

1967

Mary Colleen Roundy v. Norman R. Reber, Bonnie Reber, Melvin C. Roundy, and Others Including the Church of the First Born : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY COLLEEN ROUNDY,

Plaintiff and Respondent,

vs.

NORMAN R. REBER, BONNIE
REBER, MELVIN C. ROUNDY,
and O T H E R S INCLUDING
THE CHURCH OF THE FIRST
BORN,

Defendants and Appellants.

No.
157718
No.
168592

10533

APPELLANTS' BRIEF

Honorable A. H. Ellett, District Judge

MAR 31 1967

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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action in unlawful detainer.

DISPOSITION IN LOWER COURT

The case was heard on the plaintiff's motion for a special setting on the 17th day of December, 1965. Judgment was entered in favor of the plaintiff and

against the defendants Reber on the 20th day of December, 1965, by the Honorable A. H. Ellett and treble rents were awarded. The defendants' motion for a modification of the judgment or for a new trial was denied. From both rulings the defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment and for an order remanding the case back for dismissal.

STATEMENT OF FACTS

The action was commenced by the service of a summons on or about the 3rd day of June, 1965. (R-2). A notice to quit was served on the 26th day of May, 1965. (R-23). It is a three day notice and it does not require "in the alternative the payment of the rent or the surrender of the detained premises."

The plaintiff's complaint was amended two additional times, (R-12 and R-27), and there were two additional notices to quit (R-31 and R-39) served on the 29th day of July, 1965 and the 17th day of August, 1965, respectively.

On the 2nd day of November, 1965 the second case was commenced by the filing of a complaint (R-81) and the service of a summons (R-88), and on the 26th day of October, 1965 a fourth notice to quit was served (R-86). The service of the summons in this latter case, No. 160592, was challenged by a special

appearance and motion to quash (R-89), and this case got no further than a hearing, (R-92) when the two cases were ordered consolidated without further ruling.

No judgment was taken against either of the other defendants and no other defendant has an interest in this appeal except the defendants Reber.

It should be noted as a matter of clarity that the Rebers entered into possession of the premises under a quit claim deed from Melvin Roundy, the then husband of the plaintiff, and that at the hearing to determine the validity of the quit claim deed only, the plaintiff produced and introduced into evidence Exhibit 2-P along with the quit claim deed, 1-P, which are in the exhibit envelope. 2-P provides in its final paragraph that "If Roundys cannot furnish clear deed to the property then the Rebers will consider all amounts paid as rent and have no claim of lien to property." Judge Faux held that the quit claim deed was void and the case went forward on the plaintiff's claim for unlawful detainer. (R-47 to 51).

ARGUMENT

POINT I.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE JUDGMENT.

The court erred in finding that the plaintiff's notice to quit served on the 17th day of August, 1965, was valid. (R-58, Par. 4).

This was the plaintiff's third notice to quit. It was served almost two and a half months after the suit had been commenced. Whether or not the plaintiff's action stands must be determined from the notice to quit served on the 26th day of May, 1965 (R-23) which was not "in the alternative the payment of the rent or the surrender of the detained premises," as required by the provisions of Title 78-36-3, Utah Code Annotated, 1953.

In support of this the case of Lee Van Zyverden v. Farrar, 15 U 2nd, 367, 393 P 2nd, 468, is cited:

"It is uniformly held that the unlawful detainer statutes provide a severe remedy and must be strictly complied with before the cause of action thereon may be maintained. Perkins v. Spencer, 121 U. 468, 243 P 2nd 446. The court correctly held that the later notice served on the Van Zyverdens on February 10 was not effective to perfect Seagull's right to maintain unlawful detainer in this action. This notice was served after the action had been commenced. Whether such a cause of action exists is to be determined at the time the action is commenced."

POINT II

PLAINTIFF'S ACTION SHOULD BE DISMISSED.

The case of Perkins v. Spencer referred to above holds as follows:

“Until the tenancy is terminated by proper notice to quit there is no unlawful detainer. The notice to quit is necessary to give rise to the cause of action. When a landlord commences suit without first terminating the tenancy by giving proper notice to quit, the tenant can certainly appear and show that his tenancy has not been terminated by proper notice. The court should dismiss the suit on the grounds that there is no cause of action.” 121 U. 468, 243 P.2nd 446. See also *Erisman v. Overman*, 11 U.2nd, 258, 358 P.2nd 85.

CONCLUSION

The court erred in considering as valid the plaintiff's notice to quit served on the 17th day of August, after the action had been commenced. The case should be remanded with instructions for its dismissal.

Respectfully submitted,

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Served by mailing copy to Del B. Rowe, 26 West Broadway, Salt Lake City, Utah, Attorney for the plaintiff, this 9th day of April, 1966, postage prepaid.

HORACE J. KNOWLTON