

1973

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 : Reply Brief of
Calinois Land Company

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

REPLY BRIEF OF
CALINOIS LAND COMPANY

APPEAL FROM THE SUMMARY JUDGMENT OF
THE THIRD DISTRICT COURT FOR
SALT LAKE COUNTY
Honorable Bryant H. Croft, *Judge*

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Clerk, Supreme Court, Utah

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APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

The appellant feels that because of the statements made by the respondent regarding the facts in this matter that for the convenience of the Court a resume of the facts be clearly stated.

Plaintiff filed its amended complaint in the present action (R. 64 through 66) in which it alleged in substance as follows:

That the defendant Cunningham and appellant made and entered into a certain Trust Agreement in which the defendant Security Title Company was named as Trustee, said Trust Agreement being dated the 15th day of November, 1966.

That in accordance with said Trust Agreement plaintiff conveyed certain real property located in

Weber County, State of Utah, consisting of 553 lots to the Trustee, Security Title Company, defendant-respondent herein.

That subsequent to the execution of the Trust Agreement, Cunningham made and entered into an Exchange Agreement (R. 14 through 16) whereby Cunningham agreed to transfer 500 lots set forth in the Trust Agreement to a corporation known as Dumont Corporation in exchange for 62,500 shares of Class A common stock of Dumont.

That subsequent thereto on the 14th day of October, 1968 Dumont Corporation, one of the parties to the Exchange Agreement other than defendant Cunningham, by letter set forth terms for the defendant Security Title Company to do certain acts in performance of the Exchange Agreement (R. 17). That under date of November 1, 1968 the defendant Cunningham sent a letter (R. 18) to Security Title Company in which it advised Security Title Company that Cunningham had sold 500 of the subdivision lots to Dumont Corporation in exchange for 62,500 shares of Class A common stock in Dumont Corporation.

That in accordance with the terms and condition of the Exchange Agreement (R. 17), the letter of Cunningham (R. 18), and the letter of Dumont Corporation (R. 17), the defendant has conveyed by proper documents 500 subdivision lots as more particularly described in the Trust Agreement to Dumont Corporation.

That plaintiff Calinois has been paid for the 500 subdivision lots, but not for the 53 subdivision lots remaining and more particularly described in said Trust Agreement (R. 4) and which were not included in the Exchange Agreement (R. 17), letter of Dumont (R. 17), and the letter of Cunningham (R. 18).

The plaintiff has not received payment for the 53 lots and the defendant Security Title Company has conveyed said 53 lots at the authorization and direction of John W. Cunningham, defendant herein and over the objection of the plaintiff and without plaintiff's consent.

In its amended answer (R. 81 through 84) to amended complaint Security Title Company admits and alleges as follows:

In paragraph 2 Security Title admitted the execution of the Exchange Agreement of October 8, 1968 in which neither Calinois Land nor Security Title was a party. In paragraph 3 Security Title Company admits that they conveyed the 500 lots pursuant to the aforementioned Exchange Agreement and related documents. In paragraph 4 of the amended answer the defendant Security Title Company raises the defense of res judicata based upon the compromise settlement in a prior lawsuit denoted as Civil No. 184745. In paragraph 5 of the amended answer defendant Security Title Company raises the defense of estoppel, alleging that "plaintiff is estopped by

its conduct in executing a settlement agreement and general release under date of October 9, 1969, by the terms of which it specifically 'for itself and all persons claiming under it, hereby jointly releases, acquits and forever discharges Dumont, Security and Cunningham' from any and all obligations, claims, debts, demands, covenants, contracts, promises, agreements, liabilities, controversies, costs, expenses, attorney's fees, actions or causes of action whatsoever, whether known or unknown".

Finally in paragraph 7 Security Title alleges that the plaintiff Calinois has been paid in full under the terms and conditions of the Trust Agreement.

In Civil No. 184745 Calinois Land Company appeared as plaintiff, Dumont Corporation who is not a party to the present action appeared as intervening plaintiff, Security Title Company appeared as defendant and third party plaintiff, and John W. Cunningham appeared as third party defendant.

In the plaintiff's complaint therein in Civil No. 184745 Calinois sought pursuant to paragraph 5 of the complaint, to achieve the following result: "That the relationship of the plaintiff and defendant as set forth in Exhibit 1 and Exhibit 2 is terminated and the parties affected thereby are to be returned to their former positions". In referring to Exhibits 1 and 2, Calinois was referring to an instructional letter dated October 10, 1968 directed to Security Title Company and a subsequent instructional letter dated

October 29, 1968 directed to Mr. Herb Halliday, Trust Officer, Security Title Company. Pursuant to the terms set forth in the instructional letter of October 10, 1968 Calinois was to receive 20,625 shares of Dumont Corporation Class A common stock in exchange for its beneficial interest in 500 lots that were transferred to Security Title Company in trust pursuant to the aforementioned Trust Agreement. Security Title Company was to act as the escrow agent in facilitating the transfer of the land pursuant to an Exchange Agreement (see envelope Exhibits) whereby John Cunningham was exchanging his interest in 500 of the 533 lots covered under Trust Agreement to Dumont Corporation in exchange for Dumont stock. Security Title Company's failure to comply with the instructional letters of Calinois Land Company resulted in the filing of the lawsuit denoted as Civil No. 184745. In its answer and counterclaim Security Title Company simply denied that it had failed to comply with the instructions given by Calinois Land Company.

In a compromise settlement in Civil No. 184745 the parties to that action entered into a Settlement Agreement and General Release (see envelope Exhibits) that states in part:

“WHEREAS, DUMONT CORPORATION, a Utah corporation (“Dumont”) entered into an Exchange Agreement with JOHN CUNNINGHAM (“Cunningham”) dated October 8, 1968, a copy of which is attached hereto as Exhibit A and incorporated

herein by reference, under the terms of which some five hundred (500) lots in Evergreen Subdivision, Weber County, Utah were to be conveyed to Dumont Corporation by Security Title Company ("Security"), as Trustee for Cunningham and Calinois Land Company ("Calinois") and

" * * * * *

"WHEREAS, the parties hereto have agreed upon the terms of settlement of all claims arising from the said Exchange Agreement and said lawsuit and have agreed that the conveyance of said lots to Dumont may be completed and that a judgment may be entered dismissing the said lawsuit with prejudice;"

Consequently, Calinois having not received payment for the remaining 53 lots covered under the Trust Agreement, and inasmuch as the Trust Agreement was not a part of this Settlement Agreement and General Release, made demand upon Security Title Company for reconveyance of the said 53 lots. Security Title Company refused to reconvey said lots, alleging that they had conveyed the said lots pursuant to the direction of John Cunningham and over the objection of Calinois Land Company.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN SUMMARILY DISMISSING THE PLAINTIFF'S COMPLAINT ON THE BASIS THAT CIVIL NO. 184745 WAS RES JUDICATA AS TO ALL ISSUES OF FACT AND LAW RAISED IN THE PRESENT ACTION.

It has been almost unanimously accepted that the affirmative defense of res judicata in order to be sustained must meet four basic criteria. These criteria are succinctly set forth in *Smith v. Baxter*, 419 P.2d 752 (Mont. 1966).

“In State ex rel. Sullivan v. School Dist. No. 1, 100 Mont. 468, 472, 50 P.2d 252, we established four criteria that must exist before a plea of res judicata would be sustained. These criteria are: (1) the parties or their privies must be the same; (2) the subject-matter of the action must be the same; (3) the issues must be the same, and must relate to the same subject-matter; and (4) the capacities of the persons must be the same in reference to the subject-matter and to the issues between them.”

A quick analysis of these four criteria as applied to the present action indicates unquestionably that the Trial Court erred in its determination that res judicata was applicable and therefore dismissing the complaint of Calinois Land Company. First it will be noted that the parties in the two actions are not the same. In Civil No. 184745 Dumont Corporation was a party as an intervening plaintiff and they are not involved in the present suit. Next it will be noted that the subject matter of the actions as framed by the pleadings are not the same. In Civil No. 184745 the various parties thereto were involved in the proper disposition of 500 lots to be conveyed pursuant to an Exchange Agreement entered into between Dumont Corporation and John Cunning-

ham. That entire action centered around the various interests and legal relationships created by the Exchange Agreement and documents related thereto concerning the aforesaid 500 lots. The issue involving Calinois Land Company and Security Title Company as the escrow agent for Calinois Land Company had fully complied with the instructional letters given to Security Title Company in creation of the agency relationship. Calinois alleged that Security Title had failed to comply and Security Title Company countered that they had in fact fully complied. At no time during the previous litigation; during the negotiations; or in the Settlement Agreement and General Release was there every any mention of the pre-existing Trust Agreement.

The issue in the present action does not involve and center around the said Trust Agreement and the relationships created between Calinois Land Company, Security Title Company, and John W. Cunningham in that document. (See envelope Exhibit P-2).

Next with relationship to the "capacities of the persons must be the same in reference to the subject-matter and to the issues between them", *Smith v. Baxter*, as has been pointed out above the capacities of the parties in Civil No. 184745 and in the present action are not the same. The legal relationships sought to be terminated in Civil No. 184745 between Calinois Land Company and Security Title Company was that of principal and escrow agent in relation

to an Exchange Agreement neither party was privy thereto. The relationship sought to be terminated and the legal relations incident to the Trust Agreement set forth the capacities and relationships in the present action, i.e., Calinois Land Company as the first beneficiary, John W. Cunningham as the second beneficiary, and Security Title Company as trustee.

POINT II.

THE TRIAL COURT ERRED IN SUMMARILY DISMISSING THIS ACTION IN THAT SAID COURT WENT BEYOND THE PLEADINGS AND EVIDENCE TO ESTABLISH ITS BASIS FOR DISMISSAL.

We contend herein that the Trial Court went beyond the record in basing its memorandum decision and order of dismissal (R. 101 through 108) on the defense res adjudicata. On page 7 of the Court's memorandum decision the Court eludes to facts not in evidence wherein the Court states, "From the foregoing, it is clearly apparent that Calinois had agreed to transfer all of its interest in the trust agreement of November 15, 1966, in exchange for 20,625 shares of Dumont stock ($\$8.00 \times 20,625 = \$165,000$)***" (R. 107). Then again on page 8 of the memorandum decision the Court stated, "But for the fact that the stock bubble burst when the S.E.C. suspended trading of the stock, the transaction would have been completed in accordance with the agreements between the parties. In settlement, Calinois got the stock and an \$82,500.00 note secured

by a trust deed on the 500 lots that went to Dumont". There is nothing in the record of this lawsuit that would substantiate the findings made above.

In a most recent Supreme Court decision entitled *Salt Lake City v. United Park City Mines Company*, 503 P.2d 850; Utah 2d..... (Nov. 1972), the Supreme Court of this state overturned a decision made by the same Trial Court Judge involved in the present action on the basis that the Trial Court had gone beyond the evidence and record in making its decision:

"In deciding a case tried without aid of a jury, the court has a great leeway in deciding what are the facts as presented by the evidence before him. However, neither a judge nor a jury is permitted to go outside the evidence to make a finding."

We would further contend that there are certainly questions of fact and law raised by the documents forming the record in Civil No. 184745 and that the plaintiff Calinois Land Company ought not to be precluded from its right to put on evidence in explanation of those documents.

CONCLUSION

The two principal issues raised and framed by the amended complaint and amended answer in the present action are:

(1) Has Calinois Land Company received payment for 553 lots conveyed to Security Title Company pursuant to a Trust Agreement dated Novem-

ber 15, 1966?

(2) Does Civil No. 184745 act to bar the plaintiff from recovery in the present action on the basis of res judicata?

The plaintiff contends that the first issue of payment cannot be resolved as a matter of law in that it raises an issue of fact upon which evidence must be adduced. The second and somewhat related issue of res judicata is not applicable in the present action in that the parties, subject matter, capacities, and legal relations of the parties in Civil No. 184745 and the present action are not the same.

The plaintiff Calinois Land Company has been denied the opportunity to present its evidence in support of its amended complaint, said denial being premised on "directions and evidence" not of record in the present action. These directions are outside the evidence of the present action and therefore outside the direction of the Trial Court. Therefore plaintiff-appellant Calinois Land Company respectfully requests that the Lower Court's decision be reversed and the action remanded for a trial upon the issues.

Dated this 9th day of February, 1973.

Respectfully submitted,
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