1960

Larry L. Jones and Della Mae Jones v. Grow Investment and Mortgage Co. : Brief of Respondents

Utah Supreme Court

Young, Young & Sorensen; Attorneys for Plaintiffs and Respondents;

In the Supreme Court of the State of Utah

LARRY L. JONES and DELLA MAE JONES, his wife,

Plaintiffs and Respondents,

vs.

GROW INVESTMENT and MORTGAGE COMPANY,

Defendant and Appellant.

Case No. 9240

RESPONDENTS' BRIEF

Allen B. Sorensen
for YOUNG, YOUNG & SORENSEN
Attorneys for Plaintiffs and Respondents

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STATEMENT OF FACTS

This action was brought for breach of warranty against encumbrances contained in a warranty deed conveying real property in Orem, Utah from appellant to respondents. The encumbrance complained of is a prescriptive right to an irrigation ditch which transversed the property sold to respondents. In connection with the construction of the house thus purchased, the ditch was moved in its location upon the premises, but the substituted ditch continues to cross on two sides the lot purchased by respondents.

The case was tried to the court sitting without a jury. There is a direct conflict in the evidence on material issues. In its brief, appellant has set forth as its statement of facts the evidence as it was presented on behalf of appellant. Because the trial court found otherwise, we shall present our statement of fact by means of a direct quotation of the findings of fact as made by the court, with citations to the transcript in support thereof:

"1. At some time in the latter part of October, 1958, the plaintiff, (respondent) Larry L. Jones, made a personal inspection of Lot 3, Block 4, Plat "B," Keyridge Heights Subdivision, Utah County, Utah, in the company of an agent of the defendant (appellant) for the purpose of considering purchasing the property (Tr. 22, 69, 72).

"2. That at such time, the plaintiff, (respondent) Larry L. Jones, saw a visible open irrigation ditch across the rear of the said property, said ditch appearing to dead-end at the south line of said lot (Tr. 22-23).

"3. That at that time, the ditch appeared to be abandoned and there was present therein tree limbs, building refuse, weeds, and trash (Tr. 22-23, 28, 30, 73).

"4. That at that time, there was also on the premises, but not revealed to the plaintiff, (respondent) Larry L. Jones, a 22 inch diameter cement pipe running in a westerly direction from the end

of the rear open ditch along the south line of the property, said cement pipe being completely covered and not visible on a casual inspection, and that said covered pipe continued across the street and away from the premises (Plaintiffs' Exhibits 1, 3, Defendant's Exhibit 7. Tr. 73).

"5. That the plaintiff, (respondent) Larry L. Jones inquired of the defendant's (appellant's) agent whether or not the open ditch could be filled, as he wanted to completely enclose the rear yard and make it secure for a child and a dog (Tr. 23, 73-74, 150).

"6. That the defendant's (appellant's) agent represented that the ditch could be filled in, and the yard leveled (Tr. 150).

"7. That the plaintiffs (respondents) then agreed to purchase said premises and that on or about December 12, 1958, in consideration of the sum of of $19,500.00 to it paid, the defendant (appellant) conveyed said premises to the plaintiffs (respondents) by warranty deed, in fee simple (Plaintiffs' Exhibit A; Tr. 68).

"8. That said warranty deed was without restriction or exception, except for deed restrictions and easements of record, (Plaintiffs' Exhibit A).

"9. That there was, and is no easement of record for said irrigation ditch, (Plaintiffs' Exhibit 5).

"10. That immediately after taking possession of said premises, the plaintiffs (respondents)

proceeded to fill in the ditch across the rear of said lot, and thereupon learned that there was a claimed easement by prescription across the premises for said irrigation ditch (Tr. 5, 16-19, 24, 31,).

"11. That there is in fact a prescriptive easement in others for an irrigation ditch across the premises of plaintiffs (respondents), described above, and that said easement is actively used by the owners of the dominant estate (Tr. 6-8, 9, 12-14, 16).

"12. That by reason of the burdens of said easement, the plaintiffs (respondents) have been damaged in the amount of $750.00 (Tr. 25, 28, 39, 47)."

The Court has pronounced innumerable times the rule that, where the evidence upon the trial was sufficient to support the trial court's findings, this Court would not disturb such findings on appeal See ***Dusenberry Vs. Taylor's,*** 7 Utah 2d 383, 325 P2d 910.

STATEMENT OF POINTS

POINT I

THIS CASE TURNS ON ISSUES OF FACT ON BREACH OF WARRANTY AGAINST ENCUMBRANCES DECIDED BY THE TRIAL COURT ON SUFFICIENT EVIDENCE, AND THIS COURT NEED NOT DECIDE QUESTIONS OF LAW URGED BY APPELLANT.

POINT II

IN URGING RESPONDENTS WERE NOT DAMAGED, APPELLANT IGNORES THE FINDINGS OF FACT AND THE APPLICABLE LAW.

ARGUMENT

POINT I

THIS CASE TURNS ON ISSUES OF FACT ON BREACH OF WARRANTY AGAINST ENCUMBRANCES DECIDED BY THE TRIAL COURT ON SUFFICIENT EVIDENCE, AND TIONS OF LAW URGED BY APPELLANT.

The appellant conveyed the property in question to the respondents by the usual statutory warranty deed form (57-1-12 Utah Code Annotated 1953) which contains, amongst other things, by operation of law a warranty "that the premises are free from all encumbrances" (Exhibit A). The only exception contained on said deed was the statement "subject to deed restrictions and easements of record." The trial court found that the property in fact was subject to an active prescriptive easement, not of record, for an irrigation ditch (R. 27, Findings of Fact No. 10 and No. 11).

Courts are not in agreement on the question whether there is an implied exception to the covenant against encumbrances ***where the irrigation ditch is visible and its existence known to the vendee.*** Annotation, 64ALR 1479, "Easements as

Breach of Covenant against Encumbrances" at page 1499.

The Supreme Court of Idaho, in the case of ***Schurberg Vs. Moorman,*** 117 Pac. 122, 20 Idaho 97, held there was such an implied exception where canals existed on farming land improved under the Carey Act. The Supreme Court of Colorado, in the case of ***Ericksen Vs. Whitescarver,*** 142 Pac. 413, 57 Colo. 409, held to the contrary where the ditch was found to be across a lot in a subdivision.

We have found no Utah cases dealing with the legal question urged by appellant. The appellant cites none. The case of ***Rollo Vs. Nelson,*** 34 Utah 116, 96 Pac. 263, is distinguished in two respects. That case involved a sidewalk running across several lots. It was completely obvious to anyone who looked, and the agent of the complaining party had been upon the premises and had seen the walk. Second, the easement was mutualy beneficial to the property owners, including the one complaining thereof.

This Court, in the case of ***Van Cott Vs. Jacklin,*** 63 Utah 412, 226 Pac. 460, treated of covenants of general warranty and for quiet enjoyment where a part of the land conveyed was lost because of an ancient existing fence which did not follow the property line. This Court, in that opinion, commented upon the question of breach of warranty against encumbrances such as the one involved in this case, as follows:

" . . . we do not wish to be understood as passing upon the question of liability of a covenantor in case there is an open water ditch or private right of way over lands which are the subject of warranty. Where such is the case, it is evident that such constitute easements and are covered by the warranty against encumbrances. The decisions as to the effect of such covenants in case there are easements ***which are open and visible, or are known to the purchaser before he purchases***, are not uniform, and for that reason, as well as for the reason that the question is not necessarily involved, we express no opinion upon the subject." (Emphasis added).

We respectfully but strenuously urge that this Court, in the case at bar, is still not called upon to express such opinion. The facts found by the trial court exclude this case from the authorities relied upon by the appellant. They are not in point. The findings of the trial court shows that the easement here complained of was ***not*** open and visible (R. 26-7; Tr. 22-23, 28, 30, 73-74, 150). They further show that the agent of the appellant actively represented that there was no such easement and that the respondents could proceed to fill what appeared to be a dead ditch at the rear of their lot (Tr. 23, 150). Although the authorities cited by appellant may well be good law, we maintain that this Court need not decide the issue as urged by the appellant, for the simple reason that the facts here concerned render the authorities immaterial.

In Points I to VIII inclusive of its brief, appellant simply quarrels with the trial court's findings of fact. It is further observed that the argu-

ment under Point VI of appellant's brief ignores the fact that the court viewed the premises (Tr. 4).

POINT II

IN URGING RESPONDENTS WERE NOT DAMAGED, APPELLANT IGNORES THE FINDINGS OF FACT AND THE APPLICABLE LAW.

Under Point IX of its brief, appellant urges that the respondents were not damaged at all and that the court erred in finding damages. Here again, it ignores the record and the trial court's findings of fact.

The measure of damages in an action on a covenant against encumbrances when the encumbrance is of a nature that it cannot be removed or discharged is that amount of money which is a just compensation to the covenantee for the real injury resulting from the encumbrance. Annotation 61 ALR 11, at page 72 and following, "Measure of damages for breach of covenants of title in conveyances or mortgages of real property," supplemented in 100 ALR 1194 at page 1199.

Mr. Delmar C. Kenner testified that the value of the property was depreciated by the existance of the ditch along the east and south sides of the property in the amount of $1,971.00 (Tr. 39). He was qualified as an expert witness and was subjected to extensive cross examination. Three witnesses were called by the appellant to rebut this.

Little profit would come from belabouring their testimony here. Mr. J. Edwin Stein, as a review of his testimony will indicate, had only made a casual inspection of the premises, dealt in vague generalities and was unalterably opposed to giving any direct answer. Other witnesses for the appellant were little, if any better, prepared and we submit that their testimony was of small service to the trial court.

Suffice it to say that the trial court awarded as damages less than one-half the sum that Mr. Kenner's testimony would have supported. The court determined that the respondents were in truth damaged, and the award of the trial court was most modest.

CONCLUSION

We submit that this case is determined by questions of fact, not of law, and that the evidence well supports the facts as found by the trial court. Because this Court has consistently refused to substitute its judgment on credibility of witnesses for that of the trier of the fact, this appeal is frivolous. The judgment of the trial court should be affirmed.

Respectfuly submitted,

Allen B. Sorensen, for
YOUNG, YOUNG & SORENSEN
Attorneys for Plaintiffs & Respondents