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Jack B. and Joanna M. Zito v. Cendant Mobility Services : Cendant Mobility Services v. Craig and Kylie Reagan : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JACK B. AND JOANNA M. ZITO,
Plaintiffs,

vs.

CENDANT MOBILITY SERVICES
Defendants.

CENDANT MOBILITY SERVICES
Third-Party Plaintiff/Appellee,

vs.

CRAIG & KYLIE REAGAN
Third-Party Defendants/Appellants.

Case No.: 20010715-CA

BRIEF OF APPELLEE

Appeal from a Judgment of the
Fourth District Court of Wasatch County, Utah
The Honorable Donald J. Eyre, District Judge

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Clerk of the Court

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BRIEF OF APPELLEE

JURISDICTION

The Order of the District Court granting Cendant's Motion for Summary Judgment against the Reagans and the Rule 54(b) determination regarding the appeal of that decision was filed August 6, 2001. The Reagans filed their Notice of Appeal on August 29, 2001. Jurisdiction was conferred on the Utah Supreme Court by §78-2-2(3)(j), Utah Code Annotated, because the appeal is one over which the Court of Appeals does not have original jurisdiction. The Utah Supreme Court transferred the case to the Court of Appeals, as authorized by §78-2-2(4), U.C.A. (R. 227.)

ISSUES PRESENTED

1. Was the Trial Court's correct in granting summary judgment for Cendant finding that the Reagans had illegally subdivided the property they sold to Cendant? This Court "reviews the district court's grant of summary judgment for correctness. Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *see also, e.g., Kearns-Tribune Corp. v. Salt Lake County Commission*, 2001 UT 55, 28 P.3d 686. In reviewing a grant of summary judgment, [this Court] give[s] the [Trial Court's] legal decisions no deference, reviewing for correctness. *Kearns-Tribune Corp.*, 2001 UT 55, 28 P.3d 686. Specifically, a district court's interpretation of a statutory provision is a question of law that [this Court] review[s] for correctness. *State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County*, 2002 UT 8, 44 P.3d 680."
2. Was the Trial Court correct in granting summary judgment finding that the Reagans illegal subdivision of the property sold to Cendant created a substantial encumbrance upon the property which violated the covenants of the Warranty Deed? *Id.* - review for correctness.
3. Was the Trial Court correct in granting summary judgment finding that rescission was the proper remedy for a real estate sale where there was a material breach of the covenants of the Warranty Deed? *Id.* - review for correctness.

DETERMINATIVE PROVISIONS

The following provisions were effective at the time of the sale of the Home from the Reagans to Cendant and are determinative of this appeal.

§17-27-103(1)(w) U.C.A.:

(i) “Subdivision” means any land that is divided [] into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms, and conditions. (ii) “Subdivision” includes the division or development of land whether by deed, metes and bounds description, devise and testacy, lease, map, plat, or other recorded instrument.

§17-27-804, U.C.A.:

(1) Unless exempt under §17-27-806 or not included in the definition of a subdivision under Subsection 17-27-103(1), whenever any lands are divided, the owner of those lands shall have an accurate plat made of them

§16.04.030, Wasatch County Code:

Sale, Advertisement, or Offering for Sale of Lots in Unapproved Subdivisions Prohibited. Lot(s) in a subdivision¹ that has not received final approval according to the requirements contained in this Title may not be advertised for sale, or offered for sale in any manner.

§57-1-12, U.C.A.:

A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, ... with covenants from the grantor, ... that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs, and

¹ The definition of “subdivision” in the Wasatch County Code tracks, as it must, the definition in the State Code. §16.04.010, W.C.C.

assigns in the quiet possession thereof; that the premises are free from all encumbrances; and that the grantor, his heirs, and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever.

STATEMENT OF THE CASE

A. Nature of the case.

This is an appeal from the grant of summary judgment in a civil action. The case involves an illegal subdivision of property by the Reagans, one parcel of which was then sold to Cendant, and the subsequent rescission of the sale upon discovery of the encumbrance.

B. Course of proceedings and disposition below.

Cendant was initially sued by the Zitos, the purchasers from Cendant of the property that Cendant had acquired from the Reagans. (R. 1.) Cendant then immediately filed a third-party complaint against the Reagans. (R. 27 - 26.) Cendant settled with the Zitos. (R. 35 - 37.)

After conducting discovery Cendant moved for summary judgment against the Reagans. (R. 54-53.) After hearing oral argument, the Trial Court entered an Order granting the Cendant's motion for summary against the Reagans on August 6, 2001. (R. 201-199.)

The Trial Court determined that the division of the property into three parcels by the Reagans and the sale of one of these parcels to Cendant constituted an illegal subdivision which violated the covenants of the Warranty Deed to Cendant. (R. 200.)

The Trial Court found that the proper remedy for such a void contract is rescission. (R. 199.) Because the Reagans had claimed that the property had been damaged during Cendant's ownership and that the Reagans could not therefore be restored to the *status quo ante*, the Trial Court reserved a decision on the issue of damages. (R. 200-199.)

C. Statement of Facts.

The Reagans owned approximately 80 acres of property in Wasatch County. (R. 80.) In June of 1997, the Reagans split up the property into three pieces by conveying two ten-acre parcels to themselves and retaining the remaining 60 acres. (R. 79.) All that Mr. Reagan did in order to split up the property was to have deeds prepared and recorded with the County. (R. 79.) The Reagans thus failed to comply with §17-27-804, U.C.A., in making these divisions of their property by failing to obtain approval for and record a plat of the subdivision.

According to Mr. Reagan, one of the purposes for splitting up the property was to lower the financing costs on his mortgage². (R. 164.) However, Mr. Reagan also testified that another purpose was to "have the advantage of adding another home if I ever needed to." (R. 161.)

² Mr. Reagan testified that he called the Wasatch County Recorder and obtained the incorrect advice that all he had to do to split up the property was file some deeds. (R. 162.) The Trial Court found that "[t]he Reagans are not excused from the subdivision laws by their claimed reliance on the verbal instructions of a functionary employee of Wasatch County." (R. 200.)

The Reagans conveyed by a Warranty Deed to Cendant, as part of a relocation of Mr. Reagan's employment, one of the ten-acre parcels including their home (the "Home"). (R. 79.) This sale by the Reagans of the Home violated §16.04.030 W.C.C., which requires a County-approved subdivision before a portion of an entire property can be sold.

After purchasing the Home from the Reagans as part of an employment relocation agreement, Cendant sold the Home to the Zitos. (R. 79.) Upon discovering that the Home had not been legally subdivided by the Reagans, the Zitos sued Cendant. (R. 26 - 27.) Cendant settled the suit with the Zitos for \$25,000.00.³ (R. 35 - 37.)

The Trial Court's grant of summary judgment for Cendant found that the Reagans had illegally subdivided their property and that the sale of the Home to Cendant therefore violated the covenants in the Warranty Deed. The Trial Court concluded that rescission was the appropriate remedy for a void contract. (R. 198 - 201.) The Trial Court reserved the matter of the amount of money to repaid to Cendant by the Reagans because of the Reagans' claims that the Home had been damaged while it was owned by Cendant. (R. 198 - 201.)

SUMMARY OF ARGUMENT

Summary judgment is the appropriate resolution of this dispute as there are no disputed facts. The Trial Court correctly applied §17-27-103, U.C.A. finding that the

³ The Reagans claim in their Brief that they have no knowledge of Cendant's settlement with the Zitos and this somehow affects this case. This is simply untrue. Cendant

actions of the Reagans in splitting up their property into three pieces without obtaining the required subdivision approvals was illegal. Mr. Reagan's claim that the only reason he divided his property into three pieces was to lower the interest rate on his mortgage is belied by the obvious fact that if that were the only reason the parcel would have been divided into two pieces, not three. Moreover, in his deposition, Mr. Reagan admitted a future intent to develop one of the remaining two parcels of land.

If §17-27-103, U.C.A., were interpreted any differently than it was by the Trial Court, landowners could just conjure up any specious reason other than future development for dividing their property and escape governmental oversight. The Reagans desired interpretation of the code would leave a hole big enough for a truck to drive through, making it impossible for local to regulate the subdivision of property. It would, perversely, create an incentive for landowners to lie instead of comply with the law. Certainly that is not a result the Legislature or local governments envisioned or intended when creating their subdivision regulations.

The Reagans' illegal subdivision of their property made the subsequent sale of the Home to Cendant a violation of the covenants statutorily contained in the Warranty Deed. It seems impossible to dispute the logical proposition that since the Reagans' sale to Cendant was illegal then the Reagans did not have the "good right to convey the same" as required by §57-1-12, U.C.A.

responded to all discovery requests from the Reagans including turning over all information about this settlement, moreover the Settlement Agreement is in the Record.

Finally, the Trial Court correctly determined that rescission was the appropriate remedy as the covenants in the Warranty Deed had been breached and the purchase and sale was thus void. The case law in Utah and across the country is clear on this point and it is telling of the weakness of their case that the Reagans failed to even cite in their Brief the opinion of this Court in *Anderson v. Doms*, 984 P.2d 392 (Utah App. 1999) almost directly on point. The Reagans' only argument against rescission, that they cannot be restored *status quo ante* because of damages claimed to have been incurred to the Home during Cendant's ownership, was correctly remedied by the Trial Court's reservation of that issue for future proceedings.

ARGUMENT

POINT I

THE SALE OF THE PROPERTY VIOLATED THE SUBDIVISION LAWS OF BOTH THE STATE AND WASATCH COUNTY

The Reagans have admitted that they did not comply with the subdivision requirements of State and County law either when they divided their property into three pieces or when they sold the Home on one of the parcels to Cendant. Their only defense is to claim that they didn't "subdivide" their property.

The Reagans would have this Court believe that the only reason they divided their property was for a lower interest rate on their mortgage. If that were the case they would have divided the property into two pieces rather than three. Even if it was true that no "subdivision" occurred when the Reagans owned all three parcels they created from their

original parcel, it was no longer true when they sold their Home to Cendant without bothering to obtain approval of and record a subdivision plat. What did the Reagans intend to do with their remaining 70 acres? Own it forever as sagebrush?

More importantly, the Reagans' argument that they did not intend to resell or develop the property when they split it up, and therefore were not required to properly subdivide the property is, quite literally, belied by Mr. Reagans' own words. He testified that he "wanted to be able to have the advantage of adding another home if [he] ever needed to." (R. at 161.)

In their Brief the Reagans argue that since Mr. Reagan referred to the lower interest rate on his mortgage a dozen times as his motivation for subdividing the property and his future intent only once then this Court should do simple math and eliminate the future intent statement altogether, leaving eleven references to the lower interest rate and none about his future intent. Obviously, this is not how a party properly deals with a fatal admission against interest. The result the Reagans argue for is irrational, and that is why no case law or statutes are cited to support their argument.

Likewise Reagan would have the Court believe that since his "primary" purpose in dividing his land was not development that the law does not apply to him. This sophistry about "primary" purpose is exactly the type of behavior the extremely broadly written statute was designed to prevent. The language "immediate or future" was included in §17-27-103, U.C.A., by the Legislature because the Legislature clearly wanted local governments to be able to control the hypothecation of property within their jurisdictions.

The Reagans would have this Court believe that §17-27-103, U.C.A., includes a “primacy of intention” requirement for the division of property. This type of “primacy” requirement would encourage people to lie about their reason for dividing their property. Every time someone decided to subdivide their property without following State and local laws, and then later sold or developed the property, a judge would have to listen to all the reasons, both those arguably real and those certainly fictitious, why the *primary intent* was not to develop or sell the property. This is an absurd result. The Legislature should not be presumed by this Court to have written a statute that opened the doors and protections of the judiciary to liars.

The Reagans attempt to weasel out of their obvious intentions by claiming that their “primary” purpose was innocent would create an exception to the subdivision laws that would swallow their purpose. Anyone could divide their property claiming exemption for some innocent “primary” purpose and later sell the divided property to an innocent, or not so innocent, third-party who could then develop it with impunity. If the Legislature had intended that a “primacy” requirement apply to the statute, it could have added the word “only” or “primary” before the language “for the purpose of.” Since the Legislature did not include this language, the plain meaning of the statute is that Reagan should have availed themselves of the legal mechanisms of the County before subdividing their land. Simply put, the reading of the statute the Reagans want this Court to adopt would completely change the structure of zoning and development code at the state level as well as for every local government in Utah.

Reagan relies on the Supreme Court's decision in *Associated General Contractors v. Board of Oil, Gas and Mining*, 38 P.2d 291 (Utah 2001) to support their claim that the statute was misinterpreted by the Trial Court.⁴ Reagan would have the Court believe that the only part of the statute that should be read is "for the purpose of . . . development." This reliance is misplaced.

Obviously, the statute must be read as a whole, and when it is the meaning is clear. As in *Associated General Contractors*, the statutes here are not defined from "extraneous contexts," but, instead, from "the plain language of the [statutes]." *Id.* at 300. When read as a whole it is obvious that the Legislature intended that landowners seek local government approval before willy-nilly subdividing their land.

In order to bolster the argument that the Trial Court did not apply the statute as written, the Reagans engage in yet another strange diatribe regarding percentages.⁵ Once again they cite no law to support this "mistake" the Trial Court made. The Reagans states that the Trial Court did not decide what percentage of the motive Reagan had to develop the property. This misses the point of the statute entirely. It does not matter if 0.001% of the motivation was to sell or lease or develop the property today or at some point in the future. The fact of the matter is that the Legislature intended people to divide their property legally, which is the purpose of the statute.

⁴ Reagan also relies on the case *State v. Lusk*, 37 P.3d 1103 (Utah 2001) to argue that Cendant is somehow adding to the statute. The Reagans read *Lusk* exactly backwards. The statutes in this case, as in *Lusk*, could not be clearer. Cendant has not looked to "legislative history or policy considerations" to support an interpretation of the statutes involved. Instead Cendant relies on the "plain language" of the statutes.

POINT II

THE ILLEGAL SUBDIVISION IS A SUBSTANTIAL ENCUMBRANCE UPON THE PROPERTY WHICH BREACHES THE COVENANTS OF THE WARRANTY DEED

Both §17-27-804, U.C.A., and §16.04.030, W.C.C., make it illegal to sell and convey an illegally subdivided parcel of property. Thus the Reagans had no legal right to convey the illegally subdivided Home to themselves and then to Cendant.

Although this is a case of first impression in Utah, courts of other state have consistently found that nonconformance with applicable zoning laws constitutes an impermissible encumbrance upon the property in violation of a warranty deed. In a case where plaintiffs purchased a home that did not have a certificate of occupancy because of an incorrectly installed septic system, the Vermont Supreme Court held that “an encumbrance is present when seller can determine from municipal records that the property violates local zoning regulations.” *Bianchi v. Lorenz*, 701 A.2d 1037, 1039 (Vt. 1997).

In so finding, the Vermont Supreme Court recognized “that the majority rule in other jurisdictions in the country is that a violation of zoning regulations existing at the time of the conveyance is an encumbrance, at least where the violation has a substantial impact on the use and enjoyment of the land.” *Id.* Citing *Feit v. Donahue*, 826 P.2d 407, 410 (Colo. Ct. App. 1992) (numerous jurisdictions have held that an existing violation of

⁵ See p. 15 of the Reagans’ Brief.

a zoning law constitutes an encumbrance); *FFG, Inc. v. Jones*, 708 P.2d 836, 846 (Haw. Ct. App. 1985) (majority of jurisdictions that have decided question hold that zoning code violation is encumbrance within meaning of covenant against encumbrances); *Seymour v. Evans*, 608 So. 2d 1141, 1146 (Miss. 1992) (majority of jurisdictions regard existing violation of zoning regulations as breach of covenant against encumbrances).⁶

In this case, the illegality of the subdivision, in violation of zoning laws is a substantial encumbrance upon the property resulting in a breach of the covenant against encumbrances contained in the Warranty Deed. One of the covenants in a warranty deed is that the deeded property will be free from encumbrances and that the transferor has the “good right to convey the same”. §57-1-12, U.C.A. If the sale to Cendant was illegal under both State and County law then how the Reagans can claim that they didn’t breach this covenant is a mystery that the Reagans have yet to explain.

The Reagans reliance on *Ellis v. Hale*, 373 P.2d 382 (1962) for the proposition that Utah has held that a violation of zoning laws does not equal an encumbrance on property is misplaced. Reagan would have the Court believe that a violation of the subdivision ordinances and statutes do not give rise to a private action, but, instead, only creates a duty running to the sovereign. But, the statute involved in *Ellis* was a criminal statute making it a misdemeanor to sell an unrecorded subdivision lot. Therefore, it is logical

⁶ In *Seymour v Evans*, 608 So. 2d 1141 (Miss. 1992) the Mississippi Supreme Court held that for a zoning violation to create an encumbrance that violated the warranty deed the “violation had to exist prior to the sale.” That is precisely the factual situation here. (R. 173.) The Reagans had deeded the property to themselves, thus creating the violation, and then sold it to the innocent third party, Cendant, thereby breaching the covenants of

that the Court, when referencing a statute with criminal penalties, would specify that any duty under the statute would run to the sovereign, as the sovereign would be the one to prosecute under the statute.

Ellis did not address, as even the Reagans acknowledge, whether the illegal subdivision violated any of the warranties of title because that issue was not raised in the Complaint.⁷ In the case at bar this issue was indisputably raised by Cendant and decided by the Trial Court.

While attempting to rely on *Ellis* as the law in Utah, the Reagans admit that the majority of courts across the country (as seen above in *Bianchi*, *Feit*, *FFG* and *Seymour*) regard a violation of a zoning restriction as a breach of the covenant against encumbrances. The Reagans argue that those rulings are inconsistent with Utah authority supposedly requiring that an encumbrance must involve a third party holding a right in the land constituting a burden or limitation. Even following that analysis, in this case the County is a third party and the limitation the County imposes on selling a property that is illegally subdivided constitutes an almost insurmountable burden on the future use and resale of the property. That the third party holding the encumbrance is a governmental entity instead of a private person is neither unusual nor violative of the logic of the impermissibility of the encumbrance.

the warranty deed.

⁷ “In fact, the complaint does not rely on any of the five warranties embraced in the statutory warranty deed.” *Ellis* at 386.

While the Reagans claim to find succor for this argument in *Brewer v. Peatross*, 595 P.2d 866 (Utah 1979) the Reagans must have missed the portion of the *Brewer* opinion where the encumbrance on the property held to be improper was the existence of a special improvement district imposed by the City of Roosevelt. *Id.* at 867. The factual situation here is therefore directly analogous to *Brewer*.

The law across the country is logical and consistent. The provisions of §57-1-12, U.C.A., are the same. The illegal subdivision of a piece of property creates an encumbrance that breaches a warranty deed's covenants against encumbrances and in favor of transferability. This Court should follow the other courts across the country and rule that an illegal subdivision of land is a breach of the covenants of a warranty deed.

POINT III

RESCISSION OF THE SALE OF THE PROPERTY IS THE PROPER REMEDY

In the recent case of *Anderson v. Doms*, 984 P.2d 392 (Utah App. 1999), this Court found that rescission was the appropriate remedy for a breach of the covenant against encumbrances even where the legal dispute had lingered for years before the buyer realized he could attempt to rescind the contract. Frankly, that should be the end of this argument and it is astonishing that the Reagans did not even bother to address the controlling case on the subject in their Brief.

Moreover, “[Rescission] is consistent with Utah case law and that of other jurisdictions.” *Id.* at 398. In *Anderson* the Court directed that “the Trial Court should

determine what is necessary to restore the parties to the status quo at the time the parties entered into the contract.” *Id.* The Trial Court can easily accomplish that after the resolution of this appeal. The Reagans get their property back and Cendant’s get their money back, while leaving the option of an adjustment to Cendant’s recovery as damages for the Reagans alleged property deterioration. How much closer to *status quo ante* can you get?

Instead of addressing the controlling case, *Anderson*, the Reagans rely on a misreading of *50 West Broadway Associates v. The Redevelopment Agency of Salt Lake City*, 784 P.2d 1162 (Utah 1989). In addition to the fact that *50 West Broadway* was decided before *Anderson*, that case is distinguishable from the case at bar for at least three reasons. First, this is not a case about contract construction between a savvy commercial developer and a government entity, it is a simple residential real estate transaction. Second, Cendant rescinded the contract as soon as the facts about the illegal subdivision came to light. In contrast to *50 West Broadway* where the attempt to rescind the contract only occurred after years of knowing about and ignoring the option Cendant “pursue[d] its claim with timely diligence.” *Id.* at 1170. Third, unlike in *50 West Broadway* a building has not been placed over any of the Reagans property, a situation which would make *status quo ante* restoration more difficult.⁸

Utah courts have said time and time again that rescission is the appropriate remedy, even when the dispute has continued for years, and even when there is an

⁸ Similarly, because Cendant promptly sought rescission against the Reagans this case is

argument about damages. What is important in the case at bar is that the Reagans illegally subdivided their property. Upon discovery of the encumbrance created by the illegal sale Cendant promptly sought to rescind the contract and attempted to return the property to the Reagans.

The remedy of rescission in the case at bar would require placing the parties in the same position they were before the sale. This would be a refund to Cendant of the purchase price, plus interest and other damages, plus the monies Cendant was required to pay the Zito's, less any possible deterioration of the property directly attributable to Cendant.

[T]he rule that he who desires to rescind a contract must restore whatever he has received under it is one of justice and equity, not of procedure - of substance, not of form - and must be reasonably construed and applied. The object of the rule is *theoretically* to place the parties in status quo; but the rule is equitable, not technical, and *does not require more than that such restoration be made as is reasonably possible* and such as the merits of the case demand. *All that is generally necessary is that one party be placed in substantially his original situation and that the other derive no unconscionable advantage from his conduct.*

17A Am.Jur. 2d., Contracts §592 at 602. (Emphasis added.)

If the Reagans have a claim that the Home has been damaged the burden of proof on that issue shifts to them. Logically, their claim of damages to the Home can't logically be more than the value of the Home and therefore any such damages could simply be deducted from the purchase price that the Reagans would be required to return to Cendant.

not controlled by *Coalville City v. Lungren*, 930 P.2d 1206 (Utah App. 1997).

CONCLUSION

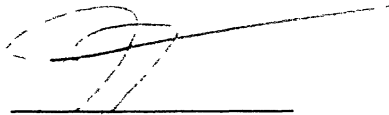
The Reagans illegally subdivided their property and then illegally sold one of the parcels to Cendant. This illegal subdivision created a substantial encumbrance upon the property resulting in breaches of the covenants against encumbrances and in favor of transferability statutorily contained in the Warranty Deed. The sale was thus void. Rescission is the suitable remedy in this case.

This Court should affirm the Trial Court's grant of summary judgment.

Respectfully submitted this ^{16th} day of August, 2002.

Baird & Jones L.C.

Attorneys for Third-Party Plaintiff/Appellee Cendant Mobility

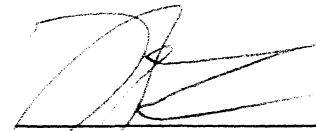
A handwritten signature in black ink, appearing to read "Baird", written over a horizontal line.

Bruce R. Baird

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of August, 2002 two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid addressed to the following:

Don R. Peterson
Howard Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603



Bruce R. Baird

Statement Regarding Addendum

No Addendum is required.