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IN THE SUPREME COURT
OF THE
STATE OF UTAH

UNIVERSITY OF UTAH

OCT 15 1965

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MORTGAGE INVESTMENT CO., INC.
Plaintiff-Respondent,
vs.
SPENCER W. TOONE,
Defendant-Appellant.

Case No. 10311

FILED

APR 2

BRIEF OF DEFENDANT-APPELLANT SPENCER W. TOONE

Appeal From Judgment
of the Third Judicial District Court
Honorable Stewart M. Hanson, Judge

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS — Continued

AUTHORITIES CITED

IN THE SUPREME COURT
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STATE OF UTAH

MORTGAGE INVESTMENT CO., INC.
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vs.
SPENCER W. TOONE,
Defendant-Appellant.

Case No. 10311

BRIEF OF DEFENDANT-APPELLANT SPENCER W. TOONE

STATEMENT OF NATURE OF CASE

The appellant, Spencer W. Toone, appeals from a summary judgment entered by the Honorable Stewart M. Hanson, Judge, upon a suit by respondent, Mortgage Investment Company, claiming monies due it under the terms of a uniform real estate contract.

DISPOSITION IN LOWER COURT

On June 26, 1963, the respondent filed its complaint in the District Court, Third Judicial District. The suit was for a money judgment under a uniform real estate contract. A default judgment was entered and set aside. Subsequently, first and second amended complaints were filed and on December 17, 1963 the appellant's answer to the

second amended complaint was filed. Subsequently, discovery was undertaken and on December 17, 1964 a pretrial order was entered by Judge Hanson, in which he took under advisement the respondent's motion for summary judgment. On December 22, 1964, the Court entered summary judgment. From this judgment, the appellant prosecutes this appeal.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the summary judgment and trial on the issues.

STATEMENT OF FACTS

The appellant submits the following statement of facts. The record will be cited as (R-) and the deposition of the appellant as (D-).

The respondent, in its second amended complaint, alleged that on December 6, 1962, Northwestern Investment Corporation and the appellant executed a uniform real estate contract (R-29). The appellant further alleged that the plaintiff was the assignee of the seller, Northwestern Investment Corporation (R-29). It was additionally alleged that the appellant was indebted to the respondent, apparently because of the contract, in the sum of $3,919.32 for one payment and $3,676.90 for another. Respondent sought $1,287.00 attorney's fees (R-29). A copy of the uniform real estate contract was attached as an exhibit to the first complaint (R-2).

The appellant admitted the execution of the contract, but denied the assignment and all other allegations (R-19). The appellant raised as an affirmative defense that the contract he signed was not his obligation but that of a Mr. O. A.

Tatro (R-19). Appellant obtained an order allowing Tatro to be joined as a third party (R-28).

At the time of pretrial, the pretrial order framed as an additional issue a claim that the respondent knew that the appellant was not the true buyer of the property involved in the contract and that he was acting as an agent (R-22).

The only evidence of record, in addition to the pleadings, considered by the trial court was the deposition of the appellant, Spencer W. Toone (R-23). The deposition of the appellant recites that he is a rancher and executed the contract with Northwestern Investment Corporation (D-2, 3). He testified that he suspected that the appellant might purchase the contract from Northwestern when he executed it (D-4), but did not know of the assignment or purchase (D-5). He testified to executing two contracts for the same property on different terms, but did not know why that was done (D-12). He testified that he signed the contract as the purchaser, but assigned it to O. A. Tatro who was present when the contract was signed (D-9-11). The appellant admitted he had not made any payments under the contract (D-6). No inquiry was made concerning any knowledge of the respondent that appellant was acting as an agent for Tatro, or whether he was in fact acting as an agent. No evidence was produced as to the absence of a novation or of any notice having been given to the appellant of the claimed assignment from Northwestern to Mortgage Investment Company.

Based on the above evidence, it is submitted the trial court erred in entering summary judgment for the respondent.

ARGUMENT

POINT I

THE RECORD FAILS TO SHOW THAT APPELLANT HAD ACTUAL KNOWLEDGE OF THE CLAIMED ASSIGNMENT BETWEEN THE SELLER AND RESPONDENT AND THEREFORE FAILS TO PROVE APPELLANT'S DUTY TO PAY RESPONDENT.

It is well settled that on appeal from a summary judgment the facts will be viewed most favorable to the loser, *Frederick May & Co., Inc.* v. *Dunn,* 13 Utah 2d 40, 368 P.2d 266, and judgment sustained only if, from the evidence considered, it appears that there is no material dispute of fact as to any of the issues. When so viewed the winner is entitled to judgment as a matter of law if he should otherwise prevail. *Tanner* v. *Utah Poultry & Farmers Co-op,* 11 Utah 2d 353, 359 P.2d 18; *Christensen* v. *Financial Service Co.,* 14 Utah 2d 101, 377 P.2d 1010. If the pleading of a party is not traversed by actual evidence to the contrary, a factual dispute exists for the jury's determination. *Christensen* v. *Financial Service Co.,* supra.

The evidence in this case clearly shows that there is a definite factual dispute as to whether the appellant was ever notified of the alleged assignment from Northwestern to the respondent. The appellant in his deposition expressly denied knowing anything about the alleged assignment (D-7). The only indication of knowledge was a mere suspicion at the time of execution that the respondent might purchase a contract from Northwestern (D-4). Nowhere does the record show the date of the alleged assignment or show any notice of assignment having been given to the appellant.

It is well settled that before a party is bound to make contract payments to an assignee of a seller, he must have notice

of the assignment. Thus, in 6 Am. Jur. 2d, *Assignments*, § 96, it is stated:

> "* * * It has been said that a debtor has the right to deal with his creditor until he has actual notice of an assignment of the debt."
>
> * * *
>
> "The courts generally are agreed that notice to the debtor of an assignment is necessary in order to charge the debtor with the duty of payment to the assignee, * * *"

Williston, *Contracts*, 3rd Ed., § 433, comments:

> "The debtor should not be prejudiced by an assignment of which he has no notice. Accordingly, 'while notice to an obligor is not essential to the validity of an assignment as between an assignor and an assignee, until such notice has been given, the obligor may continue to regard the assignor as the owner of the interest or thing assigned, whether it be a leasehold; a contract to pay rent; a lien or charge against property; or otherwise; the assignor remains in privity with the obligor insofar as the performance of obligations by the latter is required under the instrument assigned.' "

This Court has recognized the general rule in *Van Dyke's Food Store* v. *Ind. Coal & Coke Co.*, 84 Utah 95, 34 P.2d 706 (1934) where the Court observed in an assignment dispute:

> "It is elementary that, in the absence of such notice, defendant is not liable to plaintiff."

See also *Nanny* v. *H. E. Pogue Distillery Co.*, 56 C.A.2d 817, 133 P.2d 686; *Skivington* v. *Studer Tractor & Equip. Co.*, 350 P.2d 729 (Wyo.).

Under the above rules and the evidence of this case, it is clear that the question of the sufficiency of notice is not

without dispute. Further, since the appellant has made other allegations that he was a mere agent, and that a third party was involved which raises a possible novation, it is apparent that the question of notice and the sufficiency of notice raise issues warranting further exploration. Mere imputed notice is not favored. 6 Am. Jur. 2d, *Assignments*, § 99.

Further, the pleadings show that the appellant denied the assignment. This placed the burden of proof upon the respondent to prove that an assignment was made prior to the commencement of the action and that notice of the assignment was given to the appellant. 6 Am. Jur. 2d, *Assignments*, § 136, observes:

> "Unless the defendants admit the assignment under which the plaintiff claims, it is incumbent upon the plaintiff to prove a valid assignment in order to show that he has a cause of action. * * *"
>
> * * *
>
> "As between an assignee and the debtor, the burden of proving that the debtor has received actual or constructive notice of the assignment so as to shift his responsibility for performance of his obligations from the assignor to the assignee, rests upon the assignee."

It is apparent that the record in this case does not show the evidence to have been so conclusive and of such posture as to warrant summary judgment.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE APPELLANT CONTENDED THAT THE RESPONDENT WAS AWARE THAT APPELLANT WAS ACTING ONLY ON BEHALF OF A THIRD PERSON IN MAKING THE PURCHASE.

It is well settled that a person acting as an agent on behalf of someone else, who discloses his agency, is not liable under

a contract made on behalf of the principal. 3 Am. Jur. 2d, *Agency*, § 294, notes:

> "If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon, unless credit has been given expressly and exclusively to the agent and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone."

The *Restatement of Agency* 2d, § 320, acknowledges the rule:

> "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."

This Court acknowledged the above rule in *State ex rel Public Welfare Commission* v. *Bonnett*, 114 Utah 546, 201 P.2d 939 (1949).

The rule is applicable to the instant case since the pretrial order recites as an issue the claim that the respondent and the seller were aware that the appellant was merely acting on behalf of a third person. No evidence appears of record that dispells this contention of the appellant. The evidence is most sketchy concerning what was actually intended at the time the appellant executed the contract, which is the subject of the instant action. The full factual circumstances surrounding the execution of the subject contract, and another contract for the same property, do not clearly appear. Further, there may have been a contemporaneous oral agreement between the appellant, Northwestern, Tatro and the respondent that Tatro would assume all

obligations.* This, of course, would avoid any contention that the parole evidence rule is somehow applicable so as to bar proof of any other arrangement. Corbin, *Contracts*, § 584; *Restatement of Contracts*, § 240. This being so, it is apparent that the trial court acted hastily in granting summary judgment and the case should be remanded for trial to allow the appellant to show the full circumstances surrounding the transaction.

POINT III

THE TRIAL COURT ACTED IMPROPERLY IN GRANTING SUMMARY JUDGMENT WHEN IT FAILED TO CONSIDER THE APPELLANT'S CONTENTION OF NOVATION AND ALLOW EVIDENCE CONCERNING FACTS WHICH WOULD SUPPORT NOVATION.

The record in the instant case discloses that the appellant contends that by virtue of the assignment of the contract by him to Tatro that he is no longer obligated under the contract. This, of course, could only be so if the seller, Northwestern, or its assignee agreed to look to the assignee of the appellant. *Kennedy* v. *Griffith*, 98 Utah 183, 95 P.2d 752 (1939). If this did occur, the appellant would not be obligated. If at the time of contract there was an oral contemporaneous agreement to relieve appellant on the contract upon his assignment to Tatro, a novation would have occurred on assignment. 39 Am. Jur., *Novation*, § 4; *Davis* v. *Kemp*, 3 Utah 2d 16, 277 P.2d 816.

The claim of novation is clear from the nature of the pretrial order and appellant's contention. The record does not

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* It is well recognized that many transactions concerning real estate involve the use of nominees. Friedman, *Contracts & Conveyances of Real Property*, Section 2.2, 2nd Ed., 1963:

> "As heretofore mentioned, it is familiar practice in real estate transactions to use a nominee (sometimes called a 'dummy' or 'straw man') instead of the real party in interest, for one or more of the following purposes: to sign a contract of sale, as purchaser; to take title; execute mortgage instruments. There are many other uses for nominees, many of which are legitimate."

factually dispell the contention that a novation actually occurred. Rather, there are several inferences that support a novation: (1) the apparent understanding of appellant that he was a mere nominee and would not be liable on assignment; (2) the fact that the respondent was apparently involved along with Tatro in the original negotiation; and (3) the fact that two contracts were executed. The latter fact itself could be the basis for a novation and preclude an action on the instant contract. 39 Am. Jur., *Novation,* § 14.

It is submitted this Court should afford appellant the right to have the factual basis of his claims determined. The record, as it now exists, is at best sketchy and obscure. The appropriate remedy is to reverse and allow a full airing of the facts.

CONCLUSION

Summary judgment is a harsh remedy. Its function is to expedite cases where there is no factual dispute between the parties and where further proceedings would present no basis which would alter the result. It is apparent that in the instant case the facts surrounding several of the legal issues raised by the appellant were not explored. The trial court's summary action, based on the sketchy record, makes it obvious that summary judgment was inappropriate. There are factual matters which still require exploration. This Court should reverse and allow the appellant an opportunity to have his case determined at trial.

Respectfully submitted,

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