

1960

Jesse J. Leavitt and Phoebe Leavitt v. Eleanor Blohm and Verda Lynn : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

MAY 13 1960

JESSE J. LEAVITT and PHOEBE)

LEAVITT, his wife,)

Clerk, Supreme Court, Utah

Plaintiff-Appellants,)

-vs.-)

Case No.

ELEANOR BLOHM,)

Defendant-Respondent,)

9153

-vs.-)

VERDA LYNN,)

Third Party Defendant.)

BRIEF OF RESPONDENT

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-vs.-

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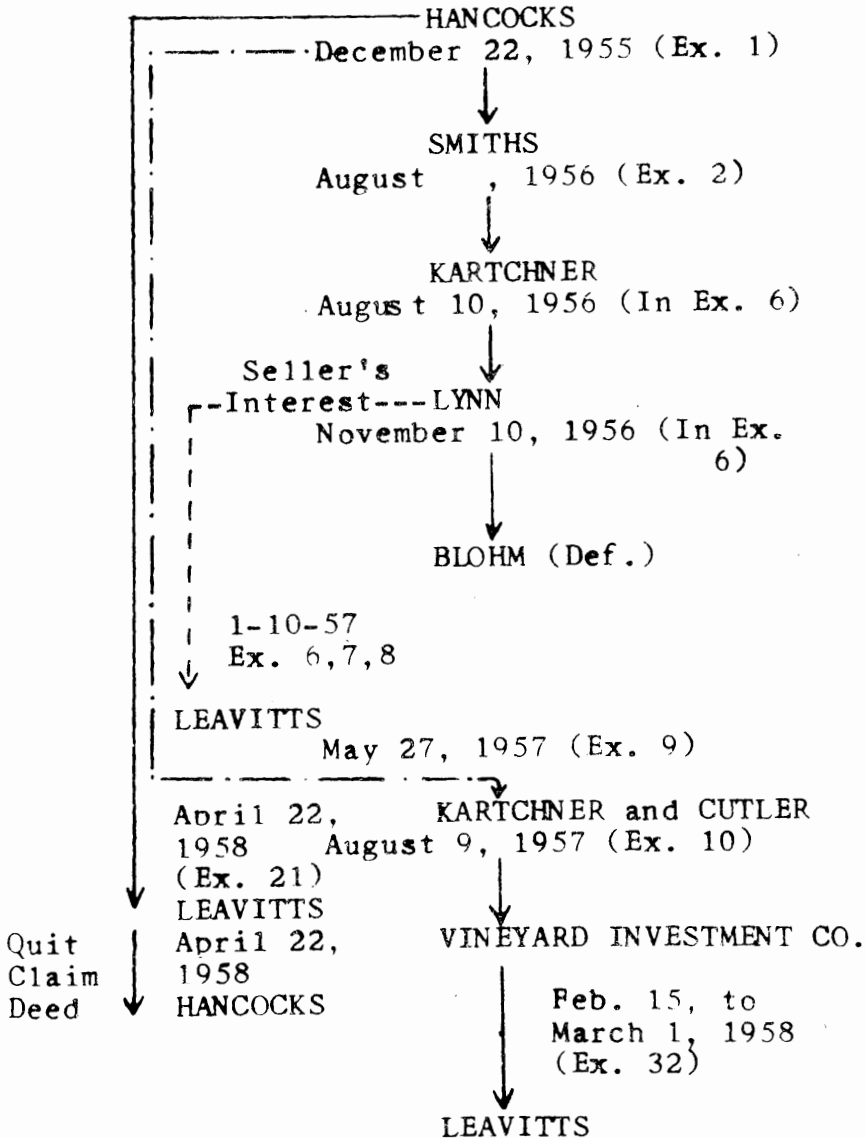
BRIEF OF RESPONDENT

FACTS OF THE CASE

Defendant-Respondent finds it necessary

to review the facts in detail because there appear to be numerous statements of facts in Plaintiffs' brief with which we cannot agree.

As Plaintiff states the property in question was owned in fee by Forrest and Renae Hancock on December 22, 1955. All documents transferring the various interests thereafter are detailed in Exhibits 12 and 12a, the chart. A simplified outline is as follows:



Leavitts and their assignors were delinquent from and including the September payment forward. Contrary to their statement on page 1, the \$600.00 did not apply on the principal or interest of the original contract, Ex. 1 (Ex. 22 and Ex. 26; testimony of Ramon Child, T. 48, 49). Furthermore, no additional payments were made to Hancocks, until \$1,500.00 was tendered March 26, 1957. This was refused by the Hancocks as being insufficient to catch up the account. (Ex. 11. T. 42,43)

Defendants first payment was due on December 10, 1956 (T. 111). Though she had some difficulty making her payments, in March she paid sufficient to cover all payments through May, 1957, and the amount of \$471.67 of the June 10, 1957, payment

(T. 86, 87).

In the meantime the Hancocks had served notice (Ex. 16, received - T. 37) mailed out November 8, 1956, on Lynn, Smith, and Kartchner to pay up in five days or quit (T. 35). Although Defendant did not receive this notice, she was bound by the notice given her predecessors in title and occupation. (U. C. A. 1953, Sec. 78-36-7.)

The Hancocks then filed suit #2148 (received T. 11) in which Defendant was a party and she was served with Summons on March 25, 1957. This action stated that the Smith Contract, Ex. 1, was terminated, and asked for eviction and treble damages. At the time of trial herein, the treble damages still hung over Defendant's head.

On May 27, 1957, the Hancocks, who

had apparently given up on Leavitt, now entered into a new contract, Ex. 9, with Kartchner and Cutler, which declared the Smith Contract forfeited. At this stage Defendant ceased making payments. By June 15, 1957, the Smith contract, Ex 1, was now delinquent from September, 1956, on, or \$3,000.00, plus penalties, taxes, insurance and attorney fees.

By assignment dated August 9, 1957, Kartchner and Cutler assigned this contract, Ex. 9, to Vineyard Investment Corporation (Ex. 10).

The only payment Kartchner and Cutler made on this contract was by an automobile which turned out to have been stolen and was retaken by the owner (T. 76). Only one cash payment was made (T. 76) which

would apply on the June 25th payment. The contract provided a 30 day grace period, so on August 25th the contract was in default.

In the conversation which Defendant had with Mr. Leavitt in August, 1957, (T. 90) he told her he was straightening things up. She told him until she knew everything was straight, she wouldn't pay him anything.

On December 13, 1957, Defendant was again sued for eviction and treble damages, in action #2207 (T. 90). Upon being advised by her attorney that she had no defense, she gave up possession of these premises on January 21, 1958 (T. 91).

On February 17, 1958, judgment was entered by stipulation in this matter and Defendant escaped the threat of attorney

fees or treble or other damages in this action. (See file in #2207).

Between February, 15th and March 1, 1958, Vineyard Investment Company conveyed its interest to the Leavitts (Ex. 32, T. 134).

Following execution of a new Hancock Leavitt Contract (Ex. 21) on April 22, 1958 the Leavitts defaulted out entirely, and the quit claim deed of April 22, 1958, was duly recorded on June 27, 1958, (Ex. 12a). Case #2236 was brought and El Ranch Corporation was defaulted out in that (see file).

Substantially all of the statements on pages 5, 6 and 7 of Plaintiff's brief are erroneous or merely argumentative.

The contract of November 10, 1956,

fixes the value of the Coronado Street property, accepted as a down payment from Defendant at \$5,000.00. Defendant's payments amounted to \$2,721.67. A reasonable rental was stipulated to be \$200.00 a month, or \$2,866.67 during the period of occupancy.

ARGUMENT

POINTS I AND III

As to Plaintiff's contention that the trial Court erred in denying Plaintiffs' Motion for Summary Judgment and/or judgment on the pleadings and that the Court erred in entering judgment for Defendant on her counterclaim.

I will discuss these points together since the issues raised are almost identical.

When Plaintiffs acquired Lynn's seller's interest in the Blohm contract there can

be no question that they stood in her shoes as to the Defendant and were obligated to keep the payments up to the fee title holder and not permit the contract to be defaulted and the Defendant ousted.

Plaintiffs cite 55 AM. JUR. (Vendor and Purchaser) Sec. 601 for the general rule that the Vendee must first tender payment before the Vendor can be in default. It should be noted that the last two sentences are to the following effect:

"However, even though the vendor's promise is conditioned upon payment by the purchaser of the purchase price, there may be an obligation to perform and a breach upon the part of the vendor without payment or tender of payment by the purchaser where payment or tender of payment would be useless, as where the vendor is unable or refuses to perform. Accordingly, where performance or tender of performance by the vendee would be useless, the vendee need not

perform or tender performance in order to rescind for a breach of the vendor."

Section 602, however, is even more specific. I quote:

"... where there is a defect in or want of title which the vendor cannot or will not remedy within the time allowed for conveyance and perfection of title even if payment or tender of payment is made, such defect in or want of title may be a breach of the executory contract which warrants rescission even though payment is neither made nor tendered; in such a case the purchaser need not perform or tender in order to rescind because of the defect in or want of title, it being assumed that the defect in or want of title is such as to warrant rescission if the purchaser performs or tenders. This rule has been applied where the vendor's title was subject to an easement, to a mortgage or other lien, and to an outstanding lease. This rule has also been applied where the vendor had no title to a portion of the premises where the vendor's title has been terminated by foreclosure of a mortgage or lien, and where title was in a third person and was not within the control of the

vendor. If a vendor has disabled himself to convey such title as he has contracted to convey, the purchaser's right of rescission is complete without an offer by the purchaser to perform. It has been held in a number of cases that where the vendor, by reason of having conveyed the property to another, is unable to perform, an offer to pay the balance of the purchase money is unnecessary."

This doctrine is spelled out in 40 A. L. R. at page 700. The note indicates that tender is dispensed with where title of vendor has been terminated by foreclosure of a mortgage. In the instant case the fee title holders had declared the contract under which Plaintiffs held to be terminated. After some further maneuvering Plaintiffs were foreclosed of all interest in the property.

To like effect is 59 A. L. R. at page

250. I quote:

"There may be circumstances which will justify the vendee in refusing further to perform, and enable him to recover the amount he has paid on the purchase price, although the time fixed for performance by the vendor has not yet arrived. Thus, it has been held that, where the only title the vendor had to the land he had contracted to sell was as a vendee in an executory contract for its purchase, and he made default in this contract, and it was foreclosed, and the land was sold and purchased by a third person, this constituted such a complete change in the title as entitled the vendee to rescind and recover the amount he had paid on the purchase price. Girratano v. McIlwain (1926) 215 App. Div. 644, 214 N. Y. Supp. 582."

The most specific note is found in

109 A. L. R. 242. I quote from page 243:

" . . . whereas if the vendor had an apparent, and, to some extent at least, a valid, title, at the time of contracting, the vendee may with some reason urge that in entering into the agreement to purchase he relied upon, or at least assumed, the existence of potential ownership in the vendor,

and that, conceding he may not complain of defects or encumbrances which are within the power of the vendor in due time to remove, he should not be expected to proceed with the contract where the fact develops that there are defects or encumbrances the removal of which rests upon mere hope and conjecture, as where, in the acquisition of title, the vendor must necessarily be wholly dependent upon the will and volition of a third party."

Many cases in support of the doctrine are noted on page 251.

In the instant case we not only have the institution of foreclosure proceedings under which the vendor ultimately lost title, but these additional factors:

- A. The fee title owners re-sold to Cutler and Kartchner and,
- B. During the entire time from the filing of the first action till Defendant vacated the premises she was in peril of having treble damages

assessed against her. This question is included in the pre-trial order in case #2148, and, we submit, was a real threat.

These factors are assessed in the portion of the last mentioned A. L. R. note. See Metcalf v. Dallam 4 Ky. 196 and Liveridge v. Coles 72 Minn. 57, 74 N. W. 1109, briefed on p. 263. The note then cites an application of the principle by our court. I quote from page 263:

" a vendee, when sued for an instalment coming due prior to the time set for conveyance, may well defend that the vendor is insolvent, that he is not, as the vendee had supposed, the absolute owner of the premises, but himself holds merely an executory contract to purchase the same, together with other lands, and is in default thereunder, and that the vendee has declined to make payment merely because he fears that his payments will be lost, and is willing to make pay-

ment when it can be safely made to some person in a position to carry out the vendor's contract. Such at least is the rule where the action is brought in a court having equity jurisdiction. Tremonton Invest. Co. v. Horne (1921) 59 Utah, 156, 202 P. 527."

The Tremonton case varies slightly from our case, but certainly equity has a strong purpose in intervening on behalf of the Defendant here. On June 15th the Plaintiffs were \$3,000.00 behind, new owners held the contract and it certainly would not have been prudent for Defendant to go on pouring her payments down the hole.

True, a corporation in which Plaintiffs held a large interest did re-acquire the May 27th contract in August, but not even then, nor till after Defendant vacated did Plaintiffs take title in their own names. During that period Plaintiffs had the capacity

to perform as to Defendant if they wanted to, but she had no capacity to require them to perform. In other words, if they ran across a better deal, Vineyard Investment Company could just as easily have entered into a contract with a third party.

In the conversation in mid-August Leavitt told Defendant he was straightening things out. She said she would pay nothing unless they got the matter straightened out. He made no effort to do this or to set her mind at rest. The next thing that happened was the filing of #2207. Could Defendant be blamed for giving up in despair? It is not reasonable to expect her to continue to run the risk of treble damages under #2148, which was still pending, while these maneuvers went on.

Plaintiffs urge upon the Court a rule of damages which I submit is unsound. The correct rule is set forth in the Utah case of McBride v. Stewart, 68 Utah 12, 249 Pac. 114, 48 A. L. R. 267. I quote from the opinion:

" . . . the injured party has an election to pursue one of three remedies: 1. He may treat the contract as rescinded and recover upon quantum meruit so far as he has performed, or 2. He may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform and at the end of the time specified in the contract for performance, sue and recover under the contract, or 3. He may treat the repudiation as putting an end to the contract for all purposes of performance and sue for the profits he would have realized if he had not been prevented from performing."

In our case, we have treated the contract as rescinded and are suing for what

the Defendant paid less the reasonable rental value of the premises, the first alternative stated above. This rule is also announced in McKellar Real Estate and Investment Company v. Paxton, 62, Utah 97, 218 Pac. 128.

The contract between ynn and Defendant fixed the value of the Coronado Street property at \$5,000.00. An inquiry into the relative values of the properties is irrelevant and is an attempt to vary the terms of a written agreement with utterly no basis to do so. Furthermore, this question of the relative values of the properties was not raised, nor was the amount of the down payment questioned by the pleadings or during the pre-trial conference, nor at any time prior to trial, and for this reason was properly excluded from consid

ation.

POINT II

As to Plaintiffs contention that they should have been allowed to amend to show that Defendant had removed certain personal property from the premises. Plaintiffs presented this proposal at the start of trial, although many months had elapsed since suit was filed, depositions had been taken and pre-trial was complete (T. 1).

From Mr. Fuller's statement it appears that the property he is talking about originally belonged to Mrs. Lynn, was not a part of the inventory and did not ever become the property of the Plaintiffs (T. 6, 7). This is why he denied that it should

have been a part of his case in chief, i. e. as converted property. Thus in effect Plaintiffs are saying, 'You took property which a third person left on the premises, and so we are entitled to a benefit from the value you received.'

As the trial court pointed out, Lynn herself would be the one to claim reimbursement if the property were taken by Defendant (T. 7). Mr. Fuller even conceded that she might claim payment for it (T. 7). Of course, we don't concede that the property was not paid for. However, even admitting that is a question of fact, property belonging to Lynn which we might have taken, would not entitle Plaintiffs to a credit against damages owed us.

I also want to point out that there

never was anything before the Court. Mr. Fuller merely asked the Court for a ruling, as to the breadth of particular matters in the pre-trial order (T. 1). He never did ask any question about this, which might have been the basis for a ruling on its relevancy.

CONCLUSION

The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED,

GLEN M. HATCH

Attorney for

Defendant Respondent