1993

The Estate of Douglas B. Covington by and through its Co-Personal Representatives, Robert H. Covington and Mary C. Whetman v. John C. Josephson and Geraldine C. Josephson: Petition for Rehearing

Utah Court of Appeals

DOCKET NO. 930371

IN THE UTAH COURT OF APPEALS

THE ESTATE OF DOUGLAS B. COVINGTON, by and through its Co-Personal Representatives, Robert H. Covington and Mary C. Whetman,	)	
Plaintiffs and Appellees,	)	Case No. 930371CA
vs.	)	Priority (15)
JOHN C. JOSEPHSON and GERALDINE C. JOSEPHSON,	)	
Defendants and Appellents.	)	

PETITION FOR REHEARING

APPEAL FROM A SUMMARY JUDGMENT OF THE THIRD CIRCUIT COURT
OF SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT
HONORABLE ROBIN W. REESE, JUDGE

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Defendants and Appellants, John C. Josephson and Geraldine C. Josephson, (hereinafter "defendants"), by and through their attorney of record, Gordon A. Madsen, hereby petition for rehearing pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

CERTIFICATE OF GOOD FAITH

Gordon A. Madsen, attorney of record for plaintiff, hereby certifies that this petition is present in good faith and not for delay.

STATEMENT OF FACTS

The opinion of the Court of Appeals was filed December 22, 1994. This petition for rehearing has therefore been timely served and filed.

STATEMENT OF POINTS OF LAW OR FACT WHICH PLAINTIFF CLAIMS THE COURT OF APPEALS HAS OVERLOOKED OR MISAPPREHENDED

POINT 1. THE DECISION OF THE COURT OF APPEALS CONTRADICTS ITSELF ON THE ISSUE OF UNPAID TAXES AND ASSESSMENTS AND LEADS TO THE CONCLUSION THAT SAID ISSUE COULD AND SHOULD HAVE BEEN

TRIED IN THE ORIGINAL ACTION BETWEEN THE PARTIES AND IS THEREFORE PRECLUDED IN THE SECOND ACTION.

The decision of the Court of Appeals at page 5 states in substance that the issues of unpaid taxes and assessments did not have to be raised by plaintiff in the prior action between the parties because said claims "were not ripe."

Notwithstanding that conclusion, at page 7 of the said decision the Court of Appeals states that "The fact that some taxes and assessments were due and owing at the time of the Judgment is a strong indication that the District Court's ruling did not terminate the Contract, but rather was limited to the issues discussed." (Emphasis added.)

We believe these statements are inconsistent. If the taxes were due and owing then the claim that defendants owed them was indeed ripe, and could and should have been raised in the first action. Accordingly the trial courts determination in the first action that the contract "was paid in full" must be construed to mean that it was paid in full as to all matters that could or should have been brought before it at that time, and that of necessity includes the claims asserted by plaintiffs in the second case.

POINT 2. THE COURT OF APPEALS HAS MISAPPREHENDED THAT MATTERS RAISED IN POST-JUDGMENT MOTION ARE NOT BARRED FROM APPELLATE REVIEW WHERE THEY DO NOT RELATE TO EVIDENTIARY MATTERS.

The Court of Appeals rules in this action that raising an

issue in a motion to alter and amend does not preserve it for appellate review, unless in effect the lower court makes it the subject of an evidentiary hearing. If there is such a rule, it certainly cannot be applicable in a summary judgment case. By definition we are never going to be dealing with an evidentiary hearing on a motion for summary judgment. The only justification for a rule that a matter first raised in a motion for a new trial or to alter and amend should not be reviewable on appeal is that it should have been raised during the evidentiary hearing when the court could have corrected the error. This will only occur in proceedings which are not limited to legal issues.

That reason for the rule does not exist in summary judgment proceedings and therefore the rule does not exist. We are dealing in this action with a summary judgment, which means the court is dealing with questions of law and not with evidence. At page 6 of the opinion in this case, the Court of Appeals cites the case of Barson v. E.R. Squibb & Sons, Inc., 682 P2d 832, (Utah 1984). That case involved a belated objection relating to evidence in a jury trial. It had nothing to do with an issue of law. All of the other cases cited on page 6 of the opinion under the hearing "Termination of Contract" likewise deal with issues that should have been raised during trials. They have nothing to do with legal issues being considered in a motion for summary judgment. The Court of Appeals states in note 5 of the opinion in this case: "The trial court did not take evidence or hold an evidentiary

hearing on the issue, but instead simply denied the Motion to Alter or Amend." This statement entirely begs the question and is without meaning. This is a motion for summary judgment so of course there was no evidentiary hearing.

It appears to be well established that appellate courts can properly consider legal arguments which are first raised on appeal. If this is so how much more can they consider legal matters raised in post judgment motions. We cite to the court from 5 Am. Jur. Appeal and Error, Sec. 546:2

> "...However, an exception to the general rule has been made in some cases where the newly advanced theory involves only a question of law arising upon the proved or admitted facts, and is finally determinative of the case. Judgments have been sustained in such cases upon a theory not asserted or urged below upon the ground that the same result would necessarily be reached upon a new trial, if granted. The rule requiring adherence to the theory relied on below does not mean that the parties are limited in the appellate court to the same reasons or arguments advance in the lower court upon the matter or question in issue..." (Emphasis added.)

Defendants clearly asserted that the uniform real estate contract could not sustain plaintiffs' claims, and were at liberty to assert any and all reasons available in support of their position.

The opinion of the court of appeals states by way of dicta that even if the issue had been properly preserved, defendants would fail anyway because in effect "paid in full" does not mean paid in full, but for the reasons stated in Point 2 above defendants respectfully submit that those words must be construed

to mean what they say.

POINT 3. THE COURT OF APPEALS HAS MISAPPREHENDED THE STATUS OF PLAINTIFF'S AFFIDAVIT FOR ATTORNEY FEES, AND THE ISSUE OF THE REASONABLENESS OF ATTORNEY FEES REQUIRES AN EVIDENTIARY HEARING.

The opinion of the Court of Appeals is to the effect that defendants did not contest the affidavit of plaintiff's attorney regarding attorney fees.

The Court of Appeals fails to note that the affidavit of Mr. Broadbent regarding attorney fees was not filed as part of the motion for summary judgment and therefore no counter affidavit was possible or required. It its ruling on January 4, 1993, the court directed as part of its memorandum decision that:

"Plaintiffs attorney to prepare affidavit for attorney fees

"Objection to be filed in 10 days"

The affidavit was served on January 22, 1993, and filed on January 25, 1993. (See Docket in Addendum to Reply Brief of Appellant and Motion to Alter or Amend Judgment at R. 105.) Defendants objected thereto by serving Motion to Alter and Amend and Memorandum on February 4, 1993, and the same were filed on Feb. 5, 1993. Although the Docket shows these documents to have been filed, the clerk's office somehow lost them, and these documents were added to the record by stipulation of the parties. Notwithstanding the timely filing of said documents as an objection to the entire proposed summary judgment including the attorney fee

portion thereof, Judge Reese entered Summary Judgment on Feb. 10, without an evidentiary hearing as required by Provo City Corp. V. Cropper 28 Utah 2d 1, 497 P.2d 629 (1972). It should be noted that the said case of Provo City Corp. v. Cropper holds that an evidentiary hearing is necessary "unless the parties agree otherwise." There was no agreement by the parties that attorney fees be handled by affidavit. Without an evidentiary hearing there is no way that defendants can determine how many hours were spent on this case by plaintiff's counsel. There is no way that defendants can file an affidavit to contract plaintiff's asserted facts. That can only be done with an evidentiary hearing where cross examination is possible.

POINT 4. THE COURT OF APPEALS IMPROPERLY FAILED TO ADDRESS THE ISSUES OF COLLATERAL ATTACK AND EXISTENCE OF ISSUE OF FACT.

The court of appeals should have dealt with these issues, but erroneously declined to do so. The issues as developed in the two briefs filed by defendants herein were proper and substantial issues and should have addressed by the court and should have been ruled upon in favor of defendants for the reasons set forth in said briefs by defendants.

Defendants will not repeat those arguments herein except as to the issue of the supposed representation that the issue of taxes and assessments was to be excluded from the trial.

On motion for summary judgment, all inferences are to be

construed in favor of the party moved against. The Court of Appeals refers to the affidavit of Mary Whetman and to the affidavit of plaintiff's counsel, David Broadbent. Mrs. Whetman asserts in her affidavit: "8. During the trial before Judge Moffat regarding the right-of-way claimed by the Josephsons across our property, Mr. Cummings,their attorney, represented to us and to the court that the Josephsons would pay any taxes and water assessments which were due on their parcel, as they had previously paid since 1973 throughout the course of our contract with them." (Emphasis added. See R. 75, and Ex. B in Addendum of Brief of Appellees.)

David K. Broadbent in his affidavit stated that on "several occasions prior to trial...and on at least one occasion during the trial, Mr. Cummmings, their attorney, represented to me and to the court that the Josephsons would pay any taxes and water assessments which were due on their parcel. He stated to the court (and the Covingtons and their counsel agreed) that the case before the court was to determine the existence of the right-of-way which was the subject of the action." (Emphasis added. See R. 63 and Ex. G in Addendum of Brief of Appellees.)

Both plaintiff, Whetman, and her attorney Mr. Broadbent themselves admit that such taxes were due at the time of the trial. (See Point 1 above.) Mrs. Whetman makes no claim that Cummings made any representation before the trial, and Mr. Broadbent who claims that he did, does not assert that the claimed

representations before trial were agreed to by plaintiff or himself. He only claims that the representation at the trial was agreed to by plaintiff and himself. Where he does not make the same claim as to the other so-called representations the inference is that any such representations were not agreed to nor relied upon by plaintiffs or himself. Nowhere in his affidavit does he claim reliance on any such representation. Defendant Josephson in making his affidavit thought he was fairly meeting the assertions of Mr. Broadbent and Mrs. Whetman. Under these facts to rule that denial of a stipulation is not a denial of a representation is not fair and flies in the face of the rule that summary judgment is proper only if the party moved against cannot recover upon any theory reasonably claimed by such party. Even plaintiffs did not claim such a narrow and unreasonable interpretation. Josephson has clearly stated in good faith facts which raise a bona fide issue of fact. Surely, a sense of fairness dictates that Mr. Josephsons affidavit must be construed to have created a factual issue on this matter.

POINT 5. THE COURT ERRED IN NOT ALLOWING DEFENDANT ORAL ARGUMENT.

Defendant's counsel did not receive notice of the hearing of this matter, as set forth in the affidavit of defendants' counsel filed herein when counsel learned of this error. Failure to give such oral argument to defendant when such was allowed to plaintiff constitutes a denial of due process.

CONCLUSION

For the reasons therefore that the court has created an unworkable rule and because a great injustice has been done to the plaintiff, we respectfully request that this petition for rehearing be granted.

Respectfully submitted,

/s/

GORDON A. MADSEN
Attorney for the Defendants

CERTIFICATE OF MAILING

Two copies of the foregoing Petition for Rehearing were mailed to David K. Broadbent, attorney for the plaintiffs and appellees, at his address, City Centre I, Suite 900, 175 East Fourth South, Salt Lake City, Utah, postage prepaid, this 5th day of January, 1995.

/s/

Attorney for the Defendants