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Gerald J. Creason and Viola M. Creason, and Hallmark Constructors, Inc. v. Arnt Leroy Peterson and Ruby W. Peterson : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD J. CREASON and VIOLA M. CREASON, and HALLMARK CONSTRUCTORS, INC., a corporation,

Plaintiffs-Respondents,

v.

ARNT LEROY PETERSON and RUBY W. PETERSON, his wife,

Defendants-Appellants.

Case No. 11878

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Third District Court for Salt Lake County, Utah
Hon. Leonard W. Elton, Judge

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STATEMENT OF THE KIND OF CASE

This is an action to recover damages for breach of the covenants of a Utah statutory form of warranty deed.

DISPOSITION IN LOWER COURT

Plaintiff's-Respondents received a judgment in the sum of $720.00, plus interest.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the judgment of the trial court.

STATEMENT OF FACTS

On the 20th day of December, 1963, Appellants gave Respondents a Warranty Deed (Plfs ex. 2 and R-5), conveying certain property in Salt Lake County. The starting point of the description was the intersection of the center lines of 9th East and 56th South Streets which point was also related to a corner of a quarter quarter section. The description did not refer to a fence line. At the trial two (2) survey plats (Plfs ex 3 and 4) of the property prepared by Surveyor Charles V. King were received in evidence upon the stipulation of Appellants that if King was called he would testify that he had prepared them (R-73 line 38 and R-74 line 12). Robert B. Jones testified for Respondents that his field crew, including at least one licensed surveyor acting under his direction field checked the first plat prepared by Surveyor King (R-75 line 22) and discovered an error which he believed was a chaining error (R-82 line 18); that he pointed that error out to King (R-76 line 2), who then sent his field crew out to check to discrepancy. The second survey plat was then prepared by King to correct that discrepancy. Jones testified that the corrected survey was accurate (R-76 line 15). He testified that his crew's field notes began at a monument at the center

of 56th South and 9th East designating the center of that intersection (R-78 line 19 and R-77 line 16); that he knew of that monument and had personally used it at least twice in the previous year (R-80 line 1). He further testified that it was customary in the surveying profession for a surveyor to rely on the field notes and findings of his field crew (R-88 line 25).

Appellants called two surveyor witnesses, each of whom testified that the second King survey was done correctly (R-134 line 2 & R-135 line 3, in accordance with good surveying practice and as they would have done the survey if they had done it themselves (R-146 line 3-19). Each of the surveyors testified that that corner of the quarter quarter section was a paper tie (R-81 line 26, R-128 line 15 and R-143 line 9); that there was no marker or monument designating that point; and that it was proper to rely on the monument at the intersection of 56th South and 9th East as King had done (R-78 line 19), R-134 line 9, and R-146 line 7). Appellants' witness, Goff, testified that accordnig to the "Old Bible" kept in the County Surveyor's Office the original survey of that intersection was accomplished in 1896 and that road stones were located at all four corners of the intersection at that time (R-127 line 11).

The survey plat which all of the experts agreed was properly prepared shows the Northerly line of the described property to be 4.5 to 4.1 feet North of and outside of a fence that is upon the ground (Plfs ex 3).

Mr. Erekson testified that his family owned and were in possession of the property North of that fence since 1920 (R-120 line 28 & R-122 line 5).

Don A. Stringham testified at length about his efforts expended to obtain surveys, examine title, prepare and obtain quit-claim deeds both between Respondents and other owners and between Respondents and their purchasers, to conform the property delivered to that described and to satisfy Respondents purchasers of the identically described property respecting the land that Respondents had sold but failed to deliver (R-91 line 1 and R-116 line 6).

ARGUMENT

Point I

THE EVIDENCE THAT THE PROPERTY DESCRIBED DID NOT COINCIDE WITH THE PROPERTY FENCED IS COMPETENT AND UNCONTRADICTED.

Appellants assert without citation of precedent or authority that Robert Jones testimony that the second King Survey was accurate based upon the investigation, verification, and field notes of his field crew, which included a licensed surveyor was incompetent, apparently because he did not personally hold the tape or sight the transit to make the required measurements. I assume that if he had held the tape or sighted the instrument Appellants would claim the testimony of

the person holding the other end of the tape was also required. The cases hold otherwise. 32 C.J.S. 419 under the heading Evidence, subsection 546 (112), entitled "Surveying" states the rule as follows:

> "A surveyor may interpret the field notes of another, where a proper foundation is laid . . . "

In the case of *Warczynski v. Barnycz,* 117 A 2d 573, cited in support of the statement in C.J.S., the Supreme Court of Maryland held that an employee in a surveyor's office could testify concerning a plat prepared by his employer's office and the field notes of the survey on which the plat was based, even though he had not made the plat or participated in the survey (the employer was ill), on the basis that such survey and notes were made and kept in the regular course of business.

POINT II

THERE IS NO EVIDENCE TO SUPPORT APPELLANT'S THEORY THAT THE PROPER COMMENCEMENT POINT WAS IN LINE WITH THE NORTH FENCE.

Appellants introduced the testimony of two expert witnesses at the trial—both they and Robert Jones rejected the invitation of Appellants' counsel to agree that the fence was the proper starting point (R-81 line 5, R-89 line 27, R-131 line 12, and R-144 line 16). All three agreed that the King Survey was correctly made.

Appellants apparently contend that Judge Elton should have rejected their expert testimony and should himself have determined that the starting point was in line with the fence based solely on the recitation in several old deeds (the last was in 1943), not including the deed in question, that such point was in line with a fence (Defs ex 7 Abstract Page 26 and earlier pages). Even if one concludes that the fence which had been re-built several times over the years (R-123 line 16) had not been moved, there is no indication approaching the quality of admissible evidence that it was originally in line with such starting point. That the starting point in those descriptions is not only double but triple tied (the fence, the intersection, and the quarter quarter corner) suggests some insecurity on the part of the grantor. It is a matter of common knowledge, about which the Court can take judicial notice, that the location of fence lines is often approximated and that succeeding grantors merely copy the description used by their grantor. If it was not common knowledge, each of the expert witnesses so testified in this case (R-81 line 5, R-131 line 5, and R-144 lines 13-21). The source of the dispute in this case is the failure of Appellants to continue the practice of referring to the fence in their description. If they had done so Respondent would presumably have continued the practice and we would all have been spared this comparatively small but tedious dispute.

Appellants have in this case relied on the *Reese v. Murdock Case,* 121 Ut. 517, 243 P2d 948, wherein

the Court concluded that where the monument for the same quarter quarter section mentioned in the instant description (and described by each of the surveyor witnesses as a paper tie) was missing or never present and where its location was uncertain even by calculation, a fence, regarded prior to the survey by everyone involved to be on the section line was a more reliable monument than the old survey notes which supported the calculations on which surveys conflicting with that fence were based. The Court indicated its uncertainty about its decision as follows:

> "There seems to be no possibility that anyone will ever dispute the right of plaintiffs to the property to that fence line, and should such dispute arise he may rely on his warranty deed and look to the Whites to make it good. Where this quarter quarter corner was under the original survey and as re-established cannot be demonstrated and under the evidence is very uncertain, but the situation demands that it be made certain by this decision, as between these parties. The existence of this fence line under these facts and circumstances is sufficient to sustain the finding of the trial court's decision."

The instant case is very different. The monument marking the intersection of 56th South and 9th East to which the description is tied was in place and used by the surveyors. Despite Appellants' effort at trial to render its location uncertain, all of the expert witnesses testified that the intersection had been clearly marked since 1896, except for brief periods where the markers or monuments were destroyed or removed

and had to be replaced (R-77 line 16, R-127, R-127 line 11, and R-141 line 1).

Presumably, there was some competent evidence to support the determination in the *Reese v. Murdock* case that the fence was in fact on the section line. In the instant case that determination would have to depend upon recitations in deeds which were in all probability simply based on similar recitations in prior deeds. We have no indication of the basis of the original recitation. Moreover, in the instant case the trial court determined on competent evidence that the description and the fence line did not coincide. Even if there was competent evidence to the contrary and Respondents claim there was not, Judge Elton's determination made as it was on the basis of his observation of the witnesses and their testimony, shoudl be upheld.

POINT III

APPELLANTS' COVENANTS OF QUIET ENJOYMENT AND WARRANTY WERE BROKEN BY THE CONSTRUCTIVE EVICTION OF RESPONDENTS AND THEIR GRANTEES FROM THE LAND CONVEYED TO THEM LYING NORTH OF THE FENCE.

Erekson clearly testified that he and his family had owned and been in possession of the land lying North of the fence since 1920 (R-120 line 19 and following). It is likely that his chain of title derives from conveyances using the fence as a starting point

in which case he is probably the owner by grant of the strip of land North of the fence. If not he was in open notorious possession for some forty nine years and had acquired it by adverse possession. Short of that all of the recent decisions of this Court indicate to this writer that he would be declared to be the owner under the doctrine of "Boundary by Acquiescence". See particularly *King v. Frong,* 14 Ut 2d 135, 378 P 2d 893. Also see *Fuoco v. Williams,* 18 Ut. 2d, 282, 421 P2d 944. Respondents cannot even claim that their grantors grantors or the grantors grantor before him had title to that strip by grant or otherwise because the descriptions in their respective conveyances began from the fence line. Appellants dilemma is simply that they received a conveyance of one piece of property and conveyed to Respondents a slightly different one relying on some previous grantor's prediction that the point of beginning was at the fence line without protecting themselves by tying their point of beginning to the fence line.

In any event the cases do not require Respondents to become a trespasser and be evicted or to bring a useless and losing action to quiet title in order to obtain damages for their grantor's breach of the covenants of warranty and quiet possession. The rule is noted at 20 *Am Jur 2d,* 630, *Covenants,* as follows:

> "§ *61. Inability of grantee to obtain possession from adverse claimant.*
>
> As a general rule, where at the time of the conveyance the premises are in the possession

> of a third person claiming under a paramount title, so that the covenantee is unable to obtain possession of the property, a constructive eviction exists which supports an immediate action for breach of the covenant of warranty. The reason most frequently given for this rule is that the law will not compel the grantee to commit a trespass in order to establish a lawful right in another action. Where the covenantor has no title, possession of the premises by a third person under color of title has been held sufficient to amount to a constructive eviction breaking the covenant."

The entire subject is discussed in an annotation entitled "What Amounts to a Constructive Eviction, Which Will Support Action for Breach of Covenant of Warranty or for Quiet Enjoyment" at 172 *A.L.R.* 18. Under subparagraph VIII entitled "Inability of Grantee to Obtain Possession", subparagraph E-4 entitled "Adverse Possession By One Under Color of Title", the rule is stated.

> "Where the covenantor has no title, possession of a third person under color by title has been held sufficient to amount to a constructive eviction."

No contrary decisions were noted.

Judge Elton was and is perfectly capable of determining whether Respondents were reasonable in not trespassing, in not bringing a losing quiet title action and in fact in proceeding as they did to remedy the situation and satisfy their grantees.

POINT IV

RESPONDENTS ACTIONS TO REMEDY THE DEFECTIVE TITLE AND TO SATISFY THEIR GRANTEES WERE INCURRED AS A RESULT OF APPELLANTS' BREACH; WERE REASONABLE; WERE LEGALLY COMPENSABLE; AND THE AMOUNT AWARDED BY THE COURT AS COMPENSATION WAS NOT EXCESSIVE.

Some of the expense and activity of Respondents' attorney to remedy the breach was addressed to clarifying title to the fence lines on the East and South sides of the property. Appellants' claim that activity and expense should not be compensated because they point out, it was to obtain title to land outside the land conveyed, which is true. The point is, it was in an effort to satisfy Respondents' grantees and not to obtain additional land for Respondents themselves that such activity was undertaken. Respondents eventually satisfied their grantees and protected their sale by clarifying title to that property *and* crediting them $200.00 on the agreed purchase price because they could not obtain title to the apparently desirable North strip. Obviously, clarifying title to the South and East strips was a part of the consideration given to Respondents' grantees without which the price concession on the North strip would not have been available, whereupon said grantees could have rescinded their purchase and Respondents' damages would have been greater. Whether Respondents'

activities on the South and East strips are described in terms of mitigation of damages or expense reasonably incurred to correct Appellants' breach, the result is the same.

It is helpful to look at this problem through Respondents' eyes. They bought a tract of property and sold that tract by a deed using an identical description. When their grantees discovered the title line and fence discrepancy they asked Respondents to correct it. Respondents hired Don A. Stringham, a qualified attorney, who I submit proceeded reasonably to obtain surveys, title reports, quit claim deeds, satisfaction of judgments, agreements and an adjustment of price with Respondents grantees respecting the property he could not obtain because the owner would not sell it. In this process Respondents incurred and paid $750.00 in attorney's fees and $499.00 in expenses. The Court apparently in a gesture of compromise because of the hot dispute gave Respondents judgment for only $720.00. Respondents have only the benefit of a bargain he was entitled to, less $1,249.00 in actual expense, less also the expense of a trial and this appeal. Appellants who caused the difficulty by selling property they didn't own now claim that imposing $720.00 of that expense on them is excessive and unreasonable.

Appellants have in their brief attempted to limit Respondents' damages to only certain of his expenses, but clearly all of said expenses were incurred by Respondents to correct a problem they caused.

Courts generally and Utah in particular have allowed Plaintiffs in actions for breach of covenants of warranty and quiet enjoyment all of their costs including reasonable attorney's fees actually incurred to maintain or defend title to the premises conveyed. See *VanCott v. Jacklin,* 63 Ut. 412, 226 Pac. 460 at Page 463 for the Utah rule. For the rule generally see the annotation entitled "Damages for Breach of Covenants of Title" at 61 ***ALR*** 10, particularly subsection XIV beginning at Page 154.

CONCLUSION

Appellants' theory of the case is not supported by the evidence. If it was, the trial court found against them on the basis of competent evidence. Respondents proceeded reasonably to satisfy the claims of their grantees. The expenses they incurred were directly caused by Appellants' breach of their covenants and warranty and quiet enjoyment. Even though the trial court did not give them judgment for all of the expenses they incurred as a result of that breach, Respondents now ask that the judgment of the trial court be affirmed.

Respectfully submitted,

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