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

Utah Supreme Court

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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 RESPONDENT

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IN THE SUPREME COURT
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GENE W. MOWER,

Plaintiff and Respondent,

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The only facts pertinent to this appeal are in connection with the Sheriff's Sale of that certain real property known as 981 Lincoln Street, Salt Lake City, Utah, to satisfy Respondent's judgment against Appellant, which had stood for almost eight years at the time of said Sheriff's Sale.

There appears to be no dispute on the facts in regard to the Sheriff performing the necessary acts required in such sales under Rule 69 of Utah Rules of Civil Procedure, at

least up to the time of the requested postponement of the sale, on or about May 20, 1957.

The postponement of the sale was at the special instance and request of both the Sheriff of Salt Lake County and the Counsel for Appellant, Etta Bohmke, and was reluctantly (R. 72, 75) agreed to by Gaylen S. Young, Jr., (R. 59, 60, 72) associate counsel for Respondent, upon the express condition that the Sheriff would postpone from day to day in accordance with Utah law without the necessity of Respondent incurring further delays and expenses in having to re-advertise or re-notice the sale (R. 72), and upon the further condition and stipulation of counsel for Appellant that they waive any rights to re-advertisement or re-notice on the sale by reason of said postponement (R. 72, 75).

It was understood by both the Sheriff and counsel for Appellant that the postponement, as requested by them, was to take place for the purpose of awaiting the return of Gaylen S. Young, Sr., which was understood wouldn't be for about ten days time (R. 61, 72, 84).

Sheriff Holley cried the postponement of the sale from day to day until June 4, 1957, on which date the property was sold. The facts further show that Gaylen S. Young, Sr. returned to Salt Lake City near the end of May, 1957, and attempted to contact by phone Appellant's attorney, leaving word for him to call back on two or three occasions, and thereafter, since no word was heard, or offers received from Appellant or her attorney, the Sheriff finally went ahead with the sale on June 4, 1957 (R. 84, 85, 80).

The facts seem to be in conflict as to whether there was supposed to be some further agreement between the respective

counsel as to a future date for the Sheriff's Sale (R. 84), but it is clear that counsel for Appellant was notified of the actual sale before it took place and that he made no effort whatsoever to object or further postpone the same (R. 74, 75).

The facts further show that neither Appellant, nor her counsel, James Barker, Jr., made any objection or raised any question as to notice after the sale had taken place, but that after James Barker, Jr. had withdrawn as Appellant's counsel, Appellant, with new counsel, files a motion to set aside the sale which had taken place more than 6 months previous, and after Respondent's judgment had expired.

Appellant's attorney refers to "The obvious and glaring failure to comply with required procedures prescribed for execution sales," but there are no facts to support this statement. True, there was an error made by the Sheriff's office in recording the proper date, but no argument is made by counsel on this matter, so no further facts or arguments will be stated by counsel in this Brief.

As to the "Declaration of Homestead," filed by Appellant, the facts are clear that there is no claim, nor showing on the declaration itself, that Mrs. Bohmke is a "Head of a family" (R. 70, Exhibit D-1).

It is, therefore, Respondent's position that Appellant's motion and appeal is not well taken, that the Sheriff acted according to law in said Sheriff's Sale, that proper and due notice was given, and that Appellant should be estopped now in raising any question as to lack of notice in an attempt to void said sale.

STATEMENT OF POINTS

POINT I

PROPER NOTICE WAS GIVEN JUDGMENT
DEBTOR OF SHERIFF'S SALE.

POINT II

ADEQUATE CONSIDERATION WAS GIVEN TO
HOMESTEAD RIGHTS, AND THERE WAS NOT A
PROPER DECLARATION ON FILE.

ARGUMENT

POINT I

PROPER NOTICE WAS GIVEN JUDGMENT
DEBTOR OF SHERIFF'S SALE.

It must be kept in mind that the only real question raised by Appellant in this appeal is whether the Sheriff's Sale can be declared void by reason of the postponement of said sale and the amount of notice that was given before the actual sale took place. Since this is apparently the only real issue, it must be borne in mind that the postponement of the sale was clearly brought about and promoted through

Appellant's counsel, James Barker, Jr. (R. 59) and then specifically requested of Respondent's counsel through Sheriff Holley and James Barker, Jr., as was testified to by both Sheriff Holley and James Barker, Jr. (R. 59, 60, 72). Further it was specifically agreed and stipulated by said counsel for Appellant that they were waiving any rights they might have to further re-advertisement or re-notice on the sale by reason of the postponement. This was made a condition, clearly for the reason that Gaylen S. Young, Sr. was out of town and was not expected back for about ten days, and because the statute on postponement of a Sheriff's Sale was not absolutely clear as to the length of time for a postponement without additional notice. Appellant's own counsel testified at the hearing as follows:

“Harry Holley said he wanted to settle it, and I thought Gaylen Young, Jr. would be amenable to postponing the sale and I called him up. He said he would be agreeable to setting the sale over until his father got back. He was worried about posting notice, and he didn't want to go through the expense of posting notice. I said if he agreed to postpone, and if the homestead matter fell through, I would withdraw as attorney and we would agree to the date, and the sale take place, and we had had notice and no new notices needed to be posted, and he said under those circumstances it was agreeable to postpone the sale, and we agreed both would call Harry Holley, stating that is the agreement.” (See Record Page 72)

It certainly appears to counsel for Respondent that Appellant, after waiting more than six months from the actual sale date, after Respondent's judgment had expired,

and after acquiring new counsel, is out of order in prosecuting this appeal on this ground. It is Respondent's position, therefore, that even if Appellant's argument were sound, which we claim it is not, Appellant has waived her rights to additional notice and should be estopped from asserting that the lack of such notice makes the said Sheriff's Sale void. Respondent is supported by the law in this matter as shown in 21 American Jurisprudence—Executions—Sections 186, 187, and 195. Section 195 on "Waiver and Estoppel" is quoted as follows:

"Notice of an execution sale is primarily for the benefit of the defendant, who may waive his right to object to the lack of it or to irregularities connected therewith, at least where there are no liens on the property. Moreover, the objection will be considered as waived unless made within a reasonable time by the defendant in execution or by some person who has been prejudiced." (See also 31 American Jurisprudence—Judicial Sales—Section 261).

Again in 21 American Jurisprudence—Executions—Section 196, Page 100 it states:

"An execution sale at a time other than that prescribed by law has been held not to render the sale void, but to be a mere irregularity which may be waived by the execution debtor . . ."

It is Respondent's contention, however, that the sale did take place as prescribed by law and that due and seasonable notice was given. Notice was properly given of the sale as prescribed by statute to the time of postponement, which is not denied, then during the postponement period the

Sheriff cried the postponement of the sale, each day, from day to day, and in addition contacted, personally, Appellant's counsel before the sale, after all reasonable efforts had been made by Respondent's counsel to do so. Counsel, in Appellant's brief, makes a point of the fact (which is in dispute) that some definite sale date would have to be agreed upon by the parties before the Sheriff's Sale could take place. This would appear to be quite out of reason, for that would have left it in the hands of Appellant to delay at will the sale date for an indefinite length of time. The whole spirit and intent of the postponement was to await the return of Gaylen S. Young, Sr., who had been handling the case for Respondent, to confer with them on an offer that was supposed to be presented, or forthcoming from Appellant, (which offer was never in fact made) and then the sale to be conducted. (See R. 59, 60, 61, 72, 75, 83, 84, 85). However, the fact that Appellant's counsel did not return the calls made to his office, and the fact that no objection whatsoever was made to the Sheriff going ahead with the sale after personal contact was made, indicates that Appellant *did* agree to the sale taking place on June 4, 1957, and cannot now object to any lack of notice. The fact, also, that all attempts to come to some agreement between the parties had failed prior to this time, and the fact that an offer, substantially the same as that which James Barker, Jr. testified was agreeable with Appellant at the time of the request for the postponement, was made by Respondent to Appellant after the sale was consummated, but again refused, (R. 77), leads one to believe that Appellant was not seriously considering making any offer to Respondent, and Respondent

was certainly justified in having the sale take place after making reasonable efforts to contact Appellant.

Under these circumstances counsel for Appellant cannot claim that the notice of postponement was substantially misleading, erroneous, or insufficient or that due and seasonable notice of time and place of adjournment was not given.

In 31 American Jurisprudence—Judicial Sales—Section 79, it states as follows:

“The weight of authority apparently supports the view that a notice of adjournment of a sale, which has been in all respects regularly advertised, is sufficient if made in good faith, and if reasonably calculated to give proper publicity as to time and place. Reasonable effort to prevent a sacrifice of the property is all that is necessary, the sufficiency of a notice depending largely on the particular facts of the case wherein it was given. Personal service of the notice is not necessary, it may in a proper case, be given by publication in a newspaper, *or by proclamation.*” (See also 31 American Jurisprudence—Judicial Sales—Section 80, and 37 American Jurisprudence—Mortgages—Section 613).

Counsel is not aware of any Utah law interpreting the statute on “Postponement” as set out in Rule 69 (e) (2) of Utah Rules of Civil Procedure, but it is clear that the Salt Lake County Sheriff’s Office has postponed sales in the past, and it has been their custom to postpone from day to day and not have to re-advertise or re-notice the sale. That is what Sheriff Holley informed counsel for Respondent on at the time of the request for postponement and how he

testified at the hearing in this matter (R. 54). We submit that under the statute the Sheriff may, on his own, if he deems it expedient, postpone the sale. He deemed it expedient in this case, and did it in the manner to which he had been accustomed. Such custom should be a factor in considering what the Legislature had intended on such postponements. The statute also indicates that the officer "may postpone the same from *time to time*, until the same shall be completed," indicating, it seems, that several days were contemplated, because the statute goes on to say what kind of notice is needed in that event, to-wit, only a proclamation, for it states, "and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale." The only restriction on this type of notice, then, was in case the officer postponed the sale for a longer period than a day. In the case at bar, Sheriff Holley postponed by public proclamation for a day at a time, clearly within the spirit and meaning of the statute. In 21 American Jurisprudence, Section 242, Page 123, it states.

"Execution sales are not scrutinized by the courts with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor so as to secure, if such can be done consistently with legal rules, the object they were intended to accomplish."

Where an officer is exercising due diligence and acts in good faith and with an honest intention to perform his duty, he should be given some latitude of discretion, and where it is within reason to do so, we submit that his acts should be upheld by the courts. (See *Williams vs. Conti-*

mental Securities Corporation, 153 P 2nd 852, also 31 American Jurisprudence—Judicial Sales—Section 42.)

There is another factor to be considered in this matter, and that is, if the acts of the Sheriff in this sale render the sale void for the reasons stated by opposing counsel, then surely it would place a cloud on the title of all other real property where the Sheriff has performed in a similar fashion.

It is not clear whether Sheriff Holley postponed the sale from one business day to the next, where Sundays or holidays intervened, or whether the proclamation was actually made on said Sundays and holiday; however, in either event, counsel for Respondent is of the opinion that there would be no violation of the meaning of the statute which would require re-advertisement or re-notice as originally given.

In the 1953 Utah Code the word “day” is used rather than “twenty-four hours,” as used in the 1943 Utah Code at 104-37-20. This apparently was the only change made when this section was repealed by laws 1951, Ch. 58, Sec. 3. No doubt the Legislature had in mind the postponement from one business day to the next as is also contemplated in the statute pertaining to “time” found in Rule 6 (a) of the Utah Rules of Civil Procedure. A “day” by this rule does not include Sundays or holidays. So if the Sheriff postponed the sale from one business day to the next, we submit that he was within “one day” as contemplated by the statute.

However, if the proclamation was made on a Sunday or a holiday by the Sheriff, postponing the sale to the next day, again, we submit that it would not render the sale

illegal and void as argued by counsel for Appellant. Section 78-7-8 Utah Code Annotated 1953 does indicate that the courts are not open, nor can judicial business be transacted on Sunday and legal holidays, with certain exceptions, among, which, however, are "executions"; but there is no mention of making such acts void. It merely indicates that where such business does fall upon said days, "it is deemed appointed for, or adjourned to, the next day." It is further Respondent's contention that a Sheriff's sale is not a "judicial act" or "judicial business" that comes within the meaning of this statute. (See 58 ALR, 1273; also *White vs. Zust* 28 N. J. Eq 107 and cited in the annotation 58 ALR at Page 1275.)

Again it is submitted that the consideration and interpretation to be given in this case should be that most favorable to upholding said Sheriff's sale as valid.

POINT II

ADEQUATE CONSIDERATION WAS GIVEN TO HOMESTEAD RIGHTS, AND THERE WAS NOT A PROPER DECLARATION ON FILE.

Since counsel cited no cases to support this ground of Appellant's appeal and has made only a passing statement concerning it, we assume he is not serious on this point.

Even in the case where there is a homestead right, it is clear in the law that the judgment creditor may have execution against the homestead and may have the same sold,

where the homestead exceeds in value the exemption. See Utah Code Annotated 1953, 28-1-15 and Notes; 28-1-2; 28-1-14; and Giesy-Walker Co. vs. Briggs, 162 P 876.

In the instant case it is clear that the value of the real property far exceeds the homestead exemption claim (Exhibit D-1), and therefore we submit that the Sheriff's sale of said property is not void. This would also be the case, even if a proper homestead declaration were on file. However, it is Respondent's contention that the homestead declaration filed by Appellant is of no force or effect, and is null and void.

The law requires under 28-1-10 Utah Code Annotated 1953, as follows:

“The homestead must be selected and claimed by the homestead claimant by making, signing and acknowledging a declaration of homestead as provided in section 28-1-11, Utah Code Annotated 1953, which declaration must, before the time stated in the notice of sale on execution, or on other judicial sale, as the time of sale, of premises in which the homestead is claimed, be delivered to and served upon the sheriff or other officer conducting the sale or recorded as provided in section 28-1-12, Utah Code Annotated 1953. *If no such claim is filed or served as herein provided, title shall pass to the purchaser at such sale free and clear of all homestead rights.*”

Also 28-1-11 of the said Code requires the following:

“The declaration of homestead must contain:

(1) A statement showing *the person making it to be the head of a family*, or, when the declaration

is made by the wife, showing that her husband has not made such declaration.

(2) A description of the premises.

(3) An estimate of their cash value.”

It is undisputed from the facts that Appellant's Declaration does not contain a statement showing her to be the “head of a family,” and therefore, Appellant has not made a claim as provided by 28-1-11. Consequently, title to the real property passed to the purchaser at the Sheriff's sale free and clear of all homestead rights as indicated in 28-1-10 of said Code.

CONCLUSION

Respondent respectfully submits that the view held by the District Court is the proper one and that the appeal should be dismissed and the judgment of the District Court should be affirmed with costs to Respondent.

Respectfully submitted,

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