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Agnes Lundberg v. Le Grand P. Backman : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

SEP 22 1958

AGNES LUNDBERG,

Plaintiff and Appellant,

—vs.—

LE GRAND P. BACKMAN,

Defendant and Respondent.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS RELIED UPON.....	6
ARGUMENT	7
POINT I. DEFENDANT WAS NOT ENTITLED TO A SUMMARY JUDGMENT OF DISMISSAL.	7
POINT II. THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN THE PREPARATION OF THE TRIAL OF THE CASE.	9
POINT III. THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN FAILING TO APPEAL THE JUDGMENT ENTER- ED AGAINST PLAINTIFF.	13
CONCLUSION	15

AUTHORITIES CITED

CASES

Holland v. Columbia Iron Mining Co., 293 Pac. 700 ; 4 U. 2d 303.....	8
Morris v. Farnsworth Motel, 259 P. 2d 297-298.....	7
Young, et al. v. Felornia, et al., 244 P. 2d 862 ; 121 U. 646.....	7

TEXTS

45 A.L.R. 2d.....	9
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IN THE SUPREME COURT
of the
STATE OF UTAH

AGNES LUNDBERG,

Plaintiff and Appellant,

—vs.—

LE GRAND P. BACKMAN,

Defendant and Respondent.

Case No. 8896

BRIEF OF APPELLANT

(Numbers in parenthesis refer to pages of the Record. The parties will be referred to as they were in the Trial Court.)

STATEMENT OF FACTS

This is an appeal from an order granting defendant's motion for summary judgment.

Defendant is a practicing attorney in Salt Lake City, Utah, and a member of the law firm of Backman, Backman & Clark. Plaintiff employed defendant as her attorney in the defense of an action filed in the Third Judicial

District Court in and for Salt Lake County, State of Utah, entitled "Pearl J. Herridge, et al. vs. Agnes Lundberg, File No. 100963." Plaintiff instituted the case at bar to recover damages for the negligent and unskillful manner in which defendant performed his services in the defense of said quiet title action.

For a proper statement of facts in this case it is necessary to set forth the background of the quiet title action.

The quiet title action concerned the real property located at 1215 South 8th East Street, Salt Lake City, Utah. Plaintiff believed that she was the owner of the property by virtue of a warranty deed from her mother and plaintiffs in the quiet title action claimed a two-thirds interest in the property by virtue of a decree of distribution in their father's estate.

The plaintiffs in the quiet title action were the heirs of Ernest J. Herridge who had been married to the mother of the plaintiff in the case at bar. Mr. and Mrs. Herridge had purchased the property located at 1215 South 8th East and the title thereto was taken in their names as joint tenants with full rights of survivorship. The controversy arose concerning the rights of the parties to the property and this matter also concerned the defendant LeGrand P. Backman.

Defendant Backman was the attorney for Mr. and Mrs. Herridge and prior to the purchase of the property referred to above had someone in his office prepare a

joint will for them. The will set forth that the parties had jointly purchased other real property in Salt Lake and each owned an undivided one-half interest therein. The will further provided that upon the death of either the one-half interest of each should be divided one-third to the surviving spouse and two-thirds to their surviving children by previous marriages. At the time of the execution of the will Mrs. Herridge had five children, including the plaintiff herein, and Mr. Herridge had three children, who were later to be the plaintiffs in the quiet title action.

After the execution of the will the parties sold the real property referred to in said will and a few years later purchased the property located at 1215 South 8th East, taking title as joint tenants. Mr. and Mrs. Herridge remained in possession of the property at 1215 South 8th East until the death of Mr. Herridge in 1940.

Defendant Backman represented Mrs. Herridge who was the executrix of her husband's estate and the joint will was admitted to probate. In that proceeding the home at 1215 South 8th East Street, which was held in joint tenancy, was erroneously included as an asset in the estate and was distributed one-third to the widow and two-thirds to the three surviving children of Mr. Herridge.

Mrs. Herridge continued living alone in the home until plaintiff herein and her family moved in with her. Defendant Backman continued representing plaintiff's

mother and had numerous consultations with her pertaining to her affairs and prepared a will wherein the property located at 1215 South 8th East was set forth as belonging to her personally. On July 12, 1950, defendant Backman, after consultation with plaintiff and plaintiff's mother, prepared a warranty deed wherein the said property was conveyed to the plaintiff herein but reserved a life estate in plaintiff's mother. Defendant Backman advised plaintiff and her mother that upon the death of Mrs. Herridge the title to the property would revert to plaintiff and there would be no need to have any will or probate. Defendant Backman recorded the deed in the Office of the County Recorder of Salt Lake County on the 13th day of July, 1950.

Plaintiff continued residing in the home and after the death of her mother in 1953, and upon the advice of defendant Backman she recorded a death certificate and was informed by defendant Backman that title to the property was then vested in her.

Plaintiff made certain improvements thereon and was not aware of the claimed interest of the heirs of her stepfather until she received a letter from one of the heirs and their attorney demanding a partition of the property. Upon receipt of both letters plaintiff immediately consulted with defendant Backman and was assured by him that she was the sole owner of the property and that the claim of the said heirs was unfounded. Defendant also advised plaintiff not to attempt any settlement

of the matter or admit the interest of the heirs and, thereafter, on January 23, 1954, suit was instituted against plaintiff herein to quiet title to the said property.

The pleadings of the quiet title action are included in the record now on appeal. The pleadings disclose that the claim of the plaintiff heirs was based upon the interest in the property which was distributed by the decree of distribution in the estate of Ernest J. Herridge. The defense to the action and the basis for the counterclaim filed therein was predicated upon the theory that plaintiff herein was the sole owner of the property by virtue of the warranty deed executed by her mother who was the owner of the property.

Trial was held and a judgment was entered in favor of the plaintiff heirs and quieted their title to a two-thirds interest in the property and a one-third interest in the defendant, the plaintiff herein. The judgment further assessed the plaintiff herein reasonable rental value from the 1st day of February 1953 to the date of trial. A motion for a new trial was filed on behalf of the defendant, the plaintiff herein, which was dismissed as not being timely filed. The pleadings further reveal that the defendant herein filed a withdrawal as counsel on January 24, 1955.

The action at bar was filed to recover damages for defendant's negligence in handling the defense of the action and for failure to prepare an appeal from the judgment. The defendant Backman did not file an

answer to plaintiff's complaint, but did file a motion for summary judgment with a supporting affidavit. Plaintiff filed a counter-affidavit which was confined to answering the matters raised in the affidavit of defendant, and did not set forth any additional matters. Argument was held before the trial court and defendant's motion was granted and this appeal is from the granting of said motion.

Before commencing with the arguments I personally would like to state that I was employed by the Commission of the Utah State Bar Association to advise the plaintiff in the matter. That in preparing the complaint now under consideration, I felt that a fair question was presented by the pleadings and I wish to assure this court that the action was not filed for any reason other than doing justice between the parties. I am acquainted with Mr. Backman and his reputation before the bench and bar of the State, and I would not intentionally do anything to abuse that reputation.

STATEMENT OF POINTS RELIED UPON

POINT I.

DEFENDANT WAS NOT ENTITLED TO A SUMMARY JUDGMENT OF DISMISSAL.

POINT II.

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN THE PREPARATION OF THE TRIAL OF THE CASE.

POINT III.

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN FAILING

TO APPEAL THE JUDGMENT ENTERED AGAINST
PLAINTIFF.

ARGUMENT

POINT I.

DEFENDANT WAS NOT ENTITLED TO A SUMMARY
JUDGMENT OF DISMISSAL.

The rule is clear that in ruling on a motion for summary judgment the court's function is to determine whether a genuine issue exists and if it does, then the motion for summary judgment should be denied. This rule has been stated by this Court in numerous cases.

Young, et al. v. Felornia, et al., 244 P. 2d 862; 121 U. 646, at page 648 it is stated:

“In respect to a summary judgment Rule 56 (c), U.R.C.P. provides:

‘The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’

“Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion should be denied.”

Morris v. Farnsworth Motel, 259 P. 2d 297-298:

“Under such circumstances, the party against whom the summary judgment is granted, is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light most favorable to him; which we do in reviewing the incident.”

In *Holland v. Columbia Iron Mining Co.*, 293 Pac. 700; 4 U. 2d 303, the following is stated in the concurring opinion of Justice Crockett, at page 310:

“It is true, indeed, that a summary judgment is a drastic remedy which the courts are, and should be reluctant to use. Yet it does have a salutary purpose in the administration of justice in not requiring the time, trouble and expense of trial, when the best showing the plaintiff can possibly claim would not entitle him to a judgment.

“Viewing the evidence in the light most favorable to the plaintiff does not mean that the court should pick out all of the aspects thereof favorable to supporting plaintiff’s claim and ignore those that indicate to the contrary. It means that the court surveys the whole picture, takes into consideration facts and inferences therefrom tending to favor the plaintiff’s position and also considers other facts appearing which must be accepted as a matter of law, and weighs the whole matter against the background of legal precepts bearing on the problem. If when so viewed, reasonable minds could make findings that would make out a cause of action in accordance with the plaintiff’s claims, summary judgment should not be granted; on the other hand, if it appears to the court that reasonable minds could not make findings which would establish a cause of action for the plaintiff, then the summary judgment is proper.”

Plaintiff contends that in reviewing this matter in the light most favorable to plaintiff this Court will find that there are genuine issues of fact presented and reasonable minds could find defendant was negligent.

POINT II.

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN THE PREPARATION OF THE TRIAL OF THE CASE.

The duty of an attorney toward his client is stated in 45 ALR 2d, 5, at page 11 as follows :

“While occasionally language may be found, especially in the earlier cases, suggesting that an attorney is liable to his client for the conduct of litigation only where he is chargeable with gross negligence or want of skill, it appears to be the presently well-settled rule in most if not all of the American jurisdictions in which the question has arisen that an attorney to whom the conduct of litigation is entrusted may be held liable to his client for damages resulting from his failure to exercise ordinary care, skill, and diligence, or, as it is frequently expressed, that degree of care, skill and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction.”

It is the contention of plaintiff that defendant failed to exercise the reasonable skill and diligence of an attorney in his relationship with plaintiff, and this matter presents a genuine issue of fact. Plaintiff further contends that the record now before this Court substantiates this position.

Plaintiff alleged in the third paragraph of the First Cause of Action of the Complaint that defendant was unskillful and negligent in the conduct of the case. This allegation of negligence places in issue the entire conduct of defendant Backman in advising, preparing and

conducting the trial of the case he was employed to defend. The defendant did not file an answer to the Complaint. We submit that without this pleading the issues raised by the allegations in the complaint are still present and are genuine issues of fact.

Even though the defendant failed to deny the allegations of the Complaint, the averments by defendant in his affidavit present genuine issues of fact.

The affidavit defendant filed in support of his motion for summary judgment presented to the court an outline of his actions as an attorney in advising plaintiff, in preparing the defense of the case, and included an incomplete statement concerning the background of the title to the property involved. The affidavit of defendant is completely without any assertion by him that before advising plaintiff or preparing the defense of the quiet title action he examined the records and files in his own office pertaining to the estate of Ernest J. Herridge. It is the contention of plaintiff that this failure of defendant to examine the files of his office presents a genuine issue of fact from which reasonable minds may conclude that he was negligent.

We submit that this contention is logically sound. If defendant had examined the files in his office his memory would have been refreshed and he would have known that the asserted claim by the heirs of Ernest J. Herridge must naturally be based upon the Decree of Distribution entered in his estate. Defendant's recollection would have been refreshed and he would have known

that he had erroneously included the property involved in the controversy in the estate of Ernest J. Herridge and that the deed from plaintiff's mother did not convey a fee simple title to the property. With this valuable information defendant could have attempted to rectify his mistake and if this were impossible he would have been in a position to advise plaintiff herein that the asserted claims were valid and unimpeachable and that it was impossible for him to eliminate their interest in the property.

Defendant failed to exercise reasonable care and diligence and advised plaintiff herein that the asserted claims by the heirs were unfounded and she was the sole and exclusive owner of the property by virtue of the warranty deed from her mother.

This matter is material because evidence will be introduced that the heirs approached plaintiff for a settlement of their claims. The evidence will be that the heirs were willing to accept as settlement of their case the sum of \$1,000.00 each and in consideration of this payment would convey their interests in the property to plaintiff. Evidence will also be introduced that defendant was aware of this offer and advised plaintiff not to make any settlement.

Plaintiff submits that by not settling the case for the sum of \$3,000.00 she did not obtain the two-thirds interest in the home which had a value of \$5,200.00. Plaintiff further submits that a judgment in the sum of

\$1,026.74 was assessed against her one-third interest for rent which resulted in her being damaged in a total amount of approximately \$3,226.74.

The failure of defendant to use ordinary skill and diligence in appraising himself of the basis of the asserted claims against his clients property, prevented him from discovering that the decree of distribution in the Ernest J. Herridge estate was not in accordance with the provisions of his will. Evidence will be introduced that the joint will of Mr. and Mrs. Herridge recited that each had invested money in the purchase of the real property then in their possession and that each owned a one-half interest in said property. The will then recited that the distribution of the one-half interest of the deceased would be one-third to the surviving spouse and two-thirds to the surviving children. The decree of distribution did not make this distinction and we submit this matter could have been modified prior to the quiet title action. This would not have altered the judgment rendered in the quiet title action, but would have assured that plaintiff would have received a greater interest in the property.

The affidavit of defendant states that his theory of the defense to the quiet title action was developed in good faith and an honest belief that his theory was well founded. The affidavit further avers that he resorted to the only defense that was open to him or would have been open to any well informed lawyer. Plaintiff respectfully submits that the failure of defendant to fully

appraise himself of the basis of the alleged claim to a two-thirds interest in his client's property makes this a genuine issue of fact.

Plaintiff submits that the matters presented herein establish there is a genuine issue of fact in this case and reasonable minds could find that defendant Backman did not use reasonable skill and diligence in the defense of this case.

POINT III.

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER DEFENDANT WAS NEGLIGENT IN FAILING TO APPEAL THE JUDGMENT ENTERED AGAINST PLAINTIFF.

The second cause of action is based upon the theory that defendant was negligent in failing to perfect an appeal from the judgment to the Supreme Court of the State of Utah. The allegations place in issue the actions of defendant after the trial of the case.

The affidavit of defendant avers he withdrew as counsel for plaintiff on December 1, 1954, which was in ample time for her to secure other counsel. We submit that a genuine issue of fact is presented in that the record now before this Court establishes that this withdrawal was not filed with the Clerk of the Court until the 24th day of January, 1955, when the time for filing a notice of appeal had expired. The record discloses that while the affidavit of defendant avers the withdrawal on December 1, 1954, defendant filed a motion for new trial dated December 3, 1954.

Plaintiff contends the date of withdrawal is material because if an appeal could have been perfected in time the judgment entered by the court would have been reversed. Plaintiff contends that the finding by the trial court that plaintiff herein should be assessed rent from February 1, 1953, was reversible error. The trial court committed reversible error in failing to find that plaintiff was entitled to credit for taxes and improvements made on the property.

We respectfully submit that this conduct of defendant presents a genuine issue of fact as to whether he exercised reasonable care under the circumstances.

CONCLUSION

We respectfully submit that the summary judgment of dismissal should be reversed and the case remanded to the trial court in order that the parties may present fully the evidence from live witnesses on the stand to a tribunal that may then determine the factual issues involved and render a verdict and judgment based upon that determination.

Respectfully submitted,

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