

1961

John D. Glynn v. Marjorie Doctorman Dubin et al : Brief of Defendant-Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Glynn v. Dubin*, No. 9388 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN D. GLYNN,
Plaintiff and Appellant,

vs.

MARJORIE DOCTORMAN
DUBIN, aka MARJORIE
DOCTORMAN and DESERET
FEDERAL SAVINGS AND
LOAN ASSOCIATION,
a corporation,
Defendants and Respondents.

FILED
CLERK, SUPREME COURT, UTAH

Case No. 9388

BRIEF OF DEFENDANT-RESPONDENT

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BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF FACTS

Lot 24, East Millbrook No. 2, State of Utah, was acquired by Marjorie Doctorman (then Dubin), hereinafter called the Defendant and Dr. Martin F. Dubin, in joint tenancy on July 22, 1957. The down payment, in

excess of \$10,500, was made out of funds accumulated by Defendant prior to marriage to Dubin. (Response No. 12, dated June 18, 1959, of Dr. Martin F. Dubin to interrogatories, in file No. 119467 and findings of fact in file No. 123578.)

Defendant Marjorie Doctorman sued in separate maintenance against Dr. Martin F. Dubin in cause No. 119467 in the Salt Lake County District Court in December 1958, and recorded a lis pendens setting forth that Marjorie Doctorman Dubin prayed for the property in dispute under claim of right. More than three months later an amended complaint in divorce on the grounds of cruelty was filed setting forth Marjorie Doctorman Dubin's principal outlay in the said property, her right to it, and requesting the Court to award her all of Dr. Martin F. Dubin's right, title and interest in and to the same.

Plaintiff in this action was retained as counsel for Dr. Martin F. Dubin, entered his appearance as such, and answered the amended complaint, also cross complaining for a divorce.

A quit-claim deed was dated and recorded December 7, 1959, in Salt Lake County, with Dr. Martin F. Dubin as grantor and John D. Glynn as Grantee. (Exhibit No. 6) On trial a promissory note dated December 7, 1959 (Exhibit No. 8) was presented as partial consideration therefor, on which payments began January 7, 1960. (Tr Pg 40,

Ln 4) The remaining consideration was performed legal services. (Tr Pg 35, Lns 6-12; Tr Pg 41, lns 24-29.)

After 2 p.m. on December 8, 1959, the Honorable A. H. Ellett dismissed cause No. 119467 on his own motion without prejudice to the rights of the parties and with leave to proceed in another action (Exhibit No. 1). The Court's reason was that it lacked jurisdiction because the amended complaint in divorce related back to the date of original filing in separate maintenance and, therefore, the three months resident requisite was not a fact.

Prior, however, to the dismissal, Marjorie Doctorman Dubin filed a new action in divorce (order to show cause file No. 123578, signed by A. H. Ellett, Judge at 1:10 P.M. Dec. 8, 1959) against Dr. Martin F. Dubin, specifically describing the property here involved, claiming her right thereto and praying for distribution to her of the interest therein of Dr. Martin F. Dubin. Lis pendens was recorded at 1:45 p.m. (Exhibit No. 7).

Plaintiff herein, John D. Glynn, knew prior to the execution and delivery to him of the December 7 deed that the down payment for this property was made by Marjorie Doctorman Dubin from her separate estate acquired prior to marriage to Dr. Martin F. Dubin (Tr. Pg. 57, ln. 12; Tr. Pg. 58, lns. 10 and 18). He knew that payments were made on the property from the separate funds of Marjorie Doctorman Dubin; he knew that causes

No. 119467 and 123578 were filed praying distribution of the interest of the subject property to her (Tr. Pg. 50, Ins. 10 to bottom of page; Exhibit No. 9).

All this Glynn knew prior to the execution and delivery of the deeds to him.

A quit-claim deed dated December 8, 1959, with Dr. Martin F. Dubin as grantor and John D. Glynn as Grantee, conveying the subject property was recorded in Salt Lake County, at 4:40 p.m. It states for informational purposes a promissory note in the sum of \$5,000 payable in \$100 monthly installments was delivered by the grantee to the grantor. Another document was recorded purporting to be for informational purposes setting forth the said note. The considerations for both deeds were the same, the second deed being made because Glynn "wasn't sure of the legality of the first document (Tr. Pg. 45, Ins. 4-bottom of the page). The deed and note dated December 8, 1959, were executed and delivered on the morning of December 8, 1959 (Tr. Pg. 46, ln. 21; Tr. Pg. 48, ln. 10) which was prior to the dismissal without prejudice of cause No. 119467.

A decree was made and entered in cause No. 123578 on January 20, 1960, as follows: "Plaintiff be, and she hereby is, awarded as her sole and separate property, free and clear of any claims of the Defendant, the following described property located in Salt Lake County, State of Utah, to-wit: Lot 24, East MillBrook No. 2, according to the official plats of Salt Lake County."

The Court in the instant case granted Plaintiff's motion to dismiss Plaintiff's complaint in partition and ordered judgment entered thereon, and further decreed the quieting of cross complainant Marjorie Doctorman's title in and to the subject property.

POINTS OF LAW

I. ALTHOUGH A COMPLAINT DOES NOT SET FORTH ALL OF THE ALLEGATIONS TO STATE A CAUSE OF ACTION UNDER THE FRAUDULENT CONVEYANCE STATUTE, THE COURT MAY TAKE SUCH EVIDENCE AS MAY BE RELEVANT AND GRANT JUDGMENT THEREON.

II. IN AN ACTION FOR DIVORCE WHERE CERTAIN PROPERTIES ARE SPECIFICALLY NAMED IN THE COMPLAINT AND TITLE THERETO SPECIFICALLY SOUGHT BY EITHER OR BOTH OF THE PARTIES IN THE ACTION, THEN THE SAID PROPERTY IS WITHIN THE JURISDICTION OF THE COURT, SUBJECT TO ITS ORDER AND FREE FROM ANY PERSON CLAIMING THEREAFTER, OTHER THAN A BONAFIDE HOLDER FOR VALUE; THAT IS, ONE TAKING INNOCENTLY WITHOUT NOTICE OF THE ADVERSE CLAIM, AND PAYING AN ADEQUATE CONSIDERATION.

III. LIS PENDENS GIVES NOTICE TO ALL THE WORLD OF CLAIM IN THE PROPERTY NAMED, AND ANY PERSON TAKING SUBSEQUENT TO THE RECORDING OF LIS PENDENS TAKES SUBJECT TO THE RIGHTS OF THE PARTIES AS DETERMINED BY DECREE IN THE ACTION NAMED.

THE EFFECT OF LIS PENDENS TO OPERATE AS SUCH NOTICE EXTENDS BEYOND THE DISMISSAL WITHOUT PREJUDICE OF AN ACTION AND CONTINUES

AS NOTICE TO ALL PARTIES TO AND THROUGH A SUBSEQUENT ACTION BROUGHT TO DETERMINE THE MERITS OF THE ORIGINAL CAUSE.

ARGUMENT

I. ALTHOUGH A COMPLAINT DOES NOT SET FORTH ALL OF THE ALLEGATIONS TO STATE A CAUSE OF ACTION UNDER THE FRAUDULENT CONVEYANCE STATUTE, THE COURT MAY TAKE SUCH EVIDENCE AS MAY BE RELEVANT AND GRANT JUDGMENT THEREON.

Rule 15 (b) of Utah Rules of Civil Procedure, Amendments to Conform to the Evidence. — When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

While Respondent believes it has established a cause under the fraudulent conveyance statute, it is not our purpose to be limited to seeking relief through its medium.

It is not essential that respondent establish that Dr. Dubin delivered this deed with the fraudulent intent to deprive his wife of her rights, but rather to establish that Glynn was not free of the suspicion that Dr. Dubin acted with such a motivation.

II. IN AN ACTION FOR DIVORCE WHERE CERTAIN PROPERTIES ARE SPECIFICALLY NAMED IN THE COMPLAINT AND TITLE THERETO SPECIFICALLY SOUGHT BY EITHER OR BOTH OF THE PARTIES IN THE ACTION, THEN THE SAID PROPERTY IS WITHIN THE JURISDICTION OF THE COURT, SUBJECT TO ITS ORDER AND FREE FROM ANY PERSON CLAIMING THEREAFTER, OTHER THAN A BONAFIDE HOLDER FOR VALUE; THAT IS, ONE TAKING INNOCENTLY WITHOUT NOTICE OF THE ADVERSE CLAIM, AND PAYING AN ADEQUATE CONSIDERATION.

Rumsey v. Rumsey (Kansas), 90 Pac. (2) 1093 is a case aptly in point. The wife sued husband for divorce on July 30, 1937, and the husband and J. R. Harris to set aside a deed. Incidental to and at the same time, the Plaintiff levied an attachment on the said land. Investor's Royalty Co., a grantee of J. R. Harris, intervened.

The wife's complaint alleged the husband to be the owner of certain land and petitioned that it be set aside to her as alimony.

A supplemental petition alleging that after the commencement of the action mineral deeds conveying the subject land to Harris were recorded and this was a scheme to defraud Plaintiff of her interests.

The intervenor claimed the transfer to Harris on July 19 and to them August 3, 1937. On trial the intervenors testified paying \$2750 and were aware of the status of the record (attachment and divorce file for alimony.)

The Court stated: "The record was certainly sufficient to put an ordinarily prudent person upon inquiry. Under the facts shown by the record it would be difficult for intervenor to sustain its contention that it was an innocent purchaser for value without notice. But it is not necessary to determine the claims of the intervenor on these equitable grounds alone; any right title or interest now asserted by intervenor was acquired while the alimony suit was pending and undetermined."

Even more succinctly the Court in *Wilkinson v. Elliot* 43 Kan. 590, 23 Pac. 614: "Where the wife files a petition asking for divorce and alimony in which she definitely described real estate of husband and prays it be set apart and decreed hers as permanent alimony, the doctrine of *lis pendens* will apply; any one who purchases such property during pendency of the action will be bound by the judgment subsequently tendered therein.

"Under the *lis pendens* statute the intervenor was charged with constructive notice of the rights of plaintiff; from the record it is clear it also had actual notice. It cannot now complain."

The two cases cited above deal with the problem of specific property where the complaints have requested that the properties be set aside as alimony.

The subject case and the following cases deal specifically where Plaintiffs have specified the land, claiming

them not merely as permanent alimony but also under claim of right.

In *Moore v. Zelic*, 338 Ill. 583, 170 NE 664, Fannie Zelic Scoda and Louis Scoda took certain property as joint tenants in 1916. On August 12, 1927, Fannie filed for divorce describing the said property and alleging she had furnished the purchase price. She prayed that Scoda be required to convey the said property to her and for an injunction restraining him from encumbering and disposing the same. The summons and the injunction were not served upon Scoda until August 30, 1927. On August 20 the appellant's, (who like Glynn here, were counsel for Scoda in the divorce proceedings) took judgment by confession against Scoda and levied execution on Scoda's share of the property. On the Sheriff's sale, the appellants bought for their judgment.

At trial the court held that Fannie had furnished the purchase price and ordered Scoda to convey all of his right, title, and interest in lieu of alimony and in the alternative, his master in chancery should make the conveyance. On May 5, 1928, Fannie conveyed an undivided 1/20 of the said property to Mary Moore who on the 31st of May, 1928, filed a suit for partition. Appellants answered admitting having notice of the filing of the bill for divorce. (In Illinois, by statute, the filing of a bill of complaint operates to give constructive notice of the subject stated therein.) The Court declared as follows:

“It appears on taking testimony in this action chancellor found Fannie had paid money and he concluded a resulting trust arose for benefit of wife—notwithstanding the rights and interests of the parties to this property had been disposed of in the divorce decree which was *res adjudicata* as to all questions raised in that proceeding.

“The principal question for review here is whether the judgment for appellants secured August 20, 1927, *v. Louis Scoda* was *lis pendens* the divorce proceedings—if it was the appellant here are without title or interests and the circuit court in the partition proceedings was right in so decreeing.”

Her suit August 12.

Judgment August 20.

Service August 30.

“Under that statute (*lis pendens*) from the date of filing of bill appellants and all others had notice of pendency of the suit in equity affecting this real estate, and whatever rights appellants sought were made subject to the decree of the court in that case. Appellants did not intervene therein, although the record shows they filed notice of a motion to set aside the default against Louis Scoda but apparently abandoned it.”

The decree of the circuit court in the divorce proceeding is *res adjudicata* of the right of Fannie Zelic to the entire property.

Appellant cites *Sun Insurance Company v. White*, 123 C 196, 55 Pac 902. Respondent cites the same case

in support of his principal contention and distinguishes it from the case at bar on the following grounds. Plaintiff sued her husband for a divorce enumerating parcels of community property in her complaint. The subject property here was included in the enumeration. The trial court found the subject property not to be community property but the private estate of the husband. The court decreed all of the community property to the wife with leave to file for a supplemental decree as her needs may determine. Sun Insurance Company, although aware of the status of this divorce proceeding at all times, including knowledge of an order to the effect that the husband should not alienate or encumber except in the ordinary pursuits of his business, loaned money on the said property and took a mortgage which they attempted ultimately to foreclose. The suit here involves the determination of lien priority, either the wife's or the insurance company's.

The court holding was to the effect that a power to enter supplemental decree for alimony is not such as to constitute a lien on all of the property of a husband, and in substance her rights against the property are no better than those of a general creditor. Further, it stated approvingly as follows:

“Mr. Freeman, also, in his treatise on Judgments (section 196), after stating that the doctrine of *lis pendens* is applicable only when the object of the action is to affect specific property, and that the rules pertaining thereto have no applica-

tion in a suit for divorce and alimony, unless the wife designates in her complaint certain specific property which she seeks to subject to her claim, says: 'If the pleadings in a suit for divorce describe specific property, in respect to which relief is sought, either by making it chargeable with the payment of alimony, or setting it apart for the use of, or as the property of, one of the parties, or of partitioning or dividing it between them, the doctrines of *lis pendens* apply,' — citing in support thereof some of the same authorities. But the decisions in the cases cited by the appellant, as well as those cited by Mr. Freeman in support of his statement, will be found, upon examination, to have been made either by virtue of some statutory provision, or upon the peculiar circumstances of the case before the court. In some of the cases the decision was rendered upon the ground that the complaint alleged that the property therein described constituted all the property out of which alimony could be recovered.'"

It proceeds further to cite a series of cases completely and conclusively supporting the contention of the respondent here.

Lewis v. Lewis, 210 Ga. 330, 80 SE 2nd 312 cited by the appellant also we feel supports the respondent's case. In this case the trial court nonsuited the divorced wife in an action brought to cancel a deed from her former husband to his attorney of a house and lot which had been awarded to her and her children in the divorce proceedings.

On appeal this nonsuit was held to be error

“where it appeared that the property had been transferred to the attorney prior to the bringing of the divorce action, but at a time when the parties were separated, the agreed consideration being \$500 as a fee for services by the attorney in bringing a divorce action against the wife, and a purchase-money note of \$700, together with the assumption of a loan against the property. The appellate court noted that the attorney had never seen the property but accepted the value of the husband’s equity in it on information given him by the husband, and also knew that the property was occupied by the wife and her children, and held that whether knowledge of these facts was sufficient to raise a reasonable suspicion in the attorney’s mind that the husband’s object was to defeat the wife’s possible claim for alimony should have been submitted to the jury. The court pointed out that even though the deed was made upon a valuable consideration, if the grantee had knowledge that it was made by the husband with the intent to defraud his wife, the jury would be authorized to cancel the deed.”

Thies v. Thies, 111 Neb. 805, 198 NW 151, cited by the appellant is distinguishable from the case before this court largely on the same theory as that of the Sun Insurance case. In the *Thies* case, an attorney took a mortgage on a certain piece of land, while the divorce action was pending against the husband. The wife did not join in the mortgage nor did she specify in the complaint the setting aside to her of the subject land either

as specified alimony or under other personal claim. The question involved was whether the mortgage was to prevail against a later claim for alimony and attorney's fees.

Appellant makes further point on his behalf of *Adamson v. Adamson*, 55 Utah 544, 188 Pac. 635. Respondent feels this case should properly be cited for the respondent.

In this case several divorce proceedings had been started by either the husband or the wife in the period between 1909 and 1916. In March 1916, they owned a parcel of land valued at \$2500. The parties were separated and the husband had been trying for sometime to sell this parcel of property. The wife consistently refused to join in any conveyance with the husband. He finally sold his one-half to his father for \$1250, acknowledged to be a fair value for the one-half of the land, on terms of \$250 down, \$500 before the end of the year, and the final \$500 the following year. In 1917 this action in divorce and to set aside the conveyance to the father was instituted.

The plaintiff wife contended the conveyance was made to defraud her of her interest. The court, in sustaining the rights of the father, declared as follows:

“The testimony in this case strangely tends to show defendant, Adamson Senior, purchased the property in good faith, and the testimony is quite conclusive that he paid for it all that it was

worth. The fact that the amount paid was in installment is not conclusive of fraud. At best it only raises a presumption."

III. LIS PENDENS GIVES NOTICE TO ALL THE WORLD OF CLAIM IN THE PROPERTY NAMED, AND ANY PERSON TAKING SUBSEQUENT TO THE RECORDING OF LIS PENDENS TAKES SUBJECT TO THE RIGHTS OF THE PARTIES AS DETERMINED BY DECREE IN THE ACTION NAMED.

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The first sentence is so universally accepted as law it requires no further support. The effect of a lis pendens as adapted to the case at bar is exhaustably discussed in *Goodson et al v. Lehman*, (N.C.) 35 SE2d 623, 165 ALR 510. In the Goodson action the plaintiff brought suit in July 1943 and recorded a lis pendens. At the time of trial defendants demurred and moved for a nonsuit. The court overruled both and ultimately found for plaintiffs on the issues. Defendants appealed and were sustained on the appeal. The appellate opinion was certified to the trial court on or about December 5, 1944. The judgment was entered January 15, 1945. On December 1944, the defendants in the first action, holding by virtue of the contested deed, conveyed to the defendants in this action.

On January 15, 1945, the plaintiffs in the former proceedings brought a new action on the same cause seeking the same relief, alleging additionally that the defendants personally knew all of the facts and also were purchasers pendente lite on the old lis pendens. The defendants in the second action demurred contending that it appears on the face of the pleading that at the time they took title the lis pendens was in force since a judgment of reversal was final, ending the cause and the effectiveness of the notice of lis pendens, thereby giving them the status of an innocent purchaser without notice.

The court gives two pages of reasons sustaining the effectiveness of the lis pendens recorded in the first action through the second cause but significantly adds the following:

“Equally decisive on the point, however, is the circumstance to which appellants seem to be inadvertent. It is that plaintiffs have not relied solely on the original notice of lis pendens, although they they have pleaded it, but have alleged that defendants had actual knowledge of plaintiffs rights and equities in the land at the time they acquired title.”

CONCLUSION

Defendant-cross complainant is justifiably entitled to the relief granted by the court. In the light of Judge Van Cott's observations with respect to appellant, it is charity to say no more about appellant's good faith.

We feel the effects of lis pendens together with, or apart from the fact of personal knowledge in the appellant; the fact of the property being in the jurisdiction of the court at all times involved; and the significant principle of res adjudicata of the claims of the appellant as settled in the second divorce action, are compelling of no other conclusion than that of sustaining the trial court. If, however, the court should see fit to reverse decision of trial court, it is submitted that this cause must be remanded for further trial in that the Defendant-cross complainant has not yet had the opportunity to present a defense to plaintiff's action in which the Honorable A. H. Ellett is a witness to testify essentially to the substance of the question propounded to plaintiff Glynn by Mr. Dean Conder on transcript page 54, lines 7-10.

Respectfully submitted,

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