

1982

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

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,

vs.

Case No. 18371

PERRY G. FITZGERALD,
CAROLYN S. FITZGERALD,
et al.,

Defendants-
Appellants

BRIEF OF RESPONDENTS

Appeal from Judgment and Order of the
Fourth Judicial District Court of Utah County
Honorable Allen B. Sorenson, Judge

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Clerk, Supreme Court, Utah

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Respondents seek to have the Order dated March 11, 1982, denying defendants' Motion to Set Aside Judgment affirmed.

STATEMENT OF THE FACTS

Respondents generally agree with Appellants' statement of facts as set forth in Appellants' brief, but believe the chronology is sufficiently important that it should be outlined as follows:

1. 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, payable \$90,116 down and \$40,000 annually until December 30, 1986, when the entire balance would become due and payable. (R. 6,7)
2. Defendants failed to make the payment of \$40,000 due December 30, 1980. (R. 3,11,14)
3. Plaintiffs sent notice to the defendants for said default. (R. 23,24)
4. When the default was not cured, Plaintiffs filed an action in the Fourth Judicial District Court in and for Utah County on May 13, 1981, to foreclose said contract as a note and mortgage. (R. 2-7)
5. Defendants Perry G. Fitzgerald and Carolyn S. Fitzgerald were served with Summons and Complaint on May 21, 1981. (R. 121)
6. On June 10, 1981, defendant Perry G. Fitzgerald allegedly paid Leland A. Fitzgerald, a relative of Perry G. Fitzgerald, the sum of \$40,000. (R. 79) Said payment was made without the knowledge of or consent of plaintiffs. (R. 42)
7. Defendants Fitzgerald filed their answer July 15, 1981. (R. 11)
8. Plaintiffs moved for Summary Judgment on September 18, 1981, four months after defendant-appellants were served with Summons and Complaint. (R. 12)
9. By a Motion filed October 5, 1981, defendants moved to amend their Answer. The proposed Amended Answer raised two additional defenses, the first being

that plaintiffs were in default in the payment of an underlying contract on the said property, the second being that the contract should be reformed to include a release agreement. (R. 86-88)

10. Defendant never requested oral argument on plaintiffs' Motion for Summary Judgment in accord with Rule 20(d), Rules of Practice in the District Court of the Fourth Judicial District of the State of Utah.

11. The Court's ruling granting plaintiffs' Motion for Summary Judgment was entered as a minute entry on October 14, 1981. (R. 82) The Court signed the Summary Judgment November 23, 1981. (R. 29,30)

12. Defendants moved to set aside the Judgment on November 27, 1981. One of the grounds for said Motion was the payment allegedly made by Perry G. Fitzgerald to Leland A. Fitzgerald on June 10, 1981. (R. 32,33)

13. Defendants' Motion to Set Aside Judgment was denied in a minute entry dated March 3, 1982. (R. 64) The Order was signed by the Court March 11, 1982. (R. 44)

ARGUMENT

POINT I

THE LOWER COURT PROPERLY GRANTED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS AND PLAINTIFFS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Plaintiffs moved for Summary Judgment pursuant to Rule 56, Utah Rules of Civil Procedure. That Motion was supported by the Affidavit of plaintiff Calvin N. Hall setting forth the facts which established that plaintiffs were entitled to relief as a matter of law, i.e., that plaintiffs as sellers and defendants as purchasers had entered into a Uniform Real Estate Contract dated December 30, 1977, (Mr. Hall averred that the Uniform Real Estate Contract attached to his affidavit was a true and correct copy of the original. [R. 14]. The Uniform Real Estate Contract attached to Mr. Hall's

affidavit as Exhibit "A" [R. 17-19] contains an addendum inadvertently left off Exhibit "A" of the Complaint. [R. 6,7] Defendant never denied that the Uniform Real Estate Contract attached to Mr. Hall's affidavit was not the agreed contract.); defendants had failed to make payment pursuant to the terms of said contract; demand for payment had been made, and defendants had not cured the default. (R. 14) The defendants had admitted the existence of a contract, and that it was in default. (R. 11)

In response to plaintiffs' Motion for Summary Judgment, defendants filed a Motion for leave to amend their Answer and a copy of the proposed Amended Answer. Neither the original Answer nor the proposed Amended Answer was verified. Defendants never submitted any affidavit raising any genuine issue of fact as required by Rule 56(e), Utah Rules of Civil Procedure, which states:

When a Motion for Summary Judgment is made and supported as provided in this Rule, by submitting Affidavits, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, via affidavits, or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.

Defendants' filing of a Motion to amend their pleadings does not relieve them of the obligation to present sworn testimony, by affidavit, verified pleadings, or otherwise, showing that there is a genuine issue of fact. Defendants failed to present sworn testimony which raised any genuine issue of fact.

The unverified amendments of a pleading should not be allowed to defeat a Motion for Summary Judgment if the amendment does not affect any substantial change in the issues as they were originally formulated. Dupler v. Yates, 10 U.2d 251, 351 P.2d 624 (1960). The unverified amendments to defendant's Answer do not substantially change the issues as originally formulated.

Furthermore, the defenses asserted by the Amended Answer were not valid defenses to plaintiffs' claim. The two defenses raised were: (i) plaintiffs were in default in the payment of \$30,000 due to a third party on an underlying contract on the subject real property, and (ii) the contract should include a release provision. (R. 88) However,

defendants' obligations to plaintiff are independent of plaintiffs' obligations to third parties. And, any reformation of the Contract to include a release provision would not affect defendants' liability to make full and timely payment to the plaintiffs.

Plaintiffs' Motion for Summary Judgment was supported by an Affidavit in accord with Rule 56(a). The affidavit included a true and correct copy of the contract which the parties had signed. Defendants never offered any affidavits or any sworn testimony raising any genuine issue of fact. Plaintiffs' Motion for Summary Judgment was properly granted, and the Judgment and Order of the Fourth Judicial District Court should be affirmed.

POINT II

THE LOWER COURT PROPERLY DENIED DEFENDANTS' MOTION TO SET ASIDE JUDGMENT AS THE DEFENDANTS OFFERED NO NEWLY DISCOVERED EVIDENCE WHICH, BY DUE DILIGENCE, COULD NOT HAVE BEEN DISCOVERED AND PRESENTED AT THE TIME THE COURT HEARD PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

The Fourth Judicial District Court properly denied defendants' Motion to Set Aside Judgment. Defendants offered no newly discovered evidence which could not have been produced at the time the Court heard plaintiffs' Motion for Summary Judgment.

Rule 60(b), Utah Rules of Civil Procedure, states that Judgment may be set aside for newly discovered evidence which by due diligence could not have been discovered prior to trial. There have been no assertions that the evidence which the defendants proposed to introduce via their second motion to amend their answer was not discoverable prior to plaintiff's Motion for Summary Judgment. In fact, the evidence was the exclusive knowledge of the defendant-appellants at the time they filed their Answer in July and for three months before plaintiffs moved for Summary Judgment.

The evidence which defendants proposed to introduce as the basis for setting aside Summary Judgment was a receipt given to the defendants by Perry G. Fitzgerald's

relative, Leland A. Fitzgerald. After this action had been commenced in the lower court, and after the defendants had been served with Summons and Complaint, defendant Perry G. Fitzgerald tendered to plaintiff the sum of \$40,000.00. Upon plaintiffs' refusal to accept said payment, defendant paid Leland A. Fitzgerald said sum. (R. 79) Plaintiff had no knowledge of any payment made by Perry G. Fitzgerald to his cousin, Leland A. Fitzgerald. (R. 42)

Although defendants knew of their own conduct in June, 1981, they failed to raise this issue either in the original Answer filed July 15, 1981, or in the Amended Answer which was filed with defendants' original Motion to Amend Answer dated September 24, 1981.

The rules allowing for reopening cases where evidence is newly discovered should not be construed to allow defendants to continuously reopen cases to try various defenses, of which they had knowledge, but which they failed to plead.

After plaintiffs had filed this action, defendants were in a forum designed to resolve legal and factual issues. They could either settle their differences with plaintiffs or present their evidence to the court for an impartial adjudication. Defendants did neither. By making a partial payment to a third party, defendant Perry G. Fitzgerald's cousin, without plaintiffs' knowledge or consent, defendants contrived to avoid the consequences of their former delinquency. Defendants cannot be permitted to circumvent a lawful resolution of actions by collusive conduct with relatives and third parties once plaintiffs have petitioned a court for relief.

Furthermore, the allegations of the Perry Fitzgerald - Leland Fitzgerald transaction do not constitute a defense to plaintiff's action. Defendants' alleged payment of sums to a third party, a close relative, without the consent or knowledge of the plaintiff, is no defense to defendants' liability to plaintiffs. 77 AmJur2d Vendor and Purchaser §309.

There has been no production of newly discovered evidence which, with due diligence, could not have been discovered prior to summary judgment. Defendants' payment of sums to a related third party does not constitute a defense to defendants' obligations to plaintiffs. Summary Judgment was properly granted by the Fourth District Court and the Order denying defendants' Motion to Set Aside Judgment was proper. The Court should affirm the Judgment of the Fourth District Court.

POINT III

THE LOWER COURT PROPERLY GRANTED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS PLAINTIFFS HAD PASSED TITLE TO DEFENDANTS IN ACCORD WITH PARAGRAPH 16C OF THE UNIFORM REAL ESTATE CONTRACT.

A.

Title was Properly Passed from Plaintiffs to Defendants via a Warranty Deed Deposited with the Fourth Judicial District Court.

Title to the subject real property was properly passed from Plaintiffs to Defendants via a Warranty Deed dated July 16, 1981, which was deposited with the Fourth Judicial District Court. (R 84.)

B.

An Issue Not Raised in the Court Below May Not Be Raised on Appeal.

Appellants have raised issue with the procedure used by plaintiffs in tendering title to the buyers pursuant to paragraph 16C of a Uniform Real Estate Contract. This issue was not raised in the court below, and therefore may not be raised on appeal. Shayne v. Stanley and Sons, Inc., 605 P.2d 775 (Utah 1978); Edgar v. Wagner, 572 P.2d 405 (Utah 1977); Tygesen v. Magna Water Company, 375 P.2d 456, 13 U.2d 397 (1962).

C.

Defendants Waived any Objection to Plaintiffs' Tender of Title.

Defendant-Appellants waived any objection to Plaintiffs' tender of title. Rule 8(c), Utah Rules of Civil Procedure, requires all affirmative defenses to an action be specifically pleaded. Defendants never questioned Plaintiffs' tender of title in the original answer filed July 15, 1981. In fact, in that Answer the Defendants Perry G. Fitzgerald and Carolyn S. Fitzgerald admitted that "Plaintiffs have elected to treat the contract as a note and mortgage and do hereby tender title to buyer subject to said note and mortgage." (R. 11) Nor did Defendants ever object to Plaintiffs' tender of title in their proposed Amended Answer dated October, 1981, or by their Motion to Set Aside Judgment dated November 27, 1981. Pursuant to Rule 12(h), Utah Rules of Civil Procedure, those defenses and objections not presented by motion or answer are waived.

D.

The Fourth Judicial District Court Properly Foreclosed the Subject Uniform Real Estate Contract as a Note and Mortgage.

Paragraph 16C of the Uniform Real Estate Contract reads:

The Seller shall have the right, at his option, and upon written notice to the buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorneys fees; and the seller may have a judgment for any deficiency which may remain. . . .

It is imperative that the foreclosure provision be reviewed in its entirety. No phrase should be interpreted out of context.

The stated intent of the provision is to allow the Seller to treat the Uniform Real Estate Contract as a Note and Mortgage. Ordinarily, the Seller retains title to the subject property of a Uniform Real Estate Contract until the Contract has been paid in full, at which time title is conveyed to the Buyer. In order to foreclose as a mortgage, however, it is necessary for title to pass to the buyer. The passage of title must be recognized and appreciated for what it is — a method by which the purchaser of land acquires an interest in land which is subject to judicial execution.

In order to pass title, there must be a validly executed deed and delivery of the deed. Recording is not necessary to validate the transaction between the parties. §57-1-6, Utah Code Ann. 1953, as amended.

In reading Appellants' Brief, it appears that the only objection raised concerning plaintiffs Calvin N. Hall's and Rita M. Hall's deposit in Court of a Warranty Deed conveying title to Perry G. Fitzgerald and Carolyn S. Fitzgerald was that Calvin N. Hall and Rita M. Hall did not have fee simple title to the property as they too were purchasing the property on a Uniform Real Estate Contract.

The purchaser of a land contract cannot, as a defense to an action for foreclosure for default to make payment of the purchase price, assert defects in the vendor's title. Woodward v. Allen, 1 U.2d 220, 265 P.2d 398 (1953), 77 A.L.R. 298, Foreclosure of Land Contract. "Complimenting this is the fact that the buyer himself should not be heard to complain when it is his own default which is preventing fulfillment of the contract." Corporation Nine v. Taylor, 30 U.2d 47, 54, 513 P.2d 417 (1973). Appellant's position that a Uniform Real Estate Contract cannot be foreclosed as a note and mortgage unless the seller owns an unencumbered fee simple title is untenable and without precedent. This is especially insupportable where it is the buyer's default which puts the seller's interest in jeopardy.

Plaintiffs properly observed the formalities of preparing, executing and delivering a deed. It is not essential to legal delivery of a deed that the physical possession of the

instrument be transferred from grantor to grantee. It is sufficient for delivery that there be a manifestation of grantor's intention to relinquish control over the instrument and have it become presently effective as a transfer of title. 23 AmJur2d Deeds, §89. The plaintiffs made an effective delivery of the deed by depositing it with the Court for the purposes of foreclosure.

In fact, some Courts have ruled that a tender of deed is unnecessary when the equitable remedy of foreclosure is being exercised. Vanderwilt v. Broerman, 201 Iowa 1107, 206 N.W. 959 (1926); Miami Bond and Mortgage Company v. Bell, 133 So. 547 (Florida 1931).

E.

If There Were any Error in Plaintiffs' Conveyance of Title, it Was Harmless Error and Defendants Were Not Prejudiced Thereby.

Rule 61, Utah Rules of Civil Procedure states:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court in every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Judgments are not reversed for mere error. They are reversed for prejudicial error; and appellant must show both error and prejudice in order to prevail. Startin v. Madsen, 120 U.631, 237 P. 2d 834 (1951). And Boyd v. San Pedro, L. A. & S. L. R. Co., 34 U.449, 146 P.282 (1915).

If there were any error in plaintiff's tender and conveyance of title, defendants were not prejudiced thereby.

The Fourth Judicial District Court correctly ruled that plaintiffs, having met all conditions precedent to their action, were entitled to Summary Judgment as a matter of law. The decision of the lower court should be affirmed.

POINT IV

THE LOWER COURT PROPERLY ENTERED JUDGMENT IN ACCORD WITH §78-37-1 AND §78-37-2, UTAH CODE, 1953

A.

The Fourth Judicial District Court Properly Adjudged an Amount Due.

§78-37-1, Utah Code Annotated, states, "Judgment shall be given adjudging the amount due, with costs and disbursements . . ." It is imperative that a dollar amount be attributed to the Judgment in order to proceed with the foreclosure sale. Otherwise, it would be impossible to make bids or disbursements to parties without knowing the sums due. The Judgment of the Fourth District Court set forth the indebtedness of the defendants, stated that the real property which secured that indebtedness would be sold, and stated that the plaintiffs would have a judgment for the deficiency. This is the proper procedure to foreclose a Uniform Real Estate Contract as a Note and Mortgage.

B.

The Issue is Now Moot as the Real Property Was Sold by Court Order and No Deficiency Was Entered.

Appellants arguments concerning a deficiency judgment are now moot. The subject real property was sold at Sheriff's sale on July 1, 1982, for the full Judgment amount. No deficiency will be entered.

CONCLUSION

The Fourth Judicial District Court properly granted plaintiffs' Motion for Summary Judgment as there were no genuine issues as to any material facts and plaintiffs were entitled to judgment as a matter of law. Plaintiffs' Motion for Summary Judgment was supported by an affidavit setting forth the facts which established that plaintiff was entitled to relief. Defendants never submitted any sworn testimony, by verified pleadings, affidavits, or otherwise, which raised any material issue of fact. Pursuant to Rule 56, Utah Rules of Civil Procedure, Plaintiffs were entitled to judgment as a matter of law, and the decision of the Fourth Judicial District Court should be affirmed.

The lower court properly denied defendants' Motion to Set Aside Judgment as the defendants offered no newly discovered evidence which, by due diligence, could not have been discovered and presented at the time the court heard plaintiffs' Motion for Summary Judgment. The evidence which the defendants proposed to offer as grounds for setting aside the judgment had been known to defendants at the time they filed their Answer and for three months prior to plaintiffs' Motion for Summary Judgment. In neither defendants' original Answer nor in defendants' Amended Answer did defendants offer such evidence, although they had ample time and opportunity to do so. Furthermore, the proffered evidence did not constitute a defense to plaintiffs' action as defendants' payment to a third party of a sum less than the total amount due without plaintiffs' knowledge or consent could not cure a default once the contract was accelerated and defendants served with Summons and Complaint. The lower court properly denied defendants' Motion to Set Aside Judgment, and the decision of the Fourth Judicial District Court should be affirmed.

The lower court properly granted plaintiffs' Motion for Summary Judgment as plaintiffs had passed title to defendants in accord with paragraph 16C of the Uniform

Real Estate Contract. Title was properly passed from plaintiffs to defendants by a Warranty Deed deposited with the Fourth Judicial District Court. If there were any error in plaintiffs' tender and conveyance of title, the defendants waived any objection and the issue may not be raised on appeal. Furthermore, any error was harmless as defendants were not prejudiced thereby. The decision of the Fourth Judicial District Court should be affirmed.

The lower court properly entered judgment in accord with §78-37-1 and 78-37-2, Utah Code Annotated 1953. The lower court properly entered a judgment giving the amount due, with costs and disbursements, and ordering a sale of the subject property. The issue is further rendered moot by the fact that the property was sold July 1, 1982, for the full judgment amount and no deficiency has been entered. The decision of the Fourth Judicial District Court should be affirmed.

DATED this 19th day of August, 1982.


Barbara Jane Watkins

MAILING CERTIFICATE

I hereby certify that on the 19th day of August, 1982, a true and correct copy of the foregoing Brief of Respondents was mailed, postage fully prepaid, to the following:

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