1970

Robert A. Thompson, Herbert Richey And Marib Richey v. Kyle H. Brewster And Monarch Loan Company, Inc. : Brief of Appellant

In The Supreme Court of the State of Utah

ROBERT A. THOMPSON,
HERBERT RICHEY and
MARIE RICHEY, his wife,
Plaintiffs and Respondents,

vs.

KYLE H. BREWSTER and
MONARCH LOAN COMPANY, INC.,
A Utah Corporation,
Defendants and Appellant.

Case No.
11905

APPELLANT'S BRIEF

Appeal from the Judgement of the
3rd District Court for Tooele County
Hon. Aldon J. Anderson, Judge

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STATEMENT OF THE KIND OF CASE

This action is brought by the plaintiffs to quiet title. The case against the Monarch Loan Company Inc., was dismissed. The defendant Brewster denies the right of the plaintiffs, alleges that the right to possession is in himself, and by way of counterclaim seeks to regain possession of the property with damages.

DISPOSITION IN THE LOWER COURT

The issues were found in favor of the plaintiffs, and the defendant Brewster, hereinafter referred to as the defendant, was denied relief on his counterclaim.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgement and an order remanding the case for retrial.

STATEMENT OF THE FACTS

"The property consists of thirteen duplexes built on land held on a long-term government lease with the furniture and fixtures and is located in Tooele County. The plaintiffs sold the same to the defendant under a uniform real estate contract."(R-9, 10 and 17. The quotation is taken from page 1 of the court's memorandum decision of which there are three copies in the record.)

The contract was executed on the 27th day of September, 1967, with a recited consideration of $130,000.00 , of which $20,100.00 was paid down and the balance at $900.00 a month with 1/12 of the taxes, insurance, etc. , amounting to an additional $300.00, or a total of $1,200.00 a month.

One only notice of intention to declare a forfeiture was given on the 4th day of September, 1968 (Exhibit 5-P) which alleged a default of $1,195.75 and allowed five days within which to pay the amount of the default.

Some confusion exists in the record as to whether or not there was in fact a default at the time, growing out of the fact that the defendant was to have received a $4,100.00 credit on the contract growing out of a former "self-help"seizure of the same property by the plaintiffs, which the defendant claims was never received, except as a bookkeeping item, (Exhibit P-2 and Tr,-71-3) and the further fact that the defendant claims

to have sent the payments in within the grace period (Tr-69-12 and 79-17).

Following that notice the plaintiff served by registered mail a notice to defendant declaring forfeiture, and by its terms allowing five days to surrender premises or in the event of "your failure to do so, legal proceedings will be instigated against you to recover possession of the said property." (Exhibit P-4 and P-6 and Tr 51-1) This notice was postmarked September 16, 1968. However, without waiting five days, the plaintiff Robert A. Thompson, "went out there" and "physically took over the property," (Tr 9-8) with the money, $200.00 rent, which had been collected by the defendant's caretaker and all (Tr 14-18).

On the 6th day of December, 1968, the defendant filed a petition in bankruptcy Case Number B-1324-68, under the provisions of Chapter 13 of the Act and set out in his schedules and his plan the property and the contract sued upon (R-14).

This action was commenced by the filing of a complaint on the 3rd day of April, 1969 (R-1).

On the 17th day of June, 1969, the defendant filed his affidavit and motion to stay proceedings, immediately prior to the time set for the commencement of the trial, and his motion to stay was denied (R11, 12, 13 and 14, and Tr-2 and 3).

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO STAY IN THE LIGHT OF HIS THEN PENDING BANKRUPTCY PROCEEDINGS.

At the time the plaintiffs filed their complaint in the above entitled matter, on the 3rd of April, 1969 (R-1), the affairs of the defendant were and ever since the said time have been and now are administered by the bankruptcy court under the provisions of Chapter 13, which vests in the Federal Court the exclusive jurisdiction of the defendant, his property and his earnings:

> "Title 11 Sec. 1011 (U.S.C.A. at page 717). Exclusive jurisdiction of debtor, property and earnings. Where not inconsistent with the provisions of this Chapter, the Court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages during the period of consummation of the plan." Colliers 14th edition Vol.10 on Bankruptcy page 74 paragraph 23.01 and page 79 paragraph 23.05.

The following language is from the decision in the case of Matter of Forgay, 140 Fed. Sup. 473, granting a permanent injunction against the enforcement of a Utah state default judgement, decided April 4, 1966, from pages 477 and 480 respectively:

> "Neither the bankrupt nor his lawyer is familiar with this field of law and both are led into the false security of a belief that while the matter is pending, the bankrupt court has exclusive charge of it. This is shown by the fact that almost always these cases arise out of defaults in the state court action. Enforcement of the default judgement penalizes the bankrupt for having faith in the dignity and power of the federal court...
>
> "Strong additional reasons support our view. The Act itself provides that it shall be administered by the federal courts. Every orderly and needful remedy and proceeding are provided in the Act. Protection to the debtor, creditor and the public are provided. The division of judicial administration weakens the Act and confuses its administration.

With orderly procedure and jurisdiction available. it can be relied upon by the worthy debtor to protect him against embarrassment, surprising and harrassing proceedings and the expense of a multiplicity of unnecessary suits. The public and the creditor are protected against the discharge of the unworthy debtor."

POINT II

THE COURT ERRED IN SUSTAINING A FORFEITURE OF THE RIGHTS OF THE DEFENDANT IN THE CONTRACT AND IN THE PROPERTY.

"The pertinent issue is whether the forfeiture of all past payments on the premises as provided in the contract unconscionably burdened defendant", is the language of the Court in approaching a similar question in the case of Weyher v. Peterson, 16 U 2nd 278 at 279, 399 P 2nd 438 at 439.

"In Christy v. Guild Supra, we recognized the principle that acceptance of delinquent payments may well result in a waiver of the ordinary "time is of the essence" clause since by such conduct the vendor has led the vendee into the belief that the vendor will continue to waive the strict performance of the contract." Pearce v. Shurtz, 2 U 2nd 124 at 129, 270 P 2nd 442 at 445. This decision also points out the rule from Section 300 of Restatment of Contracts, with reference to the effect of "acceptance of defective performance" that "This is a question the answer to which depends on the differing facts of each case."

The contract in this case recites a down payment of $20,100.00 cash (R1).

The vendors, the plaintiffs, permitted the vendee, the defendant, to make irregular payments during the whole time. (Tr 12-16, 27-6, page 3 1st paragraph of Court Ruling).

The plaintiffs, in violation of their settlement agreement to "credit Mr. Brewster with a total of $4,100.00 which shall be applied toward the unpaid balance owing on the contract" (Exhibit P-2), "took out what we had to spend on the property for maintenance and big stoves, refrigerators or whatever we needed to buy." (Tr 28-1 also 12-8).

On the 23rd of August, 1968, the date of the plaintiff's default notice which was served on the 4th day of September, claiming a default of $1,195.75, there was no default at all according to the agreement of the parties (exhibit P-2). There was a missapplication of funds by the plaintiffs.

There was one only notice of default (Exhibit 5-P) which, since payments had been irregularly received was not sufficient.

Finally there was an unlawful and improper taking of the property together with the books and effects of the defendant, and the "very small amount (of money)--maybe two hundred and some dollars or-- I don't think over three hundred" (Tr 14-18).

This two hundred and some dollars seems to have been over-looked by the Court and it is referred to here merely as an evidence of the sort of "sharp practice" that Judge Worthen seems to have been referring to in the Peck v. Judd case 7 U 2nd 421 at page 428, 326 P 2nd 712 at 717, which has been cited with approval in Carlson v. Hamilton 8 U 2nd 272 at 275, 332 P 2nd 989 at page 991 and also Weyher V. Peterson referred to above, at page 279 Utah, 439 Pacific:

"Courts of equity shall not interfere except when sharp practice or most unconscionable results are to be prevented."

POINT III

THE COURT ERRED IN FAILING TO FIND DAMAGES FOR THE DEFENDANT.

The Court on Page 5 of its memorandum decision finds that "the re-entry of plaintiffs was in violation of Section 2 of 78-36-2" but fails to award damages, which seems to be inconsistent with the holding of the well reasoned case of Freeway Park Building Inc., v. Western States Wholesale Supply, 22 U 2nd 266 at page 271, 451 P 2nd 778 at page 782:

"...There is no question under Utah cases that a violation of the duty set by statute gives rise to an action for damages, not in an action under the Forcible Entry and Detainer Statute but as a separate tort..."

CONCLUSION

Since, as stated in the Kohler v. Lundberg case back in 1919, 54 U 339 at 343, 180 P 590 at page 594:

"Courts of equity are loath to enforce a forfeiture, especially when a refusal to do so, as in this case, gives to all parties to the agreement every right to which they are entitled, and thus works no hardship upon anyone. The right of forfeiture once waived cannot be recalled."

and since a forfeiture in this case would unconscionably burden the defendant and since a trial is required to determine the defendant's damage, the above case should be reversed and the matter remanded for a new trial.

Respectfully submitted,

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