

1960

Southeast Furniture Co. v. Granite Holding Co. : Brief of Respondent

Utah Supreme Court

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Backman, Backman and Clark; Alton C. Melville; Attorneys for Respondents;

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IN THE SUPREME COURT
of the
STATE OF UTAH

SOUTHEAST FURNITURE COM-
PANY,

Respondent,

vs.

GRANITE HOLDING COMPANY,
Appellant.

LED
1960 - 1960
Clerk Brief Court, Utah
No. 9175

BRIEF OF RESPONDENT

Backman, Backman and Clark
and Alton C. Melville
Attorneys for Respondents

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Brief

No. 9175

STATEMENT OF FACTS

Respondent takes issue with most of the statements and the conclusions contained in Appellant's "Statement of Facts."

There are some facts reflected by the record which are not in dispute, namely: The deed which appellant made and delivered to respondent at the time respondent purchased the property now occupied by respondent's furniture store, contained a grant of a "floating" right of way, to be furnished to respondent by appellant (R.

140). The driveway as now located is 33 feet wide (north and south) and 170 feet long (east and west) entering McClelland Street on the west. It adjoins and runs parallel to a strip of ground owned by appellant on the north. The title to the east 40 feet of the driveway as now located is and has for many years been vested in appellant, and the title to the west 130 feet is vested in respondent, the same having been acquired by respondent from Clara L. Cracraft by deed on May 14th, 1941. Shortly after respondent acquired said property respondent at its own expense hard-surfaced the driveway and respondent has ever since resurfaced and maintained the right of way without any part of such expense having been paid by appellant, respondent has paid all taxes on that part of the right of way title to which is vested in respondent. Appellant has never offered to pay anything toward the maintenance of the driveway. (R. 149) It is evident that appellant reserved, by its deed to respondent covering that property on which respondent's business is operated which carried a right of way title to property running northerly and southerly along a railroad right of way, the right to relocate that right of way from time to time if and as the necessity or convenience of appellant or those claiming or to claim under appellant and its successors in estate shall require a deviation in the course or location of the driveway. (Ex. 1-P)

The basic fact in dispute is the contention of appellant that a representative of appellant corporation, Nephi

J. Hansen and a representative of respondent corporation, S. C. Sorensen, both of whom are now deceased, entered into an oral agreement in the year 1942 granting their respective corporations reciprocal easements over the driveway in dispute.

The appellant has attempted to broaden the scope of its action beyond the limits of its pleadings by contending for and producing purported evidence of an implied agreement, estoppel and dedication of a public way. Their motion to amend their pleading following the trial to include these other theories to establish a joint right of way was properly denied by the court.

Before considering the points relied upon by Appellant, we answer some other matters mentioned in Appellant's "Statement of Facts."

Appellant argues that the way has been used as a public street, but there is no evidence supporting such contention. The evidence shows that the public generally did not make use of the driveway, but the only ones making use thereof are appellant and appellant's tenants. Appellant's witnesses testified that they made use of the driveway for delivery purposes but their customers did not make use of it. (R. 142)

The record does not support the statement of appellant on page 3 that the closing of the old right of way would relieve respondent from a possible encroachment claim by a land owner who stood to gain by the closing of the driveway. This statement is but a bare conclusion of appellant.

Appellant further states at page 3 of its brief that counsel for respondent agrees that if appellant had asked for a right of way deed at a conversation purportedly had between the late Messrs. Hansen & Sorenson, both deceased, that it would have been given, and therefore, it was so intended. In the first place we contend the record is in error. It is respondent's contention that the word "you" was used by counsel for respondent in his cross examination of appellant's witness and not the word "I." Even if the record correctly reflected the question as recorded, it is evident that no deed was ever given, therefore, the right given by respondent to appellant to use appellant's property was nothing more than a permissive right revocable at the will of respondent. Witness Hansen admits he should have asked for a deed to the right of way (R. 150).

Neither does the record bear out the statement of appellant that the closing of that right of way conveyed by appellant to respondent irrevocably closed the right of way and extinguished the only means of access to McClelland from appellant's property. Appellants in anticipation of being called upon by respondent and others at some time, to perform under its deed and furnish a right of way by relocation, acquired property adjoining the present way on the North (R. 127, 128). Witness Richards and appellant had protected themselves against the possibility of being cut off from the present way.

At page 8 of appellant's brief appellant states that it acquired the property adjoining the drive way here

in question in desperation and as a possible escape in the event the respondent should prevail and *to insure appellant's* ability to perform its prior and long standing obligation to others to provide them a right of way. This argument is conceding the correctness of respondent's position. One of those to whom appellant is obligated to provide a right of way is respondent.

Appellant states that if it is denied a permanent right over respondent's property it will be irreparably damaged. There is no showing in the record that appellant would be damaged if it were denied the right to the use of respondent's property, appellant having made provisions to protect itself against damage by acquiring property adjoining that property here in question on the North.

Appellant lays great weight to that evidence which the court permitted to come into the record over objection of counsel for respondent to the effect that in 1942 an effort was made by the late Messrs. Hansen & Sorenson to have the way accepted by the city of Salt Lae City as a public street.

There is nothing in the record which shows any transaction on the part of respondent company to take such action, there is no executed deed, there is no competent evidence to such effect, that evidence which was received is nothing but hearsay, and incompetent. If this evidence were to be given consideration, the logical conclusion would be that the Respondent sought the dedication in order to be relieved of the burden of main-

tenance, for which it had the sole and exclusive responsibility.

At page 5 appellant states the evidence shows there were no signs posted on the property for more than 10 years subsequent to 1952. Appellant's witnesses admit there was a sign posted in 1945 (R. 102). No objection was made by appellant when the sign was posted. Witness Bill Hansen testified that "he didn't feel it applied to us." (R. 146)

The evidence that signs had been posted at the McClelland Street entrance to the way in 1945 is uncontradicted, therefore, no legal rights had been acquired by appellant to that time unless the rights could be shown by oral agreement.

At page 5 (R. 145) appellant makes it appear that bad feelings existed between officers of appellant and respondent, but we submit that the only evidence of disagreement shown is that Bill Hansen, an officer of appellant company objected to Mr. H. A. Sorensen, an officer of respondent company, having hard topping put on that part of the driveway title to which is in appellant without first having obtained the consent of appellant, but nothing more.

POINT I.

Appellant's principal contention point I is based on its counterclaim Paragraph 2 at page 3 (R. 11, R. 64) wherein appellant alleges as follows:

“It was further agreed that the right of way would be used and maintained by plaintiff and defendant jointly.”

It is admitted by appellant that it has paid nothing toward maintenance of the way (R. 149). Therefore, even provided appellant could establish the agreement contended for, by its own admission it failed to perform its part of the agreement.

Appellant does not rely on a prescriptive right, but relies entirely on an oral agreement to establish a right of way to encumber the property of respondent with a permanent easement. In order to prove such an agreement appellant relies on testimony of witnesses incompetent under the laws of the State of Utah to testify.

As to the competency of witnesses, Section 78-24-2 (3) UCA 1953 on who may not be witnesses reads as follows:

“A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derived his interest, or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, *or transaction with, such deceased, insane or incompetent person, or matter of fact whatever,*

which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding." (italics added)

Timely objection was made to appellant's witnesses who were permitted to testify. The testimony given by appellant's witnesses clearly shows the importance of the rule and the reason for same.

POINT II

Under Point II appellant contends that by its having shown performance, on the part of appellant, of its obligation under the purported agreement by the removal of some sheds the statute of frauds does not apply.

By appellant removing a few sheds appellant was only doing that which it was already legally obligated to do in furnishing that property over which the driveway was established for convenience. Because respondent was at the time willing to permit the temporary use of its property in the relocation, even had there been an agreement as contended for by plaintiff, this does not constitute performance of the agreement contended for inasmuch as appellant was as heretofore stated, legally obligated to furnish a right of way to respondent, still such act on the part of respondent did not pass any legal right for a permanent use of respondent's property to appellant.

The attention of the Court is further directed to the fact that as heretofore stated, appellant admits by its pleadings that if an agreement had been entered into as contended for, appellant was obligated to pay a portion of the maintenance of the driveway and appellant's witnesses admitted that appellant had paid nothing toward such maintenance.

It is most unreasonable to presume that respondent would give over four times more property than that given by appellant, pay taxes thereon and pay the total cost of improving and maintaining the driveway for the benefit of appellant as is contended for by appellant.

The cases cited by appellant under Point II are not applicable, because appellant did not show performance of an agreement which would take the case out of the statute of frauds.

Under Section 25-5-1 UCA 1953 the law is stated as follows:

“No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunder authorized by writing.”

In 49 Am. Jur. — Statute of Frauds, Section 182 at page 513 the law is stated as follows:

“It is universally held that an easement is an ‘interest’ within the meaning of statutes which follow in effect the English statute prohibiting the creation by parol of any ‘interest’ in real property and requiring any contract for the sale of any ‘interest’ therein to be in writing, and therefore, that the creation of an agreement to create an easement is within the statute.”

Had it not been evident that appellant was legally obligated under its deed to respondent to furnish respondent with a right of way and had appellant and its successors not reserved the right by said deed to relocate the right of way, then appellant’s position and argument might carry some weight, but appellant cannot ignore its obligation to respondent under the provision of its deed.

POINT III

As to appellants Point III on Estoppel, the cases relied upon and the argument made by appellant might apply to that case where there appeared no legal obligation on the part of the party who would invoke the rule to furnish a right of way, but the same do not apply to the case at issue.

The fact that respondent officers might have observed tearing down of some sheds by appellant could not under any circumstance of this case act to estop respondent from defending its title to its land when

appellant was already obligated by deed to furnish respondent with a right of way.

Appellant argues that the sign in evidence (Ex. P. 5) is not that sign first posted on the property. The sign which is in evidence bears the same wording as one previously placed at the entrance of the driveway as was testified to by witness, J. Gordon Sorenson (R. 161).

POINT IV

The same argument which is made to appellant's Point III is applicable to its Point IV.

POINT V

As to Point V of appellant's brief, there is no presumption that a right to use respondents property exists inasmuch as the use has not been for the statutory period, this even if no sign had been posted on the property. Therefore the evidence to establish appellant's claim of an agreement must be clear and convincing. The law is jealous of a claim to an easement, 28 CJS Sec. 68. P. 734.

Appellant has not shown that the way is by necessity. Appellant has not pleaded nor relied on a right of way by necessity but relies wholly on an oral agreement.

Appellant has not cited a Utah case in support of its argument under Point V and it is our opinion that the Utah Courts have not adopted the rule of law relied on by appellant but on the contrary our courts have required one relying on use or on implied agreement to have made use of the way adversely to the owner of the servient estate for the required period to have acquired a right of way by prescription.

The Utah cases cited by appellant under its Point V are not in point, the cases cited apply to boundary line cases and not rights of way.

POINT VI

As stated under respondent's opening argument there is no competent evidence to support appellant's argument under its Point VI. There is no evidence of public use of the way as contended to establish a right of way under Section 27-1-2 UCA 1953 but on the contrary appellant's witnesses testified that its tenants used the same, but not the customers of its tenants. The evidence even if admissible would show that the city refused to accept the way as a dedicated public thoroughfare and therefore if there was an agreement made by the officers of appellant and respondent to dedicate the way as a public street the same failed.

POINT VII

Much of appellant's argument under its Point VII is not supported by evidence, but contrary to the argu-

ment of appellant the evidence which is corroborated by one of appellant's own witnesses is to the effect that signs were posted for many years, in fact from the time of acquisition by respondent of its property. Appellant's witness, Richards, even testified to a chain having been placed across the way at a point where appellant's property adjoined the property of respondent (R. 119).

POINT VIII

Regarding Point VIII the record shows a default certificate having been entered on October 22, 1958 but judgment was not entered until January 27, 1959. Respondent's Motion to set aside the default judgment was filed February 6, 1959 which was well within the three (3) month period provided under Rule 60 b. Appellant would have the court read into Rule 60 b the word "default" where the word "judgment" appears.

Attention is here directed to the fact that the default was entered on a counterclaim. A counterclaim on which appellant's action is predicated which was not served on respondent as required by Rule 5 but the same was mailed to the attorney for respondent.

The courts do not favor judgments by default (*Utah Com. & Sav. vs. Trumbo*, 17 U 198 footnoted under Rule 55 (a) (1). Especially is this true of defaults entered on counterclaims where as in this case it is evident that respondent had a meritorious defense to the counterclaim. Then too, it is clearly evident that that which appellant calls a counterclaim was not in fact a counter-

claim, it added nothing new to that pleading which appellant had already filed as its answer. That is to say while the answer of appellant as amended does contain that which they title a counterclaim, technically it is not a counterclaim at all and requires no answer.

Then too, while we are mindful of the fact that it is the practice among attorneys here in this district to but mail a counterclaim to counsel of record for respondent, still such service does not meet the requirement of the Utah Rules of Civil Procedure. Rule 5 (b) (1) permitting service upon a party by mailing to his attorney is not applicable where a counterclaim is interposed.

In further support of this statement we cite Rule 55 (a) (2) which reads as follows:

“Notice to Party of Default. After the entry of the default on any party, as provided in subdivision (a) (1) of this rule, it shall not be necessary to give such party in default any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, *except as provided in Rule 5 (a).*”

And we find Rule 5 (a) reading as follows: Service. When Required.

“Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex

parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and other papers requiring service shall be served upon each of the parties affected thereby, *but no service need be made on parties in default or failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.*"

If the counterclaim does in fact assert a new or additional claim for relief on behalf of defendant and against plaintiff then the counterclaim must be served upon the plaintiff as a summons is served and not upon its attorney by mailing a copy thereof to the attorney.

"The allowance of a vacation of a judgment is a creature of equity designed to relieve against harshness of enforcing a judgment which may occur through procedural difficulties, the wrongs of the opposing party or misfortunes which prevent the presentation of a claim or defense."

Citing *Warren vs Dixon, Utah*, 260 P2d 741.

The Warren case further states as annotated: "The rule that the courts will incline towards granting relief to a party who has not had an opportunity to present his case is ordinarily applied at the trial court level."

In the Warren case the court speaking through Mr. Justice McDonough says at page 743:

“The difficulty facing the trial court upon a motion to vacate the judgment lies in the fact that a compromise between two valid considerations must be selected. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the affects of *res judicata* and create a hardship to the successful litigant in causing him to prosecute his action more than once and possibly lose the ability to collect his judgment; *on the other hand, the court is anxious to protect the losing party who has not had the opportunity to present his claim or defense. Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing. Citing Hurd v. Ford, 74 Utah 46. (Italics added).*

There can be no hardship claimed by appellant in the instant case nor is appellant in any danger of losing any right to collect its judgment should the Court grant Respondent's motion, there being no money judgment involved.

In the *Hurd v. Ford* case we find 8 of the syllabus reading as follows:

“Judgment-Discretion to relieve from Default judgment must be exercised in furtherance of Justice, and Court will Incline toward granting relief in doubtful case (Comp. Laws 1917, Sec. 6619). The discretion lodged in court by Comp. Laws 1917, Sec. 6619, to set aside default or relieve party from default judgment, is to be exercised in furtherance of justice, and court will

incline toward granting relief in doubtful case to end that party may have a hearing.”

Now Rule 60 b is substantially the same as former section 104-14-4 Utah Code 1943 and we find section 14-14-4 taken from Sec. 6619, Laws of Utah, 1917.

Our Courts have said no general rule can be laid down respecting discretion to be exercised by trial court in setting aside or refusing to set aside judgment by default; each case must necessarily depend on its own peculiar facts and circumstances, *but discretion should always be so exercised as to promote ends of justice.*

In *Utah Commercial & Savings Bk. v Trumbo*, 17 U. 198, 53 P. 1033, the law is stated as follows:

“Power of trial court to set aside judgments by default should be exercised liberally to end that causes may be tried on their merits, and where circumstances which led to default are such as to cause court to hesitate, doubt should be resolved in favor of application for setting aside judgment rendered on default.”

In footnote to Rule 55 (a) (1) note 10 we find the following:

“While granting or refusing applications to open and set aside defaults is addressed to court’s sound discretion, yet power should be exercised freely and liberally.”

Our Courts have not deviated from the rule of law laid down in the setting aside of defaults.

There is nothing in the instant case from which appellant could have assumed that plaintiff had abandoned its case even though appellant argues the matter had been pending since 1954. It is evident there has been negotiations for settlement between the parties for many years and even after the case found its way into the office of the present counsel for appellant. Counsel for appellant argues that respondent did nothing to press the case to conclusion. What prejudice has appellant shown in the case not having been brought to trial sooner? None at all. Had respondent pressed the case for trial at a time and before the counter-claim of appellant was filed which was not filed until a few months before trial, respondent would not have been faced with the necessity of this proceeding. If there was any prejudice because of delay it appears that respondent is the one who has been prejudiced in being forced to a trial of the case.

POINT IX

As to Point IX, if error was committed by the trial court it was prejudicial to respondent and not to appellant. All the evidence offered by appellant was received over objection of counsel for respondent and it must be presumed inasmuch as the court did not rule out the evidence that the court considered same.

POINT X

Regarding Point X, appellant contends that the court erred in not finding on all issues before the court.

The court found there was no agreement to create a joint right of way. This was the only issue raised by the pleadings which was before the court. The court denied appellant's motion to amend its complaint and therefore there was no issue as to the contention of appellant that there was a dedicated public thoroughfare.

There is ample evidence in the record to support the findings of the court, the only issue before the court being whether there was an oral agreement entered into between appellant and respondent to encumber respondent's property with a permanent right of way.

CONCLUSION

Appellant failed to establish by a preponderance of evidence that there was an oral agreement between appellant and respondent to burden respondent's land with a permanent right of way. The court properly entered judgment finding and determining that there was no such agreement.

The judgment should be affirmed.

Respectfully submitted,

MILTON V. BACKMAN of
Backman, Backman & Clark,
ALTON C. MELVILLE,
Attorneys for Respondent.