

1983

Granada, Inc., Utah Corporation v. George Tanner and Ida Tanner Hamblin : Brief of Appellants

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.E.J. Skeen; Attorneys for Defendants and Appellants

Recommended Citation

Brief of Appellant, *Granada Inc. v. Tanner*, No. 19247 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4163

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 -) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

GRANADA, INC., a Utah
Corporation,

Plaintiff and
Respondent,

vs.

GEORGE TANNER and IDA
TANNER HAMBLIN,

Defendants and
Appellants,

and

STANLEY H. WALKER, Utah
County Treasurer,

Defendant.

Supreme Court No. 19247

BRIEF OF APPELLANTS

E. J. SKEEN
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street, Suite 1600
Post Office Box 3400
Salt Lake City, Utah 84110-3400

Attorneys for Defendants and
Appellants.

CULLEN Y. CHRISTENSEN
CHRISTENSEN, TAYLOR & MOODY
55 East Center Street
P. O. Box 1466
Provo, Utah 84603

Attorneys for Plaintiffs and
Respondents.

TABLE OF CONTENTS

Cases Cited	ii
Authorities Cited	iii
Statement of Kind of Case	1
Disposition in Lower Court	1
Relief Sought on Appeal	2
Statement of Facts	2
Argument	
I. THERE ARE GENUINE ISSUES OF MATERIAL FACTS RAISED BY THE PLEADINGS AND AFFIDAVITS	6
II. THE AFFIDAVITS IN SUPPORT OF THE PLAINTIFF'S MOTION DO NOT MEET THE REQUIREMENTS OF RULE 56 OF THE RULES OF CIVIL PROCEDURE	12
III. A PART OF THE AMENDED SUMMARY JUDGMENT IS VOID FOR WANT OF JURISDICTION AND OTHER PARTS ARE VOID FOR THE REASON THAT JURIS- DICTION WAS NOT PROPERLY INVOKED	15
Conclusion	16

CASES CITED

1.	<u>Colvin v. Weigold</u> , 31 Ariz. 370, 253 P. 633 . . .	10
2.	<u>Hampshire v. Wooley</u> , 72 Utah 106, 269 P 135 . . .	16
3.	<u>Hatch v. Sugarhouse Finance Co.</u> , 20 Utah 2d 156, 434 P.2d 758	14
4.	<u>Holbrook Company v. Adams</u> , (Utah) 542 P 2d 191 . .	14
5.	<u>Mining Co. v. Mining Co.</u> , 18 N.M. 153, 135 P. 78 .	11
6.	<u>Moise v. Timm</u> , 262 P. 535 (N.M.)	10, 11
7.	<u>Mollerup v. Storage Systems International</u> , 569 P. 2d 1122	10, 11
8.	<u>State ex rel. Anderson v. Kerr</u> , 51 Minn. 417, 53 N.W. 719	10
9.	<u>State v. O'Connor</u> , 6 N.D. 285, 69 N.W. 692	10
10.	<u>Stockyards National Bank of South Omaha v. Bragg</u> , 67 Utah 60, 245 P. 966, 973	15
11.	<u>Tanner v. Provo Reservoir Co.</u> , 99 Utah 158, 103 P. 2d 134	15
12.	<u>Upper Blue Bench Irr. Dist. v. Continental Bank and Trust Co.</u> , 93 Utah 325, 72 P 2d 1048	15
13.	<u>Walker v. Rocky Mountain Corporation</u> , 29 Utah 2d 274, 508 P. 2d 538	14
14.	<u>Western States Thrift and Loan Co. v. Blomquist</u> , 29 Utah 2d 58, 504 P 2d 1019	14

UTAH RULES OF CIVIL PROCEDURE

Rule 54(b), Utah Rules of Civil Procedure	6
Rule 56(c), Utah Rules of Civil Procedure	12
Rule 56(e), Utah Rules of Civil Procedure	13, 14
Rule 69(f), Utah Rules of Civil Procedure	8
Rule 69(f) (2), Utah Rules of Civil Procedure . .	5, 7, 11, 12
Rule 69(f) (3), Utah Rules of Civil Procedure . .	9, 12

OTHER AUTHORITIES

<u>50 C.J.S. Judicial Sales</u> , Sec 37c	10
<u>1 Freeman on Judgments</u>	15, 16

IN THE SUPREME COURT OF THE STATE OF UTAH

GRANADA, INC., a Utah Corporation,
Plaintiff and Respondent,
vs.
GEORGE TANNER and IDA TANNER HAMBLIN,
Defendants and Appellants,
and
STANLEY H. WALKER, Utah County Treasurer,
Defendant.

Supreme Court No. 19247

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is a suit by an alleged assignee of a right of redemption of real estate from a sheriff's sale against the assignees of the certificate of sale for a judgment determining that the plaintiff had rightfully redeemed the land.

DISPOSITION IN LOWER COURT

The trial court granted the plaintiff's motion for an amended summary judgment seeking a judgment directing the defendants to execute and deliver to the plaintiff a good and proper

certificate of redemption and directing the defendants to accept as consideration therefor the sum of \$84,366.00 theretofore paid to the clerk of the district court.

RELIEF SOUGHT ON APPEAL

The defendants and appellants seek the reversal of the amended summary judgment and remand of the case for an evidentiary trial on the merits.

STATEMENT OF FACTS

The plaintiff and respondent will be referred to in this brief as the "plaintiff" and the defendants, George Tanner and Ida Tanner Hamblin, will be referred to as the "defendants".

This suit involves a parcel of land in Utah County which was sold on May 26, 1981, at sheriff's sale pursuant to a decree of the district court entered in the case of First Security Mortgage Company v. American Tierra Corporation, et al, (R. 3, 4). On June 4, 1981, the First Security Mortgage Company, the purchaser of the land at the sheriff's sale, assigned to the defendants the certificate of sale. (R. 8, 9). On September 11, 1981, one Charles Moore, d/b/a/ Township Square, grantor, by warranty deed, conveyed the above mentioned land and other land to Granada Inc., grantee, subject to taxes and certain trust deeds, specifically described. (R. 10, 11).

There is attached to the complaint a document entitled "Assignment of Right of Redemption", which is undated, but acknowledged on November 24, 1981, assigning and transferring the right of redemption from Charles Moore, d/b/a Township Square and American Tierra Corporation. (R. 12 - 14).

It is alleged in the complaint that the transfers and assignments mentioned above had been made. It is then alleged:

"6. Immediately preceding the sheriff's sale and at all times material hereto, either Charles Moore, d/b/a Township Square or American Tierra Corporation ("American Tierra") was the owner of the Subject Property. Immediately following the sale either Charles Moore d/b/a Township Square or American Tierra was the owner of the right of redemption existing in connection with the Subject Property." (R. 4)

It is further alleged that on or about November 17, 1981, an agent of the plaintiff contacted an attorney whom was known to have represented the defendants and that the attorney said he would contact the defendants to find out what amount would be required to redeem. The attorney refused to inform the plaintiff as to the amount, but indicated the defendants "...intended to get the property back." (R. 5)

It is further alleged that on or about November 23, 1981, plaintiff, through its attorney, contacted Lieutenant Keith Bills of the Utah County Sheriff's Department and informed him that the plaintiff as successor to American Tierra was ready to redeem, that Tanner and Hamblin were disputing the right of

the plaintiff to redeem, and that they would not inform the plaintiff of the amount required to redeem. It is then alleged that Bills instructed plaintiff to pay the amount bid together with six percent to the Utah County Clerk and that this payment was made. (R. 5, 6).

A second cause of action alleges that "...economic injury" has and is being suffered by plaintiff as a result of the actions of Tanner and Hamblin...." (R. 6)

The defendants answered the complaint, denying the allegations as to certain contacts with the defendants' alleged attorney, and denied for lack of information the allegations regarding contacts with Lieutenant Bills of the Sheriff's office. (R. 20, 21).

The plaintiff filed a motion for partial summary judgment seeking an order directing the defendants to execute and deliver to the plaintiff a certificate of redemption and to accept from the Utah County Treasurer the funds which had been paid to the County Clerk. It is stated in the motion that the pleadings, exhibits, and affidavits show that there is no genuine issue as to any material fact. (R. 22, 23).

A memorandum in support of motion for summary judgment was filed to which was attached copies of the documents of transfer, a copy of the judgment of foreclosure (R. 31 - 34), an affidavit of Lieutenant Keith Bills (R. 39, 40), and affidavits of David K. Broadbent. (R. 44, 45, 46 - 48).

The defendants responded to the motion alleging that payment was tendered as required by Rule 69 (f) (2), Utah Rules of Civil Procedure; that payment to the County Clerk is permitted only if there is a disagreement as to whether any sum demanded for redemption is reasonable and proper, and that there was no disagreement, and that material issues of fact are raised by the affidavits of Lieutenant Bills, Mr. Tanner and Mrs. Hamblin. (R. 53 - 58)

The trial court granted the plaintiff's motion and made and entered a formal partial summary judgment which orders, adjudges, and decrees:

(1) that the plaintiff has taken all steps to redeem the property described in the complaint;

(2) that the defendants forthwith execute and deliver to the plaintiff a certificate of redemption;

(3) that the county clerk turn over the funds on deposit to the defendants;

(4) that if the defendants should fail, neglect, or refuse to deliver the certificate of redemption "...that this judgment shall stand and be a good sufficient, and complete conveyance and certificate of redemption from the defendants Tanner and Hamblin to the plaintiff...";

(5) that the title of the plaintiff against the defendants is quieted;

(6) that matters raised by the pleadings and not here adjudicated are reserved for further proceedings.

An appeal was taken from the partial summary judgment (Supreme Court No. 18906) It was dismissed on the ground that the order appealed from was not a final judgment, citing Rule 54(b), Utah Rules of Civil Procedure.

After the case was remanded, the parties stipulated that an order might be made by the district court dismissing the second cause of action for damages. An amended summary judgment was made and entered in the same form as the partial summary judgment, referred to above, except that it states that the second cause of action (damages) is dismissed without prejudice. There is, therefore, no issue in the case as to the finality of the judgment. (R. 61 - 65)

This appeal is from the amended summary judgment. (R. 68, 69).

POINT I.

THERE ARE GENUINE ISSUES OF MATERIAL FACTS
RAISED BY THE PLEADINGS AND AFFIDAVITS

The allegations of the complaint and answer are stated above under "Statement of Facts". It will be noted that in paragraph 6 of the complaint, quoted above on page 3, it is alleged that "...either Charles Moore d/b/a Township Square or American Tierra Corporation ("American Tierra") was the owner of the subject property..." immediately preceding the sheriff's sale and "...at all times material hereto." It is further alleged in the

same paragraph that either one or the other was the owner of the right of redemption. (R. 4)

The allegations of paragraph 6 are denied by paragraph 2 of the defendants' answer. This raises a genuine issue of fact as to the ownership of the land and the right of redemption. (R. 20)

The other genuine issues of material fact relate to the attempted redemption of the land by the plaintiff.

Rule 69(f) (2), which relates to the method of redemption, provides:

"Redemption--How Made. At the time of redemption the person seeking the same may make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale, or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer: (1) a certified copy of the docket of the judgment under which he claims the right to redeem, or, if he redeems upon a mortgage or other lien, a memorandum of the record thereof certified by the recorder; (2) an assignment, properly acknowledged or proved where the same is necessary to establish his claim; (3) an affidavit by himself or his agent showing the amount then actually due on the lien."

As stated in the affidavits of Ida T. Hamblin and George Tanner, no payment of the amount required for the redemption of the land, namely \$84,366.00, was made to them or to either of them, on or before the expiration date of the redemption period or at all, and no money in any amount was tendered. (R. 55 - 58). In fact there was no direct communication, written

or oral, between a Granada representative and either George Tanner or Ida Hamblin before the expiration of the redemption period.

No payment or tender was made to the officer who made the sale or his successor as required by the rule quoted above. The affidavit of Lieutenant Keith Bills, attached to the Motion for Summary Judgment, states that he had a telephone conversation with David K. Broadbent, attorney for Granada, in which Mr. Broadbent indicated that Granada, Inc., was ready to redeem the property sold by affiant at sheriff's sale, and that Mr. Broadbent had asked the Attorney for George Tanner and Ida T. Hamblin which amount would be required for redemption of the property.

It is stated:

"Mr. Broadbent also informed Affiant that Tanner and Hamblin refused to give an amount and in fact disputed the right of Granada, Inc., to redeem the property."

It is further stated in the Affidavit:

"Affiant responded that he had heard that Tanner and Hamblin were trying to obtain interest in addition to the amount provided in Rule 69(f), Utah Rules of Civil Procedure, and that in any event since the amount was not agreed upon he would be unable to accept the funds tendered. Affiant informed Mr. Broadbent that he should deposit the amount of eighty-four-thousand-three-hundred-sixty-six dollars (\$84,366.00) (the amount paid by the purchaser at sale plus 6%) with the Utah County Clerk, since that is the procedure required by the Utah Rules of Civil Procedure when there is a dispute regarding redemption." (R. 39, 40).

The Affidavits of George Tanner and Ida T. Hamblin state specifically that at no time before the expiration of the period of redemption did Mr. Broadbent contact them personally or by telephone regarding the amount of money required for redemption and that they had never refused to "give an amount". The affidavits also state that they had never told Lieutenant Bills or anyone else in the sheriff's office that they disputed the amount required for redemption or that they disputed the right of Granada, Inc., to redeem. (R. 55 - 58)

The second paragraph of Rule 69(f) (3) provides:

"In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court a petition setting forth the item or items demanded to which he objects, together with his grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the petition and order fixing time for hearing shall be served on the purchaser not less than two days before the day of hearing. Upon the hearing of the objections the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption."

As indicated in Rule 69(f) (3) (second paragraph), the only right of a redemptioner to pay money to the court is ".... In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper...." (Emphasis added.)

A reading of the affidavit of Lieutenant Bills and the entire record does not disclose any disagreement as to whether the sum demanded was reasonable and proper. That affidavit only says that Mr. Broadbent said that Tanner and Hamblin (1) refused to give an amount and (2) disputed the right of Granada to redeem. (R. 39, 40)

There is clearly an issue of fact as to whether there was any disagreement as to the amount required for redemption. This is obviously a material issue because the rule requires a disagreement before money can be paid to the court.

A right of redemption from a judicial sale is a statutory right, the nature of which was considered by the Supreme Court of Utah in the case of Mollerup vs Storage Systems International, 569 P.2d 1122. It is stated:

"The right of redemption is not an equitable right created or regulated by principles of equity but rather is a creature of statute and depends entirely on the provisions of the statute creating the right. U.C.A. 1953, 78-37-6."

In footnote No. 3 on page 1124, the Court cites the following:

"50 C.J.S. Judicial Sales Sec. 37c; Colvin v. Weigold, 31 Ariz. 370, 253 P. 633; State ex rel. Anderson v. Kerr, 51 Minn. 417, 53 N.W. 719; State v. O'Connor, 6 N.D. 285, 69 N.W. 692."

A case closely in point, which involved a tender of the redemption money to the clerk of the court as in this case was decided by the Supreme Court of New Mexico, Moise v. Timm, 262 P. 535. It is stated in the opinion:

"It seems clear that under this statute the redemption payment is to be made to the purchaser or his assign, and that, unless we are to enlarge the right by construction, a tender made to the clerk of the court is ineffectual.

"'As a general rule we agree that a statutory right of redemption is to be favorably regarded, but, it is statutory right that is not to be enlarged by judicial interpretation. We cannot extend the time allowed for redemption nor waive any condition attached to the statute.'" Mining Co. v. Mining Co., 18 N.M. 153, 135 P. 78.

"So it seems that the trial court erred in basing judgment upon payment or tender to the clerk."

In summary, the affidavits in support of the motion for partial summary judgment, and the affidavits of Mr. Tanner and Mrs. Hamblin in opposition thereto, definitely show that no tender or payment of any money was made to either the "...person from whom the property is being redeemed or for him to the officer who made the sale..." as required by Rule 69(f) (2). The affidavits in opposition show conclusively that there was no contact with the assignees of the certificate of sale by any representative of Granada and there is nothing in the record to show any disagreement as to the amount required for redemption.

The law in this State is clear that "...the right of redemption must be exercised in strict accord with statutory terms...". It was not so exercised and the motion for amended summary judgment should have been denied. Mollerup v. Storage Systems International, supra.

There is a good reason why the rule requires a disagreement as to the sum demanded before permitting the payment of the redemption money to the clerk.

The defendants were not parties to the case in which the judgment was entered and the sheriff's sale was held. They were not already in court. The payment of money to the clerk resulted in plunging them into litigation which obviously would not have been necessary if Granada had paid the amount of money, \$84,366.00, to them. This sum could have been computed by simple arithmetic in accordance with Rule 69(f) (3), of the Utah Rules of Civil Procedure. If, after a tender, there was a dispute, the money could have been paid to the clerk.

If this amended summary judgment is affirmed, the provisions of Rule 69(f) (2) as to payment and tender can, in all cases, be ignored and payment made to the clerk.

POINT II.

THE AFFIDAVITS IN SUPPORT OF THE PLAINTIFF'S MOTION DO NOT MEET THE REQUIREMENTS OF RULE 56 OF THE RULES OF CIVIL PROCEDURE

Rule 56(c) provides in pertinent part:

"...the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The issues raised by the affidavits of Lieutenant Keith Bills and the defendants are discussed under the previous heading and will not be repeated here. However, the defendants contend that the Lieutenant Keith Bills' affidavit does not meet the requirements of Rule 56(e) which provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein...."

It will be noted that Bills' affidavit, quoted, in part, on page 8 of this brief is not made on personal knowledge, but is hearsay, and no pertinent part of it would be admissible in evidence. He gave legal advice to Broadbent based on what he had heard. (R. 39, 40).

The other affidavit in support of the plaintiff's motion for partial summary judgment, which was made by David K. Broadbent, one of the attorneys for the plaintiff, states that affiant contacted Bills and told him that plaintiff was prepared to redeem the property by paying the sum of \$84,366.00, and that Bills told him that such tender and payment would not be accepted because of an apparent dispute as to the amount. (R. 44, 45)

The pertinent part of this affidavit is hearsay and would not be admissible. Broadbent's affidavit does not show contact with either defendant for the purpose either of inquiring as to the amount due or paying or tendering payment. (R. 44, 45).

The following cases hold that an affidavit consisting of hearsay statements is insufficient:

Walker v. Rocky Mountain Corporation, 29 Utah 2d 274, 508 P.2d 538.

Western States Thrift and Loan Co. v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019.

The affidavits of George Tanner and Ida T. Hamblin, which are uncontradicted, state that neither of them was contacted by any representative of plaintiff about the redemption, neither had refused to "give" Broadbent the amount required for redemption, and neither had told him the amount was disputed. It is further stated that neither had had any conversation with Lieutenant Bills and did not tell Lieutenant Bills or any other person that they were trying to get additional interest. (R. 55 - 58).

An affidavit was made by Lawson O. Hamblin to the effect that in the afternoon of November 27, 1981, (the last day for redemption), he talked to Lieutenant Bills in person, at the Sheriff's office, and inquired as to whether any money had been paid to redeem the land and was told, "No one has tendered any money to me nor to this office to redeem that property." He said further that an offer to pay the money would have to be made by "12:00 midnight today". (R. 59, 60)

The requirements of Rule 56(e), quoted above, have not been met and there is nothing in the record to support the judgment that a redemption was made.

Holbrook Company v. Adams, (Utah) 542 P.2d 191.
Hatch v. Sugarhouse Finance Co., 20 Utah 2d 156,
434 P.2d 758.

POINT III

A PART OF THE AMENDED SUMMARY JUDGMENT IS VOID
FOR WANT OF JURISDICTION AND OTHER PARTS ARE VOID
FOR THE REASON THAT JURISDICTION WAS NOT PROPERLY INVOKED

The part of the summary judgment which directs the county clerk to pay the money on deposit to the defendants is void for lack of personal jurisdiction over the Clerk. The county treasurer was named as a defendant, but the county clerk was not so named. No process was served on the county clerk. There is no jurisdiction over the person and the judgment against the clerk is void.

Tanner v. Provo Reservoir Co., 99 Utah 158,
103 P.2d 134.

The defendants' second point under this heading is that the part of the judgment declaring that the judgment shall constitute a certificate of redemption and the part of the judgment quieting plaintiff's title against the defendants are void because the jurisdiction of the court was not properly invoked.

In the case of Stockyards National Bank of South Omaha v. Bragg, 67 Utah 60, 245 P. 966, 973, it was held:

"It is fundamental that a petition or pleading of some kind is the juridical means of investing a court with jurisdiction of subject matter to adjudicate it."

In this court's opinion in the case of Upper Blue Bench Irr. Dist. v. Continental Bank and Trust Co., 93 Utah 325, 72 P. 2d 1048, the following is quoted from 1 Freeman on Judgments, Section 388:

"...Mere possession of power to act in respect to a specific subject matter is of no consequence unless the power is properly invoked."

See also Hampshire v. Wooley, 72 Utah 106, 269 P. 135

In this case, the only allegation in the complaint of ownership of the land and the right of redemption is in paragraph 6, quoted above on page 3. It will be noted that it is in the alternative and is that either Moore or American Tierra own the land and redemption right. Apparently the plaintiff did not know who the owner was when the pleading was drafted. This allegation did not invoke the jurisdiction of the district court. There is no pleading to support a judgment quieting the plaintiff's title.

CONCLUSION

The amended summary judgment should be reversed for the several reasons set out above and the case should be remanded for an evidentiary trial.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: 

E. J. SKEEN
Attorneys for the Defendants and
Appellants
50 South Main Street, Suite 100
Post Office Box 3400
Salt Lake City, Utah 84110-3400

CERTIFICATE OF MAILING

Copy of the foregoing BRIEF OF APPELLANTS mailed,
postage prepaid, this 27th day of August, 1983, addressed
as follows:

Cullen Y. Christensen
CHRISTENSEN, TAYLOR & MOODY
55 East Center Street
P. O. Box 1466
Provo, Utah 84603

Stanley H. Walker
Utah County Treasurer
Provo, Utah 84601


Secretary