1974

David Leroy Sargent, Jr. v. Norman T. Stephens : Brief of Appellant

In the Supreme Court
of the State of Utah

DAVID LEROY SARGENT, Jr., et al.,

Plaintiff and Respondent,

vs.

NORMAN T. STEPHENS, et al.,

Defendants and Appellants

Case No. 13783

BRIEF OF APPELLANT

Case No. 13783
Appealed from the Judgment of the Fifth Judicial Court
of Iron County, Utah
The Honorable J. Harlan Burns, Judge

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NATURE OF CASE

The nature of this case is based upon a question as to whether or not the purchaser of a partly executed contract of a judgment sale, aquires the right to stand in the place of the judgment creditor whose rights were purchased and by virtue of an execution.

DISPOSITION IN LOWER COURT

It is to be noted that this case was in the nature of a Quite title action against not only the Appellant, Norman T. Stephens, but against many other individuals known as Newton Mullendore, Roger Eulberg, Kay Willis, Dan E. Moss and in addition, a Corporation by the name of Radec, Incorporated. The previous summary judgment terminated their rights and no one has seen fit to appeal for any of these defendants, Radec Incorporated, Newton Mullendore, Roger Eulberg, Kay Willis, or Dan E. Moss. The order upon which the first summary judgment was based was dated 16 January, 1974, ordered that the summary judgment be overruled and denied against Norman T. Stephens. The first summary judgment made and filed thereafter, in paragraph 3 limited the effect of same to the other defendants than Norman T. Stephens. Thereafter a second motion for summary judgment was filed, as against the defendant Norman T. Stephens, and was granted by an order dated the 11th day of July, 1974, and Summary Judgment thereafter was signed and was filed on the 31st of July, 1974.

RELIEF SOUGHT ON APPEAL

The defendant and appellant, Norman T. Stephens, desires that the order granting summary judgement against defendant Norman T. Stephens, dated the 11th of July, 1974 and the Summary Judgment thereafter, filed July 31, 1974 be reversed and the matter be remanded for trial, either with or without a jury as the future developments of the matter may prescribe.

STATEMENT OF FACTS

On the 10th of August, 1971, the plaintiffs, the Sarrents and the Parrishs, entered into an agreement to sell real estate with H. Newton Mullendore, Roger Eulberg, Kay Willis and Dan E. Moss, together with Radec Incorporated by virtue of which agreement the plaintiffs agreed [illegible]

buyers a large parcel of land north of Cedar City, Utah, east of Highway 91, fronting the east side of Highway 91, of approximately 297 acres for a purchase price of $300,000.00. This matter provided for a down payment of $50,000.00, with the balance in 9 annual installments under an escrow provision, deeds for a portion of the land were delivered to Radec Incorporated, and only to Radec Incorporated, and Radec Incorporated was the beneficiary of the contract as well as one of the parties to the contract and was the only grantee on the deed. There was provision for release of additional parcel with each payment on an annual basis, and 9 deeds were placed in the escrow in addition to the one that was delivered which showed Radec Incorporated as the grantee. The other buyers, according to the best knowledge, information and belief of the undersigned, were stockholders in Radec Incorporated, and may have been the only stockholders. However this particular statement pertaining to these parties being stockholders of Radec, must not be relied upon as the undersigned has not had an opportunity to verify this particular matter, and has not verified same.

After a contract was entered into, and had been partly complied with by each of the parties, Radec Incorporated came upon hard times, and eventually sought relief in bankruptcy. Prior to the bankruptcy, several actions had been filed against Radec Incorporated, including but not limited to civil action No. 6031, in the district court of Iron County, Utah, entitled Pacific States Cast Iron Pipe Company a corporation, plaintiff, v. Radec Incorporated, defendant. A default judgment was taken on this item on the 18th day of July, 1972, and execution was taken in this particular action on or about the 9th day of August, 1972, and it together with a Praecipe requiring the sheriff to serve on personal property, inviting his attention to bank accounts at First Security Bank of Utah, Bank accounts at State Bank of Southern Utah, and to a certain sales contract held in escrow in the State Bank of Southern Utah. The various people named [illegible] and Parrish, wherein Sargent and Parrish agreed

to sell certain real property in Iron County, state of U
Radee Incorporated, was issued and delivered to the sh
on the 10th day of August, 1972, this being the same
tract as is attached to the plaintiffs complaint, that the
after the sheriff levied on said contract at the State Ba
of Southern Utah, which within said contract are narro
agents of the plaintiffs, and the sheriff sold same on the 7
day of Septe mber, 1972, at 10:00 o'clock noon at the S
Bank of Southern Utah, pursuant to notice to Norman
Stephens, defendant and appellant herein for the s
$50,000, that there has been no attempt at redemption in
the Sheriff duly filed thereafter his certificate of sale and
turn of sale of personal property, in the matter of Pac
States Cast Iron Pipe Company v. Radee Incorporated.

That said agreement, a copy of which is attached
plaintiffs complaint, recites in part IV on page 9, to the
fect that within 60 days of the date of the agreement
deeds would be delivered to Security Title Company of S
thern Utah, for the issuance of Title Policy and various
items, that this was never done. That said agreement on
of page 10, and the same part thereof, makes the
vision that in the event there is any failure to cure title
to give title, for a period of one year that the purchase pr
would be reduced by $1,000.00 per acre, that this is now
effect.

That on said sale date, Norman T. Stephens made de
mand upon the State Bank of Southern Utah, the agent of
the plaintiffs, for a copy of said agreement and was refuse
that regardless of what Norman T. Stephens did until
commencement of this action, he was unable to find
what payments were due or when they were due. That
the time of said sale, Eldon Schmutz, vice-president of
State Bank of Southern Utah by marriage, a member of the
Sargent family, and as agent of State Bank of South
Utah, the agent of the plaintiffs, made available to
that said contract would be honored if the full purchase
Norman Stephens was in accordance with said

upon said purchase, said Norman T. Stephens, immediately served each plaintiff upon notice of his purchase and requested a copy of the contract so that he could see what the payments were, that until the filing of this action, this request is provided.

That said Norman T. Stephens is ready, willing, and able and has always been ready, willing and able to comply with said contract, and the plaintiffs have been so notified. That he has never been able to find out what sums are due, or what sums the plaintiffs contend are due. That on the 25th day of September, 1972, by registered mail, after being refused said documents, said Norman T. Stephens, by an attorney made demands for said document to The Bank of Southern Utah, as escrow agent, and as agent of the plaintiffs and tendered $25.00 for the cost of reproducing same. That although verbally promised, that same would be produced by the State Bank of Southern Utah, same has never been produced. That on the 28th day of September, 1972, said Norman T. Stephens placed each of said plaintiffs on notice of his purchase of the rights of Radec Incorporated, by virtue of said execution sale, that this was done by agent, but although on that date, said Norman T. Stephens requested service of all notices on him, there had never been a service of any notice whatsoever, on him, except the filing of the complaint in the above entitled matter. That the plaintiffs have failed to comply with their duties under said contract before attempting to cancel or terminate same. That any and all attempts to cancel or terminate same were effected by the sheriff on said State Bank of Southern Utah the agent of the plaintiffs, at the time of said execution.

ARGUMENT

POINT I

THE COURT REVERSED ITS OWN RULING PERMITTING SUMMARY JUDGEMENT

This needs no argument, although the Order for Summary Judgement dated 16 January, 1974, specifically made the finding that there are justiciable issues of fact, as to the interest, if any, of said defendant Norman T. Stephens. To this previous finding is reversed by the Order dated the 11th day of July, 1974. That this item was submitted by affidavit on both events on both motions for summary judgment, although different affidavits, that there is a conflict between the affidavit of Norman T. Stephens, and the affidavit of Eldon Schmutz, as to what happened in tht bank, and the representations that were made. That this conflict can not be determined without a hearing.

POINT II

THAT THERE ARE ITEMS THAT NEED EVIDENCE BEFORE RULING.

That there is a conflict on the fact situation as to the statements made by Eldon Schmutz, Vice-president of the State Bank of Southern Utah, immediately prior to the sale on the 27th of September, 1972. Affidavits of Eldon Schmutz were submitted by the plaintiff, and it gave one version of the statements made by Mr. Schmutz, the affidavit of Mr. Norman T. Stephens was submitted by Mr. Stephens, which gave a different version. That for purposes of summary judgement, the court has no choice but to take the affidavit of the non moving party as correct, when there is a conflict of this nature, and under these conditions, this matter must be resolved by evidence.

POINT III

THE LEVY WAS MADE ON THE BANK BEFORE ANY CANCELLATION AND AGENT OF THE PLAINTIFF PARTICIPATED IN THE SALE, AND STATED SAME WOULD BE HONORED.

This of course one of the items that is specific in

affidavits, is contested pertaining to the statements of the agent of the bank, to-wit; Eldon W. Schmutz. The plaintiffs who were not present, by affidavit of Mr. Schmutz, contend that he made certain statements, the affidavit of Norman T. Stephens contends that he made other statements. That under these conditions, the state of mind of Norman T. Stephens at the time of making the purchase, in reliance upon the statements of the agent of the plaintiffs, must be determined by evidence, and before a just and proper ruling can be made, there must be a finding as to whether or not Mr. Schmutz was an agent of the bank; whether or not the bank was the agent of the plaintiffs; what statements were made by Mr. Schmutz and what statements Mr. Stephens was entitled to rely on?

POINT IV

THE CONTRACT HAS NOT BEEN CANCELED OR TERMINATED, AND IS STILL IN FULL FORCE ON EFFECT

There are many rules of law to the effect that the ltw abhors a forfeiture, and also that any party that attempts to cancel a contract, must have complied with it. It is unrefuted by affidavit or any other method, that part IV of said agreement commencing on page 9, running onto page 10, makes a provision for action to be initiated pertaining to the issuance of Title Insurance, within 60 days of the date of the agreement, and this was not done. Also there is provision that in the event evidence of title is not furnished within said time, that the purchase price will be reduced $1,000.00 per acre on which evidence of title was not submitted. That prior to any alleged notice of cancellation to the original parties or anyone else, which was not done admittedly until ninety days after the date of said agreement, this necessary to have been done, and until these items were done the plaintiff is not in position to cancel any [illegible] the authority for this is 17A Corpus Juris Secun-

dum, on contracts pertaining to validity and accrual of rig... section 407, commencing on page 494 and showing the c... cumstances under which cancellation can be effected, a... upholding the doctrine, that for a person to cancel, "the p... ty insisting on the forfeiture must comply strictly with a... contract requirements and with the conditions authoriz... the forfeiture." This quotation is found on page 497 on v... ume 17 A, Corpus Juris Secundum. This section continues ... endorse this policy, and among other things cites Green v... Palfreyman which is cited as 109, Utah 291, 166 Pacific 2d... 215, and was decided February 14th, 1946 as requiring ... avoidance of a forfeiture, and in the same case citing 17 Co... pus Juris Secundum, on contracts, section 454, page 955.

Green v. Palfreyman and the cases following the same very definately hold that a person asking for a cancella... must be in compliance with the contract, and must carry strictly in accordance with the terms thereof. This is also followed in the case of Parker v. California State Life I... surance Co., 40 Pacific 2nd, 175, 85 Utah, 595, and in the case of Gresser v. New York Life Insurance Company, 1... Pacific 2nd, 212, 108 Utah 173.

POINT V

APPELLANT NORMAN T. STEPHENS, STANDS I... THE SAME POSITION AS RADEC INCORPORATED.

Whenever one buys a chose an action in an executio... sale, there is no question he stands in the right of the exe... cution debtor or judgment debtor in the case in which sa... is bought. There is no question that Mr. Stephens in an u... contested sale purchased the rights of Radec Incorporat... and where by virtue of an earlier summary judgment Radec Incorporated and the other named defendants, ha... been found to have no right in the property, for the ... after knowledge and without prejudicing the rights of ... man T. Stephens, and specifically protected the rights ... Norman T. Stephens in the property. The undersigned ...

that it would have been more advantageous to Norman T. Stephens had the plaintiff seen fit to include other judgment creditors of Radec Incorporated in this quite-title action and to eliminate their rights if any, in the Radec Incorporated properties.

The doctrine that a judgement purchaser, or execution purchaser stands in the position of the person whose property is sold under the execution as endorsed by the Utah Supreme Court in the matter of a Local Reality Company v. Quinney, 85 Pacific 2nd, 770, 96, Utah 297, and Swain v. Salt Lake Real Estate, 279 Pacific 2nd, 709, 3 Utah 2nd 121.

CONCLUSION

That the matter should be remanded to the trial court for trial.

Respectfully submitted,

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and Appellant