

1963

Kamas State Bank v. J. Buys Cummings and Mary Cummings et al : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Kamas State Bank v. Cummings*, No. 9798 (Utah Supreme Court, 1963).
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IN THE SUPREME COURT

of the

STATE OF UTAH

KAMAS STATE BANK,)	
A Utah Corporation,)	
)	Case No.
Respondent and Plaintiff,)	9798
)	
-vs-)	
)	
J. BUYS CUMMINGS and)	
MARY CUMMINGS, et. al.,)	
)	
Appellants and Defendants.)	

RESPONDENT'S BRIEF

STANLEY AND SMEDLEY

Attorneys for Respondent

IN THE SUPREME COURT

of the

STATE OF UTAH

KAMAS STATE BANK,
A Utah Corporation,

Respondent and Plaintiff,

-vs-

J. BUYS CUMMINGS and
MARY CUMMINGS, et. al.,

Appellants and Defendants.

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RESPONDENT'S BRIEF

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Attorneys for Respondent

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

For purpose of appeal we accept the
Statement of Facts set forth in Appellants'
brief.

GENERAL RESPONSE TO
APPELLANTS' BRIEF

At the outset Respondent would like to make the following observation about Appellants' Brief:

There appears to be a general effort on the part of the Appellants in writing their brief to cloud the issues by making continued reference to matters that are wholly irrelevant and immaterial.

First, Appellants refer, both directly and indirectly, to an insurance company. There is no insurance company, as a party, plaintiff or defendant, before the court and such references are wholly out of order and improper.

Second, Appellants take the position that in the commercial world third parties must look for and seek out the feelings of

all parties who are or might be affected by their acts. That is, third parties are bound to determine not only if parties are legally bound but must also see if they feel morally bound. For example:

"Respondent....made no effort....to determine whether or not the Appellants felt they had a binding option." In other words they are saying that Respondent is not to look to the law or precedent but to what each individual feels before it can act and have the protection of the law. This in essence destroys the long established principal of Stare Decisis.

ARGUMENT

I

THE AGREEMENT IS NOT A TRUE OPTION BUT
IN REALITY ONLY A RIGHT OF PRE-EMPTION OR

OF FIRST REFUSAL.

It is a well settled rule in this State as well as other jurisdictions that the agreement on which the Defendants claim their priority of interest is not a true option but only the right of "pre-emption" or of "first refusal" and that until the Bourgeois decide to sell, no option springs into being. In Chournos vs. Evona Investment Company, 93 Pacific 2nd 450, 97 Utah 335, the Court states "An option to purchase may be defined as a contract by which an owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a specified time. The land owner does not sell his land; he does not then agree to sell it; but he does then sell something,---viz., the right or

privilege to buy at the election, or option of the other party. The second party gets in praesenti, not lands, nor an agreement that he shall have lands, but he does get something of value; that is the right to call for and receive lands if he elects."

In this case the Court held that the provision giving a person the first opportunity to purchase the land did not constitute an option. For the individual did not have the "right to call for and receive lands if he elected." He only had this right after the owner decided to sell. In the case at hand until Bourgeois decided to sell, Mr. Cummings had no power to require him to do so. In *Re Rigby's Estate*, 167 Pacific 2nd 964, Wyoming Case, 1946; *James On Option Contracts*, Sections 101, 211, 212; *Williston*

On Contracts, Section 43, page 71, First Edition, Section 44, page 129 of Revised Edition; Restatement of Property, Section 393, comment f, and Section 413, comment b.

Until Mr. Bourgeois decided to sell, Mr. Cummings had no right or interest in the property and thus, when it became necessary for Mr. Bourgeois to borrow money on his property, the mortgagor, Kamas State Bank, had a right to take a first lien upon the property which would be good against all other parties who might claim an interest in the future. This includes the interest of J. Buys Cummings which at most could spring into being only after Bourgeois decided to sell. After Mr. Bourgeois had found it necessary to mortgage his property, possibly he was estopped to offer it for sale until

the mortgage had been cleared. In the event it became necessary for Mr. Bourgeois to sell in order to avoid the foreclosure action, then it would be impossible to perform, and it would seem that the individual who held the first right of refusal could at most have an action against Mr. Bourgeois for damages. In James On Option Contracts, 504, Section 1104, we read as follows: "If during the time he breaches the option agreement by repudiating the option, or by placing himself in a position where it is impossible for him to perform, it would seem the optionee has an action to recover damages arising from the breach of the option."

In as much as J. Buys Cummings had only a "pre-emptive right" or "right of first

refusal" he had no immediate interest in the land and thus, the mortgage created a first lien on the property. In fact, he had no true option until Bourgeois decided to sell.

II

A RIGHT OF PRE-EMPTION THAT ESTABLISHES A FIXED PRICE IS VOID.

In Simes On Future Interests, page 347, Section 102, we find the following under Pre-emption Conditions:

"Suppose A conveys land to B in fee on the express condition that B desires to sell he must first offer the land to A at the lowest price he is willing to accept from any other vendee. Or suppose the condition is that, if B desires to sell he must first offer the property to A at a fixed price, or at a price which is a percentage of, or lower than, he is willing to accept from anyone else. In the second case, it may be said that this is merely a qualified

forfeiture restraint on a fee simple and should be held void. There is authority to that effect. On the other hand, in the first case, where the restraint is to the effect that the grantee will first offer the property to the grantor at the lowest price which he will accept from anyone else, it would seem that marketability is not, in fact, restrained at all. The owner can sell to his grantor or to anyone else in the world at any price which he desires. The only restriction is that he cannot prefer any other vendee over his grantor."

Mr. Cummings' position clearly falls within the second case which should be held void. It is clearly distinguishable from the case of Cummings et. ux. vs. Nielson et. al., 42 Utah 157, which is quoted by Appellants in their brief, the case of Cummings et. ux. vs. Nielson et. al. falling within first case which is valid as contrasted with the second which is void.

In Brace vs. Black, 144 A 2nd 385, 51

New Jersey Super. 572, we have a case wherein the facts are basically that there was a pre-emption agreement, whereby the land owner, should he decide to sell land, would give to the other party the right and option to purchase for a stated sum, such right to expire with death of the party. The Supreme Court in holding the right of option invalid reasoned as follows: "The first matter to be considered is the validity of the so called option, which is really a mere right of refusal or right of pre-emption. The Court below held that the agreement was too vague and indefinite to be inforcible and that it was an unreasonable limitation on alienability.

"Restatement, Property, Section 413 (2), states:

'A promissory restraint or forfeiture restraint on the alienation of a legal estate in land which is in the form of a provision (a) that the owner of the estate shall not sell the same without first offering to sell to some designated person,....at a fixed price.....is valid if, and only if, the restraint is valid under rules stated in Section 406-411.'

"Section 404 thereof defines a promissory restraint on alienation as an attempt by an otherwise effective conveyance or contract to cause a later conveyance to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey.

"There is in the law a well-recognized policy of freedom of alienation of property. This is so embedded that restraints on alienation must be in some way justified in order to be upheld. In the Restatement under

Section 413, at page 2442, we find this illustration:

'A owning Blackacre in fee simple absolute makes an otherwise effective conveyance there "to B and his heirs, and B covenants for himself, his heirs, executors and assigns, that if C is still alive, he will not sell Blackacre without first offering Blackacre to C for \$5000.00." C is in being at the time of the conveyance. The promissory restraint is invalid.'

In the comment under Section 413, 2(a), we find the following at page 2444:

'When, by the terms of the restraint, the price at which the estate must be offered to the designated person is fixed or is to be a certain percentage of a third party's offer, there is substantial curtailment of the alienability of the land. A fixed price is usually set sufficiently low, in the light of possible developements, to enable the designated person to reap the benefits of any increase in value....the owner of the estate will be deterred from attempting to sell his property because of the improbability that he will realize the full market value. This hindrance to alienation brings these provisions within the rules

previously stated in Section 406-411.'

"Restatement, Property, Section 406, declares that a restraint on the alienation of a legal possessory estate in fee simple which is, or but for the restraint would be, indefeasible is valid if, and only if, among other things the restraint is reasonable under the circumstances.

"In a comment upon reasonableness under the foregoing section, at page 2407, various factors are set forth which might tend to support the reasonableness of unreasonableness of a restraint. It is pointed out that these factors are not exhaustive and that 'each case must be thoroughly examined in the light of all circumstances to determine whether the objective sought to be accomplished by the restraint is worth attaining at the cost of

interfering with the freedom of alienation or to determine whether the particular interference with alienability is so slight as not to be material.'

"'Restraints against alienation are not favored by law, but on the contrary there is a strong public policy in favor of the free transferability of property; and restraints thereon have been characterized as obnoxious to public policy and void.' 73 C.J.S. Property, Section 13, page 195.

"'All restraints on alienation run counter to the policy of freedom of alienation so that to be upheld they must in some way be justified.' Restatement, Property, Section 405, Comment.

"In the situation presented in this case there has been no adequate showing of purpose that the restraint on alienation

was to serve." *Brace vs. Black, Supra.*

A more complete reading of the Restatement of Property reveals the following: Section 406, Indefeasible Possessory Estates in Fee Simple.

f. Application---Restraints qualified only as to manner of alienation. If the full benefits which flow from the freedom to alienate what is or otherwise would be an indefeasible legal possessory estate in fee simple are to be obtained, the owner of such an estate must be able to take advantage of any of the existing methods of transferring property. Any restraint which interferes with the power to alienate in some manner, though it leaves the owner of the estate free to alienate in other ways, places a substantial hindrance in the way of the disposition of the property and the rule stated in this section prevents such interference.

Illustrations:

7. A owning Blackacre in fee simple absolute, makes an otherwise effective conveyance thereof "to B and his heirs, but if Blackacre is ever mortgaged, A or his heirs shall

have a right to re-enter and terminate the estate conveyed." The forfeiture restraint on Blackacre which prohibits only mortgage is invalid. B has an undefeasible estate in fee simple.

In essence the restraint in the case at hand prohibited for all practical purposes the mortgaging of Mr. Bourgeois' property.

And in Section 406, in n, pages 2412, 2413 we read as follows:

n. Application---Change in Circumstances. A restraint in the alienation of that which is or otherwise would be an indefeasible legal possessory estate in fee simple which fails to satisfy the requirements of Clauses (a), (b) and (c) at the time of its creation is invalid and is not made valid by a change in circumstances at any later date. If, however, the restraint at the time of its creation in the light of the circumstances which then exist, a change in circumstance which makes the enforcement of the restatement unreasonable renders it invalid. The restraint must not only be valid at its inception, but must pass the test for validity at the date when the enforcement of it is sought.

It is certainly evident that at the time Mr. Cummings attempted to take advantage of his right of first refusal, that the circumstances rendered the inforcement of the restraint unreasonable, and, thus, invalid. See also Maynard vs. Polhemus, 15 P 451; Falkenstein et. al. vs. Pipper, California case, 183 P 2nd 707; Crecents vs. Vernier, 204 P 2nd 785, 53 N.M. 185; in Hardy vs. Galloway, 15 Southeastern, 890, 111 N.C. 519, wherein the grantor of land retained for himself and his heirs the right to repurchase the land when sold, and stipulated that, if the the grantee should sell or mortgage the land without giving grantor and his heirs the right to repurchase, the deed should be void. The condition was held bad as repugnant. See In Re Roscher, 26 Ch. D. 801; Tiffany, Volume 5 on Real Property,

Section 1345, page 166; Gray, Restraints of Alienation, Section 26, page 18.

The case in controversy is but a futile effort of Mr. Cummings to control alienation, which if recognized would result in unjust enrichment to J. Buys Cummings and an injustice to the Plaintiff, Kamas State Bank, and Mr. Joe Bourgeois and his wife.

III

EVEN IF THE RESTRAINT HAD BEEN VALID, MR. J. BUYS CUMMINGS' REMEDY WOULD HAVE BEEN AGAINST JOE BOURGEOIS FOR INCUMBERING HIS LAND AND HE WOULD HAVE HAD TO RELY ON THE COVENANTS IN HIS WARRANTY DEED.

In Knight vs. Southern Pacific Company, 172 P ■■■ 689, 693, ■52 Utah 42 the Supreme Court of Utah states: "In view that it was shown that the option agreement was subsequently merged into a deed in which the

right of way was conveyed by plaintiff....
held that plaintiff could rely upon the
option agreement only for the purpose of
showing consideration for putting in of the
new crossing and the wire-wing fence....the
Court's ruling, however, conforms to the
doctrine that, where a written antecedent
contract to convey real property is merged
into a deed, the grantor ordinarily must
rely on the covenants contained in the deed
and cannot predicate a right of action upon
an antecedent contract." And in Utah Savings
and Trust Company vs. Stoutt, 102 P 865,
867, 36 Utah 206, we read: "Although it
be conceded that Adeline Stoutt agreed to
convey a marketable title in the contract of
sale, yet, when the warranty deed was
executed and delivered under which possession
was given and taken, the contract of sale was

fully executed and its provisions were merged in the deed, and Fleishman thereafter was bound to rely upon the covenants in the deed, and if any breach occurred in any one of them he was required to sue and recover in a proper action for breach of such covenants. We think no case can be found, and counsel have cited none, where an action was based upon an executed contract of sale after such contract had been fully performed by the execution and delivery of a deed and the vendee was given possession under it. The deed conveying the property sold by the contract is ordinarily a complete execution of the contract of sale, and the covenants in the deed must thereafter be looked to for redress in case of defects in the title." And in Reese Howell Company vs. Brown, 158

P 684, 689, 48 Utah 142 our Court states,

"No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is functus officio, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor; and as, in the sales of land, the law remits the party to his covenants in his deed, if there be no ingredient of fraud or mistake in the case, and the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title."

Mr. Cummings has no standing in a quiet title action against the Plaintiff, Kamas

State Bank, except to establish the amount of the lien. And if his title has failed, his recourse is on the covenants in his deed and not upon a pre-emptive right or right of first refusal which had not even bloomed into an option at the time Joe Bourgeois encumbered his property with the lien created by the mortgage of Kamas State Bank.

Other materials which may be helpful are: 55 Am Jur 493, Section 27; 5 Am Jur 113, Section 8, 63; 55 Am Jur 506, Section 37; C.J.S., Vendor and Purchaser, Section 13, 36 ALR, 1438 n., 162 ALR, 590 n., 596 n.

CONCLUSION

From the foregoing Respondent respectfully submits that the lower court properly held as a matter of law that Respondent's mortgage was superior to any claim of J. Buys

Cummings and Mary J. Cummings, his wife, for the following reasons:

1. At the time the land was mortgaged, Mr. Cummings and his wife had no present interest in the land.

2. Mr. Cummings' restraint on alienation was invalid as against public policy.

3. Any possible claim that he might have on his pre-emption agreement would at most be confined to the covenants in his warranty deed.

4. To make Mr. Cummings' claim superior to that of the Kamas State Bank would result in unjust enrichment to Mr. Cummings and wife and an injustice to Mr. Bourgeois and the Plaintiff, Kamas State Bank.

Respectfully submitted,


STANLEY C. SHEDLEY