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Jack Le Hoy Mecham, Julia Ruth Smoot, Thelma Mecham Hintze, J. Ralph Mecham, and First National Bank of Utah, Administrator of the Estate Of Sophia O. Mecham, Deceased v. Mel-O-Tone Enterprises Incorporated, A Utah Corporation, and Barby'S Cafes Incorporated : Appellant's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

JACK LE ROY MECHAM, JULIA
RUTH SMOOT, THELMA MECHAM
HINTZE, J. RALPH MECHAM, and
FIRST NATIONAL BANK OF UTAH,
Administrator of the Estate of SOPHIA
O. MECHAM, Deceased,

Plaintiffs-Respondents,

vs.

MEL-O-TONE ENTERPRISES IN-
CORPORATED, a Utah Corporation,
and BARBY'S CAFES INCORPORAT-
ED, a Utah Corporation,

Defendants-Appellants.

Case No.
11749

APPELLANT'S BRIEF

Appeal from Summary Judgment of the
3rd Judicial District Court for Salt Lake County
Hon. Leonard W. Elton, Judge

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FILED

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STATEMENT OF THE KIND OF CASE

This is an action by Plaintiffs to quiet title to certain real estate in themselves.

DISPOSITION IN LOWER COURT

Plaintiffs, the fee owners of the real estate in question, moved the lower court for Summary Judgment against the Defendants, who claim their interest in said real estate through an auditor's tax deed. The trial court granted Plaintiff's Motion for Summary Judgment, quieting title in the Plaintiffs, and reserving to the Defendants a lien against the real estate for part of the

taxes paid by the Defendants, or their predecessors in interest, and further reserving to the Defendants any rights they may have as occupying claims of said real estate. From said order, the Defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Decree quieting title in the Plaintiff's and desire that the case be remanded to the lower court for a trial on the merits. Defendants further seek an order of this Court awarding them their costs of this Appeal.

STATEMENT OF FACTS

Plaintiffs instituted this action for the purpose of quieting title in themselves to the real estate which is the subject matter of this lawsuit (R. 1-2). Plaintiffs claim their interest in the real estate as fee owners thereof (R. 8-9). Defendants claim their interest in the real estate as successors in interest by and through an auditor's tax deed (R. 9-10).

Salt Lake County caused the property in question to be sold for delinquent sewer taxes (R. 17 & 20). Subsequent to said sale, the Salt Lake County Auditor executed a tax deed in favor of Defendant's predecessors in interest (R. 9, 11, & 17). The tax deed given by the Salt Lake County Auditor was in the statutory form as provided in cases of tax sales for general taxes. The deed recites on its face that the property "was sold to said county at preliminary sale for non-payment of general taxes." Said tax deed on its upper, left-hand

corner is marked by an identification number, with an indication that the delinquent taxes in question were those resulting from a sewer assessment (R. 17).

Because of the need to review detailed and complex records of the Salt Lake County Treasurer's Office, the Salt Lake County Auditor's Office and the Salt Lake County Recorder's Office, an Answer was not immediately interposed. In addition, because of the pressing and heavy work load of the Treasurer's Office and Recorder's Office in the early part of 1968, which was created by tax collection problems, this author was unable to obtain a recorder's certificate and certified copy of the tax sale record. Accordingly, a general denial was interposed in behalf of Defendants on March 7, 1969, to allow Defendants adequate time to discover the necessary facts and obtain the auditor's certificate so that a detailed answer could be later filed (R. 7).

Notwithstanding the lack of pertinent documents and evidence in the file, Plaintiffs moved for Summary Judgment on April 9, 1969 (R. 18). This author was finally able to obtain a certified copy of the tax sale record on April 28, 1969.

In addition to the foregoing problems concerning the filing of a detailed pleading, this author made it known to Mr. Lewis S. Livingston, one of the attorneys for Plaintiff, that the Defendants intended to make and assert claims as an occupying claimant, and this author advised Mr. Livingston that additional time would be required to obtain an accounting and the invoices in

support thereof in connection with improvements made upon the real estate which is the subject of this lawsuit. Ignoring the need for additional time for the Defendants to communicate as to an accounting concerning improvements made upon the property, and the completion of a more complete responsive pleading, Plaintiffs noticed up their Motion for Summary Judgment for May 26, 1969 (R. 24). Pursuant to said notice, the Court went forward on Plaintiff's Motion for Summary Judgment, and notwithstanding the incompleteness of the file. Plaintiffs were granted Summary Judgment after both parties orally argued the matter, and submitted supporting memorandums (R. 32).

Although an examination of the Salt Lake County Records would disclose that Salt Lake County held a preliminary sale for sewer taxes for the year of 1967, and that a further examination of the records would disclose that Mel-O-Tone Enterprises paid said taxes in the amount of \$42.75, plus penalty, interest and costs, or a total of \$47.87, Judgment was rendered by the lower court without any protection of Defendants' statutory lien rights for the delinquent 1967 sewer taxes paid (R. 3).

ARGUMENT

POINT I.

THE AUDITOR'S TAX DEED ON WHICH DEFENDANTS RELY IS VALID ON ITS FACE, AS A MATTER OF LAW.

Sections 17-6-3.4 and 17-6-3.6, Utah Code Annotated 1953, provide that the enforcement of sewer taxes shall

be handled in all respects as general county taxes. Specifically, Section 17-6-3.4 provides that "all laws applicable to the imposition, collection and enforcement of general county taxes, including those pertaining to the allowance of collection fees, to the imposition of penalties for delinquencies and to *the sale of property for non-payment of taxes*, shall be applicable to the taxes so levied for the district." (Emphasis added.) Section 17-6-3.6 indicates that upon certification of delinquent sewer charges to either the County Treasurer or County Assessor that they

become a lien on the delinquent premises on a parity with and collectible at the same time and in the same manner as general county taxes are a lien on such premises and are collectible. All methods of enforcement available for the collection of such general county taxes, including sale of the delinquent premises, shall be available and shall be used in the collection of delinquent sewer charges.

Accordingly, the employment by the County Treasurer and County Auditor of the provisions of Chapter 10, Title 59, Utah Code Annotated 1953, to collect delinquent sewer taxes is not invalid, since the quoted portions of the above cited statutes expressly empower and require that sewer taxes be collected in the same fashion followed in this case. The only form of tax deed as prescribed by the statutes is set forth in Section 59-10-64 (5), Utah Code Annotated 1953, and that form was employed by the Salt Lake County Auditor in the case before this Court. Although the paragraph ending the

body of the auditor's tax deed states that the property "was sold to said county at preliminary sale for non-payment of general taxes," the delinquent taxpayer is put on notice that the sale took place as a result of a sewer tax delinquency. The identification number stamped in the upper, left-hand corner, and the indication that the tax was for "sewer", is an explicit and express reference to the appropriate county tax sale record. The Salt Lake County Auditor followed the express statutory mandates in connection with sale procedures followed, and the ultimate granting of a tax deed. Accordingly, it is submitted that said tax deed is not invalid on its face, as a matter of law.

POINT II

SUMMARY JUDGMENT WAS IMPROPERLY AND PREMATURELY GRANTED BY THE LOWER COURT.

This Court has consistently recognized the harshness and the many dangers implicit in the granting of summary relief under Rule 56, Utah Rules of Civil Procedure. The cases are legion in support of this proposition; however, Defendants merely call attention to the case of *Tanner v. Utah Poultry & Farmers Cooperative*, 11 U.2d 353, 359 P.2d 18 (Utah 1969). At page 19 this Court indicates that the Summary Judgment remedy "is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of *any relief* to the losing party." (Emphasis added.) It seems patently apparent from the record that the

lower court has deprived the Defendants of valuable rights and relief, otherwise allowable in this case.

Specifically, a lien is available to Defendants for \$103.41 for the delinquent sewer taxes which were recovered by Salt Lake County as a result of the tax sale in question and a lien is available to Defendants in the amount of \$456.77 for 1968 general property taxes paid by the Defendants. These amounts were reserved as liens under the Decree of Summary Judgment awarded by the lower court; however, the liens reserved to Defendants under Section 59-10-65, Utah Code Annotated 1953, are interest bearing, and the lower court's Decree makes no provision for continuing interest. In addition, the Decree of the lower court made no provision for the 1967 sewer taxes paid by Defendants in the amount of \$47.87, plus accruing interest. To be sure, evidence of this latter tax is absent from the file, but given adequate time to tie discovery matters down, it is submitted that this would become part of the matters plead, as it should properly be.

The Decree of the lower court, while preserving two of the three outstanding liens accorded the Defendants by statute, fails to make any provision therein for foreclosure. Section 59-10-65, Utah Code Annotated 1953, provides that tax liens "*shall* be foreclosed in any action wherein the invalidity of such tax title is determined. If such lien is not foreclosed at the time of the determination of the invalidity of such tax title, any later action to foreclose such lien shall be forever barred . . ." Al-

though at first blush it seems that the lower court protected and preserved outstanding rights of the Defendants, the Decree nonetheless effectively takes away valuable rights of the Defendants, as is apparent from the cited statute.

This Court construed a similar lien statute in the case of *San Juan County v. Jen, Inc.*, 16 U.2d 394, 401 P.2d 953 (Utah 1965). The Court concluded that the statute involved created only lien rights, and not any *in personam* rights as against the owner. Therefore, Defendants respectfully submit that the only remedy available Defendants is a foreclosure action, and if they cannot bring such an action, they are forever barred. This would seem to be further supported by the "one-action" rule which is followed in this jurisdiction in connection with the foreclosure of mortgages on real estate.

Since the Defendants took occupancy of the premises in question, they have expended large sums of money, and would make claim therefore for valuable improvements rendered as occupying claimants under the purview of Chapter 6 of Title 57, Utah Code Annotated 1953. It would seem that it would be more economical, considering the expenses to the parties and the time and expense to the Court, for the Court to dispose of the occupying claimants' rights as a part of this lawsuit. Moreover, Section 57-6-1, Utah Code Annotated 1953, indicates that the Plaintiff shall not be put in possession of the property until there has been a full com-

pliance with the Chapter. Accordingly, until there has been a trial on the merits, it seems clear under the statute that the Plaintiffs, though the trial court has quieted title in them, are not entitled to possession of the premises, and are unable to move forward with a disposition thereof.

POINT III

THE APPLICATION OF THE APPLICABLE LAW BY THE LOWER COURT CONSTITUTES A DEPRIVATION OF PROPERTY TO THE DEFENDANTS, VIOLATIVE OF THE DUE PROCESS CLAUSES OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF UTAH.

The Fourteenth Amendment to the Constitution of the United States provides that no "state [shall] deprive any person of life, liberty or property without due process of law. . . ." Section 1 of Article 1, Constitution of Utah, accords to the citizens of the State the inalienable right to "acquire, possess and protect property. . . ", and Section 7 of Article 1, Constitution of Utah, provides that "no person shall be deprived of life, liberty or property, without due process of law." This Court in the case of *Christiansen v. Harris*, 109 Utah 1, 163 P.2d 314 (Utah 1945), at Page 316 indicates that each party is entitled to his day in court, "*with the privilege of being heard and introducing evidence to establish his cause or his defense . . .*" (Emphasis added.) Also, the Court alludes to the standard definition which indicates that a court should render judgment only after trial. It is apparent that Defendants have been deprived of their day in court in this case.

The Legislature has granted certain protection to tax deed purchasers, or those holding under them, in clear and unambiguous language. Section 59-10-64(7), Utah Code Annotated 1953, provides that "a copy of the record of the tax sale and a copy of the auditor's endorsement made thereon, duly certified by the recorder under the seal of his office, shall be prima-facie evidence in all courts of the conveyance to the county in fee simple of the property therein described and of the regularity of all proceedings preliminary thereto." Moreover, Sub-section 5 of the same Statute provides that when the auditor executes and delivers his tax deed that it "shall be prima-facie evidence of all proceedings subsequent to the preliminary sale and of the conveyance of the property to the grantee in fee simple." Certainly without more, it seems plainly clear that the Legislature intended that tax title purchasers, or successors in interest, would be entitled to their day in court to protect valuable property interests, which they have acquired under the Statutes of the States of Utah. Before the lower court entertained any Motion for Summary Judgment, it first should have inquired into the circumstances surrounding the assessment, levy and sale, and notices thereof, and the circumstances under which the Plaintiffs failed to meet their tax liabilities. The record itself indicates that Plaintiffs were guilty of several lapses in paying the taxes on the property in question, so it well could be concluded that there might have been some willful ignoring of the law, a subject into which it is submitted the trial court should have made some inquiry.

The failure of the lower court to provide for foreclosure of Defendants' liens, which are allowed the Defendants under Section 59-10-65, Utah Code Annotated 1953, in its Decree quieting title in the Plaintiffs, obviously deprives Defendants of valuable property rights without Due Process of Law. Since the lower court has invalidated the tax deed under which Defendants claim, and since Section 59-10-65 creates a "one-action" rule, the Defendants have not been given their day in court. Moreover, the Defendants have not had their day in court concerning any claims they may have as occupying claimants of the property in question.

Although this Court in its prior decisions has judicially legislated away many of the rights afforded by the Legislature to tax deed purchasers, or their successors, it is respectfully submitted that there has been some recognition of this fact by the Court. Specifically, in the case of *Toronto v. Sheffield*, 118 Utah 460, 222 P.2d 594 (Utah 1950), the late and esteemed Justice Wolfe, in his concurring opinion, alluded to the very problem raised by this case. At Pages 603 and 604, Justice Wolfe pointed out that the courts bear some responsibility for the muddled situation concerning tax titles. He indicated that there should be some relaxation of the "strict compliance" doctrine. Where there have been simple administrative omissions or misfeasances, not prejudicial to the taxpayer, he suggested that such technical defects should not aid the delinquent taxpayer. To be sure, the taxpayer is entitled to certain protections which the statutes adequately insure. However, he should not be

allowed to sit idly by while the county proceeds to sell his valuable property, and then later make entreaties to the court that he should be put back in his previous position, at the expense of another equally important citizen. The tax deed purchaser, or his successor in interest, should be able to place some reliance upon the explicit statutes of this state in evaluating what potential property rights they may acquire, or may have acquired. Based upon a reading of the statutes, the tax deed purchaser is then lulled into a sense of some security, and may then go forward with large expenditures of money to alter or improve the property, as is the case with Defendants herein. In a different context, it would seem that the judicial legislation prevalent in this area of the law might be rightly construed and held to be entrapment.

CONCLUSION

Reviewing the record in the light most favorable to the Appellants, it must be concluded that the lower court has deprived Appellants of valuable property rights, without any consideration therefor. Notwithstanding the fact that there had never been any Notice of Readiness for Trial filed with the court, and notwithstanding the fact that both parties had conducted some of their discovery work over many months, the lower court chose to dispose of the whole case on a very narrow, legal point, disposing of all possible issues, without the advantage of all the evidence before the court. Accordingly, Defendants-Appellants have been deprived

of their day in court, and their opportunity to be heard as to any important issues bearing on the preservation of valuable property rights granted them under the Statutes of the State of Utah.

It is respectfully submitted that this Court must reverse the lower court, and the case should be remanded to the lower court for a trial on the merits.

Costs should be awarded Appellants.

Respectfully submitted,

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