1967

Donald L. Steadman and Donna B. Steadman, His Wife, and Norma E. Steadman v. Lake Hills, a Corporation and M. M. Merrill, and Lester M. Johnson and Johnson , Enterprises, Inc., Successors In Interest : Appellants' Petition and Brief For Rehearing

IN THE SUPREME C
OF THE
STATE OF UT

DONALD L. STEA
DONNA B. ST
his wife, and
NORMA E. ST

FILED

NOV 16 19

Clerk, Supreme Court, Utah

PARSONS, BEHLE, EV
& LATIMER
STEWART M. HANSON, JR.
520 Kearns Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD L. STEADMAN and
DONNA B. STEADMAN,
his wife, and
NORMA E. STEADMAN,
Plaintiffs-Respondents,
vs.
LAKE HILLS, a corporation, and
M. M. MERRILL, and LESTER M.
JOHNSON and JOHNSON
ENTERPRISES, INC.,
successors in interest
Defendants-Appellants,

Case No.
10779

APPELLANTS' PETITION AND BRIEF FOR REHEARING

Appellants respectfully petition this court for a rehearing in this matter on the grounds set out below and in support thereof submit the following brief.

1) This court erred in stating that the lower court "found that plaintiffs were entitled to attorney's fees." The lower court made no such finding and erred in failing to do so. This court erred in failing to reverse on this ground.

2) This court erred in holding that "the defendants had an obligation to see to it that proper findings of fact, conclusions of law and a decree were entered in the cause."

3) This court erred in holding that "the defendants elected by their stipulation to go to trial on the issue of attorney's fees rather than proceeding to have a final judgment entered pursuant to the first hearing."

4) This court erred in stating that the defendants were in default under the mortgage. The defendants were in fact not in default and the lower court made no finding of fact that they were in default upon which to base its judgment.

5) This court erred in failing to consider or even mention the various contentions made by defendants on appeal.

STATEMENT OF FACTS

A more complete statement of facts is found in Appellants' Brief but most of the facts important to this petition are briefly given here.

This action was brought by plaintiffs to foreclose a mortgage entered concurrently with an escrow arrangement providing thirty days grace for the annual installments due under the mortgage. After a trial on the merits the court rendered judgment of "no cause of action." Because the court failed and refused to make findings of fact and conclusions of law, no written judgment was entered.

Nearly five years later the plaintiffs filed a supplemental complaint asking for attorney's fees in their original foreclosure action. In order to clear the title to the property involved to facilitate a pending sale, a stipulation was entered into under which the supplemental complaint was dismissed and $5000.00 paid into court pending a hearing on the right to attorney's fees. After a hearing pursuant to this stipulation, the lower court awarded the plaintiffs $3500.00 as attorney's fees without making any finding that defendants were in default or that plaintiffs were entitled to attorney's fees. It is from this award of attorney's fees that this appeal was taken.

By its opinion filed October 27, 1967, this court upheld the ruling of the lower court. This court's opinion makes certain statements and holdings which are in error. In addition the opinion fails to consider or even mention the various contentions raised by defendants on this appeal.

ARGUMENT

POINT I

THIS COURT ERRED IN STATING THAT THE LOWER COURT "FOUND THAT PLAINTIFFS WERE ENTITLED TO ATTORNEY'S FEES."

The lower court, in awarding attorney's fees to plaintiffs, made only one finding of fact. That finding states that $3500.00 is a reasonable attorney's fee. (R. 77). There is no finding that plaintiffs

were entitled to attorney's fees as stated in this court's opinion. There is no finding that defendants were in default under the mortgage or that the mortgage provided for attorney's fees in case of default. There is no finding that the successors-in-interest, Lester N. Johnson and Johnson Enterprises, Inc., had assumed the obligation to pay attorney's fees. There is no finding that plaintiffs did not waive their right to attorney's fees by accepting subsequent payments under the mortgage.

This failure of the court to make sufficient findings to support the judgment is reversible error according to past decisions of this court. *LeGrand Johnson Corp. v. Peterson*, 18 Utah 2d 260, 420 P.2d 615 (1966); *F.M.A. Financial Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965); *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 285, 286 (1954); *In re Thompson's Estate*, 72 Utah 17, 35, 269 Pac. 103, 109 (1927).

This court inconsistently refuses to grant finality to the lower court's original decision of "no cause for action" because no findings of fact were made and then upholds the later ruling in spite of the lack of findings to support that ruling.

POINT II

THIS COURT ERRED IN HOLDING THAT "THE DEFENDANTS HAD AN OBLIGATION TO SEE TO IT THAT PROPER FINDINGS OF

FACT, CONCLUSIONS OF LAW AND A DECREE WERE ENTERED IN THE CAUSE."

It is common practice for attorneys to prepare findings of fact, conclusions of law and a decree for the judge to sign. However, the duty to make findings and conclusions rests on the court. Rule 52(a), UTAH RULES OF CIVIL PROCEDURE. In this case proposed findings and conclusions were submitted to the court for signature but the court refused to sign them until the parties agreed upon findings and conclusions. It was error for the court to shift this burden to the parties when they have no power to require the court to sign the findings and conclusions submitted.

Because no findings and conclusions were signed the parties were left to rely upon the court's minute entry of "no cause for action". After five years delay, during which defendants relied upon the original ruling and changed their position because of it, it is inequitable to allow an award of attorney's fees contrary to that ruling. The principles of waiver, estoppel and laches should bar any such award.

POINT III

THIS COURT ERRED IN HOLDING THAT "THE DEFENDANTS ELECTED BY THEIR STIPULATION TO GO TO TRIAL ON THE ISSUE OF ATTORNEY'S FEES RATHER THAN PROCEEDING TO HAVE A FINAL JUDGMENT ENTERED PURSUANT TO THE FIRST HEARING."

Obviously, to have a final judgment entered pursuant to the first hearing would require another hearing before the court. The defendants merely stipulated that such a hearing be held. The purpose of the stipulation was to have the action against the property dismissed in order to clear the title to the property. The stipulation was not to determine the reasonableness of attorney's fees but "the entitlement of plaintiffs to attorney's fees." (R. 55). To determine the "entitlement" or right of plaintiffs to attorney's fees, it must necessarily be determined whether a final judgment should have been entered pursuant to the first hearing.

Defendants did not elect to give up any of their rights under the original ruling of the court. Rather, they sought only to preserve those rights. If findings and conclusions should have been entered pursuant to the original ruling of the court, that was an issue to be determined by the court at the second hearing pursuant to the stipulation. There was no election to forego this issue and the stipulation cannot reasonably be so construed. Neither plaintiffs nor defendants understood or claimed that defendants were giving up their rights. For this court to volunteer that conclusion without any findings or conclusions thereon, or any basis in the record, or any claim to that effect by either party, is error.

POINT IV

THIS COURT ERRED IN STATING THAT THE DEFENDANTS WERE IN DEFAULT UNDER THE MORTGAGE.

This point requires a great deal of argument for which reference is made to Point I of Appellants' Brief and Point I of Appellants' Reply Brief, which were overlooked in the opinion of this court. Here a couple of observations will be made. First, the lower court made no finding of fact that defendants were in default under the terms of the mortgage. As stated in Point I of this brief, such a finding is necessary to support both the lower court's judgment and this court's opinion. The lack of such a finding is reversible error.

Secondly, the mortgage was limited by the terms of the escrow agreement which allowed a thirty-day grace period for the annual installments. The annual installment was paid within this grace period so there was no default. This contention is supported by the authorities cited on page five of Appellants' Reply Brief to the effect that the mortgage and escrow agreement must be read together to determine the intent of the parties, *Wallace v. Build, Inc.*, 16 Utah 2d 401, 402 P.2d 699 (1965), *Strike v. Floor*, 97 Utah 265, 92 P.2d 867 (1939), 17 AM. JUR. 2d *Contracts* § 264 (1964); the practice of paying and receiving all installments through the escrow agent both before and after the action was commenced indicates an intent to be bound by the terms of the escrow agreement, *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86, 91 (1963), *Hardinge Co. v. Eimco Corp.*, 1 Utah 2d 320, 266 P.2d 494 (1954), 17 AM. JUR. 2d *Contracts* § 274 (1964); and any right to receive the annual installments by April 15, the due

date provided in the mortgage, was waived by the acceptance of every installment prior to 1961 aftr April 15 (R. 24), *McBride v. Stewart*, 68 Utah 12, 249 Pac. 114, 116 (1926).

In the face of the manifest intent and practice of the parties, and the applicable law, it is incongruous and unjust to hold that the defendants were in default. Moreover, the lack of a finding of fact to this effect requires this court to reverse the lower court.

POINT V

THIS COURT ERRED IN FAILING TO CONSIDER OR EVEN MENTION THE VARIOUS CONTENTIONS MADE BY DEFENDANTS ON APPEAL.

In Appellants' Brief, originally submitted to this court, six separate points were set out, discussed and supported by ample authority. In Appellants' Reply Brief these same six points were again set out in different form, discussed and supported by further authorities in order to reply to the contentions of respondents. Yet, this court's opinion fails to consider or even mention any one of these six points. Appellants submit that each of these points is meritorious and sufficient to reverse the judgment of the lower court and therefore deserves due consideration by this court. From the court's failure to mention these points in its opinion, appellants can only conclude that they have not been given the due consideration they deserve.

The opinion does refer to the lack of finality of the lower court's original ruling of "no cause for action." But it does not deal with appellants' contention that this original ruling was required by the facts and the law and therefore the later judgment for attorney's fees is erroneous.

The opinion also fails to consider the claim that plaintiffs were barred from any claim to attorney's fees because of the principles of waiver, estoppel and laches. Each of these principles is clearly established in this case and therefore should be considered by the court.

The lower court's entry of a nunc pro tunc order upon ex parte application and after five years delay without a showing of clerical error was highly irregular and deserves consideration by this court. The same can be said for the fact that the second hearing was before a different judge than the one that originally heard the case.

Appellants' claim that the lower court's judgment is not supported by the findings of fact and conclusions of law is well supported in Point I of this brief and in appellants' two prior briefs. This claim was also not considered nor mentioned in this court's opinion.

The final point of unreasonableness of the amount of the attorney's fee awarded in this case also deserves some consideration because it depends not only upon the amount of time spent by plaintiff's attorneys but also upon the nature and amount of,

and the basis for, the judgment of the court. A judgment of "no cause for action" is not a basis for attorney's fees.

Since these matters have apparently not been considered by this court, a rehearing is necessary to give them due consideration and to prevent injustice.

CONCLUSION

For the reasons above stated, appellants respectfully pray that this court grant a rehearing in order that this court may reconsider its opinion herein and also consider the matters raised by appellants but not mentioned in the court's opinion.

Respectfully submitted,

BACKMAN, BACKMAN
& CLARK
RALPH J. MARSH
Attorneys for
Defendants-Appellants

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.