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Calvin N. Hall and Rita M. Hall v. Perry G. Fitzgerald, Carolyn S. Fitzgerald et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

CALVIN N. HALL, and RITA M. HALL, Plaintiffs-Respondents,	)	Case No.
vs.	)	18371
PERRY G. FITZGERALD, CAROLYN S. FITZGERALD, et al., Defendants-Appellants.	)	

BRIEF OF APPELLANTS

Appeal from Order of District Court of Utah

County for Summary Judgment

Honorable Allen B. Sorensen, Judge

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NATURE OF CASE

This is an action by the sellers of real property to treat a uniform real estate contract as a note and mortgage, to have the property sold at a foreclosure sale, and for judgment against the buyers for the deficiency.

STATEMENT OF FACTS

The parties entered into a uniform real estate contract dated December 30, 1977, whereby plaintiffs sold to defendants 1,840 acres of undeveloped land in Cedar Valley, Utah County, for $460,000.00, payable $90,116.00 down and $40,000 annually until December 30, 1986, when the entire balance was payable (R 6,7). Defendants made the down payment and the annual payments in 1978 and 1979 (R 3, paragraph 5). Defendants paid $500.00 on October 15, 1980, but did not pay the balance of the annual payment due on December 30, 1980 (R 11). Plaintiffs filed suit in May

1981, after negotiations to settle the matter otherwise were unsuccessful (R 2-4). Defendants in their Answer denied that Exhibit B to plaintiffs' Complaint was the contract entered into because it did not have a provision requiring plaintiffs as sellers to deed to defendants as buyers part of the land purchased when the annual payments were made (called release clauses) (R 11). Before any discovery was undertaken by either side, plaintiffs moved on September 18, 1981, for a summary judgment based on an affidavit of the plaintiff husband and the attorney for plaintiffs (R 12). On September 28, 1981, defendants moved to amend their Answer to assert a breach of the subject contract by plaintiffs (failure to pay plaintiffs' seller $30,000.00 due on the contract referred to in paragraph No. 6 of Exhibit B referred to above) and to reform the subject contract to set forth the release provision referred to above (R 36-38). Without expressly ruling on defendants' Motion to Amend and without oral argument, the lower court entered a Judgment and Order for $401,464.71 on November 23, 1981 (R 29, 30). Defendants filed a Motion to Set Aside Judgment on November 27, 1981 (R 32,33) on the following four grounds: (1) defendants' Motion to amend their Answer had not been ruled upon; (2) newly discovered evidence (defendants' payment of $40,000.00 to plaintiffs' sellers had been applied by them to plaintiffs' contract so plaintiffs had the benefit of that sum which was in fact an acceptance of the only payment due as a breach upon which the judgment was predicated; (3) judgment was not supported by a Findings of Fact and Conclusions of Law as required by Rule 56(d) of U.R.C.P.; (4) the judgment violated Sec. 78-37-1, 2, U.C.A., 1953, as no money judgment is proper until after a sale of the property security as the proceeds might extinguish the debt.

The denial of that motion resulted in the Judgment of November 23, 1981, becoming final. The facts in support of the Motion last referred to and in support of both the Answer and the Proposed Amended Answer have never been found as there has been no evidentiary hearing needed to establish their existence or non-existence. Affidavit Leland A. Fitzgerald, plaintiffs' seller, generally supports these factual claims (R 79). They were filed after the Summary Judgment but before the hearing on the Motion to Set Aside.

DISPOSITION BELOW

The lower court granted plaintiffs' Motion for Summary Judgment on November 23, 1981, without oral argument. Defendants Fitzgerald moved to set aside that judgment. The latter motion was denied on March 11, 1982 (R 44).

RELIEF SOUGHT ON APPEAL

Appellants seek to have the Judgment and Order of November 23, 1981, set aside, permit their proposed Amended Answer to be filed and to proceed to trial on the merits.

ARGUMENT

POINT I

THE LOWER COURT ERRONEOUSLY GRANTED A SUMMARY JUDGMENT ALTHOUGH THERE WERE MATERIAL FACTS CONCERNING WHICH THERE WAS A GENUINE DISPUTE, SPECIFICALLY WHETHER THE CONTRACT SUED UPON WAS THE CONTRACT THE PARTIES HAD ENTERED INTO SINCE IT HAD NO RELEASE PROVISION AND WHETHER THE RESPONDENTS ACCEPTED THE PAYMENT MADE BY APPELLANTS TO KEEP THEIR OWN CONTRACT CURRENT AND THUS CURED THE BREACH ON WHICH THE JUDGMENT WAS BASED.

In their answer of July 8, 1981, the appellants expressly alleged that the contract sued upon was not the contract entered into by the parties because the contract sued upon did not contain a "release provision" (R 11). This clear denial of paragraph 2 of plaintiff's Complaint created a factual dispute which was most material to this lawsuit. There is nothing in the affidavit of either Calvin Hall, one of the respondents (R 14, 15) or in the affidavit of his attorney, Richard A. Rappaport (R 20, 21) which addresses this factual dispute at all. Such was the state of the record at the time the summary judgment was entered on November 23, 1981 (R 29, 30). To deny appellants their opportunity to prove their factual assertions was error. Numberous decisions of this Court establish this proposition beyond dispute. Illustrative are the following recent cases on this point:

In re Williams Estate, 10 Ut. 2d 83,348 P 2d 683 (1960)

Anderson v. Granite School District, 413 P 2d 596 (1966)

McBride v. Jones, 615 P 2d 432 (1980)

Foster v. Salt Lake County, 632 P 2d 810 (1981)

POINT II

IT WAS ERROR FOR THE LOWER COURT NOT TO GRANT A TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE WHICH CAME TO LIGHT AFTER THE ENTRY OF THE SUMMARY JUDGMENT.

The judgment in question was predicated upon the failure of appellants to pay $40,000 on December 30, 1980. That amount was paid by appellants to Leland A. Fitzgerald, respondents' seller, who requested that it be

paid directly to him as he was fearful that respondents would not pay him the $30,000 due him on the contract referred to in paragraph 6 of the subject contract (R 6, 7). After the entry of the summary judgment in question, it came to appellants' attention that the respondents had utilized most, if not all, of the payment respondents made to preserve their interest in the subject property. Appellants timely moved to have the judgment appealed from set aside on the basis of that evidence (R 34, 35).

No case has been found which deals with a new trial when there was not an initial trial because a summary judgment proceeding was involved but the same principles of requiring the final resolution to reflect all the facts bearing on the merits should be as applicable to this case as to any other.

POINT III

THE LOWER COURT ERRED IN GRANTING JUDGMENT FOR THE BALANCE OF THE PURCHASE PRICE PURSUANT TO PARAGRAPH 16C OF THE UNIFORM REAL ESTATE CONTRACT IN THE ABSENCE OF ANY ALLEGATION AND PROOF BY RESPONDENTS THAT THEY FULFILLED THE TERMS OF SAID CONTRACT BY "PASS TITLE TO BUYER SUBJECT THERETO."

Respondents did not allege that they had passed title to appellants, only that they "tender title to buyer subject to said note and mortgage" (R 3, paragraph 9). ". . . for a party to recover upon a contract for nonperformance by the other party, he must establish his own performance or his offer and ability to perform or a valid excuse for his failure to perform" (Contracts, Sec. 355, 17 Am. Jur., 2d 791). Here the offer to perform is not sufficient as the contract requires that the "title

pass." Respondents did not allege they held title to said property. In fact they would not acquire title until they paid off the $297,377 due Leland A. and Helen S. Fitzgerald on a uniform real estate contract referred to in paragraph 6 of the subject contract. Thus their complaint failed to state a cause of action and the Rule 12(h) of U.R.C.P. provides that the defense of failure to state a claim is not waived by failure to raise it by motion or in the answer. It could still be raised at a trial on the merits, a stage never reached in this case and for which this appeal is being prosecuted.

Even if respondents held the title subject to the lien of the Fitzgeralds referred to above, the title which they must transfer to appellants to enforce 16C would be a good marketable title not one subject to an encumbrance and certainly not to one of the magnitude in question. To prevail on this point, respondents would have to contend that a deed which purported to pass title even by those who had not received a deed themselves from the record title holder suffices to meet the contract terms and even if those grantors owe hundreds of thousands of dollars which must be paid off before the title is a marketable one. Such a proposition is so utterly unreasonable that appellants' counsel has made but a cursory search for a case in point.

If the judgment in question is affirmed, respondents will have or may acquire (1) all the interest in the land they ever had (since no one would pay anything but a nominal sum for the appellants' interest which would be subject to the aforesaid $279,327 due to the bottom having fallen out of real estate of the type in question)(2) the full purchase price

including $170,000 paid prior to this suit. Of course, courts can not make their determinations dependent upon economic factors. However, they can insist on both sound principle and precedents that the seller of realty convey good title thereto before they will enforce a contractual provision allowing judgment for the full price less payments made. If the price is to be full price, the title for which the price is payable must be full title. The cases so hold. The key word in paragraph 16C of the subject contract is "title." Words and Phrases under"Title - to Property"on page 380 cites Gillespie v. Broas, N.Y., 23 Barb 370, 381, U. S. v. Hunter, 21 F. 615, 617 and Langmede v. Weaver, 60 NE 992, 997, 65 Ohio St. 17 as leading cases on the meaning of "title." In Gillespie the court said "Title of itself to real estate implies an estate in fee; nothing short is a complete title." In U. S. v. Hunter the court said:

> . . .A leasehold interest may be considered, for some purposes, a title, and sometimes the word "title" is used in a general sense so as to include any title or interest, and thus a mere leasehold interest; but here it is the title, and this, in common acceptance, means the full and absolute title; for when we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee; . . .

In Langmede the court said:

> . . .The Century Dictionary defines the word "convey" to mean, in law, "to pass title by deed," and the word "title" to mean the "ownership; absolute ownership; the unincumbered fee." So that the petition sufficiently shows that Esselstein acquired the title to the land by legal conveyance, and that the possession of his tenants was lawfully held. . .

All these cases are ancient cases but the principles therein are as true today as in 1856 with respect to the meaning of "title."

It is evident that the respondent sellers did not fulfill the contract provisions of paragraph 16C as they never received title and

therefore could not convey title and even if they had title that title could not be encumbered by a lien of some $297,000 and "pass title" within the meaning of the contract terms. To permit judgment on such performance as the deed in this file (R 54) was error.

POINT IV

THE COURT ERRED IN ENTERING JUDGMENT FOR $401,464.71 PRIOR TO THE TIME THE SUBJECT PROPERTY IS SOLD AND THE RETURN SHOWS A BALANCE REMAINING DUE.

In the case of First National Bank of Coalville vs. Boley, 61 P 2d 623 (1936), this court said:

> We have held that under these sections there is no personal liability by the mortgagor until after a foreclosure sale of the security, and then only for the deficiency remaining unpaid, and that a mortgagee may not have a personal judgment against a mortgagor until the security has been first exhausted. See Zions Sav. Bank & Trust Co. v. Rouse, 86 Utah, 574, 47 P (2d) 617; Blue Creek Land & Live Stock Co. v. Kehrer, 60 Utah, 62 206 P 287.

In the Zions case referred to above Justice Wolfe in his concurring opinion explained the effect of the subject statute (then Sec. 104-55-1 R.S. 1933) as follows:

> Consequently, it transpires that not only must there be but one action for the recovery of the debt, but that the judgment obtained in said action must first provide for the sale of the security, unless proper allegation and proof is made that the security has become valueless, and that the only personal judgment that can be obtained is a deficiency judgment. This is a judgment obtained in the one action according to the provisions of that chapter and in no other way.

Here the lower court did not confine its Judgment of November 23, 1981 (R 29, 30) to "adjudging the amount due, with costs and disbursement, and the sale of the mortgage property" as provided in Sec. 78-37-1, but entered a personal judgment against the appellant defendants which was docketed in violation of Sec. 78-37-2 which provides that the personal judgment "must then be docketed" (emphasis added), the "then" clearly

referring to the time when "if it appears from the return of the officer making the sale that the proceeds are insufficient as a balance still remaining due." The withholding of a personal judgment to the latter time is essential as a practical matter to enforce the statutory mandate of Sec. 78-37-2 that "no general execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid." Thus the lien on all of appellants' real property interest in Utah since the judgment date has been wrongful and should be corrected by the decision in this case.

The foregoing goes to the procedure, form, and timing of the personal judgment. What about the substance thereof, especially the amount of the judgment? Sec. 78-37-1 provides that the Court must adjudicate the "amount due." Does that mean in a situation, such as this, where the sellers are themselves buying on contract that the amount is the gross amount due from the buyers or the net amount due? Since the purchaser at the sheriff's sale must satisfy the lien of the sellers' seller in order to own the property it would constitute unjust enrichment for the buyers to be subject to a deficiency judgment on the difference between the gross sum due and the proceeds of the sheriff's sale since the latter would be (or should be) based on the value of the property less the sum owing to the sellers' seller (difference being that between gross and net above).

In the instant case it is apparent that the sum found to be due was the gross sum, not the net sum, and thus there was error in fixing that amount.

CONCLUSIONS

The trial court erred in entering any summary judgment before trying the material facts that were genuinely disputed and in failing to grant a new trial on the issue of the application of funds paid by appellants to respondents' seller. Respondents' Complaint did not state a cause of action and the entry of judgment based on paragraph 16C of the Uniform Real Estate Contract in question was error as there is no proof in the record that respondents did "pass title to the Buyer" within the meaning of that term. The entry of a personal judgment against appellants was also in error as their interest in the subject property has never been sold pursuant to Sec. 78-37-1, U.C.A. 1953, and thus there has been no return of sale, a condition precedent to the docketing of any deficiency judgment as provided in the next section. Therefore, this cause should be remanded to the District Court of Utah County with instructions to permit the filing of the proposed Amended Answer and to try the case on its merits.

Respectfully submitted

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