, in holding that the new deed could be issued, from the recording of which, defendant and appellant herein, would have sixty (60) days within which to redeem.

STATEMENT OF POINT

- No.I NO PROPER NOTICE OF THE SALE DATE^{11/4/5} GIVEN TO JUDGMENT DEBTOR OR TO JUDGMENT DEBTOR'S ATTORNEY.
- No.II NO CONSIDERATION WAS GIVEN TO THE DECLARATION OF HOMESTEAD ON FILE NOR WAS ANY PROPER DETERMINATION MADE AS TO ITS EFFICACY.
-

ARGUMENT

- No.I NO PROPER NOTICE WAS GIVEN TO JUDGMENT DEBTOR OR TO JUDGMENT DEBTOR'S ATTORNEY OF THE DAY UPON WHICH THE SALE OF

THE SUBJECT PROPERTY WAS MADE.

Both the policy and positive enactment of the law require that proper notice of execution sales be given.

Notice of execution sales is required for the purpose of securing bidders and preventing a sacrifice of the property.

21 Am. Jur., Executions, Sec. 188
If a sale is regularly adjourned or postponed, due and seasonable notice must be given of the place and time to which it is so adjourned or postponed; and in the absence of such notice, the sale will be void.

31 Am. Jur., Judicial Sales, Sec. 78.

The only notice given to the judgment debtor in the instant case was that given by the Deputy Sheriff who sold the property. This notice was given to the judgment debtor's attorney via telephone no earlier than thirty minutes prior to the time at which the property was sold. (R-73)

*** If notice of postponement is in fact substantially misleading, erroneous, or insufficient to afford a full and fair notice of the time, place, and terms of the postponed sale, it will be invalid and the sale will be void.

31 Am. Jur., Judicial Sales, Sec. 79

In the instant case the record establishes that postponement was agreed upon between counsel for the respective parties. It was, however, a postponement on condition — the condition being that a definite date be fixed, and that notice thereof be effected upon the return to town of counsel for judgment creditor. (R-72,59) The Deputy Sheriff who sold the property implies there was a condition attached to the postponement when he related his conversation with counsel for judgment debtor, at page twelve of the transcript (R-59).“ ** it was agreed at that moment anyway for a postponement, that something would happen if we had this postponement. and of course it never materialized and the sale was then, of course ordered conducted June 4th, 1957.” The Deputy does not say what the condition was nor how he knows it didn't materialize, but the fact that there was such a condition is clear from the testimony of the Deputy, counsel for the creditor, and counsel for the debtor. (R-59, 72, 83, 84) The fact that one of the counsel for judgment creditor and counsel for judgment debtor both understood that the sale would be set over until the other counsel for judgment creditor returned to the city shows that the sale had been set over to an indefinite date, and shows, without question, that something more re-

mained to be done before the sale was held and if that something failed to materialize, that a new and definite notice of the time, place and terms of the sale was contemplated. The very nature of this indefinite transaction demands such a notice.

The case of *Clark v Simmons*, 150 Mass. 357, 23 N.E. 108, is illustrative of the policy of the law toward forced sales of a person's property. It was a case wherein a mortgagee postponed his foreclosure sale, and the question which was raised on appeal, was the question as to the notice of the time and place to which the sale had been postponed. The facts showed that the only notice of the day to which the sale was postponed was given to the mortgagor by letter which he received at nine o'clock P.M. on the day prior to the sale. Because of the short notice, the mortgagor thereupon made inquiry in and about the neighborhood of the sale property attempting to appraise himself of the pertinent facts surrounding the sale. The mortgagor had, prior to the receipt of this notice, made a request of the mortgagee to notify him when he should take action looking to a sale. Because of the failure of the mortgagor to give the proper notice, the court overturned the sale under the mortgage in these words, "Under these circumstances, we think that the defendant failed to do that which the exercise of good faith and the use

of proper diligence required of him for the protection of the plaintiff's interests."

It is to be noted in the case at hand that counsel for judgment debtor received a much shorter notice, viz., a telephone call from the Deputy Sheriff at about 11:30 A.M. of the day of the sale, informing him the sale would take place at noon of that day. Even then, counsel made urgent efforts to reach parties interested in bidding in the property. (R-73)

It is submitted as axiomatic that the safeguards of the law in the form of good and sufficient notice in cases of execution sales, judicial sales, and other forced sales, are designed primarily to protect persons whose property is about to be expropriated against their will. Therefore, unless proper notice is given, the policy of the law is thwarted and a person is deprived of his property unconscionably.

While the law in this state is most exacting as to notice in the case of execution sales ~~when~~ it does however provide for a postponement of a scheduled execution sale when it is deemed expedient and for the interest of all concerned. Rule 69 (e) (2) of the Utah Rules of Civil procedure provides as follows:

If at the time appointed for the sale of any real or personal property on execution

the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the same from time to time, until the same shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than a day, notice thereof shall be given in the same manner as the original notice of sale is required to be given.

The testimony of the Deputy Sheriff who postponed the sale of Etta Bohmke's property in this case from the 21st day of May, 1957, to the 4th day of June, 1957, is that each day at noon (he) appeared at the west steps of the County Court House and postponed it." (R-54) He reiterates his statement two or three times that the postponement was made "each day". He does not state that he postponed the sale from Saturday to Monday for the two Sundays which intervened between the aforesaid dates or that he skipped Decoration Day, a legal holiday, which also intervened between the aforesaid scheduled dates. The only ~~inference~~^{REFERENCE} ~~intervened~~ which can be derived from his testimony is that he appeared on each of the days between May 21st and June 4th to postpone the scheduled

sale from day to day. In this connection anything which he did on either of the two Sundays or on Decoration Day with reference to the sale of Etta Bohmke's property would be illegal and void and as a consequence the subsequent sale of her property on the 4th day of June, 1957, would be illegal and void. Section 78-7-8 Utah Code Annotated, 1953, provides in part as follows:

No court can be opened, nor can any judicial business be transacted, on Sunday, on any day which general election is held, or on any legal holiday, except for the following purposes:

None of the exceptions to section 78-7-8 refer to or in any way authorize or permit of Sheriff Sales on Sunday or on legal holidays. Furthermore, unlike some of the other Rules of Civil Procedure, and unlike many of the statutory provisions of the State of Utah, there is nothing in Rule 69 (e) (2) dealing with the postponement of an execution sale which says or indicates that if the day to which an execution sale should be postponed should happen to be a Sunday or a legal holiday such postponed sale date is deemed to be on the following day. It would seem therefore that in either alternative of this case the Sheriff's Sale which was held on the 4th day of June, 1957, was illegal and void. If the Deputy Sheriff who postponed

the sale had actually postponed it from Saturday to Monday for the two intervening Sundays, which, by his own testimony he did not, then he in any event did not give notice thereof "in the same manner as the original notice of sale is required to be given". On the other hand, if he actually cried out the postponement of the sale on the two Sundays and on Decoration Day on which they would have been held but for his postponing them, then his action on those days is illegal and void in view of the provisions of Section 78-7-8 and the subsequent sale on the 4th day of June, 1957, is also illegal and void. See also in this connection the holding of this Court in the case of Davidson v. Munsey, 27 U 87, 74 P. 431.

No.II NO CONSIDERATION WAS GIVEN TO THE DECLARATION OF HOMESTEAD ON FILE NOR WAS ANY PROPER DETERMINATION MADE AS TO ITS EFFICACY.

There is no dispute in the record at all that the Deputy Sheriff who conducted the execution sale of Etta Bohmke's property had actual knowledge that a Declaration of Homestead had been made and was on file and of record against the

property being sold. In spite of this, the property was sold without any consideration being given to the Homestead Declaration, and, without any determination being made as to its efficacy. ~~It is submitted that a failure to consider and make a proper judicial determination as to the efficacy of a prior Homestead Declaration, and, without any determination being made as to its efficacy.~~ It is submitted that a failure to consider and make a proper judicial determination as to the efficacy of a prior Homestead Declaration concerning which there is actual knowledge voids the Sheriff's Sale of such property, and, in this case, voids the Sheriff's Sale of Etta Bohmke's property.

CONCLUSION

It is submitted that the failure to give proper notice concerning the execution sale of Etta Bohmke's home at 981 Lincoln Street rendered the said sale nugatory, and, that the District Court erred in not ruling that the said sale was illegal and void. The District Court erred also in ruling that the new Sheriff's Deed could be issued, and, acted completely outside the scope of its judicial authority in holding that Etta Bohmke could have sixty (60) days within which to redeem from and after the recording of any such newly issued deed

since the prerogative of making provision for redemption lies with the Legislature and not with the Court. Its decision in the above respects should be reversed.

Respectfully submitted,

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