1971

Layton Harris and Pearl A. Harris v. Eula Tilley : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LAYTON HARRIS and
PEARL A. HARRIS,
Plaintiffs and Appellants,

vs.

EULA TILLEY,
Defendant and Respondent.

Case No.
12619

BRIEF OF RESPONDENT

**Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable Stewart M. Hanson, Judge**

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STATEMENT OF THE KIND OF CASE

Plaintiffs brought action against defendant in District Court, Case No. 188517, to recover amounts expended for repairs made to defendant's property and management fees incurred during defendant's absence from the State of Utah, during which time plaintiffs managed and maintained the property which is the subject of this appeal. To obtain the money for the repairs, the plaintiffs co-signed with defendant on a

promissory note and defendant gave them a quit-claim deed to secure the note for plaintiffs. The trial court found the quit-claim deed to be a security and not a deed absolute. The court awarded the plaintiffs a money judgment and gave plaintiffs a mortgage against defendant's property to secure the judgment.

Plaintiffs then sued in District Court, Case No. 192613 to foreclose on the above mortgage. They were awarded a Decree of Foreclosure, and the property was sold to the plaintiffs at Sheriff's sale. Defendant duly filed her claim for a homestead exemption and moved the court to determine that the plaintiffs' foreclosure was subject to her homestead exemption.

DISPOSITION OF THE CASE BY LOWER COURT

The lower court rendered its conclusions of law and judgment on July 27, 1971, determining that the quit-claim deed given by the defendant was not an equitable mortgage within the scope of Sections 28-1-1 and 78-23-3, Utah Code Annotated, 1953, and that defendant's giving of said quit-claim deed did not constitute a waiver and relinquishment of her right to a homestead exemption incident to the foreclosure.

RELIEF SOUGHT ON APPEAL

Defendant seeks to sustain the Order protecting the defendant's homestead interest from execution and sale.

STATEMENT OF FACTS

In July, 1964, defendant, Eula Tilley, owned her home at 1968 South 8th East, Salt Lake City, Utah, which was clear except for back taxes. (R. 20, L3-4).

On October 5, 1965, defendant quit-claimed her property to plaintiffs, Layton Harris and Pearl A. Harris. The quit-claim deed was used as security by the plaintiffs for co-signing a loan from First Federal Savings and Loan Association, who then loaned plaintiffs $6,500.00. The $6,500.00 was paid to the plaintiffs and used for making improvements to and for the remodeling of defendant's home in their capacity as property managers of defendant's property, while defendant remained outside the State of Utah. Plaintiffs collected rent from defendant's property which was to be used for income, repairs and to retire the loan. (R. 19, L14 - R. 20 L3; R. 37; L20-22; R. 39 L8-9). All of the repairs to defendant's property were done by plaintiff, Mr. Harris, who is a licensed contractor, and his two sons. (R. 26, L11-16).

In May, 1967, plaintiffs, without notice to defendant, recorded the quit-claim deed and obtained a loan on defendant's property, payable to themselves, in the amount of $9,000.00. (R. 29, L18 - R. 30, L4). This second loan from First Federal Savings and Loan entirely retired the balance due on the note for $6,500.00, and the balance was placed in plaintiffs' personal account. (R. 55, L20-27). All of the monies loaned were paid to, received by, and controlled by plaintiffs.

Upon defendant's return to Utah, she moved into her property and shortly thereafter, plaintiffs sued defendant, as a tenant of plaintiff's property, in eviction for unpaid rent, Case No. 188517, Third District Court, Salt Lake County, Utah.

At the trial in Case No. 188517, the court declared title to the property to be defendant's and gave plaintiffs a money judgment against defendant in the amount of $10,876.91, for their repair and remodeling costs incident to said property. The court also granted plaintiffs a mortgage against defendant's property to secure the amount of the judgment. (R. 6).

Plaintiffs then foreclosed on the said lien by filing a separate action, Case No. 192613, to foreclose the mortgage. The court awarded a decree of foreclosure and the property was sold at Sheriff's Sale to the plaintiffs. Defendant duly filed her declaration of homestead and moved the court to determine that the plaintiff's foreclosure was subject to her homestead exemption. (R. 1).

The judge who heard District Court Case No. 188517 was the same judge who heard the arguments and passed judgment granting defendant her homestead exemption in the combined cases Nos. 188517 and 192613. (R. 4-8).

In case No. 188517, in plaintiff's pleading, "Reply to Counterclaim," plaintiffs prayed for, " . . . a judgment establishing an equitable lien in the plaintiffs . . . ", and against the defendant's property. The issue

was before the court and the court awarded plaintiffs a money judgment instead and granted the plaintiffs a mortgage against the property to secure the money judgment. Appeal was taken by defendant in Case No. 188517, but not on the issue of an equitable mortgage against the homestead. Plaintiffs made no appeal, nor did they pray for an equitable lien against the homestead in the relief sought in their Respondents' Brief in the said appeal.

ARGUMENT

POINT I

THE HOMESTEAD IS AN ABSOLUTE RIGHT THAT EXISTS BOTH IN THE HEAD OF FAMILY AND IN THE FAMILY; AND THE WHOLE WORLD IS PLACED ON NOTICE OF THIS RIGHT THROUGH THE UTAH STATE CONSTITUTION, ARTICLE XXII, §1 AND THE HEAD OF FAMILY ACTS AS A TRUSTEE FOR THE PROTECTION OF THE RIGHTS OF THE OTHER MEMBER OR MEMBERS OF THE FAMILY. THUS, ALIENATION OF THE HOMESTEAD MUST BE VOLUNTARY, KNOWLEDGEABLE, CONSCIOUS, SPECIFIC AND EXPRESS.

It is very clear from the facts that defendant owned the subject home free and clear except for a tax lien, prior to the granting of the first loan on October 5, 1965. It is also very clear from the facts that the pur-

pose and use of both loans was that of a contractor, materialman, laborer, and/or mechanic in the repairs and remodeling of defendant's home.

The contractor in this case was the plaintiff, Mr. Harris, who was a licensed contractor and did contract for all of the repairs and remodeling to defendant's property, and hired his two sons to perform the work thereon. (R. 26, L11-16).

Plaintiffs' claim against defendant is for the repair costs, which repairs Mr. Harris performed while managing the property for defendant.

At best, plaintiffs have a mechanic's type lien against defendant's property, which does not defeat defendant's homestead exemption.

The Homestead Exemption is created in Article XXII, §1, of the Utah State Constitution, and is an absolute right. *Kimball v. Salisbury,* 17 Utah 381, 53 Pac. 1037, (1909), and *Panogopulos v. Manning,* 93 Utah 198, 69 P.2d 614 (1937).

All laws relating to the absolute right of the homestead exemption, *Kimball v. Salisbury,* Supra, must be liberally and broadly construed to protect the homestead and make it effective for its purpose. *In re: Mower's Estate,* 93 Utah 390, 73 P.2d 967, (1937); *Folsom v. Aspen,* 25 Utah 299, 71 Pac. 315 (1902); and *Panogopulos v. Manning,* Supra.

The purpose and intent of the homestead was to protect the home for the family as against acts of the

family which would deprive the family of the exemption without any element of knowledge or consent on the part of the family. *Volker-Scowcroft Lumber v. Vance, et al,* 32 Utah 74, 88 Pac. 896, (1907). "Homestead rights are not founded upon equity. They are founded upon public policy for the protection of the home . . ." *Volker-Scowcroft Lumber Co. v. Vance, et al,* Supra at 85.

In the present case, we have the plaintiffs co-signing on a promissory note for $6,500.00. The purpose of the note was to repair and remodel the plaintiff's house (Appellants' Brief, Pg. 3), and the contractor who performed those repairs and the remodeling was the plaintiff, Mr. Harris. (R. 26, L11-16). Plaintiffs received a quit-claim from defendant to be used as security for the loan and not as a deed absolute or a mortgage which could have as easily been prepared. (R. 45-46.)

Plaintiffs then used the quit-claim deed as a deed absolute, recorded it and obtained a second loan for $9,000.00, without the knowledge of the defendant. (R. 29, L18 - R. 30, L4). Plaintiff's relationship to defendant at this time was that of property managers, a fiduciary relationship, and that of contractor, for the repairs and remodeling of defendant's premises.

Now the plaintiffs wish to invoke the court's equity to establish the quit-claim deed as an equitable mortgage that is an exception to the homestead exemption.

In *Volker-Scowcroft Lumber Co. v. Vance, et al,* Supra, the court deals with the specific point in question

and states unequivocally that unless the homestead as such is consciously and specifically impaired by the owner in an express writing, the Constitution protects the homestead from any judgment, lien, execution or forced sale.

> While the Constitution has placed no inhibition to a voluntary alienation of a homestead, it has specifically exempted it, without exception, from all involuntary or execution sales . . . the Constitution has not prohibited a homestead claimant from selling or involuntarily incumbering the homestead, and he may make any kind of voluntariy alienation of it, or incumber it . . . Now, it may be said that the defendant, the homestead claimant, having herself voluntarily made and entered into the contract for the construction of the building on the homestead, and the material having been furnished by plaintiff in pursuance of it, therefore, she voluntarily incumbered the homestead the same as though she had given a mortgage upon it. That would be true *if by the terms of her contract she had pledged the homestead, or had given a lien on it* [the homestead] *as by law provided. But it is not made to appear that the contract contains any stipulation giving contractors, materialmen, laborers, mechanics or any one a lien upon the homestead, and nothing oppears from which the contract can be construed into a contract for a lien. In the absence of an express contract creating it, the lien which a materialman or mechanic may become entitled to depends solely upon the statute for its existence. Volker-Scowcroft Lumber Co. v. Vance,* Supra, (emphasis added).

The court stated the title to the property remained vested in the defendant, and, without more, the judg-

ment claimed by plaintiff's is, at most, a mechanic's lien, a creature of statute, and homesteads are exempt from judgment and foreclosure of mechanic's liens. *Stucki v. Ellis,* 114 Utah 486, 201 P.2d 486, (1949), following *Volker-Scowcroft Lumber Co. v. Vance,* Supra, and *Utah Builders Supply Co. v. Gardner,* 86 Utah 257, 42 P.2d 989, (1935).

POINT II

IN ORDER FOR AN EQUITABLE LIEN TO BE ESTABLISHED, OVERT ACTS ON THE PART OF THE PERSON CLAIMING A HOMESTEAD EXEMPTION MUST BE IN EVIDENCE WHICH DEMONSTRATE THAT THE PARTY CONSCIOUSLY INTENDED TO ENCUMBER THE HOMESTEAD IN THE WAY, MANNER AND TO THE EXTENT SO ENCUMBERED.

The first loan that the parties were involved in was in the amount of $6,500.00. It was for this loan that the plaintiff signed a quit-claim deed. The first loan might have been construed to be an equitablet mortgage, but the second loan for $9,000.00 cannot. The second loan was solely that of the plaintiffs. The second loan was taken out by the plaintiffs without the knowledge or consent of the defendant. (R. 29, L18 - R. 30, L4). The second loan also completely retired and terminated the first loan. It also terminated any contract the parties may have had. The plaintiffs also waived any rights they may have had to an equitable mortgage by their

subsequent conduct, which eliminated the first loan and security agreement (quit-claim deed), as between the plaintiffs and defendant, thereon.

In equity the court looks to the intent of the parties. If the conduct of the parties is to be believed, the plaintiffs only received a mechanics lien, the same as any contractor for repairs made.

How can an equitable mortgage, if there be one, in the form of a mechanic's lien, be stronger that a purchase money mortgage, which is protected by statute as an exception to the homestead exemption?

"Purchase money" has been defined by case law to be money actually used in, and for the purchase of land. If the purchase money includes monies for other indebtedness, only that portion thereof traceable to the purchase money, stands ahead of the homestead exemption, and no other. *McMurdie v. Chugg,* 99 Utah 403, 107 P.2d 163 (1940).

The plaitniffs now on appeal ask that the court grant them a mortgage against the homestead in the amount of $10,876.91, because they received a quit-claim deed to secure a mechanic's lien for $6,500.00. The plaintiffs wish this court to construe the quit-claim deed to be an express waiver of homestead contrary to *Volker-Scowcroft Lumber Co. v. Vance, et al.,* Supra, and they wish this court to extend an equitable mortgage to any and all indebtedness of defendant, contrary to this court's rules of construction in purchase money mortgages. *McMurdie v. Chugg,* Supra.

POINT III

A JUDGMENT RENDERED, WHICH HAD AS ISSUE, EITHER THROUGH THE PLEADINGS AND/OR EVIDENCE, THE QUESTION OF THE HOMESTEAD EXEMPTION AND WHERE THE ISSUE OF THE HOMESTEAD WAS NOT PURSUED BY THE MOVING PARTY, THE FIRST JUDGMENT IS RES JUDICATA AS TO THE ISSUE OF HOMESTEAD, IN ALL SUBSEQUENT PROCEEDINGS.

In *Bell v. Jones,* 104 Utah 306, 139 P.2d 884, (1943), the court states that an execution or order of sale may not go beyond the terms of the judgment upon which it is based. In Case No. 188517, plaintiffs' Reply to Defendant's Counterclaim prays for an equitable lien on the premises in favor of the plaintiffs. The court awarded a money judgment instead. The order was entered June 16, 1970. Plaintiffs made no appeal from the money judgment. The plaintiffs, in their pleadings, obviously claimed an equitable lien on the constitutionally protected homestead in an attempt to defeat the homestead exemption. They had the right and opportunity to appeal the court's decision to grant a money judgment. They failed to pursue their right of appeal and the matter is res judicata and a bar to them in any action to establish an equitable lien subsequently. 46 Am Jur.2d, §382, et seq.

If the homestead is in the pleadings and evidence,

and there is judgment without appeal, the judgment is res judicata on the question of homestead.

"Either the judgment . . . was a lien upon the land in controversy or it was not . . . If the land constituted a homestead, there was no lien . . . To hold that it was a lien without first determining the question as to whether it is such property as is subject to a lien by the plain provisions of the homestead statute, is to give a judgment creditor a right in addition to what is given him by the statute." *Antelope Shearing Corral v. Consolidated Wagon and Machine Co.*, 54 Utah 355, 180 Pac. 597 (1919).

CONCLUSION

Defendant respectfully submits that plaintiff's judgment mortgage was simply a mechanics-type lien, which by law cannot defeat a homestead. Defendant did not voluntarily relinquish or pledge her homestead rights, nor did the court determine that the judgment mortgage superseded the homestead based on pleadings and evidence. Therefore, defendant is entitled to her homestead exemption.

Respectfully submitted,

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