1960

Desert Centers, Inc. v. Glen Canyon, Inc. et al : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

DESERT CENTERS, INC.,
Plaintiff and Appellant,

vs.

GLEN CANYON, INC., THEODORE I. GEURTS, KYLE BREWSTER, and HARRY D. PUGSLEY,
Defendants and Respondents.

Case No. 9262

BRIEF OF APPELLANT

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ARROW PRESS, SALT LAKE

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STATEMENT OF FACTS

The parties are referred to herein as they appeared below in an action to quiet title in Plaintiff to lands in Kane County.

On December 1, 1957 the Defendant Glen Canyon, Inc., was a Utah Corporation with principal offices at 556 Gale Street, Salt Lake City, Utah; on that date a special meeting of its Board of Directors was held, at which a quorum was present (R. 141). At that meeting a resolution was adopted reading as follows:

> "Mr. LaVey submitted a proposal from the Desert Centers, Inc., of Phoenix, Arizona, an Arizona

> Corporation, to finance, build, lease, and operate a shopping center on Lot No. 1, Glen Canyon Utah Townsite.
>
> "In consideration of a Warranty Deed being given them to Lot No. 1, William B. LaVey and associates agree to pay Glen Canyon, Inc. 60,000 shares of stock in exchange for this lot. A motion was made, seconded and passed that this be accepted."

The resolution was then embodied in a completed set of minutes of the meeting and executed by all present. This resolution was admitted into evidence by the pre-trial Order (R. 12) and by stipulation of the parties (R. 132) and a fully executed but carbon copy thereof was admitted by the Court as Exhibit "D" (R. 141).

On December 3, 1957, a Warranty Deed was executed by the officers of Glen Canyon, Inc., attested by its secretary and acknowledged before a Notary Public conveying the aforesaid Lot 1 of Glen Canyon Townsite to the Plaintiff, Desert Centers, Inc. This deed was recorded July 2, 1958 in Book N-5 of Deeds, at Page 433 of the Kane County records. This deed was likewise admitted into evidence through pre-trial negotiations (R. 11), and at the time of trial (R. 24) as Exhibit "A" (R. 136). The deed and acknowledgment are in statutory form and content.

Also admitted into evidence but only cumulatively evidentiary of the facts was a pre-corporation agreement (R. 137-139), which became Exhibit "B" and was admitted at the pre-trial (R. 13).

After receiving the deed from the defendant Glen Canyon, Inc., the President and Secretary, S. S. Gittleman and

Belle Gittleman, respectively, of the newly formed Desert Centers, Inc., paid $15,000.00 into an account for their contribution to the capital of Desert Centers, Inc., as they had agreed to do in the pre-corporation agreement (R. 147). Thereafter there was checked out the sum of $7,500.00 to Rincon Builders and Developers, Inc. as a down payment on the construction of a shopping center on the said Lot 1. Photostatic copies of those checks appear as an exhibit at Page 142 of the record and the actual checks themselves together with bank statements of the contributors of the cash and bank statements of Desert Centers, Inc. appear at Page 147 as exhibits which were accepted by the Court at the insistence of counsel for Glen Canyon, Inc. (R. 34, R. 38, R. 127).

The pre-trial Order by stipulation provided that the title of Glen Canyon, Inc., at the time of the conveyance, Exhibit "A", by Warranty Deed to Desert Centers, Inc., would not be and was not attacked in the proceedings.

On April 28, 1958 Glen Canyon, Inc., by Theodore I. Geurts as President (a party defendant) and Gordon C. Holt as Secretary, executed a Quitclaim Deed to Harry D. Pugsley, "Trustee", and said deed was recorded on June 26, 1958 in Book N-5 of Deeds at Page 428, and prior to the time the Plaintiff recorded its deed.

Harry D. Pugsley was made a party defendant to this action; however, by his answer *per se* he admitted that he was a Trustee only for Glen Canyon, Inc.; that he disclaimed any personal interest in the land but held title for the Defendant Glen Canyon, Inc. solely as Trustee and was

neither a purchaser for value or without notice of the prior deed to Plaintiff.

The evidence of the Plaintiff was almost entirely documentary and was largely presented and admitted at pretrial. The Plaintiff called only two witnesses, the president and secretary of the Plaintiff corporation, for the purpose of proving that they had put in all the cash capital ($15,000.00) of the Plaintiff Corporation. A long colloquy ensued by objections of Defendants' counsel to their testimony which is hardly useful in deciding this case but which appears in the transcript (R. 5-48).

These witnesses were asked and testified on cross examination concerning their salaries as officers, the make-up of the Plaintiff corporation's Board of Directors, and other matters which we submit are wholly irrelevant to reach back and nullify a pre-existing deed but which apparently influenced the Trial Court to a view that possibly Glen Canyon, Inc. could have made a better deal if they had their land back. This he proceeded to make provision for. The Defendants called no witnesses except for the attorney for the Defendants, Mr. J. Richard Bell, who testified concerning his observations of the endorsement on the checks (admitted as exhibits at R. 147) since those checks were not available at the time of trial but were supplied later. His testimony contained assumptions and conclusions which proved to be erroneous (R. 8, 9, 147).

Upon the basis of this evidence the trial Court found:

> "That there is so much uncertainty and irregularity, so much inequity and unfairness as related to Glen Canyon, Inc. as to render the entire transac-

tion, including the alleged deed from Glen Canyon, Inc. to the Plaintiff, Desert Centers, Inc., void and of no effect" (R. 17).

STATEMENT OF POINTS

POINT I.

THERE IS *NO* EVIDENCE, AND CERTAINLY NO CLEAR AND CONVINCING EVIDENCE, ATTACKING VALIDITY OF PLAINTIFF'S DEED AND THE TRIAL COURT ERRED IN FINDING IT INVALID.

ARGUMENT

POINT I.

THERE IS *NO* EVIDENCE, AND CERTAINLY NO CLEAR AND CONVINCING EVIDENCE, ATTACKING VALIDITY OF PLAINTIFF'S DEED AND THE TRIAL COURT ERRED IN FINDING IT INVALID.

It is fundamental that the regularity of a deed such as is Exhibit "A", is presumed where the same is executed, acknowledged and recorded and that any individual attacking the same must do so by only clear and convincing evidence. *Chugg* vs. *Chugg*, 342 Pacific 2nd 875, 9 Utah 2nd 256.

It is further elementary that a deed, whether or not recorded, is binding between the parties. *Section 57-1-6, U. C. A. 1953.* In this case conveyance by Glen Canyon, Inc. to a "Trustee" for the grantor's own benefit had no effect whatsoever.

It is equally fundamental that there is no necessity that any consideration passed; however, in this case new equities arose and the grantor received consideration for the transaction since two incorporators, as they agreed to do in the pre-corporation agreement (Exhibit "B", R. 137-139), provided all the cash ($15,000.00) with which Desert Centers commenced business (R. 147). Glen Canyon, by the Articles of Incorporation of Desert Centers, received 49% of the capital stock of the latter corporation.

Further it should be observed that the consideration for the deed recited in the resolution of the Board of Directors (R. 141) had nothing to do with cash or performance of any pre-corporation agreement, but was in consideration of shares of Glen Canyon's own stock to be transferred by William B. LaVey to the corporation, presumably to become treasury stock. The Defendants came forward with no proof that this stock was not delivered by LaVey and the burden was upon them to do so. *Chugg* vs. *Chugg, supra.*

No doubt the Defendants will claim a great deal for the Defendant Glen Canyon, Inc.'s lack of a stock certificate evidencing shares in Desert Centers, Inc. The pre-corporation agreement (Exhibit "B", R. 137) provided that the Defendant should own 49% of the Plaintiff Corporation.

Glen Canyon, Inc. now is, and ever since the organization of Desert Centers, Inc. has been, a stockholder therein, owning 49% of its capital stock. This point may be disposed of conclusively by reference to the following citations from American Jurisprudence:

Vol. 13, p. 397; Corporations Sec. 319:

> "A stock certificate is not stock in the corporation, but is merely evidence of the holder's interest

in the corporation, his ownership of the shares represented thereby, and his rights and liabilities resulting from such ownership. It is authentic evidence of the title to stock.

"A stock certificate is not essential to the existence of a share of stock or to the creation of the relation of shareholder; the interest represented by the certificate may be held by a valid title without a certificate. A certificate of stock is generally recognized as occupying much the same status as a chose in action."

Vol. 13, p. 455; Corporations Sec. 398;

"To constitute one a stockholder, some sort of subscription or contract, express or implied, is required, whereby he obtains the right, upon some condition, to demand stock and to exercise the rights of a stockholder. Generally, it may be said that in the absence of a regulation to the contrary, one may become a stockholder by subscribing for stock in a corporation, paying the amount thereof to the corporation or its proper officer, and being entered on the book as a stockholder, *even though no stock certificate is issued to him; for although a corporation is bound upon demand to issue to anyone who has fully paid for stock in the corporation, it is not necessary in order to constitute one a stockholder in a corporation that the stock certificate to which he is entitled be actually issued.* Nor is payment by a subscriber for the stock necessary to constitute the subscriber a stockholder."

The proceedings represented by the documentary exhibits constituted a fully executed transaction upon execution of the Warranty Deed on December 3, 1957.

We respectfully submit that nothing more can be proved with respect to a corporate conveyance of land than has

been established in this case i. e.: (1) Authorization of the conveyance by the Board of Directors of the conveying corporation and (2) Execution and delivery of a Warranty Deed statutory in form, content and acknowledgment.

Certainly parol evidence cannot be received by the Court to defeat any of these written documents which are unequivocal, unambiguous and consistent in every respect with the conveying corporation's ordinary course of business. It should be remembered in this connection that Glen Canyon, Inc.'s express corporate purpose is the subdividing and development of land and the purposes set out in the pre-corporation (Exhibit "B") agreement are in furtherance of that purpose.

The rule is certainly fundamental that a Court may not attempt to re-write a contract for the parties or second-guess the wisdom in its provisions. This is true even of executory agreements; however, the Trial Court in this case has bone much farther than a mere abrogation of that rule; it has modified and revised a contract completely executed as to all of its terms.

It is significant that the Defendants called no witnesses except their counsel. The Court should consider the fact that the Defendants produced no evidence of any weight in light of the holdings in *Richmond* vs. *Ballard,* 7 Utah 2d 341, 325 P. 2d 839 and *Northcrest, Inc.,* vs. *Walker Bank,* 122 Utah 268, 248 P. 2d 692, which hold that acknowledgment and recording of deeds give rise to a presumption of genuineness and due execution and is prima facie evidence thereof and must be overcome only by clear and convincing proof.

Having come forward with no proof the Defendants nevertheless expect this Court to strike down a deed of conveyance which has been proved by the minutes of a meeting of the Board of Directors of the corporation executing the same, containing recitations therein of consideration, and by a statutory deed, acknowledged and recorded.

If the Trial Court's judgment is allowed to stand, there is no corporation in existence which has undergone a change in management whose current Board of Directors cannot look back into its predecessor officialdom and set aside some transaction which was not as good a deal as the present board, with 20-20 hindsight, could have struck.

CONCLUSION

In conclusion we respectfully urge that the Trial Court erred in denying Plaintiff relief and in granting the Defendants judgment on their Counter-Claim.

Respectfully submitted,

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