1970

Phillips Petroleum Company v. Herbert A. Hart And Mrs. Herbert A. Hart : Brief of Defendants-Appellants

IN THE SUPREME COURT
of the
STATE OF UTAH

PHILLIPS PETROLEUM COMPANY,
Plaintiff-Respondent,

v.

HERBERT A. HART and MRS. HERBERT A. HART, his wife,
Defendants-Appellants.

Case No. **12101**

BRIEF OF DEFENDANTS-APPELLANTS

Appeal From a Judgment of the Third District Court
In and For Salt Lake County, Utah
The Honorable Leonard W. Elton, Judge

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NATURE OF THE CASE

This was an action upon a "contract for deed" to recover taxes allegedly paid by plaintiff for the years 1963 through 1966.

DISPOSITION IN LOWER COURT

The District Court awarded the plaintiff the sum of $1433.26 together with interest and costs.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment or in the alternative a new trial.

STATEMENT OF FACTS

On or about the 9th day of August, 1963, the parties entered into a "contract for deed" wherein the plaintiff agreed to sell and the defendants agreed to buy certain property in Salt Lake County, Utah, (Exhibit 1-P). Said contract provided, among other things, that defendant "shall keep all taxes paid."

Defendants entered into possession of said premises and made the required monthly payments until approximately January 20, 1967, when defendants, having an opportunity to sell said property, contacted the plaintiffs and requested they waive their "first refusal option to purchase" (Exhibit 1-P).

Plaintiff's agent, Mr. Gordon Wirick, obtained such a waiver from plaintiff's Home Office in Bartlesvile, Oklahoma, and thereafter, on approximately February 20, 1967, the defendant Mr. Hart, again contacted Mr. Wirick, plaintiff's agent, and informed him that his first sale had fallen through but that he now had a second opportunity to sell the property and again requested the waiver. Said waiver was furnished to the defendants who thereupon requested a payoff figure on the contract for deed, (R. 52). After several conversations between Mr. Hart and plain-

tiff's agents, such a figure was furnished in the amount of $3,501.39, (R. 52, 53). Defendants paid said sum to the plaintiff, (R. 54), and on or about March 13, 1967, plaintiffs delivered to the defendants a "special warranty deed," (R. 60, Exhibit 10-D).

Thereafter, by letter dated November 17, 1967, plaintiffs made a claim against the defendants for taxes they had allegedly paid on said property.

ARGUMENT

POINT I

THERE IS NO EVIDENCE IN THE RECORD OTHER THAN HEARSAY, ADMITTED OVER OBJECTION, AS TO THE AMOUNT OR PAYMENT OF ANY TAXES ON SAID PROPERTY BY THE PLAINTIFFS.

The only witness, other than the defendant, Mr. Hart, called by the plaintiff was Mr. Gordon Wirick, an employee of plaintiffs, who testified that said taxes "had been paid by Phillips Petroleum Company." Plaintiffs immediately objected and moved to strike; the court overruled the objection, (R. 54). However, shortly thereafter the following occurred:

> "THE COURT: Pardon me a minute. Mr. Hatch, in regard to your last objection, is there any real issue in this case, during these years, that Phillips did or did not pay some $1,200 in real property taxes?

MR. HATCH: They have billed us for them is what started this lawsuit. I don't know whether they have paid them or not, your Honor.

THE COURT: It wouldn't be very difficult to find out, would it?

MR. HATCH: In fact they should have a record of it if they have paid them.

THE COURT: They might.

MR. HATCH: And that's where my objection would be based."

Thereafter, Mr. Wirick testified that plaintiff's tax insurance and claims office in Denver, Colorado, was the place where tax notices were received from County Assessors and where taxes were paid, (R. 59). Further, that the ledger sheets containing the tax basis on property being sold under contract were kept in Denver, (R. 63).

While again, at R. 65, in response to a leading question by the court, Mr. Wirick testified that the taxes were paid by Phillips, it is clear from the foregoing that he had no personal knowledge as to whether the taxes had actually been paid by plaintiff, or the amount of said taxes.

The only other references to the amount or payment of these taxes by plaintiff are contained in Exhibits 2-P, 3-P, 4-P, 5-P, 7-P and 9-P, which again, were admitted over objection (R. 48, 49 and 50). Exhibits 2-P and

3-P are letters from the plaintiff to Mr. Hart and the only foundation for their admission was Mr. Hart's testimony that he had received same. Thus, their only purpose would be to show that a claim had been made against Mr. Hart and not for the proof of the truth of any statements made therein. Exhibits 4-P and 5-P, while they were identified by Mr. Wirick as letters he had written, indicate that the information therein as to the taxes was furnished by a Mr. Cowdry, and as previously noted, Mr. Wirick had already testified that he had no personal knowledge as to the payment or the amount of said taxes. The same is true of Exhibit 7-P, while Exhibit 9-P is in the same category as Exhibits 2-P and 3-P.

Thus, other than hearsay, there is no evidence in the record to support the court's finding (R. 26) that "the plaintiff has paid said taxes and that the amount of taxes due are as follows: 1963 taxes (prorated from September 12, 1963, 132 days at 93c per day; 1963—$340.36, 1964 — $122.76, 1965 — $381.48, 1965 — $401.88, 1966 — $356.67." (It should be noted that even the "hearsay" won't support these figures!) (Exhibit 7-P)

There must be competent admissible evidence upon which a finding is based. Without such evidence a purported finding is ineffective to support a judgment. As well discussed by Justice Wade in his concurring opinion in *John C. Cutler Association v. DeJay Stores,* 3 Utah 2d 107 at page 115:

> "The hearsay rule excludes only 'evidence of a statement which is made other than by a witness

> while testifying at a hearing offered to prove the truth of the matter stated.' Such a statement is not admissible because it would be used as testimony of the existence of the facts stated by a witness who does not purport to have personal knowledge of such facts, and the person making such statement who has personal knowledge of such facts is not a witness subject to cross-examination. . . . Where the 'question is not whether the statements are true, but whether they were made' such statements are not excluded by the rule against hearsay. On this question Wigmore says: 'The theory of the Hearsay rule . . . is that when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference and, therefore the assertion can be received only when made upon the stand subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted the Hearsay rule does not apply."

and further quoting Wigmore,

> "Thus, the words are used in no sense testimonially, i.e., as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the hearsay rule interposes no objection to the use of such utterances because they are not offered as assertions . . . on the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially nor believed by the jury, for this would be to use them in violation of the Hearsay rule. In short, the utterances enter irrespective of the truth of any assertion they may contain and they neither profit nor suffer by virtue thereof."

In *Lake Shore Motor Coachlines, Inc. v. Welling,* 9 Utah 2d 114, although this was a case involving a hearing before The Public Service Commission, the court states the rule as follows at page 118:

> ". . . a finding of fact cannot be based solely on hearsay evidence but it must be supported by a residuum of legal evidence competent in a court of law."

In *Ephraim Willow Creek Irrigation Company v. Olsen,* 70 Utah 95, 258 Pac. 216 at page 222:

> "Although the representation . . .was not specifically excepted to, it was so obnoxious to the general rule that we hold it to be of no probative value. The error of the court in admitting the testimony referred to is clearly prejudicial unless the other evidence in the case, standing alone, justifies the finding . . ."

And a California court in *Stevens v. Mostachetti,* 67 P.2d 809 at page 810 states the rule as:

> "Such testimony was hearsay evidence and objectionable; and under the rule that evidence improperly admitted is not entitled to any weight whatever and is to be given none in considering whether a finding of fact is sustained by the evidence such testimony must be disregarded by us."

POINT II

THERE WAS AN ACCORD AND SATIFSACTION WHICH DISCHARGED DEFENDANT'S OBLIGATIONS UNDER THE CONTRACT.

During the months of February and March 1967 Mr. Hart contacted plaintiffs' agents with regard to a waiver of their first option to purchase and a payoff figure on the contract. After several meetings such a figure was furnished, paid by Mr. Hart and a Special Warranty Deed to the property delivered to him.

1 Am. Jur. 2d, Accord and Satisfaction at page 340 states as follows:

> "§42. Payment of Obligation Before Maturity. It is well established that when a debtor pays his creditor before the debt is due or before the obligation to pay it has matured, an amount less than the contract calls for at the due date, and the creditor accepts such payment in full satisfaction of the entire claim, such payment affords a sufficient consideration to support the creditor's agreement to accept it in discharge of that claim. Here indeed is a consideration which is not only valuable to the creditor for the money may be more beneficial to him when received, and he gets something which he could not demand, but it is also a detriment to the debtor for he does that which he is not bound to do and which may be detrimental to him in a practical sense."

Also see the annotation in 24 A.L.R. 1475 — Payment of Part in Discharge of Whole Debt, wherein the annotation after stating the general rule states:

> "The rule, however, does not apply to a payment made before maturity, however short the interval. And so it is established, with practically no dissent, by the cases, -- some merely recogniz-

ing and others applying the doctrine, — that the payment, before maturity, of less than the amount of a liquidated and undisputed claim, affords a sufficient consideration to support the creditor's agreement to accept it in discharge of the entire claim."

The transactions between these parties completely fits the foregoing, and it was not until some nine months later that plaintiff, by letter, notified defendant that they wanted an additional payment for taxes. With regard to the consideration of the taxes in the negotiations to arrive at a payoff figure, the only direct testimony is that of Mr. Hart (R. 43), wherein he states:

"Q. (By MR. HATCH) You didn't answer his last question, Mr. Hart, Mr. Robbins' last question was were taxes ever discussed during this period?

A. Yes . . .

Q. And who made the call?

A. I made the call.

Q. And where did you make the call to?

A. To Phillips Petroleum from Quarter Master's right next door to where the property was on Second West.

Q. And you discussed at that time the payoff figure and the waiver of the option to purchase, first option refused, is that correct?

A. Yes.

Q. And what was said about the taxes, if anything?

A. I called them up and said — he give me the payoff, and I says, 'Is this a correct payoff,' and the man I talked to said, 'Yes, this is it. He said, 'Did you ever pay taxes on that property?' And I said, 'No, I didn't.' He hesitated a minute and said, 'Well, we'll waive the taxes.'

Q. And it was after this that you gave them the check?

A. After that I gave them a check for the property, yes."

While Mr. Wirick denied that he had discussed the taxes with Mr. Hart, he did testify as follows: (R. 63).

"Q. Now, during March and February, out of these 60 people in the office how many answered phone calls and talked to people that the company was doing business with about property besides yourself?

A. How many would — I would be the only one that they would talk to regarding a payoff of a contract other than two or three men in our credit department.

Q. Then there were two or three people in the credit department that could have talked to Mr. Hart or anyone about payoffs, is that correct?

A. If someone called in and requested the payoff, they would, yes.

Q. And who would they have been?

A. One man, the credit manager, was Jay Johnson, and his assistant was Mr. Schneider."

Thus, the only direct uncontradicted evidence in the record is that an agent of the plaintiff agreed to inclusion of the taxes in the payoff figure.

However, even if this were not the case, the testimony of Mr. Wirick indicates that Mr. Hart had never been informed of any taxes assessed or paid and that any tax assessments were received by the plaintiff, (R. 59). Thus, if there were a mistake, it was a unilateral mistake by the plaintiff, and as to information peculiarly within its knowledge. The applicable rule is set forth in 17 Am. Jur. 2d, Contracts, page 492:

> "§ 146. Unilateral Mistake or Error. . . . a party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract and the other contractor has no notice of such mistake and acts in perfect good faith. A unilateral error, it has been said, does not avoid a contract."

In *Ashworth v. Charlesworth*, 231 P.2d 724 at page 727 the court quotes with approval the following rule:

> "But if unilateral mistake, where there is no fraud or inequitable conduct, is ever to be regarded as sufficient ground for the rescission of a bilateral contract, there is more reason why a court of equity should confine its jurisdiction to cases where the party seeking relief has been

free from negligence, since the blame of the situation lies wholly on the party seeking relief."

Also see the annotation "Unilateral Mistake—Rescission" at 59 A.L.R. 809.

Here the trial judge apparently completely disregarded the evidence of an accord and satisfaction since he failed to make any finding on this subject, (R. 26). Even though defendants filed an objection to such findings of fact and conclusions of law pointing out this omission, (R. 23), the court, summarily, without findings or discussion, denied said objection and by inference plaintiff's alternative motion for a new trial, (R. 29).

CONCLUSION

The plaintiff failed to carry the burden of proof as to its damages by failing to adduce any competent material nonhearsay evidence establishing that it had paid any taxes or the amount thereof.

Further, the evidence of record clearly establishes there was an accord and satisfaction which discharged defendant's obligations under the contract.

Consequently, the judgment of the trial court should be reversed, or in the alternative, remanded for a new trial.

Respectfully submitted,

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