1958

Alma J. Janke et ux v. George L. Beckstead, Jr. et ux ; Brief of Appellants

Utah Supreme Court

King and Hughes; Attorneys for Defendants and Appellants;

Case No. 8866

IN THE SUPREME COURT
of the STATE OF UTAH

ALMA J. JANKE et ux,
Plaintiffs and Respondents,

—vs.—

GEORGE L. BECKSTEAD, JR., et ux,
Defendants and Appellants.

BRIEF OF APPELLANTS

KING and HUGHES
Attorneys for defendants and appellants

TABLE OF CONTENTS

AUTHORITIES CITED

TEXTS CITED

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BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Appellants will be referred to throughout this Brief by name or as they appeared in the Court below, namely, plaintiffs . Respondents will be referred to by name or as they appeared below, namely defendants. All italics are ours.

STATEMENT OF FACTS

This appeal is from the judgment in favor of plaintiffs which ordered the rewriting of a Deed from defendants to plaintiffs. Defendants' counterclaim for the reasonable value of their land used by plaintiffs and for damages resulting from the malicious clouding of defendants' title to certain lands was dismissed.

The basic contest between plaintiffs and defendants involves a strip of land 33 feet wide. The reformation of the deed ordered by the trial court moved the 33-foot strip from the west side of plaintiffs' land to the east side of plaintiffs' land and had the effect of cutting down land retained by defendant, Fay D. Beckstead, from a piece 75 feet wide to a piece 42 feet wide.

Defendant, Fay D. Beckstead, was, prior to January, 1951, the owner of a piece of property located at 5165 South 9th East Street, Salt Lake County. On said piece of property defendants had built a home and in January, 1951 they offered said home for sale through the Bettilyon's Home Builders Co. Bettilyons interested plaintiffs in purchasing the home and on the 30th of January, 1951, a Uniform Real Estate Contract was executed by all parties.

An Earnest Money Receipt dated January 13, 1951 had been signed by all of the parties and is Exhibit No. 11. The price as set forth in the Earnest Money Receipt shows that the ground to be sold was 140-foot front by 200-foot deep, together with a share of water. A closing statement shows the proration of taxes, insurance and reveals an examination of the abstract of title to the property.

The Uniform Real Estate Contract showed the address of the property and contained the following metes and bounds description:

> Com in cen county road 16.2 chs S & N 86° 10' W 13.55 chs fr cen Sec. 8, T 2S, R 1E, SL Mer. thence 140 feet South; thence 200 feet East, thence 140 feet North, thence 200 feet West to the point of beginning;

Together with one share Tanner Ditch Water Company.

The Uniform Real Estate Contract also contains a provision that a mortgage was to be assumed by plaintiffs and the purchase price of the land to be paid down to the mortgage as soon as plaintiff sold certain of their real property. The mortgage is Exhibit No. 13. It shows the description of the West 158 feet of the property which

was covered by the Uniform Real Estate Contract. The mortgage contains a specific reference to the 33 foot right of way for 9th East Street.

At the time the defendants signed the Uniform Real Estate Contract, Exhibit No. 9, the defendant Fay D. Beckstead was the owner of additional property at the same place. It is described as commencing in the center of 9th East Street, going South 250.86 feet, East 275 feet, North 232.43 feet, more or less; thence west 275.616 feet to the point of beginning. (See description in Exhibit No. 4).

This description with the piece described to plaintiff eliminated, left a piece in the name of Mrs. Fay Beckstead of approximately 75.616 feet wide along the east side of the property contracted to plaintiffs.

Prior to the signing of the Uniform Real Estate Contract, defendants did not discuss with plaintiffs the boundary lines of the property. There was nothing on the plot which showed where the east side of the property contracted to plaintiffs was located. After the Uniform Real Estate Contract was executed there was a meeting

between defendants and plaintiff, Alma J. Janke, which occurred in the basement of the Y.M.C.A. At the meeting there was some discussion concerning the possibility of selling the retained land which defendant, Fay Beckstead owned. A price could not be agreed upon and so no deal was consumated. Plaintiff, Alma Janke, also stated that there was a discussion concerning certain water which had flooded the basement of the home which was purchased from the Becksteads. (R. 62, R. 63 and R. 162).

Apparently the meeting between the Jankes and the Becksteads, in the basement of the Y.M.C.A., was the only discussion in 1951 of any of the problems which the parties were concerned with. In December, 1951, a Deed to the property involved was prepared. Photostat of this deed is Exhibit No. 10. Description in the deed followed the description contained in the Uniform Real Estate Contract, and further recites that the property is transferred subject to a mortgage in favor of Tracy-Collins Trust Company in the original sum of $7200.00 upon which there was an unpaid balance of $6673.11. Grantees assumed and agreed to pay the mortgage according to its terms. This is the mortgage which is Exhibit No. 13.

Plaintiffs went into possession of the property in March of 1951, and during all of the year of 1951 occupied the premises either through their daughter who lived in the basement, or personally. (R. 61).

The mortgage which was assumed specifically mentions the right-of-way on the west 33 feet of the property. At the time the Deed was prepared and the assumption of the mortgage was agreed to, an attorney's opinion was obtained for A. J. Janke by Tracy-Collins Trust Company. This attorney's opinion is dated January 3, 1952 and is Exhibit No. 12. The opinion shows that the abstract was brought up to date as of 8:55 A.M. on December 31, 1951. The opinion specifically mentions the 33-foot right-of-way along the West side of the property in two separate places.

Plaintiffs deny that they ever read either the descriptions of the property as contained in the Uniform Real Estate Contract or in the Deed which was furnished to them or that they ever saw the mortgage which they assumed and agreed to pay, or knew of the attorney's opinion.

They claim that the only place where they found any indication as to where the property lines were was

on a copy of certain plats which were used in the construction of the home by Beckstead. Exhibit No. 5.

Exhibit No. 5 is the copy of the Plans and Specifications of the house which were furnished for the builder, George Barnett.

There is nothing in the Plans or Specifications to indicate the property line of defendants' property at the time the home was under construction.

Plaintiffs claim that the builders' copy of the Plans and Specifications for the construction of the home were furnished to them by E. R. Beckstead, one of the Real Estate salesmen working for Bettilyon's Real Estate Company. Beckstead denies that he furnished the Plans and Specifications. The Plans and Specifications show only that the house being purchased by plaintiffs was located 40 feet back from the edge of the 9th East Street right-of-way.

After the deed to the property had been delivered, and some time prior to October 31, 1953, defendants discovered that plaintiffs were constructing a dog-run and other structures on the east side of their property which

appeared to be over on the property defendant, Fay Beckstead, had retained. Mr. Beckstead and one, Hall, measured the ground and discovered that it was a fact that the plaintiffs were on the property.

A letter was written, Exhibit No. 7, dated the 31st day of October, 1953.

This letter clearly notifies plaintiffs that defendants claim that plaintiffs are occupying a portion of the property which was retained by Fay Beckstead. It gives plaintiffs the right to purchase the property when defendants decided to sell.

Numerous conversations occurred between Fay Beckstead and the Jankes concerning the occupancy by Jankes of part of Mrs. Beckstead's property. An additional letter was written on May 24, 1954, Exhibit P-8, concerning the property being occupied by Jankes, and this letter set a rental fee of $25.00 per year on the property. No rent was paid. On March 18, 1955 a letter was written by Hurd & Hurd. This letter, Exhibit No. 14, points out to the plaintiffs their occupancy of property in excess of that which was sold to them, refers to the $25.00 per year rental item, and requests information concerning the action which the Jankes intended to take.

Additional conversations occurred. No satisfactory solution could be agreed upon, and on August 8, 1956 plaintiffs filed the complaint which commenced the action now on appeal to this court.

The evidence concerning discussions which occurred after the deed was delivered is not reconcilable. Defendants deny that they have ever stated that the line marking the west boundary of the property sold to plaintiffs was in any place other than in the middle of 9th East Street. Plaintiffs testified that on several occasions, when discussions occurred, Mr. Beckstead indicated that the property line was somewhere along the edge of the right of way for 9th East Street. There was no evidence that Mrs. Beckstead had ever made any statement to either of plaintiffs concerning the line along the west side of the property.

The only monument referred to in the Deed, Uniform Real Estate Contract, or Mortgage, is the center of 9th East Street, There is no dispute between the parties that said monument has remained in the same position at all times relevant to the dispute.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN PERMITTING A DEED TO BE VARIED BY PAROL EVIDENCE.

ARGUMENT

POINT I

THE COURT ERRED IN PERMITTING A DEED TO BE VARIED BY PAROL EVIDENCE.

The warranty deed was delivered on or about the 29th day of December, 1951, the date it bears. It contained a description of the real property which was being transferred by Fay Beckstead to plaintiffs in the following language:

> "Commencing at a point in the center of a County road 16.2 chains South and North 86° 10' West 13.55 chains, more or less, from the center of Section 8, Township 2 South, Range 1 East, Salt Lake Meridian; thence 140 feet South; thence 200 feet East; thence 140 feet North; thence 200 feet West to the point of beginning."

The description clearly sets forth a metes and bounds description which can be traced and closed and which does not, therefore, contain any patent ambiguity. It

contains no ambiguity which is obvious from the reading of the description. The description can also be traced out on the ground as is revealed by the Plat. (Exhibit No. 16). As a consequence there are neither patent or latent ambiguities in the description contained in the Warranty Deed from Fay Beckstead to the plaintiffs.

There was no representation by defendants concerning the commencement line of the property prior to the execution of the Uniform Real Estate Contract which contained an identical description to the description placed in the Warranty Deed. The evidence of the defendants indicates that they were never on the ground with plaintiffs during the year 1951 but only at a conference with the plaintiff, Alma Janke, at the Y.M.C.A. during that year. At that meeting the boundary line of the property was not the subject matter of the discussion.

There was no evidence that there was a mistake of fact on the part of the defendants concerning where the Fay Beckstead property commenced. Apparently, they were well aware at all times that the property ran from the middle of 9th East Street.

If there were latent ambiguities within the deed so that until you applied the description to the ground one

could not discover the ambiguity, evidence of a parol nature would be admissible under the general rule. For a discussion of the cases setting forth the Rule where a latent ambiguity appears in the description of the real property, see *Detroit, Grand Haven & Milwaukee RR Co. v. Alfred Howland*, 246 *Mich.* 318, 224 *NW* 366, 68 *ALR* 1.

If the ambiguity is a patent ambiguity and it appears from an examination of the description that there is some kind of a mistake or discrepancy within the four corners of the description, then the rule has always been that no parol evidence shall be admitted to correct the deed for the deed itself is void for uncertainty. A very careful examination of latent and patent ambiguities is contained in *Thompson, On Real Property, Vol* 6, *page* 454, *Section* 3280 and *Section* 3281.

There appears to be no exception to the rule that where the description in the deed sufficiently identifies the land to be conveyed neither parol or extrinsic evidence concerning the land to be covered by the deed is admissible.

It makes no difference that one of the parties had a different intention as far as the property to be received is concerned if his intentions are uncommunicated and not

contained in the description placed on the deed. It is obvious that a unilateral mistake by one of the parties would not justify reformation of the deed where the mistake was in no way induced by conduct of the other party and did not involve fraud. This rule is set forth in *Brent v. Chase H. Lilly Co.*, 174 *Fed.* 877. The rationale of the rule is succinctly stated in *Cordua v. Guggenheim*, 274 *N.Y.* 51, 8 *NE* 2d 274 where it is stated that the parties are conclusively presumed to have intended the meaning of the language used in the description of the property conveyed. *Thompson, On Real Property*, supra, *Section* 3281, at *page* 455, states the rule in this language:

> "Nothing passes by deed except what is described in it whatever the intention of the parties might have been."

Many of the Evidence Treatise writers have recognized that while the parol evidence rule is called a rule of evidence, as an actual fact, it is a rule of substantive law which is adhered to for the purpose of preventing written instruments from being eaten away and destroyed by parties attempting to recall the agreement or description. It is obvious that if a written instrument could be varied by recollection of the parties, the purpose for reducing the document to writing, and the purpose of having written deeds would be completly destroyed.

Jones on Evidence, 4th *Ed. Vol.* 2, *page* 863, *Section* 450, states the rule from an evidence treatise point of view in the following language:

> "Parol evidence is not admissible to identify the land where the description in the contract is insufficient, nor may it be introduced in order to make the writing operative upon land which is not embraced in the descriptive words."

One of the earliest cases setting forth the rule in its complete form is *Drew v. Swift*, 46 *N. Y.* 204, decided September 2nd, 1871. At page 208, the following quote appears:

> "The declarations of the defendant, or other parol evidence, could not be resorted to, to vary the terms or aid in the interpretation of the instrument. The description begins at a point capable of being ascertained, and runs thence by courses and distances well defined; and no extrinsic evidence tending to explain the intention of the parties, and thus give effect to the deed different from its terms, was allowable. A deed cannot be contradicted, varied or explained by parol evidence. (Linscott v. Fernald, 5 Greenl. 496; Bell v. Morse 6N.H. 205; Van Wyck v. Wright, supra (18 W.R. 157) Clark v. Baird, 5 Seld., 183; Clark v. Wethy, 19 Wend. 320). It is distinctly

> declared in the cases cited, and others that might be referred to, that upon principle, when the description in the deed designates a piece of land as that conveyed, the description cannot be departed from, by parol evidence of intent, or of acquiescence in another boundary, unless such an adverse possession be shown as is, in itself, a bar to an action. (Adams v. Rockwell, 16 Wend. 285)."

A much later Massachusetts case, *Peavy v. Moran,* 256 *Mass.* 311, 152 *N. E.* 360 at *page* 362, carries the rule up to modern time in the following language:

> "The description in the deed to the plaintiff was explicit and free from ambiguity. Consequently parol evidence was not admissible to vary or contradict it."

As far as defendants has been able to discover this Court has not had an occasion to set down in specific language the parol evidence rule but in several cases the Court has recognized and applied the rule and stated that the law of Utah recognized and adhered to the rule. See *Ruthauff v. Silver King Western Mine & Mill Co.,* 95 *Utah* 279, 80 P. 2d 338; *Adamson v. Brockbank,* 112 *Utah* 52, 185 *P.* 2d 264; *Olson v. Reese,* 114 *Utah* 411, 200 *P.* 2d 733.

The trial court, in his decision and over the objections of defendants, has accepted and applied extrinsic and parol evidence in such a way as to completly change the property which was described in the warranty deed.

The judgment of the Court awards to plaintiffs a piece of property, 140 x 200, which commences 33 feet east of the center of 9th East Street. No such line was ever mentioned or described in the deed or contract. No such line was ever discussed by the parties. The Court, in effect, is giving to plaintiffs what they would wish to have if they obtained from defendant property which after the execution and delivery of the contract and deed they discovered they would like.

The Court's judgment destroys in a large measure the value of the east part of defendant Fay Beckstead's land. It reduces the strip there from a width of 75 feet, which is an adequate building lot, to a width of 43 feet which is too small a building lot to be usable in the vicinity where the homes are being constructed.

The Court's decree gives to plaintiffs something for which they did not bargain or pay for, and something which, under the terms of the written instrument no one ever intended for them to have.

It is respectfully submitted that the trial court permitted a direct and extensive violation of the parol evidence rule and allowed, by parol, the variance of a written deed and created a description which was never intended by the defendants nor the plaintiffs.

CONCLUSION

It is respectfully submitted that this Court should reverse the trial court, should order that the Deed be restored to its terms and that these defendants should be allowed and awarded a reasonable sum for the use of the property by the plaintiffs and for damages incurred for malicious clouding of the defendants' title.

Respectfully submitted

KING AND HUGHES

Attorneys for defendants and Appellants