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Don Weiler Bennion, Executor of the Estate of Heber Bennion, Jr., Vera W. Bennion And Bennion Ranching Co. v. Dudley M. Amoss And Diana H. Amoss, His Wife, And John Does Nos. I Through 5 : Brief of Defendant-Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

DON WEILER BENNION, Executor of the Estate of Heber Bennion, Jr., VERA W. BENNION and BENNION RANCHING CO., a Utah Corporation,
Plaintiffs,

vs.

DUDLEY M. AMOSS and DIANA M. AMOSS, his wife, and JOHN DOES Nos. 1 through 5,
Defendants.

Case No. 12716

Brief of Defendants - Appellants

Appeal from the Judgment of the District Court of Daggett County
Hon. Maurice Harding, Judge

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STATEMENT OF THE KIND OF A CASE

This is a case where the Plaintiffs-Respondents sought to accelerate the payment of a note and foreclose a mortgage securing the same, and the Defendants-Appellants asserted certain affirmative defenses and urged a counterclaim against the Plaintiffs-Respondents.

DISPOSITION IN THE LOWER COURT

The lower court granted to Plaintiffs-Respondents a summary judgment in the sum of $140,586.16 and decreed foreclosure of their mortgage, but a hearing was not had on the affirmative defenses of Defendants-Appellants, nor did the court rule on their counterclaim.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek an order of this Court reversing the judgment of the lower court, with directions that a trial be had on all the issues of the case, including the counterclaim, prior to the entry of any judgment.

STATEMENT OF FACTS

It is felt by the writer that a background of this case should be set forth to more fully illuminate the immediate facts before the Court.

For the sake of clarity, Plaintiffs-Respondents will hereinafter be referred to as Bennions and the Defendants-Appellants will hereinafter be referred to as Amoss.

In 1964, Heber Bennion came to Amoss, who owned a ranch neighboring Bennion, and suggested that Amoss buy the Bennion ranch at a certain figure. Amoss agreed and a contract was executed. A few weeks later, Bennion changed his mind and told Amoss that he was taking his land back. As Amoss, at that point, had spent

many thousands of dollars on the ranching operation, he did not feel inclined to fold his tent and steal away. After days of wrangling, Amoss and Bennion, in the company of Bennion's lawyer, agreed on a compromise settlement to avoid legal action. A few weeks later, Bennion again changed his mind, and Amoss brought suit for specific performance of the original contract. The lower court ruled in favor of Amoss and Bennion appealed. This Court affirmed, but added that as Amoss had agreed in the compromise to pay Bennion an additional $17,500., he should do so and he should not be allowed any attorney's fees. The case was remanded with directions to wind up a few loose ends. The lower court, not to be outdone by the generosity of the Aplate Court, decided that as Amoss had allowed Bennion to reserve 40 acres of the so-called Kiel place, which was one of the ranches making up the Bennion ranches, Bennion should be given the whole Kiel place, about eighty acres, and of course the contract price would not be reduced accordingly. The court further allowed Bennion 52 shares of water, which, again under the compromise, Amoss had agreed to let Bennion keep, however, for this the court directed that Bennion must pay. Not so! Again Bennion appealed, and this time he came away with $5,000. worth of water stock for nothing.

During all of this time, Amoss had sought to be heard on certain claims against Bennions regarding interference with Amoss' business, conversion of personal property and other tort and contract actions. The

inclusions of these claims apparently spoiled the neatness of the package and the claims were ever separated to be handled later. Later came and went and Heber Bennion died.

Amoss had previously paid off the Bennions' indebtedness of $35,000. to the Utah P.C.A., some of which came from the old Bennion livestock and some of which from Amoss' pocket. Amoss had further kept the Federal Land Bank of Berkeley current and paid off the $5,000. plus interest indebtedness of Bennions to one Rodney Schofield. In November, 1969, Bennions completed the title work on the property and Amoss signed the myriad notes, mortgages and other papers papers presented to him for signature, giving Bennions a further $35,000. in cash. Amoss did not until 1970 realize that the notes contained a prepayment penalty. Amoss also felt that as the courts had enforced every concession that they had made to Bennions as a compromise *to avoid litigation,* (and indeed more as Bennion had ended up with the gift of an additional 40 acres and did not have to pay for the water stock or attorney's fees), that the acreage release clause agreed to by Heber Bennion should be incorporated in the mortgages.

Following the death of Heber Bennion, a claim was made by Amoss against the estate and an action subsequently filed thereon as Daggett County civil No. 132. The action slowly proceeded to a motion to dismiss Plaintiffs' complaint, which motion was still under advisement upon the commencement of the subject

action .During all this time, Bennions carried on the tradition set by Heber Bennion and continue to interfere in the financial and ranching affairs of Amoss.

On December 17, 1970, Amoss was served with a Summons and a Complaint in the instant action, R-134. Amoss answered, R-123. Bennions moved the court for a summary judgment, R-118, and for sanctioning of Amoss and his lawyer under Rule 11, Utah R.C.P., R-117, the latter apparently on the grounds that Amoss had had the unmitigated gall to resist counsel in the mere taking of property. The court denied these motions, R-81 and R-110. Bennions then had an ex parte order signed appointing a receiver for the ranch, R-106. At a rehearing of this matter, the court refused to appoint a receiver and Amoss' tenant was left in possession, R-91.

In May, 1971, case no. 132, came on for trial and the jury returned a verdict in favor of Amoss. On July 28, 1971, this verdict was set aside by the trial court and a new trial was ordered; an interlocutory appeal was denied by this Court on October 19, 1971.

On July 22, 1971, Bennions mailed to Amoss interrogatories, R-71, and requests for admissions, R-68. On August 12, 1971, Bennions mailed to Amoss a notice of hearing to compel answers, R-66. Amoss had not answered Bennion's discovery because of the pendency of case no. 132, which pendency was the result of Bennions' motion to set aside the verdict, which made the questions in the discovery meaningless at that time.

Bennions at the same time renewed their petition for the appointment of a receiver for the ranch, R-60, and served Amoss and his tenant with Orders to Show Cause, R-16 and R-20. As the lower court had previously denied Bennions' motion for summary judgment and no new factual material had been presented to the court in support of the renewed motion, Amoss concentrated on the rebuttal of the wild allegations made by Bennions in support of their renewed petition for the appointment of a receiver, R-60. This proved to be a costly error in tactics, R-65. From this judgment Amoss appealed, R-14.

ARGUMENT

POINT I

SUMMARY JUDGMENT FOR THE PLAINTIFFS-RESPONDENTS WAS NOT JUSTIFIED.

Summary judgment was granted by the trial court based on the pleadings, affidavits and exhibits on file.

Don Bennion's affidavit in support of summary judgment, R-119, consists in part of self-serving declarations, e.g., paragraphs 10 and 11, "Defendant Dudley Amoss was given full credit upon the purchase price of the subject real property and Bennion livestock for the purchase price received by Plaintiffs for said alleged converted cows and calves . . . ", quite true — as far as it goes. However, the credit given was

the market value of non-pregnant cows, (the cows converted were pregnant), and calves at the date of the conversion, with no payment for the harm done Amoss' business. The same affidavit, at paragraph 9, states as fact certain legal conclusions, which of course is in flagrant violation of Rule 56 (e), Utah R.C.P., FORM OF AFFIDAVITS, "Supporting and opposing affidavits shall be made on *personal knowledge,* shall set forth facts as would be admissable in evidence, and shall show affirmatively that *affiant is competent to testify to the matters stated therein.* (Emphasis supplied). Paragraph 7 disagrees with admissions made by Heber Bennion in prior depositions which were read into the record at the trial of case no. 132. Paragraph 8 contradicts Amoss and this creates a fact issue.

Mr. Bennion's affidavit further shows photographs purporting to show damage done by Amoss, which photographs are lettered A through R. Photographs A and B are not taken of Bennion ranch land but rather of a ditch located on land belonging to the Utah Dept. of Fish and Game,a nd which serves the Bennion life estate. Although there is always some portion of fence on a large ranch in need of repair, whether due to rot, deer, cows, hunters or what have you, photograph G depicts not a down fence but an open wire gate between the Bennion and Swan properties. Photographs O through R are taken of one of the farm houses on the Bennion ranches. Photos of the same house were before Judge Harding at the hearing for the appointment of a receiver in April, 1971, at which time the

court was apprised of the fact that the vandalism done to this house was done when the deceased Heber Bennion was collecting the rents and exercizing control thereof, which was several years prior to the execution of the subject mortgages.

At the hearing on August 20, 1971, Amoss told the court that the reason for the request for admissions and interrogatories from Bennions had not been answered was because Bennions should have been aware of the pendency of case no. 132 and that the required answers could not in good faith be made until that case was disposed of.

Although at the August 20 hearing Amoss admitted not having made the payment due in 1970, they maintained that, as set forth in the pleadings, they were not in default because of Bennions' actions. Amoss had filed an affidavit, R-73, in support of their position. If, as Amoss contended in their affirmative defense, R-124, Bennions are in pari delicto in that their interference with Amoss' business from 1964 through 1970, rendered it impossible for Amoss to make payments due under the subject note, then equity will not find a default.

> "It is held, apparently without dissent, that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause, when the default of a mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee." 70 ALR 993.

The court based its summary judgment on the "pleadings, affidavits and other matters appearing in the files," R-35; it is submitted that as to Bennions' complaint, the base used contained and does contain issues of fact as to the default and form of the said mortgage.

> "Summary Judgment is appropriate only when the favored party makes a showing which precludes as a matter of law, awarding any relief to the losing party," Tanner v. Utah Poultry & Farmers' Cooperative, et al, 11 Utah 2d 353, 359 Pac. 2d 18.

POINT II

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED PRIOR TO A TRIAL OF ALL THE ISSUES INCLUDING THOSE OF THE COUNTERCLAIM.

Although there is no question that the trial court has the power under Rule 56, Utah R.C.P., to grant a partial summary judgment in the proper case, this may not be done in all cases.

> "The presence of a counterclaim predicated upon good and substantial cause justifying a trial, may bar a Plaintiff's motion for summary judgment on his complaint or may preclude the court from ordering execution of the judgment pending the determination of the counterclaim," 8 ALR 3d 1370.

In the subject case, the court not only granted Bennions' motion for summary judgment, but ordered execution thereon, R-31.

When a partial summary judgment has been properly rendered in a case, the trial court should make findings as to what material facts are and are not in substantial controversy, with directions as to what further proceedings shall be had, Rule 56 (d), Utah R.C.P. This was not done in the subject case.

In a 1959 Washington case, Lewis County Savings and Loan Assoc.v. Black, 374 Pac. 2d 157, the lower court granted Plaintiff's motion for summary judgment and dismissed Defendant's counterclaim without prejudice, decreeing foreclosure of the subject mortgage. The appellate court held that the mortgagee was not entitled to summary judgment ordering mortgage foreclosed, without reference to mortgagor's pending counterclaim based on allegations that mortgagee's actions had damaged the subject property in an amount greater than the mortgage loan. The court said, "However the judgment went beyond establishing facts. It determined that respondent was entitled to a decree of foreclosure before Appellant's affirmative defense and counterclaim was (sic) heard on its merits."

If what Amoss asserts in their counterclaim is true, then Bennions may owe Amoss an amount greater than the amount owed Bennions by Amoss, and therefore there would have been no default.

CONCLUSION

Summary Judgment is an excellent, expeditious tool of the courts—in a proper case and at the proper posture of the case. However, in the instant case, it is submitted that the lower court should either have stayed the proceedings pending the outcome of case No. 132, as stated in Amoss' Third Defense, R-124, or have ordered the case set for trial so that all of the issues might be determined prior to the disposing of the subject land at a distressed price.

The judgment and decree of the lower court should be reversed and the case remanded for a trial.

Respectfully submitted,

DUDLEY M. AMOSS
Attorney for Defendants-Appellants