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IN THE SUPREME COURT OF THE STATE OF UTAH

MUSIC SERVICE CORPORATION,
A Corporation,

Plaintiff,
Appellant

vs

Case No.
1970

CLEO WALTON,

Defendant.
Respondent

APPELLANT'S BRIEF

Appeal From a Judgment for Defendant
Third District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MUSIC SERVICE CORPORATION,
A Corporation,

Plaintiff,

vs

CLEO WALTON,

Defendant.

Case No. 10704

APPELLANT'S BRIEF

NATURE OF CASE

This is an action to quiet title to real property in plaintiff, for trespass by defendant on said real property causing damage to plaintiff and for removal of defendant's encroachment upon said real property.

DISPOSITION IN LOWER COURT

The Court, without a jury, entered judgment quieting title to the disputed property in the defendant and along a chain link fence following a described course; dismissing plaintiff's claim for damages and defendant's counter-claim for damages.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the judgment of the Trial Court in the order of this Court quieting title to the disputed property in the plaintiff. Plaintiff then seeks a remand of the case to the lower Court for its decision on the amount of damages suffered by plaintiff.

STATEMENT OF FACTS

Plaintiff purchased certain real property belonging to White Investment Company from that said company. (R. 50, Ex P-2) White Investment Company had purchased said property from a Mr. C. W. Wilkins and his wife. (R. 49, Ex. P-1) The principal portion of said property was located south of 39th South at approximately Central Avenue. The property sold to plaintiff included a strip of land 11.48 feet wide running from 3900 South south to the principal portion. This strip of land is the property in dispute in this action. Purchase of the strip was necessary in order to give plaintiff access to the principal portion of the property as access from Central Avenue was blocked by a large, marshy bog and was an essential access for development of the principal portion. (R. 73)

The strip ran between property owned by a Mr. P. L. Henderson on the east and the property owned by the defendant on the west. When Mr. Henderson purchased his property in February of 1960, the disputed property was bounded on either side by two wire fences. (R. 82) Both of the surveyors who testified at the trial, Mr. Bush for plaintiff and Mr. Coon for defendant, stated

that when they had surveyed the property in 1959, the strip was bounded by the two wire fences and was unoccupied. (R. 59, 99, 101)

Shortly after Mr. Henderson purchased his property, he removed the two wire fences and built a new chain link fence along a line which he decided would serve as the west boundary of his property. (R. 85) That line was and is actually the east boundary of the strip in dispute.

The east boundary of the defendant's property was approximately 10 to 12 feet west of the chain link fence. (R. 64) Nevertheless, some time after Mr. Henderson had erected the chain link fence, defendant proceeded to move his personal property, principally car bodies, (Ex. P-8), onto the property in dispute and did occupy the land up to the chain link fence and continues to so occupy.

Mr. Henderson had, by Quit-claim Deed (Ex. P-4), deeded any interest he had in the disputed property to plaintiff's predecessor. Subsequent to plaintiff's purchase from White Investment Company plaintiff purchased the property to the east of the property in dispute owned by Mr. Henderson.

Upon learning that defendant had occupied the property in dispute purchased from White Investment Company, plaintiff made demand upon defendant to cease said occupancy and clear the strip. Defendant refused and this action was commenced on June 10, 1965.

ARGUMENT

POINT I

PLAINTIFF HAS TITLE TO THE PROPERTY IN DISPUTE.

The only contracts and deeds which were introduced at the trial were introduced by the plaintiff (Exhibit Index R-31). They show that the plaintiff acquired his interest in the disputed property by a Uniform Real Estate Contract from White Investment Company (R. 51, Ex. P. 2). White Investment Company obtained fee title by deed from C. W. Wilkins and his wife (R. 49, Ex. P-1). At the time the plaintiff took possession of the property in dispute it was bounded by fences and there were no encroachments. (R-51) Plaintiff then examined a qualified engineer who produced a plat he had surveyed from the deed and the plat was introduced into evidence. (R. 58, p. 5)

At no time in the proceedings did the defendant challenge the validity of plaintiff's record title or introduce any evidence to show that he had record title. Therefore, under the case of *Cottrell v. Pickering,* 32 Utah 62, 88 P. 696, (1907) plaintiff must prevail. In that case the respondent plaintiff introduced in evidence a deed describing the parcel of land claimed by him, a survey made by a competent engineer identifying the property described in the deed and proved possession in himself under the deed and rested. The Court said:

> "It may also be conceded that in order to prove a perfect or complete title the plaintiff must connect his title with the original source of title, unless both he and his adversary claim from a

common source, in which event it is sufficient to trace his title back to the common source. But the question here presented is whether the respondent was required to show a perfect chain of paper title in order to successfully resist the motion for nonsuit. This seems to be the contention of counsel for appellant. We think that all that was required of respondent was to show a prima facie title as against appellant. This we think, respondent did when he produced his deed and in connection therewith a survey clearly identifying the premises and showing pssession under or pursuant to the deed. The deed and survey established the extent and boundaries of respondent's premises and his possession under the deed certainly was some evidence of title to all the land included within the boundaries. . . . As against a mere technical objection by any one who, at the time the objection is made, appears to be a mere stranger to the title, such a prima facie title would seem quite sufficient. To require more against such an objector would require everyone to prove a perfect chain of title or against every stranger making any kind of a claim. This the law does not require. If the objector has a better or stronger title than the prima facie title prevails."

The only other evidence of record title to the land in question came from P. L. Henderson but he gave a quitclaim Deed to plaintiff's predecessor. (P-4) This deed prevails above any prior oral agreement that may have been made by Henderson with a third party under the case of *Campbell v. Nelson,* 101 Utah 523, 125 P. 2d 413, (1932). In that case the plaintiff did not show a perfect record title as against defendant's prior oral agreement with the same grantor but the Court said:

> "The plaintiff in ejectment must recover upon the strength of his own title and not upon the weakness of his adversary's title. This rule does not require a plaintiff to exhibit a perfect chain of title as against one in wrongful possession."

The Court then held that the introduction of a single deed was sufficient to entitle the plaintiff to prevail over the defendant who gave no evidence of record title.

POINT II

DEFENDANT DOES NOT HAVE TITLE TO THE PROPERTY IN DISPUTE.

Section 25-5-1, Utah Code Annotated (1953) provides:

> "Estate or interest in real property. — No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

Under that statute there are only two means by which a person can acquire an interest in real property: one, by "act or operation of law"; and two, by a "deed or conveyance in writing." Defendant clearly does not have a deed to the disputed property. No deed was ever introduced in evidence by defendant. The deed under which defendant holds his own property was received in evidence as plaintiff's Exhibit P-7. Both plaintiff's sur-

veyor, Mr. Bush and defendant's surveyor, Mr. Coon, testified that the east boundary line of the description in said deed was the west boundary line of the property in dispute. (R. 64, 103) Mr. Coon, defendant's own witness, testified at R. 103, "This area in question would be to the east of what we believe the deed line to the Walton property would be."

Defendant did not acquire the property by act or operation of law. Adverse possession was not established. Section 78-12-12, Utah Code Annotated (1953), provides:

> "Possession must be continuous, and taxes paid. — In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law."

There is no evidence in the record that either defendant or his predecessors paid any taxes assessed against the property. The only evidence relating to taxes is plaintiff's Exhibit P-3, which is a paid tax notice covering the disputed property, addressed to Mr. Kenneth White, plaintiff's predecessor in interest, and Mr. White's testimony that he paid the taxes assessed for that year. (R. 50)

In addition to the above, defendant did not establish a boundary line by acquiescence. The line which the Trial Court determined to be the boundary line was along the chain link fence built by Mr. P. L. Henderson. (Find-

ing No. IV, R. 33) Mr. Henderson testified that he purchased the property in February of 1960 and built the chain link fence later that year. (R. 83) The fence then was only in existence for five years prior to the filing of this action. In the case of *King v. Fronk,* 14 U. 2d 135, 378 P. 2d 873 (1963), this Court held that a boundary line had been established between two adjoining land owners by a visibly monumented line which had been in existence for at least a period of twenty years. That holding did not appear to establish the twenty year period as a necessity to the doctrine; however, the Court did state that the seven year adverse possession period would be too short. The seven years is only a period of limitation, does not transfer title to the realty and requires compliance with specific statutory standards. Therefore, the time necessary to establish a boundary line by acquiescence would have to be at least more than seven years. In the instant case, the monument line determined by the trial court to be the boundary line had been in existence for only five years. That is not enough time within which to establish a boundary by acquiescence.

It is clear that defendant did not establish title to the property in question either by deed or conveyance or by act or operation of law.

POINT III

NO BOUNDARY LINE WAS ESTABLISHED BY AGREEMENT.

The Trial Court found that in 1960 upon the building of the chain link fence by Mr. P. L. Henderson, he and

the defendant agreed that said fence was to be the boundary line between their properties and that the said agreement did in fact establish a boundary line. (Findings of Fact III, IV, VII, VIII, IX, R. 33-35). We submit neither the law nor the evidence can support that conclusion.

As set forth in Point II hereof, Section 25-5-1, Utah Code Annotated, 1953, provides the sole method by which an interest in real property can be created. Under that statute any agreement for the transfer of real property must be in writing. There is no such writing transferring disputed property to defendant in the record of this action.

In the Findings cited above, the lower Court found a valid oral agreement. The question becomes whether there is sufficient evidence from which to conclude that there was an oral agreement and, if so, whether such an agreement would be legally valid.

The evidence does not support the finding of an oral agreement. The only mention of any agreement, was Mr. Henderson's testimony that he and defendant agreed to take down the old fences and put up a new one. (R. 83) Such an agreement was necessary because one of the fences taken out belonged to the defendant and was the east boundary line of his property. Mr. Henderson built the chain link fence along a line which *he decided* would serve as *his* boundary. He actually claimed additional ground (R. 84) but that he had no particular use for it. (R. 84) Mr. Henderson also testified that he knew some

other party had at least a right of way interest immediately to the west of his property, but did not know who the owner was. (R. 83 There is no testimony that he agreed that the chain link fence was also defendant's boundary. He could not so agree because he knew of other ownership. Everything done in relationship to the chain link fence was the unilateral act of Mr. Henderson. He removed the old fence (R. 83). He cleared the ground (R. 83). He paid for the new fence with no assistance from the defendant (R. 83). The defendant remained silent during the period of construction. Although this may be sufficient evidence from which to find that Mr. Henderson abandoned his interest in the property west of the chain link fence, it is not sufficient for a finding of an oral agreement for the transfer of real property.

In any event, we submit that two parties who are not immediately adjoining land owners and who know there is a gap between their properties (Finding II, R. 32-33) cannot agree to establish a boundary line which thereby results in the taking of the property of a third person. Plaintiff has established record title to the strip in question. Mr. Henderson testified that he knew some other person had at least a right of way interest in the disputed property. (R. 83). Defendant's deeded east boundary line stops short of the chain link fence by approximately 12 feet, a fact defendant knew or at the very least should have known. In the face of all these known factors, Mr. Henderson and defendant simply could not establish a line which would result in the transfering of the record title of plaintiff's predecessor to defendant.

In the case of *Tripp v. Bagley,* 74 U. 57, 276 P. 912 (1928), this Court was faced with a somewhat similar problem, although the parties were adjoining land owners, there being no third party owned gap as in the instant case. In dispute was about six acres of land to which the plaintiff held record title. Defendant claimed ownership of the land by virtue of an agreement between plaintiff and his predecessors in interest, which agreement had established a boundary line placing the six acres in defendant's boundaries. In discussing the law of the case, the Court pointed out that where a boundary line is unknown or uncertain, there can be a valid, oral agreement establishing the line on the theory that such an agreement does not involve a transfer of land, but only the definition of the deed under which the parties hold title. But in that case, the Court found that as the land had been surveyed, the true boundary line was certain. In finding for the plaintiff by holding that the agreement as to the boundary line was invalid, the Court set forth the rule,

> "Where co-terminus land owners know the location of the true boundary line, they may not establish a valid boundary line between their lands by a mere parol agreement at a place other than the true line." Tripp v. Bagley, 276 P. 912, at 917.

The reason for that rule is that where the true line is known any change in the line involves a transfer of land. In the instant case the true boundary line was known. There is absolutely no evidence in the record of this action to support the Trial Court's finding No. 7 (R. 34) that the property in dispute existed as a result "of land being inaccurately surveyed prior to the plat being

made." There is no evidence whatsoever of any inaccurate survey. Although the exact boundary line of Mr. Henderson's property may have been in dispute, the east boundary line of defendant's property had been surveyed, described and was clearly established. As testified to by both Mr. Bush and Mr. Coon, the defendant's east boundary did not include the disputed property. (R. 62, 103). Therefore, even if the Court should find that there was an agreement, any such agreement would be invalid under the holding of *Tripp v. Bagley*, supra. Any interest Mr. Henderson may have had in the disputed property was conveyed by him to plaintiff's predecessor by a valid Quitclaim Deed. (Ex. P. 4)

CONCLUSION

Plaintiff proved that it had actual, valid, record title to the disputed property. Defendant did not prove any title, as he did not obtain title by deed or conveyance or by act or operation of law. There was no agreement as to the boundary line and even if there was, no such agreement could deprive plaintiff, a stranger to any agreement, of its property and for the reasons stated in Point III any such agreement would be invalid, as defendant's true boundary line had been clearly established prior to the time of any alleged agreement. Therefore, the Court should reverse the lower Court and quiet title to the disputed property in the plaintiff and remand the case to the lower Court for a determination of plaintiff's damages.

Respectfully submitted,

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