

1972

Calinois Land Company, A Limited Partnership,
Consisting of Robert E. Overtree and David T.
Shiffman, General Partners v. Security Title
Company v. John W. Cunningham : Appellant's
Brief

Utah Supreme Court

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IN THE SUPREME COURT
STATE OF UTAH
OF THE

CALINOIS LAND COMPANY, a
limited partnership, consisting of
ROBERT E. OVERTREE and
DAVID T. SHIFFMAN,
general partners,

Plaintiffs-Appellants,

vs.

SECURITY TITLE COMPANY,
a corporation,
Defendant-Respondent,

vs.

JOHN W. CUNNINGHAM,
Interpleader-Respondent.

Case No.
12962

APPELLANT'S BREIF

Appeal from the Summary Judgment of the
Third District Court for Salt Lake County
Honorable Bryant H. Croft, *Judge*

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STATEMENT OF NATURE OF CASE

This action involves the sale of certain real property known as Evergreen Park Subdivision #1 located in Weber County, State of Utah. The sale was made by the plaintiff herein to the defendant John W. Cunningham pursuant to a Trust Deed with defendant, Security Title Company acting as trustee. Upon the default of defendant Cunningham, the plaintiff commenced an action in the Third District Court in Salt Lake County, Civil No. 184745. That action was settled pursuant to a stipulation between

the parties, said stipulation covering 500 of the 553 lots initially conveyed by the plaintiff to the defendant, Cunningham. This action was brought to recover the remaining 53 lots which defendant Security Title had subsequently conveyed out of trust.

DISPOSITION OF THE LOWER COURT

The District Court of the Third Judicial District in and for Salt Lake County, State of Utah by the Honorable Bryant H. Croft, after hearing oral representations of counsel at a pretrial conference, summarily dismissed plaintiff's complaint upon the grounds that said action was properly adjudicated in the prior action and therefore the prior action was res adjudicata as a bar to plaintiff's present action.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of the Lower Court's decision and requests that this action be remanded to the trial court for a trial on the merits.

STATEMENT OF FACTS

The plaintiff believes that the facts in this particular case are properly set forth in a succinct manner on pages 2, 3, 4, 5, 6, and a portion of page 7 in Judge Croft's Memorandum Decision and Order of Dismissal. Therefore, the plaintiff will not take the time to reiterate those facts at this particular time, but would direct the Court's attention to the facts as set forth therein. (R. 102 through 107.)

ARGUMENT

POINT I.

IT WAS ERROR FOR THE LOWER COURT TO SUMMARILY DISMISS THE PLAINTIFF'S COMPLAINT INASMUCH AS THERE EXIST FACTS HEREIN UPON WHICH REASONABLE MEN MAY DRAW DIFFERING CONCLUSIONS.

Momentarily bypassing the question of res adjudicata the plaintiff contends that there exist a myriad of facts in this somewhat complex transaction that would substantially uphold a judgment in favor of the plaintiff for the relief prayed for in plaintiff's complaint herein.

It is imperative that we point out but a few of the afore-alleged facts. (1) The record discloses no evidence of an agreement by and between defendant Cunningham and the plaintiff herein wherein the plaintiff agreed to accept the terms of defendant Cunningham's letter dated November 1, 1968. (R. 18) To the contrary there appears in a directive letter from defendant Cunningham to defendant Security Title Company inference that the plaintiff herein would accept 20,625 shares of Dumont Corporation Stock, cash in the sum of \$7,500.00, and a Promissory Note and Deed of Trust in the principal sum of \$82,500.00 from Dumont Corporation covering "the same 500 lots." (R. 32) These were the terms agreed upon by the parties when negotiating the settlement of the initial lawsuit brought by the plaintiff herein

to recover the 500 lots that have been the subject of the Exchange Agreement between defendant Cunningham and Dumont Corporation. Plaintiff at no time intended that its entire interest in the initial Trust Deed covering the 553 lots would be settled pursuant to the above terms.

(2) The deposition of Herbert H. Halliday, Jr., in Civil No. 193327, the present action herein, certainly indicates that he was aware that Calinois had no intent of transferring its entire interest in the Trust Deed for the consideration set forth in defendant Cunningham's instructional letter of November 11, 1968.

POINT II.

THE LOWER COURT ERRED IN DETERMINING THAT THE DEFENSE OF RES ADJUDICATA WAS A PROPER BAR TO THE PROSECUTION OF THE PRESENT ACTION.

We find a definition of res adjudicata most generally accepted in 46 Am. Jur. 2d, "Judgments," §394.

"Literally, res adjudicata means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment."

Further, in §401 we find the following:

"The doctrine of res adjudicata is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations. The doctrine is firmly entrenched in the law, as to those situations to which it is appli-

cable. Situations may arise, however, which call for exceptions, and, in the event, the doctrine should not be enlarged beyond its clear limits."

The question of the applicability of the doctrine of *res adjudicata* implies the resolving of a question of both *fact* and law. The question of fact that must be decided in each and every action involves the identity of the subject matter of the previous litigation as compared to the subject matter of the present litigation. It is this identification factor that poses the matrix of the plaintiff's appeal herein. It is also this identification factor upon which the lower court has premised its conclusions. Therefore, a most rigorous examination of the continuity of issues or the lack thereof in the two actions poses the most pressing problem at this time. Quoting from 46 Am. Jur. 2d, "Judgments," §407, we find the following:

"Indeed in order for two actions to be regarded as based on the same cause of action so that a judgment in one is a bar to the maintenance of the other action, the two actions must relate to the same subject matter; where the subject matter is essentially different, there is no identity of causes of action. However, the mere fact that two actions relate to the same subject matter does not necessarily establish that they are on the same cause of action. Hence, a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, even though each action relates to the same subject matter."

The plaintiff admits that in instituting the initial action in the previous lawsuit that the default of defendant Cunningham was sought and hence a reconveyance of the property held by defendant Security Title Company. However, during the course of negotiation and settlement pertaining to said lawsuit only that portion of the subject matter of the lawsuit dealing with the Exchange Agreement was covered by the Settlement Agreement and General Release. Wherein we note that the parties agreed as follows:

“Whereas, the parties hereto have agreed upon the terms and settlement of all claims arising from said Exchange Agreement and said lawsuit and have agreed that the conveyance of said lots to Dumont may be completed and the judgment may be entered dismissing said lawsuit with prejudice.” (R. 46)

It will be noted that the proposed settlement was based or premised upon the Exchange Agreement and inasmuch as the Exchange Agreement called for the conveyance of only 500 of the 553 lots, the subject matter then of the Settlement Agreement and General Release must be limited to those lots specifically outlined in the Exchange Agreement. Again the opening paragraph of the Settlement Agreement and General Release evidences the tripartite agreement was to be directed only to the Exchange Agreement attached to the Settlement Agreement and General Release as Exhibit A and covering only 500 of the original 553 lots. (R. 46) In executing the Settlement Agreement and General Release the plaintiff

agreed to accept the terms contained therein in full settlement of its claim and interest in the 500 lots formed the subject matter of the Exchange Agreement. It will be noted that included in the attached Settlement Agreement and General Release there is incorporated the statement that John Cunningham and the defendant Dumont Corporation under date of October 8, 1968 made and entered into an Exchange Agreement, a copy of which is attached thereto and expressly made a part thereof. The dispute arose between Calinois Land Company, Security Title Company, John Cunningham and Dumont Corporation as to the rights, duties and obligations of the parties under said Exchange Agreement. Further, such Settlement Agreement recites that Calinois Land Company filed a lawsuit in the District Court of Salt Lake County in which Dumont Corporation intervened. The parties to the Settlement Agreement premised the terms of the settlement upon the claims arising from the Exchange Agreement. It will be noted that the Settlement Agreement refers to and is restricted to the Exchange Agreement. It is the proposition of the plaintiff herein that the settlement is only limited to the 500 lots as referred to in said Exchange Agreement which is part of the Settlement Agreement. Defendant Security Title Company in the action before the lower court was charged with conveying 53 lots out of trust which were not incorporated or made a part of the Exchange Agreement but which are a part of the Trust

Agreement which defendant Cunningham and plaintiff initially signed. The Settlement Agreement and General Release formed a basis upon which the initial lawsuit was dismissed. Further evidence of the intent of the parties can be found in the instructional letter by defendant John Cunningham dated the first day of November, 1968 wherein it is clearly set forth in the second paragraph therein that Calinois Land Company was to receive 20,625 shares of Dumont Corporation stock as its share in closing the "transaction" that forms the subject matter of that particular instructional letter. It will be noted from the first paragraph therein that the subject matter of that letter was the Exchange Agrrement and Management Agreement that was delivered to defendant Security Title Company directing Security to act as escrow agent in closing that particular transaction.

It is further contended by the plaintiff herein that the failure of the interpleader and respondent John W. Cunningham to answer in this action has deprived the plaintiff of its right to make inquiry and to take discovery concerning Mr. Cunningham's intention and state of mind when entering into the Settlement Agreement and General Release set forth above. Without this opportunity the plaintiff's position has been substantially prejudiced, inasmuch as the plaintiff contends that the defendant Cunningham knew that the settlement and resultant dismissal of the initial lawsuit was premised solely on the Exchange Agreement and was not intended as a

complete release of the plaintiff's right, title and interest in any remaining properties covered by the original trust agreement.

CONCLUSION

Analysis of the nature and determining factors resolved in the Settlement and General Release resolving the disputes between the parties in the initial action clearly and unequivocally shows that the intent of the parties was to arrive at a settlement and termination of the disputes as they revolved around the Exchange Agreement involving all the parties to that initial lawsuit. The subject matter of the present lawsuit was not negotiated upon nor settled by the parties at that particular time and hence the claim or defense of *res adjudicata* is inapplicable to the present action. By the summary disposition entered by the lower court the plaintiff has been prevented from introducing substantial and convincing evidence upon which reasonable men could conclude that the subject matter of the initial lawsuit and the subject matter of the present lawsuit are separate and distinct. We therefore petition this Honorable Court to reverse the summary disposition of the lower court and remand this action for further proceedings in accordance with the plea of the prayer of the plaintiff's complaint and thus allowing the plaintiff its right to have its matter heard in open court.

Respectfully submitted this 19th day of October,
1972.

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