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Don Cordner and Sylvia Cordner v. Clinger's Incorporated, et al : Brief of Respondent

Utah Supreme Court

Hatch & Chidester; Attorneys for Plaintiffs and Respondents;

IN THE SUPREME COURT

of the

STATE OF UTAH

DON CORDNER and SYLVIA CORDNER, his wife,	)	Case No.
Plaintiffs and Respondents,	)	9866
- vs -	)	
CLINGER'S INCORPORATED, et al.	)	
Defendants and Appellants.	)	

RESPONDENT'S BRIEF

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AUTHORITIES CITED

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RESPONDENTS BRIEF

STATEMENT OF FACTS

We feel that appellants' statement of the facts is incorrect in many respects and can only serve to confuse the court. Their brief alleges as fact the Defendants' original contentions in the trial, which by admission of the Defendant, Howard

Clinger, and a mountain of evidence to the contrary was completely discredited. The allegations were disputed by competent evidence which if believed by the jury was sufficient to sustain a finding by the jury of the following facts:

1. That the Defendant, Howard Clinger, conceived and negotiated a single transaction involving a four-way exchange of real properties. (TR 306, 307, 294, 281, 215, 89, 90, 91)

2. That Mr. Clinger arranged the method of implementing this transaction. (Tr. 91, 89, 90, 92)

3. That the transaction arranged by Mr. Clinger called for a transfer by the Respondents of their equity in the Green Gables Apartment in Salt Lake City,

together with a note for $4,500.00 to the Bunkers; a transfer by the Bunkers to Plaintiffs an equity in the Villa Apartments in Afton, Wyoming; a transfer by the Plaintiffs to the Griffiths of the Villa equity; a transfer by the Griffiths to the Plaintiffs of an equity in certain homes in the Scottsdale subdivision valued at $3,167.00, and a net inventory at cost of the Picabo, Idaho Store in the amount of $16,500.00; finally a transfer of the inventory to the Clingers and a transfer from Clinger to Plaintiffs consisting of an equity in a home on 11th East Street in Salt Lake valued at $7,500.00, the $4,500.00 note (which Clinger acquired by indorsement from Bunkers) relinquishment of Clinger's commission of $2,940.00 and his note for $1,560.00 (adjusted for

variation in the inventory) See Tr. 89, 90, 91, 92, 263, 107, also Plaintiffs' exhibit 9.

4. That all parties exchanged in accordance with this agreement and actually went into possession. (Tr. R 273, 97, 99)

5. That the Defendant Clinger refused to deliver a deed to the Salt Lake home, cancel the promissory notes and the commission claim, or execute the $1560.00 note; that the Defendant Clinger actually sold the home to other persons not involved herein. (Tr. 98, 99, 100)

6. That the inventory of the Picabo Store was exactly as negotiated and agreed upon by the Defendant Clinger; that the contentions of the Defendant Clinger regarding the inventory being short was

untrue, and that the defendant knew of the $3,000.00 and $7,000.00 debts owed by the Defendant Griffith and that he promised, and failed to arrange financing of the Salt Lake Hardware debt for the Griffiths. (Tr. 214, 217, 218, 220, 147, 148, 151, 152, 153, 155, 157, 158, 159, 160, 168, 195, 196, 197, 198, 199)

7. That the Respondents were not to actually receive any of the properties involved in the foregoing exchange except the home in Salt Lake. (Tr.91)

8. That everyone involved performed except the Defendant Clinger. (Tr. 97, 273)

9. That the Clinger's failure to perform has had this result for Respondents: They have lost their $15,200.00 equity in the Green Gables Apartments and are still

subject to the $4,500.00 note. (This is offset to the extent of the $3,167.00 Scottsdale Subdivision equity)

10. They have likewise failed to receive the following:

Equity in 11th East home	$ 7,500.00
Cancellation of Note	4,500.00
Cancellation of Commission	2,960.00
Clinger's note	1,540.00
Total	$16,500.00

After adjustment from physical inventory of $319.04 this totals $16,181.96. (Tr. 168)

11. That the contentions of the Defendant Clinger regarding the inventory being short was untrue, and that the defendant knew of the $3,000.00 and $7,000.00 debts owed by the Defendant Griffith and that he promised to and failed to arrange

financing of the Salt Lake Hardware debt for the Griffiths. (Tr. 214, 217, 218, 220, 147, 148, 151, 152, 153, 155, 157, 158, 159, 160, 168, 195, 196, 198, 199)

12. That the amount of the inventory and debts, and the agreements for assumption and satisfaction thereof were determined by the Defendants Griffiths and Clinger without the knowledge of the Respondents, and in no way constituted conditions precedent to the performance by Clinger of his obligations to the Respondents. (Tr. 94, 218.)

The Respondents disagree with the statement of facts of the Appellant in the following particulars:

(a) Appellants brief sets forth separate independant transactions involving

the various exchanges of the real property involved. The jury had before it ample facts, including admissions of the defendant, himself, that this was one transaction involving a four-way exchange and that the rights and obligations of each and every party were pursuant to the original agreement as advanced and submitted to the various parties. (Tr. 89, 90, 91, 215, 281, 294, 306, 307) Appellant would like us to believe that these were separate in time and effect. The Defendant, Howard R. Clinger, conceived the method of closing the transactions. (Tr. 89, 90, 91, 92) The evidence is uncontroverted that the Respondents were to get the home in Salt Lake City and the Defendant Clinger to get the inventory of the Picabo store.

Appellant asserts several places throughout his brief that the inventory was to be $16,500.00 net inventory at cost and that by deducting the obligations of the store, the figure of $16,500.00 is not reached. The jury had before it evidence that the manner of handling the debts was arranged for by and between Defendants Griffiths and Defendant Clinger and that Respondents Cordners were not parties in any way to the payment of the debts owed by the Griffiths. (Tr. 147, 148, 151, 152, 153, 155, 157, 158, 159, 160, 168, 195, 196, 197, 198, 199, 214, 217, 218, 220) The obligations were to be paid by an arrangement made by Howard Clinger and Defendants Griffiths. The only dispute in this regard is the correct amount of

the inventory. The evidence before the jury showed that Appellant Clinger had agreed to arrange the financing to take care of the obligation for the Defendants Griffiths. Had Clinger fulfilled the terms of his committment regarding these obligations he would have received $16,500.00, less a slight adjustment contemplated by the parties.

The evidence is also uncontroverted that the Clinger's took over the store and operated the same for approximately six weeks. There is evidence that Clinger attempted to make arrangements for financing of the obligations owed by the Griffiths against the iventory in the Picabo store, but failed, and because of this failure the inventory was repossessed by the cred-

itors. (Tr. 280)

There was also evidence before the jury that the Clinger's had actual possession and knowledge of the exact inventory in the store.

ARGUMENT I

THE COURT PROPERLY REFUSED TO ADMIT EVIDENCE CONCERNING THE IDAHO BULK SALES LAW.

The Idaho Bulk Sales Law has been treated by the Idaho Supreme Court in the same manner as the bulk sales laws of other states throughout the country. Boise Association of Credit Men vs. Glen's Ferry Meat Co. 48 Idaho 600, 283 Pac. 1038, 1040.

The general rule is set forth in 24 Am. Jur., Fraudulent Conveyances § 245 as follows:

> "The sale is binding and effectual as to the parties thereto and persons claiming under them; the effect of the statute is merely to make the sale voidable at the instance of creditors, not with-standing the use of the term void."

The facts in this case are undisputed that creditors are not involved. Appellants contend that the transaction involved was separate and unrelated to the overall exchange; that the Cordners failed to provide a bulk sales affidavit and as a consequence the creditors moved in and took possession of the inventory, thereby putting the Cordners in a position where it was impossible for them to perform. The evidence is clearly to the contrary.

However, the jury had before it undisputed testimony that the Appellant was fully aware of all of the obligations

and that he undertook to procure the documents for the signature of Griffith and not for the signature of Respondents. He was to take possession directly from the Defendants Griffiths and not from the Cordners. He had full and complete knowledge of the debts and this information was never conveyed to the Cordners. Had he fulfilled his commitments regarding the financing of the obligations owed by the Griffiths in Picabo, Idaho, he would have received the full $16,500.00 worth of inventory.

Clinger now attempts to use the Bulk Sales Law as a defense for his non-performance. Not only is it inapplicable to this case, but he is clearly estopped from asserting it.

ARGUMENT II

THE COURT WAS CORRECT IN ITS RULINGS ON EVIDENCE.

The first ruling complained of is set forth in the transcript on page 142. Appellant contends that the court refused to allow testimony over objection by the Plaintiff's counsel. A check of the record will show that the objection was based upon the nature of the question and that it had nothing to do with the subject matter. We quote:

"Mr. Hatch: 'I object to this as argumentative'.

The Court: 'I believe it is, Mr. Alston'."

Contrary to the assertion in Appellants' brief the ruling sustaining the objection

on page 172 of the transcript was based upon the argumentative nature of the question and there was no prohibition against delving into the subject matter.

The objections over-ruled on pages 216 and 217 of the transcript were not objections against the subject matter but merely as to the leading nature of the questions being asked.

The Appellant contends that the objection on page 193 of the transcript sustained by the court was erroneous because there was a $3,000.00 obligation which was chargeable against the inventory. All evidence on this point was clearly to the contrary. It was undisputed that the Defendants Clinger and Griffiths arranged between themselves for the payment of this

obligation and that the Cordners had absolutely no knowledge of the existence of these debts.

The objection set forth on page 237 of the transcript concerns approximately $3,000.00 received by the Cordners in the form of an equity in the Scottsdale subdivision. The evidence is undisputed that the Defendant Clinger has been credited with the full value of the equity in said Scottsdale subdivision, and as a consequence Cordners reduced their request for damages by that amount.

Appellant contends that the court refused to allow questioning regarding the repossession of the Villa Apartments. A check of the transcript, pages 237 and 238, will show that there was no question

asked by appellants regarding the repossession of the Villa Apartments.

ARGUMENT 3

THE COURT'S INSTRUCTIONS AS TO DAMAGES WERE IN ACCORDANCE WITH THE FACTS AND LAW COVERING THE CASE AT BAR.

The appellant contends that the instructions failed to take into consideration the $7,000.00 and $3,000.00 in obligations and further claims that the same was chargeable against the inventory. The jury obviously found that the agreement between Clinger and the Griffiths was to the contrary. Instructions number 1 and 2 of the court dealt precisely with this point. The jury was instructed that should they find that the agreement between the parties was to the effect that the

obligations were chargeable against the inventory, that they should find for the defendants. It is apparent by the jury's ruling that they found the obligations not to be chargeable against the inventory as contended by appellants.

Appellants further complain that the promissory notes given by the Cordners were never paid and as a consequence the Respondents have received a judgment in the full amount of the total consideration and yet have failed to pay the promissory notes. It seems quite clear that the judgment of $16,181.00 was based upon the loss of the home in Salt Lake City and the appellant's failure to cancel the promissory note in accordance with his

agreement. How could Cordners be expected to pay the $4,500 note when appellant's performance of the agreement required the cancellation of it? It is acknowledged that the Defendant will receive credit against the judgment in the amount of this promissory note upon its cancellation. The same applies to the commission.

The authorities cited upon damages by the appellant are not disputed by respondents. We just don't feel that they apply to the present fact situation. Specifically the Appellant contends that it is the value of the home that constitutes the measure of the damage and not the price placed thereon by the parties. It is true that the home's value was part of the damages. Our

position is that the price placed upon a given piece of property by parties dealing at arm's length is substantial evidence of its value. Not only this, the jury had before it a value placed upon it by a real estate broker dealing in the business, who himself, would qualify as an expert. Tr. 92, 93, 107. It is undisputed that appellants never submitted evidence of a value contrary to the price agreed upon by the parties. It is only logical that if the Appellant considered the value was contrary to the price fixed by the parties that evidence supporting this would have been submitted.

CONCLUSION

In conclusion it is submitted that based upon the record before the court

for consideration the jury had ample and competent facts to substantiate the findings in accordance with the complaint of the Respondents and the judgment should be affirmed.

Respectfully submitted,

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