1963

L. Doyle Nunley v. Stan Katz Real Estate, Inc. : Brief of Respondent

Utah Supreme Court

Horace J. Knowlton; Attorney for Plaintiff and Respondent;
Wendell P. Ables; Attorney for Defendants and Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

L. DOYLE NUNLEY,
Plaintiff and Respondent,

vs.

STAN KATZ REAL ESTATE, INC., a Corporation, and STAN KATZ,
Defendants and Appellants.

Case No. 9820

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County, Hon. Stewart M. Hanson, Judge

HORACE J. KNOWLTON
214 Tenth Avenue
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

WENDELL P. ABLES
143 South 4th East
Salt Lake City, Utah
Attorney for Defendants and Appellants

TABLE OF CONTENTS

STATUTES

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

L. DOYLE NUNLEY,
Plaintiff and Respondent,

vs.

STAN KATZ REAL ESTATE, INC., a Corporation, and STAN KATZ,
Defendants and Appellants.

Case No. 9820

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Judgment was entered in favor of the plaintiff and against the defendants on the 3rd day of December, 1962, for the sum of $1,410.00, $390.33 attorneys fees and costs. (R. 13). Defendants' objections to findings of fact, and conclusions of law and decree were filed on the 14th day of December, 1962 (R. 18). Amended findings of fact, conclusions of law and judgment were signed and entered on the 2nd day of January, 1963 (R. 22). Notice of appeal was filed by the de-

fendant "Stan Katz, individually" "from the judgment entered . . . on January 2, 1963", on the 2nd day of January, 1963 (R. 24). A designation of record on appeal was filed by the defendant Stan Katz on the 8th day of February, 1963 (R. 25).

The action was brought to recover from the defendants the amount due and unpaid on an earnest money receipt and option to purchase, an instrument in writing, having been introduced as Exhibit P-1 by the plaintiff.

ARGUMENT

Point 1. The appeal of the defendant Stan Katz should be dismissed because the judgment appealed from was void.

Rule 59 (e) of the Utah Rules of Civil Procedure provides :

> "A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment."

The motion in this case was not filed nor served within 10 days (R. 18) and there was therefore no jurisdiction in the Court to amend the judgment and the judgment entered on the 2nd day of January, 1963 (R. 21) was void.

In the case of In Re Bundy's Estate, 121 U. 299, 241 P2 462, at page 310 Utah Reports, citing Rule 6 (b), the Court said: "The Court . . . may not extend the time for taking any action under Rule . . . 59 (b)

. . . except to the extent and under the conditions stated in them."

The attorney for the defendant in the last paragraph on page 11 of his brief seems to admit not only that the judgment of January 2nd, 1963, was the judgment appealed from, but that the said judgment was and is void. It reads: "It should be noted that the appeal was taken from the void judgment of January 2, 1963, which awarded plaintiff judgment as against defendant Stan Katz only."

Concluding the paragraph the defendants' brief reads: "If there is anything before the Court at all it is the judgment of December 3, 1962, wherein Plaintiff was awarded an identical judgment as against both Defendants, who are in fact one and the same person."

Rule 73 (b) of the Utah Rules of Civil Procedure is correctly quoted on page 10 of the defendants' brief as follows: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall designate that the appeal is taken to the Supreme Court."

Following is the defendants notice of appeal in full: "Notice is hereby given that Stan Katz, individually, as defendant above, hereby appeals to the Supreme Court of the State of Utah from the judgment entered in the above captioned action on January 2, 1963 wherein plaintiff was awarded judgment against defendant Stan Katz in the sum of $1,410.00, $390.33

attorneys fee and $26.10 costs. Dated this 2nd day of January, 1963. Wendell P. Ables, Attorney for defendant Stan Katz."

Nothing could be more definite nor more explicit. The party is specified as an individual, the judgment appealed from is designated and the Court. The judgment of January 2nd is of the defendants own making. How could there have been an oversight?

Paragraph 6 of the defendants objections to findings of fact, conclusions of law and decree states: (R. 15): "Said Decree purports to give judgment to plaintiff against defendant Stan Katz Real Estate, Inc., for the balance of a purchase price under a contract where said defendant does not appear as purchaser." And now, in his brief he says that they are the same person.

The defendants appeal was taken from a void judgment. The appeal should be dismissed.

Point 2: Failure to serve and file a designation of the record on appeal is ground for dismissing the defendants appeal.

The defendant did not serve nor file a designation of the record on appeal within ten days as prescribed by Rule 75 (a) of the Utah Rules of Civil Procedure, which is grounds within the sound discretion of the Court for the dimsissail of the defendants appeal. Holton vs. Holton, 121 U 451, 243 P2 438.

Point 3. The evidence supports the Court's Findings of Fact, Conclusions of Law and Decree of December 3, 1962.

The Earnest Money Receipt and Offer to Purchase herein referred to as Exhibit P-1, to enforce the terms of which the plaintiff brought this action, provides among other things:

> "The total purchase price of $12,500.00, shall be payable as follows: $1,000.00, which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you, $1,000.00, when seller approves sale, Loan and or closing costs (line 17) on delivery of deed or final contract of sale which shall be on or before Feb. 28, 1962, and Mtg. amt. each month commencing on mtg. requires, buyer to secure $10,500.00 mortgage loan and apply proceeds to this purpose above referred to loan and or closing costs to be paid seller (line 14) until the balance of $10,500.00 together with interest is paid."
>
> "If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorneys fee."
>
> "The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay the said agent a commission equal to the minimum recommended by the Salt Lake Real Estate Board. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph shall be of no force or effect."

With reference to the purchase price, here is some of the evidence that seems to have been taken into consideration by the Court in finding the issues in favor of the plaintiff, from Mr. Nunley, the plaintiff:

Q. I am going to show you what for the purpose of identification has been marked Plaintiff's Exhibit P-1 and ask you if you can tell us what it is. Identify it.

A. Yes. This is the earnest money that Mr. Stan Katz and I agreed upon. Mr. Stan Katz agreed in his own handwriting here to pay me $10,500.00, less loan costs for the house at 1238 Mission Road. (R. 30 Line 3).

Q. Is there a balance due and owing?

A. Yes.

Q. And what is that?

A. $1,500.00, less loan costs. (R. 31 line 53).

Q. What were the closing costs to Home Benefit?

A. I believe they were $90.00, $89.00, $91.00, $89.90, or $90.90, roughly $90.00. (R. 60 line 20).

On re-direct examination:

Q. Mr. Nunley, did you at any time agree with Mr. Katz that you will accept an amount less than $10,500.00, less the loan costs, for that property?

A. No. (R. 123 line 3).

With reference to the matter of a real estate commission. Recross examination of Mr. Nunley by Mr. Bradford:

Q. I will show you Exhibit P-1, Mr. Nunley, and ask you to show me where on Exhibit P-1 it says that you would not have to pay a real estate commission?

A. It indicates here the buyer is to secure a $10,500.00 loan and apply the proceeds on the purchase of this home, less loan costs.

Q. It does not say anything about a real estate commission?

A. No, it does not. (R. 123 line 23).

From the direct examination of Mr. Badi Mahmood, the agent of the defendants:

A. I was present at the time Mr. Katz wrote this, and he provided to Mr. Nunley, gave this $10,500.00 as a net figure, less the loan costs. I was present at the time they discussed it.

Q. Mr. Katz said that in so many words?

A. Yes, sir.

Q. Is it written up that way in the agreement itself?

The Court: Well, it is.

Q. Now, you would have gotten a real estate commission for this transaction if there had been any?

A. Yes, sir. I would have gotten 50 per cent.

Q. Did you actually get any?

A. No, sir.

Q. No real estate commission from Stan Katz?

A. No, sir. (R. 133).

Q. (By Mr. Bradford on cross examination.) Let me finish my question. Are you saying you would be entitled to 3 percent of the sales price, or 11 percent of the commission?

A. 50 percent of all the commission earned, if there was any commission earned. In this case there wasn't." (R. 13 line 22).

With reference to the matter of attorneys fees, paragraph three of the pre-trial order provides as follows:

"It was likewise stipulated at the time of Pretrial in the event either party hereto is entitled to recover that the matter of attorneys fees may be determined by the Court." (R. 9).

The Court properly found from the preponderance of the evidence that the defendants were indebted to the plaintiff and that the plaintiff was entitled to judgment against the defendants for the sum of $1,410.00 with interest, for $390.33 attorneys fees and for costs. (R. 13).

CONCLUSION

The defendant Stan Katz individually has brought this appeal from a judgment that is void "(admittedly void)" as he says on page 10 of his brief, and the appeal should be dismissed.

In the event, however, that the Court decides to review the evidence, it must be found that the evidence

preponderates in favor of the plaintiff and that the Court in the Third Judicial District Court committed no error in finding the facts in favor of the plaintiff and against the defendants and in awarding judgment in favor of the plaintiff and against the defendants for the sum of $1,410.00 with interest from the 19th day of January, 1962, together with attorneys fees in the sum of $390.33 and costs in the sum of $26.10.

Respectfully submitted,

Attorney for the Plaintiff
Horace J. Knowlton
214 Tenth Avenue
Salt Lake City, Utah