1963

Edwin F. Russell v. Grant L. Valentine : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

EDWIN F. RUSSELL,
Respondent,

vs.

GRANT L. VALENTINE,
Appellant and Petitioner.

Case No. 9648

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING

Grant L. Valentine, appellant in the above-entitled matter, and petitioner herein, in accordance with Rule 76(e) Utah Rules of Civil Procedure, hereby petitions this Court to reconsider its initial opinion in the above-entitled matter filed on the 3rd day of December, 1962, with relation to the issues hereinafter set forth, and based on this Petition to rehear and determine such issues; as grounds for this Petition, petitioner respectfully urges that the Court, in its opinion, erred in its determination of both fact and law in the following particulars:

1. In the determination of fact that Section 8 of the leasehold instrument (renewal clause) was ambiguous so

as to permit the introduction and admission of parol evidence;

2. In the determination of law that parol evidence may be received to vary and alter the terms of a written instrument and to create rather than cure an ambiguity with respect thereto.

WHEREFORE, your petitioner respectfully prays that this Court consider this petition and the brief annexed in support hereof, that the Court issue an order to rehear and determine the issues raised, and that upon rehearing, the Court enter its judgment reversing the decision of the lower Court.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

A full embodiment of the facts of this matter are not required as they relate to the Petition for Rehearing, the same having been set forth in the Brief of Appellant heretofore filed with the Court (see App. Brief, p. 2, 3).

It is adequate to say that plaintiff, in May, 1950, conveyed a leasehold estate in certain real property located in Weber County to Self-Service Enterprises, Inc., the Petitioner acquiring such leasehold interest through a series of assignments stemming from Self-Service. The writing under which the conveyance was made (Clause 8 thereof) provided that the lessee, or its assigns, held a *right to renew* the lease provided that the

latter met and satisfied specified conditions precedent (Exhibit 1). The petitioner fully performed such conditions (Exhibit 8).

It was asserted by respondent in the lower court and upon appeal that Clause 8 was ambiguous and unenforceable; particularly, it was claimed that the term or period of renewal could not be reasonably ascertained from the writing, necessitating the use of extrinsic testimony. The clause under attack states that:

> "8. If the Lessee shall keep, observe and perform all of the terms and conditions of this lease, on his part to be kept and performed, said Lessee shall have the right to renew this lease for a further period beginning as of the termination date of this lease, provided he shall notify the Lessor in writing thirty days prior to the terms of this agreement that he desires such renewal and provided further, that he shall sign or offer to sign a new lease upon the same terms and conditions as are herein contained."

The District Court found the entire clause to be unenforceable and void for ambiguity and that any renewal thereof, required further negotiation and execution, by conveyance, of a new estate (R. 22, 23). This Court, by its initial opinion, affirmed the Findings and Judgment of the lower court. It is to that opinion that this brief is directed.

STATEMENT OF POINTS

POINT I.

THE DETERMINATION THAT CLAUSE 8 OF THE LEASE IS AMBIGUOUS AND UNENFORCEABLE IS ERRONEOUS.

a. *The Plain Meaning of Such Clause is to and can be Gauged by the Terms of the Conveyance.*

POINT II.

THE OPINION OF THE COURT PERMITS PAROL TESTIMONY TO CREATE RATHER THAN EXPLAIN THE ALLEGED AMBIGUITY IN THE LEASEHOLD INSTRUMENT.

a. *The Effect of the Decision is to Void Rather Than Interpret the Writing.*

ARGUMENT

POINT I.

THE DETERMINATION THAT CLAUSE 8 OF THE LEASE IS AMBIGUOUS AND UNENFORCEABLE IS ERRONEOUS.

a. *The Plain Meaning of Such Clause is to and can be Gauged by the Terms of the Conveyance.*

The leasehold instrument unde consideration contains nine (9) paragraphs, each devoted to a separate purpose, each performing a separate function as a part of the integrated lease. The purpose and function of Clause 8 could not be more pronounced, that is, the lessee upon performance of the conditions of the lease and upon proper notice, was granted an option to renew upon the terms and conditions of the initial conveyance. The Clause is susceptible to no other construction; the Opinion of the Court finds otherwise, however.

Why, it should be queried, is it to be presumed that the lessor was engaged in a penmanship exercise in giving the lessee the right to renew; that Russell didn't intend to grant that for which the writing calls? The quick answer to this is that there is no presumption to that effect — that, in law, an individual is presumed to have given meaning to a writing rather than that which is meaningless. One need only turn to the writings of Wigmore for support of this rule of construction:

> "When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." Wigmore on Evidence, 3rd Ed. 2425.

The judicial policy underlying the presumption that a written declaration by a party is to be given effect is well put by Henroid, J., in *Jensen's Used Cars* v. *Rice*, 7 U.2d 276, 323 P. 2d 259 (1958), wherein it was announced:

> "* * * but it is also elementary and of extreme practical importance that we hold contracting parties to their fair and understandable language deliberately committed to writing and endorsed by them as signators thereto. * * * It is not unreasonable to hold one responsible for language which he himself expouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties."

There is little risk attached in saying that this axiom of construction is the life blood of the parol evidence rule.

It is said by the Court in paragraph 4 of its opinion that Clause 8 of the subject Lease is so ambiguous and uncertain that extraneous evidence should be received to determine the "intention of the *parties*" (*a statement made in light of the fact that Clause* 8 *is a grant by the Lessor, Russell, to the Lessee and if spoken orally, could eminate only from the mouth of the Lessor*). The Opinion, in paragraph 2 thereof, sets forth Clause 8 in full and emphasis is given to the following phrase:

> "* * * said Lessee shall have the *right to renew this lease for a further period* * * *"

Petitioner is in accord with the Court that this phrase, indeed, is the keynote to a proper understanding and interpretation of the Clause. It, by chronology, may be digested word by word for its formal meaning and such has been accomplished by Petitioner in his Brief on Appeal (see App. Brief, pp. 8-11). At the outside and in its most strained atmosphere, the phrase grants to the lessee a privilege, a power (which he would not otherwise have), a right to lawfully possess the leasehold estate for a time exceeding the original term; there is but a single, unitary period set forth in the writing which requires a ten (10) year "term", and that provision is found in the granting clause on page 1 of Exhibit A:

> "* * * for the *term* of ten years".

Ordinary parlance gives "period" and "term" a congeneric meaning. *Martinez* v. *Rocky Mountain & S. F. Ry. Co.,* 47 P.2d 903 (N.M. 1935). Applying the canon of the "last antecedent", *Dunn* v. *Bryan,* 77 Utah 604, 299

Pac. 253 (1931), in ascertaining the demeanor of the word "period" at the end of the phrase emphasized by the Court, it is implicit that reference is made to the original "ten year term".

But the opinion of the Court, in paragraph 4, does not arrest its treatment of the emphasized phrase with a discussion of the integrated sentence; rather, it takes *out of context* four words "for a further period" which, it is said, is the focal point:

> "The crux of the matter is the phrase 'for a further period' ".

This prepositional phrase is then said to convey an infinite number of meanings, for example, "one day, one week, one month, one year, and so on". Petitioner concurs that these four words, standing alone, aided by no other portion of Clause 8, and aided by no rules of construction, would have a host of varied responses. But is this a proper test at all?

Petitioner submits that it is not; that an adherence to this norm of construction would render every provision, condition or statement of every writing *ambiguous, uncertain and unenforceable.* This approach might have been in vogue in the day of the Sophists but not at the common law; it ignores the canon that a writing is interpreted as a whole (see Restatement of Contracts 235(c)), the rule of *pari materia,* and the doctrine of the last antecedent. *Dunn v. Bryan,* supra. It overlooks the decisions of this Court in *Ephriam Theatre Company* v. *Hawk,* 7 U.2d 163, 321 P. 2d 221, and *Wilson* v. *Gardner,* 10 U.2d

89, 348 P. 2d 931 (1960); in the latter case it was declared:

> "In considering a written instrument it is a judicial function to interpret a written contract which is free from ambiguity and does not require oral testimony to determine its meaning. *Ambiguity in a written instrument does not appear until the application of pertinent rules of interpretation to the face of the instrument* leaves it generally uncertain which one of two or more meanings is the proper meaning." (Emphasis ours).

Admittedly, Clause 8 is not a shining spectacle of draftsmanship at its best; it could be more certain in its definition or explanation of:

> "the right to renew this lease for a further period".

It could have specified the year, month, and day that the right of renewal ran. The fact that it did not so specify does not render it so ambiguous, when considered with the other portions and clauses of the lease, as to permit a traverse outside of the written instrument. The last phrase in Clause 8, itself, resolves any doubt that the lessor granted lessee a right to renew under the same "terms and conditions" as the primary writing:

> "provided * * * he shall sign or offer to sign a new lease upon the same terms and conditions as are herein contained."

It would be a parody of the worst kind to say that the clause above quoted did not refer to all other elements of the lease, including the original term of ten years. Clause 8 needs no crutch from parol evidence to portray its intent.

POINT II.

THE OPINION OF THE COURT PERMITS PAROL TESTIMONY TO CREATE RATHER THAN EXPLAIN THE ALLEGED AMBIGUITY IN THE LEASEHOLD INSTRUMENT.

a. *The Effect of the Decision is to Void Rather Than Interpret the Writing.*

Once parol evidence was determined to be necessary in order to clarfy the alleged ambiguity arising out of Clause 8, its only legitimate function, when admitted, was to explain and illucidate the nature of Petitioner's right of renewal. *Farr* v. *Wasatch Chemical Co.,* 105 Utah 272, 143 P.2d 281 (1943). For if all else be uncertain, there is no question but that Clause 8 was a "renewal" clause and that the lessee was granted the "right to renew" by Russell. The findings of the trial court, approved in this Court's initial Opinion, do much more than penetrate Clause 8 to give certainty to the uncertain. The findings eradicate the clause from the lease entirely; in effect, it denies petitioner any *right to renew* whatsoever, and places him in a position as though the writing never contained any renewal language.

Finding No. 8 of the lower court provides in part:

> "8. The Court further finds that the provisions * * * of the Lease referring to renewal * * * are ambiguous and incapable of enforcement, and that any extension, or *renewal* * * * would require *negotiations* and execution of a new lease * * *". (Emphasis added)

The finding, in itself, is contradictory for it acknowledges the existence of a "right to renew" and yet re-

quires negotiation of all elements. Such result compounds any ambiguity formerly existing instead of clarifying it and reserves to the lessee nothing that he would not have possessed had there been no lease at all. It gives license to be done that which the Supreme Court of Washington has said can not be done:

> "Parol evidence is never admissible to create an ambiguity, but *only to explain or remove an ambiguity* apparent on the face of the instrument, or to identify a subject matter otherwise uncertain." *Van Doren Roofing & Cornice Co.* v. *Guardian Cas. & Guaranty Co.,* 99 Wash 68, 168 P. 1124.

It was the theme of Russell, in the trial court, not only to contradict the terms of Clause 8 of the lease by parol testimony, but also to show such language to be confusing. The use of oral testimony in the case at bar serves as an acid test for the soundness of the parol evidence rule, for after its admission, the written instrument was still the best evidence of the lessor's intent in granting the "right to renew". In *Washington Fish & Oyster Co.* v. *Halferty & Co.,* 269 P.2d 806 (Wash. 1954), after determining that patrol testimony, received to clarify an ambiguity in a contract, was confusing and in conflict, the Washington Court stated:

> "* * * this case is an illustration of the soundness of the rule (parol evidence rule) — that the writing still remains the best evidence of the understanding of the parties and of the terms by which they intended to bind themselves. The parol evidence of the parties admitted by the court was either conflicting or confusing as to the intent of the parties. * * *"

It is submitted that it was erroneous to allow parol evidence to cause the ambiguity and predicated thereon, to deny Petitioner a "right" which Clause 8 quite clearly afforded him.

CONCLUSION

That the Court, based on the Petition and Brief of Grant L. Valentine, order a rehearing in the case at bar; that upon reconsideration, the Court reverse the judgment of the trial Court as to the issues raised by this appeal.

Respectfully submitted,

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