1959

Annie Ray Hieselt v. Nadine Heiselt : Brief of Appellant

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Richard C. Dibblee; Counsel for Appellant;

Case No. 9065

IN THE SUPREME COURT of the STATE OF UTAH

ANNIE RAY HEISELT,

Appellant,

—vs.—

NADINE HEISELT, a widow,
WILSON HEISELT and JANE DOE HEISELT, his wife, if married, whose other and true name is unknown.
CALVIN HEISELT and JANE DOE HEISELT, his wife, if married, whose other and true name is unknown.
JOSEPH HEISELT and JANE DOE HEISELT, his wife, if married, whose other and true name is unknown.
MRS. RHEA HEISELT ANDERSON, MRS. WINNIE HEISELT THOR, MRS. HELEN CHIPMAN HEISELT DIXON, MRS. MARY LOU HEISELT TAYLOR, being all of the heirs at law of Mary C. Heiselt, deceased, and if any of said heirs are deceased, then all of the heirs, devisees, legatees, creditors and assignees of said deceased heir;
The unknown heirs, assignees, legatees, devisees and creditors of Mary C. Heiselt, deceased, and all other persons unknown claiming any right, title, interest, estate or lien upon the real property described in the complaint adverse to the ownership of plaintiff or clouding the title of plaintiff thereto;
And all other persons unknown claiming any right, title, interest, estate or lien upon the real property described in the Complaint adverse to the ownership of the plaintiff or clouding the title of plaintiff thereto,

Respondents.

BRIEF OF APPELLANT

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And all other persons unknown claiming any right, title, interest, estate or lien upon the real property described in the Complaint adverse to the ownership of the plaintiff or clouding the title of plaintiff thereto,

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Case No. 9065

BRIEF OF APPELLANT

(Numbers in parentheses refer to pages of the record. The parties will be referred to as in the Court below.)

STATEMENT OF THE CASE

This is an appeal from a judgment in favor of defendants and against plaintiff. The case was tried to the court without a jury, and this appeal attacks the Amended Findings of Fact and Conclusions of Law and the Amended Decree adopted by the court. (R 109-115).

The case is a quiet title action and all of the parties are related through marriage. The property involved is a house and lot located at 1217 South 9th East Street, Salt Lake City, Utah. Plaintiff instituted the action claiming to be the owner free and clear of any interest of defendants. Defendants answered claiming an interest by inheritance.

The portion of the title material to this case commences with the purchase by Mary C. Heiselt on March 10, 1926. At the time of this purchase, she was married to N. H. Heiselt and they had three sons, Wilson Heiselt, Delbert Heiselt and Lawrence Heiselt. Mary C. Heiselt lived in the home until her death on October 1, 1929. She died intestate and left surviving, her husband and three sons. Her estate was never probated.

The three surviving sons were all married and all are now dead. Wilson Heiselt died on February 28, 1941, and left surviving as heirs, Nadine Heiselt, and five children, Wilson, Calvin and Joseph Heiselt, and Rhea Heiselt Anderson and Winnie Heiselt Thor. All of these heirs are named defendants.

Delbert Heiselt died, the exact date unknown, and left surviving as his heirs, his widow, Helen Chipman Heiselt Dixon and one child, Mary Lou Heiselt Taylor. These heirs are named defendants.

Lawrence Heiselt, died on March 27, 1951, and left surviving as his heirs, his widow, Annie Ray Heiselt, plaintiff herein, and children who have conveyed any interest they may have in the property to plaintiff.

The surviving husband, N. H. Heiselt died in January, 1943. Before his death he remarried Caroline Christensen Heiselt. They were divorced on July 15, 1936. (R-19). There were no children born as issue of this marriage. After the divorce N. H. Heiselt became delinquent in his alimony payments and his wife secured a judgment against him. To satisfy this judgment she foreclosed on his one-third interest in the described property. Caroline Christensen Heiselt conveyed her interest in the property to plaintiff. The deed was dated March 3, 1941 and was issued to plaintiff in her own name. (Ex. P-2 page 44).

On July 19, 1939, plaintiff purchased a tax deed from Salt Lake County to satisfy the delinquent taxes assessed against the property for the years 1932 to 1936 inclusive. The deed was issued to plaintiff in her own name. (Ex. P-2 pages 38 and 45).

After the death of N. H. Heiselt, plaintiff rented the property to a third party for a period of approximately seventeen months. She retained all of the rental payments, less certain commissions. (R-53). In October,

1945, (R-53) plaintiff and her husband moved into the home where she resided continuously until January 14, 1958. While in possession of the property she made material improvements totaling the sum of $4,075.00 (R-112). Plaintiff also paid all of the taxes levied against the property from her initial purchase of the tax deed to and including the year 1957 (R-111). Plaintiff sold the property on January 1, 1958 for the sum of $10,500.00. (R-112).

A pre-trial was held in this case and defendants admitted plaintiff had succeeded to the one-third interest of Caroline Christensen Heiselt and had inherited the interest of her husband Lawrence Heiselt, and was therefore, a owner of an undivided five-ninths interest in the property. Defendants contended, however, that she was trustee of the distributive share due defendants as heirs of Mary C. Heiselt.

A trial was held and the court ruled plaintiff to be a trustee of four-ninths interest of the property for the use and benefit of the named defendants. The court further ruled that plaintiff was entitled to a lien on this interest for the proportionate share of the amount she paid as taxes and improvements.

It is the ruling by the trial court which is the subject of this appeal.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS A TRUSTEE OF THE PROPERTY FOR DEFENDANTS.

POINT II.

THE TRIAL COURT ERRED IN NOT FINDING THAT PLAINTIFF'S POSSESSION OF THE PROPERTY WAS ADVERSE TO DEFENDANTS.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS A TRUSTEE OF THE PROPERTY FOR DEFENDANTS.

The trial court entered the following Amended Conclusion of Law:

Conclusions of Law

> 1. That plaintiff holds the premises described in the Complaint in trust for herself and following named defendants: Nadine Heiselt, Wilson Heiselt, Calvin Heiselt, Joseph Heiselt, Rhea Heiselt Anderson, Winnie Heiselt Thor, the heirs at law of Wallace Heiselt, deceased, Helen Chipman Heiselt Dixon, and Mary Lou Heiselt Taylor, the heirs of law of Delbert Heiselt, deceased. * * * *" (R. 113)

From said conclusion of law it is apparent that the trial court adopted defendants' theory that when plaintiff purchased the tax deed from Salt Lake County, her husband, Lawrence Heiselt, was then a tenant in common with the defendants or their predecessors in interest, and consequently her purchase was a redemption of an outstanding interest for the benefit of not only her husband, but also his cotenants.

It is our position that said conclusion is contrary

to all of the better reasoned authorities on this subject.

In this case the plaintiff testified that during the time she resided in the home defendants Helen Chipman, Mary Lou Taylor, and Nadine Heiselt were in her home on numerous occasions. (R-58, 59,). Plaintiff further testified that they had been in the home three years ago last April and never offered to pay plaintiff any amount for the taxes she had paid on the property. (R-71).

We respectfully submit that this faiure of defendants to offer a contribution toward plaintiff's payment of the tax deed in 1939 and the subsequent taxes to 1957, is a waive of their right to receive the benefit of her purchase.

As stated in 54 ALR 875:

> "* * * Tenants in common and joint tenants are said to stand in confidential relations to each other in respect to their interests in the common property and the common title under which they hold; and the courts generally assert that it would be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim to the common estate and assert it for his exclusive benefit to the injury or prejudice of his co-owners; and, if one cotenant actually does acquire such claim, he is regarded as holding it in trust for the benefit of all his cotenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures; * * *"

In the same annotation at Page 910:

"It is well established that a cotenant may, by delay, lose the right to benefit by the purchase of an outstanding title by his fellow owner; in the following cases it is expressly laid down that the cotenant seeking to share in the benefit of a purchase of an outstanding title by his cotenant must assert such right within a reasonable time:'" * * *

On Page 912 the annotation states as follows:

"In the following cases the right of a cotenant to share in the benefits of the acquisition of an outstanding title to, or encumbrance against, the common property, was held to be lost by long delay before asserting his right: (a delay of 4 years, during which there had been a large appreciation in the value of the property; under ordinary circumstances, two years is a reasonable time; delay of 10 years after redemption from mortgage held too long; delay of 9 years; *** delay of 13 years after sale for delinquent taxes, during which time the co-tenant had been in possession under claim of right, and had sold the property to a bona fide purchaser; * * *"

See the supplemented annotation in 85 ALR 1535-1538.

This principle of law has also been announced in Tiffany on Real Property, 3rd Edition, Volume 2, Sec. 466, where the author states:

"The cotenants entitled to the benefit of the rule must, within a reasonable time, having due regard to their knowledge or means of knowledge of the purchase, contribute or offer to contribute their proportion of the price paid, and a faliure so to do will be regarded as a repudiation

> of the transaction and abandonment of its benefits, and likewise, until this is done, they cannot demand a partition." * * *

The application of this rule was applied by the Supreme Court of Washington in the case of *Dwight v. Waldron, et. al.*, 164 P 761. In this case plaintiff instituted the action to set aside a tax deed to certain property and quiet title. A demurrer to the Complaint was sustained and plaintiff elected to stand on his Complaint and file an appeal. The facts are rather complicated and lengthy, but in substance the plaintiff contended that the defendant had purchased a tax deed to the property for the years 1896 to 1900 inclusive. That thereafter she conveyed the same in 1909 to one of the defendants herein. Plaintiff contended that his interest in the property was from an original owner and defendants were trustees. Plaintiff alleged he had made no tender of the taxes to defendant, but was willing to pay any amount as directed by the Court.

The demurrer was based on two statutory grounds that the facts do not constitute a cause of action and the Statute of Limitations. The Court indicated that the trial court did not disclose upon which of the grounds that the demurrer had been sustained, but affirmed the trial court. The Court stated:

> "It is a generally recognized rule that there is such a mutual relation between tenants in common of real property that one of such tenants cannot deprive his cotenants of their interests in the common property by purchasing an outstanding adverse title thereto, or by the purchase of

an incumbrance thereon which is afterwards converted into title, when the purchase is made for the benefit and protection of the common estate. The principle has been frequently recognized by this court."

"It is a settled rule also that, if the cotenant would share in the adverse title acquired by the purchasing tenant, he must pay or tender payment of his proportionate share of the price necessarily expended in acquiring the title, and must exercise the privilege within a reasonable time. *Starkweather v. Jenner,* supra; Freeman on Cotenancy, 156. What will constitute a reasonable time depends much upon the facts of the particular case, but the authorities all agree that whatever delay is occasioned must be entirely consistent with fair dealing, and not attributable to an effort to retain the advantages of the purchase while the responsibilities attending upon it are shirked. ***

* * * Equity does not oblige a cotenant to pay out his money to protect the common title. It, rather, permits him to do so and converts him into a trustee, when he has done so. But it equally lays an obligation upon the other cotenants to reimburse him for his outlay, and a failure to reimburse him within a reasonable time will be taken as an election on their part to allow him to take the title he has acquired for his individual use." * * *

In *Anderson vs. Griffeth, et al.,* 254 P. 2d 1001, a Wyoming case, the court discussed the rule. In the case plaintiff instituted the proceedings to quiet title on October 9, 1950, and she based her claim on a tax title purchased on February 9, 1928. Defendants contended that plaintiff was a trustee on the theory of tenancy in

common. The trial court entered general Findings of Fact that plaintiff was entitled to a judgment on the basis of adverse possession. In affirming the trial court the court stated the following on Page 1003:

> "There is another matter which also leads us to believe that the District Court's judgment in this case should not be disturbed. It is insisted for the defendants that plaintiff could not acquire title to the property adversely to them being a tenant in common with said defendants."

The court then cited the language of 54 ALR 875, and then continued as follows:

> "This general rule has the limitation as pointed out by the use of the word 'seasonably.' In *Mandeville vs. Solomon,* 39 Cal. 125, 133, it was held that:
>
> '* * * the co-tenant must exercise reasonable diligence in making his election to participate in the benefit of the new acquisition.
>
> 'Unless he make his election, to participate in a reasonable time, and contribute, or offer to contribute, his proportion of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits.'

and the court said upon the point, 39 Cal. at Page 133:

> 'Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property; it, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the aboslute exclusion of the other, it at the same

time exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his co-tenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself by delaying, until the rise of the land, or some event yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute or offer to contribute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits.'

In 14 Am. Jur., Cotenancy, Section 59, Page 128 the following is stated:

> While the courts are agreed that a cotenant who desires to share in the benefits of an outstanding title purchased by a fellow must offer to contribute within a reasonable time, no positive answer can be given to the question as to what constitutes a reasonable time, since each case must necessarily be determined in the light of its own peculiar circumstances. It is well settled, however, that where there are facts amounting to an acquiescence, or where it would be inequitable to compel a sharing of the benefits, the courts may refuse to grant relief even though the statutory time of limitation has not yet run. And where the delay is plainly unreasonable they will refuse to entertain the suit irrespective of the question of limitatons. The refusal to grant relief is not put upon the presumption of payment or analogy to the statute of limitation, but upon considerations of public policy and the difficulty of doing

> entire justice between the parties in consequence of the unreasonable delay. The principal facts in determining whether the plaintiff has been guilty of laches are acquiescence and lapse of time, but other circumstances are also material; thus, if a cotenant unreasonably delays his election until there is a change in the condition of the property or in the circumstances of the parties, he will be held to have abandoned all right to any benefit arising from the new acquisition. * * *

In the case at bar defendants sat by for nineteen years perfectly willing to let plaintiff bear the tax burden on this property. They were charged with knowledge that taxes were accruing, and being paid during all of this time. Only after the property was sold and their greedy hope of enrichment kindled did they make a belated decision to participate in payment of the tax deed. It is our position that the doctrine of laches and all equitable considerations require a reversal of the trial court's decision.

POINT II.

THE TRIAL COURT ERRED IN NOT FINDING THAT PLAINTIFF'S POSSESSION OF THE PROPERTY WAS ADVERSE TO DEFENDANTS.

Even though two or more cotenants own real estate, one can acquire exclusive ownership by adverse possession under certain circumstances. These circumstances are discussed with clarity in the controlling case of *Mathews v. Baker, et al.*, 47 Utah 532, 155 P. 427.

In that case the plaintiff and defendants were com-

mon heirs at law of the owner of the property, one Simon Baker.

The trial court found that plaintiff had instituted the action on March 16, 1907. Plaintiff had been in continuous open possession of the property since 1889 and paid taxes under a claim of title since 1886.

She had built a five-room cottage on the property of the value of $3,000.00; one eight-room cottage of the value of $5,000.00; one seven-room house of the value of $3,000.00; and a sum of $1,000.00 was expended for landscaping. The court further found that all defendants had either personal or constructive knowledge of the plaintiff's possession and claim of complete ownership in the property.

This court in affirming the decision of the trial court stated at page 534:

> "The controversy arises, however, with regard to the legal effect that should be given to the possession and use of the premises and the improvements made thereon in view that the plaintiff and all of the defendants are the heirs of a common ancestor, one Simon Baker, deceased. In other words, the question to be determined is: Under what circumstances may a tenant in common claim title by adverse possession as against his cotenant."

The court then stated that the law on this issue was contained in *McCready v. Fredericksen,* 41 Utah 388, 126 P. 316, and quoted from the Mathews case at page 535:

> "'Where one enters avowedly as tenant in common with others, his possession is the possession those others, so long as the tenanacy in common is not openly disavowed. Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possesson is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant to him. He must, in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct, the implication of which cannot escape the notice of the world about him, or of any one, though not a resident in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his, that the law presumes in every owner.'"

The court then discusses the evidence in the case and stated at page 535:

> "* * * Every act of the plaintiff in improving and using the property in question could be given but one construction or effect. From those acts and the use made of the property but one inference is permissible, and that is that the plaintiff claimed and used the property as her own and did so adversely to all the world. If her acts and conduct are not given such an interpretation, then acts and conduct of that character can be given no force or effect in any case. In our judgment plaintiff's acts and conduct speak for her quite as plainly, as unequivocally, and as forcibly as words could have done. If she had proclaimed

> from the housetops that she claimed the property as her own, it would have had no greater legal effect than did her acts in improving and using it in the manner found by the court. If, under the facts of this case, a tenant in common may not acquire title by adverse possession as against his cotenant, then no title can be acquired where such a relation exists except where there is an actual or physical ouster; that is, 'a turning out by the shoulders,' as Lord Mansfield expressed it. Such is not the law, as is made clear from the excerpt quoted from Mr. Justice Taft's opinion to which we have referred."

The Mathews case, supra, and the McCready case, supra, have recently been affirmed in *Clotworthy, et al vs. Clyde, et al*, 1 Utah 2d 251, 265 P. 2d 420.

We submit that from an examination of the foregoing Utah authorities, adverse possession by a cotenant must be based on conduct and use the result of which evidences a claim of ownership to the exclusion of a cotenant.

In the light of the Mathews case, supra, and the McCready case, supra, we turn to the facts in the case at bar.

The plaintiff commenced exercising absolute control over the property following the death of N. H. Heiselt. During the year 1943 she rented the property to a third person for a period of 17 months and retained all the payments less some commissions. (R-53).

After the expiration of this rental period, plaintiff continued control of the property by taking physical

occupancy of the home. (R-53).

At this time it was a one-story brick house containing five rooms. (R-54). In February, 1946, she commenced improving the entire premises. She installed a gas heater (R-53); excavated the east end of the house to install a fruit and furnace room (R-55); re-wired the entire electrical system and installed new water pipes (R-55); blacktopped the entire portion of the backyard (R-56); constructed a utility room that necessitated installing stairs to the basement (R-56); remodeled the bathroom by installing a shower (R-56); painted the outside and inside of the house and shingled the roof (R-57); and remodeled and tiled the kitchen (R-57). All the foregoing improvements were done by plaintiff and she paid the sum of $4,075.00. (R-112).

During and after this work was done none of the defendants made any indication whatsoever that they had an interest in the property or its improvements. As was said in the Mathews case, supra, "If she had proclaimed from the housetops that she claimed the property as her own, it would have had no greater legal effect than did her acts in improving and using it in the manner found by the court."

CONCLUSION

It is our position that the trial court committed reversible error in the following particulars: (1) In concluding that plaintiff was a trustee of the property for the use and benefit of defendants; and (2) In refusing

to hold as a matter of law that plaintiff's use and occupancy of the property was adverse to the respective interests of defendants.

We, therefore, respectfully submit that the trial court's decision should be reversed and judgment entered in favor of plaintiff, holding her to be the lawful and sole owner of the property.

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