1984

Associated Industrial Developments, Inc., A California Corporation v. J. Paul Jewkes And Lorna Jewkes, Husband And Wife : Brief Op Plaintiff-Respondent Associated Industrial Developments, Inc., In Opposition To Rehearing

IN THE SUPREME COURT

OF THE

STATE OF UTAH

ASSOCIATED INDUSTRIAL DEVELOPMENTS, INC., A California Corporation,	:	
Plaintiff-Respondent	:	CASE NO. 19374
vs.	:	
PAUL JEWKES & LORNA JEWKES,	:	
Defendant-Appellant.	:	

BRIEF OF PLAINTIFF-RESPONDENT ASSOCIATED INDUSTRIAL DEVELOPMENTS, INC., IN OPPOSITION TO REHEARING

Appeal from the Fourth Judicial District Court of Utah County, Honorable Allen B. Sorensen, District Judge

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DISPOSITION OF THE CASE

This Court affirmed the Judgment of Foreclosure and attorney fees of the lower Court. Appellant filed a Petition for Rehearing.

RELIEF SOUGHT

Plaintiff-Respondent seeks denial of the Petition for Rehearing filed by the defendant Paul Jewkes and Lorna Jewkes.

STATEMENT OF FACTS

Plaintiff's attorney in the case below did prove the amount of attorney fees in this foreclosure action by;

1. Plaintiff's President testified that he agreed to pay plaintiffs attorney 10% of the amount recovered. The amount recovered was $295,696.00. The amount of attorney fees awarded was $26,577.00.

2. Grant Ivins, Attorney, with approximately thirty years of practice, with a considerable percentage of his time as attorney for five banks in Utah County in forclosure of mortgages, testified that in view of the complexities of the case, as it was contested and a Counterclaim filed, that 10% of the amount recovered was reasonable. T-25.

3. The lower Court, in Findings No. 11, found, "The Court finds, based upon the testimony of the witness Ivins, and because of the fact that the foreclosure proceeding was contested and considering all of the complexities presented by the case that an attorney fee of 10% of the amount claimed is reasonable in amount."....

4. When plaintiff's attorney took the witness stand to testify, defendants attorney objected on the grounds that an attorney may not be a witness on a case which he also acts as counsel. The Court sustained the objection.

ARGUMENT

The Court awarded a Judgment including interest in the sum of $295,696.00. The Court awarded attorney fees in the sum of $26,577.00 which is approximately 9% of the total amount awarded.

Appellant's contend that in their Statement of Fact, that AID's attorney "did not make any offer of proof and did not make any attempt to prove the amount of value of his service from any other source". This is incorrect. The Respondent did prove the value of his service from witness Heber Grant Ivins, whose testimony upon direct as well as cross examination covered 22 pages of the transcript. T. 25-47.

The Court itself was able to determine from the pleadings and exhibits from the actual trial as shown in its Findings, "considering all complexities presented by the case that an attorney fee of 10% of the amount claimed is reasonable".

Respondant contents that there was sufficient evidence before the Court without the testimony of Respondents attorney, to give the Court sufficient information to establish attorney fees and the lower Court so held.

The Appellant's attorney in his argument claims that justice is required because his client is financially distressed. He fails to point out that their defaulted payment was due on the 15th day of May, 1982. The complaint was filed on the 29th day of June, 1982. The Appellant failed to comply with the rules of this Court in filing certain required appeal documents by being 3-1/2 months late and was

ordered to pay $150.00 attorney fees by this Court which are not paid to date. The Appellant through their delay tactics has so financially distressed the Respondent, that Appellant has been forced into Chapter 11 Bankruptcy. Plaintiffs exhibit No. 11.

The cases cited by the Court Kohler v. Garden City, Utah, 630 P.2d 162, 165 (1981); Hickman v. Haughton Elevator Co., 268 Or. 192, 195, 519 P.2d 369, 373 (1974), are not superficial in support of this Courts position as contended by the Appellant.

In Kohler v. Garden City, Supra, counsel did not set forth the specific purpose for which the offered evidence was inadmissable, and as such Counsel cannot complain of the Courts ruling on appeal. In the present case, counsel objected to evidence that was admissable and now cannot, according to this Court complain of the Lower Courts ruling on Appeal.

In the Hickman vs. Houghton Elevator Co., case cited by this Court, counsel did not urge the trial Court to accept the first verdict of the Jury and contended on appeal the trial Court should have accepted the first verdict of the jury. The Court held that "Under these circumstances it appears that defendant did not make proper objections or exception in the trial court as to entitle it to contend on appeal that the first verdict was a proper verdict."

In the present case, Appellant did not urge at the trial the reasons which he now asserts on appeal as to the admissability of evidence. This Court held that Appellant could not make one argument to the trial Court and a different argument on Appeal.

It is further noted that the record does not reflect in any way that the appellant raised the question of the Court's erroneous ruling at the trial, or any of the post-trial motions that could have been made to correct error before final Judgment was entered and the appeal taken.

CONCLUSION

The lower Court found that based upon the testimony of Ivins and the fact that the foreclosure proceedings was contested and considering all the complexities presented by the case, there was sufficient evident to justify a 10% fee of the full amount recovered.

The fact that the Appellant made a improper objection excluding evidence that he now claims should have been admitted, does not entitle him to complain of the lower Courts ruling on Appeal. Appellant's Petition for rehearing should be denied.

Dated this 5th day of December, 1984.

RESPECTFULLY SUBMITTED

Dave McMullin,
Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Respondent's Brief postage paid to the following:

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This 5th day of December, 1984.