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IN THE SUPREME COURT

OF THE

STATE OF UTAH

FILED
AUG 31 1953
Clerk, Supreme Court, Utah

ARTHUR R. JOHNSON and EVA JOHNSON, his wife,

Plaintiffs and Appellants,

vs.

PEOPLES FINANCE & THRIFT COMPANY, a corporation, et al,

Defendants and Respondents.

Case No. 8024

Appellants' Brief

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IN THE SUPREME COURT

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ARTHUR R. JOHNSON and EVA JOHNSON, his wife,

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vs.

PEOPLES FINANCE & THRIFT COMPANY, a corporation, et al,

Defendants and Respondents.

Case No. 8024

Appellants' Brief

STATEMENT OF FACT

The original complaint was filed August 4, 1950. On October 30, 1950, pursuant to order of the court, an amended complaint was filed which named additional

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parties to the action. On May 23, 1952, a pre-trial was held before the Honorable A. H. Ellett, judge of the Third Judicial District Court. The transcript of the pre-trial reads as follows: (R. 44-46 inc.)

> "Be it remembered that the above-entitled matter came on regularly for pretrial on Friday, May 23, 1952, at the hour of two o'clock p.m., before the Honorable A. H. Ellett, one of the judges of the above named court, the respective parties being represented by the following:
>
> APPEARANCES
>
> "For the Plaintiffs: LeGrand P. Backman, Esq.
>
> For the Defendants Francis S. Johnson and Banie W. Johnson and Ebba E. Finlayson: F. Robert Bayle, Esq.
>
> For the Defendants Andrew Reid and Mary W. Reid, his wife: Grant Macfarlane, Esq.
>
> For the Defendants A. R. Kartchner and Ada Kartchner, his wife: David H. Bybee, Esq.
>
> ---
>
> (Following is a transcript of the stipulation entered into at the close of the pre-trial:)
>
> THE COURT: This case is settled, and who will stipulate the conditions of the settlement? Who will state it?

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MR. BACKMAN: The settlement will be that we will allow —

THE COURT: Name the plaintiffs, will you?

MR. BACKMAN: The plaintiffs, Arthur Johnson and Eva Johnson, his wife, will allow Ebba E. Finlayson a claim of one thousand dollars on the uniform real estate contract and will convey to Ebba Finlayson the property west of the Fassie tract — isn't that it?

MR. BAYLE: Yes, straight west.

MR. BACKMAN: — running the full depth of the property, and a new contract will then be entered into with Ebba Finlayson describing the balance of the property within the fence lines.

MR. BAYLE: And to include the right-of-way.

MR. BACKMAN: And to include one-half rod right-of-way along the east.

MR. BAYLE: And under the same terms.

MR. BACKMAN: One rod right-of-way.

MR. BAYLE: Yes, it's a one rod.

MR. BACKMAN: One rod right-of-way along the east.

MR. BAYLE: And under the same —

MR. BACKMAN: Under the same terms.

MR. BAYLE: — terms of payment.

MR. BACKMAN: Of payment. We will give to Andrew Reid a quitclaim deed for the 89 —

MR. MACFARLANE: We would like to go around the fence line, so there isn't any question.

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MR. BACKMAN: Quitclaim deed on the whole tract.

MR. MACFARLANE: Yes.

MR. BACKMAN: All right. That is within the fence line.

MR. MACFARLANE: Yes, within the fence line.

MR. BYBEE: Yes.

MR. MACFARLANE: Now, they had better give that to you, and then you give us the warranty because there is those lots that will be affected

THE COURT: Who is Dave's clients?

MR. BYBEE: Yes.

MR. MACFARLANE: Better give that to Kartchner.

MR. BACKMAN: We will give quitclaim deed to Kartchner of the property now in the possession of Kartchner and Reid within the fence lines.

MR. MACFARLANE: Yes, on payment of fifty dollars.

MR. BACKMAN: Upon payment of the sum of fifty dollars.

THE COURT: And you gentlemen agree, Mr. Bybee?

MR. MACFARLANE: I agree to that for Andrew Reid.

MR. BYBEE: I will agree for Kartchner.

MR. MACFARLANE: What about quitclaim from you?

MR. BACKMAN: Your contract is on record.

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MR. BAYLE: We will join in the quitclaim deed or give you a separate quitclaim deed on behalf of Ebba E. Finlayson to the property which is in contest on the south boundary of the Ebba E. Finlayson property and on the north of the Reid property.

MR. MACFARLANE: Yes. Their quitclaim may not be as broad —

MR. BACKMAN: Then we will give you for Francis Johnson — the plaintiffs will also give to Francis Johnson a quitclaim deed for a tract fifty-eight feet in width adjoining his property on the north.

MR. BAYLE: 58.7.

MR. BACKMAN: 58.7.

THE COURT: There is one other thing. Then you two gentlemen are going to enter into a new contract, aren't you?

MR. BACKMAN: Yes. We have recited that.

THE COURT: Excuse me. Then shall I just hold this case until you have made those transfers, and then you will join in petitions to dismiss?

MR. BACKMAN: I think that will be well.

MR. BAYLE: That is agreeable.

MR. BYBEE: Satisfactory.

No pre-trial order was made as a result of the hearing. On February 14, 1953, there was filed with the court by counsel for Defendants Reid a judgment. (R. 39-43). On February 14, 1953, plaintiffs filed objections to the

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judgment filed by the Defendants Reid. (R. 47-48). On February 16, 1953, an additional stipulation was entered into. (R. 71-74). On March 7, 1953, counsel for plaintiffs filed a motion, notice and affidavit to set aside the stipulation entered into at the pre-trial and asking that the case be set down for trial. Said motion was denied. (R. 49-52). On March 26, 1953, the judgment was signed by the court. (R. 53-58).

On March 31, 1953, another judgment was proposed (R. 61-65) and on March 31, 1953, plaintiffs filed objections to this proposed judgment. (R. 59-60).

Motion for a new trial was filed April 4, 1953 (R. 67) and denied April 23, 1953. (R. 68). Notice of Appeal was filed May 21, 1953.

STATEMENT OF POINTS

POINT I. THE JUDGMENT IS VOID AS THERE WERE NO FINDINGS OF FACT AND NO CONCLUSIONS OF LAW FILED WITH THE JUDGMENT AND THERE WAS NO WAIVER OF THE SAME.

POINT II. THE JUDGMENT IS VOID AS IT IS SUPPOSEDLY BASED UPON A PRE-TRIAL HEARING TO WHICH THE COURT MADE NO PRE-TRIAL ORDER AS REQUIRED BY THE UTAH RULES OF CIVIL PROCEDURE, *OR IF THIS COURT HOLDS THAT THE JUDGMENT RENDERED IS THE "PRE-TRIAL ORDER"* THEN SAID JUDGMENT AND ORDER ARE VOID AS THEY ARE NOT SUPPORTED BY THE STIPULATION PRESENTED AT THE PRE-TRIAL HEARING.

POINT III. THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO VACATE THE

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STIPULATION ENTERED INTO AT THE PRE-TRIAL HEARING MAY 23, 1952, AND IN FAILING TO SET THE ACTION DOWN FOR TRIAL.

ARGUMENT

POINT I. THE JUDGMENT IS VOID AS THERE WERE NO FINDINGS OF FACT AND NO CONCLUSIONS OF LAW FILED WITH THE JUDGMENT AND THERE WAS NO WAIVER OF THE SAME.

The Utah Rules of Civil Procedure provide as follows:

> Rule 52 — Findings by the Court.
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41 (b)."
>
> * * * * *
>
> "(c) Waiver of Findings of Fact and Conclusions of Law. Except in actions for divorce, Findings of fact and conclusions of law may be waived by the parties to an issue of fact:

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(1) By default or by failing to appear at the trial;

(2) By consent in writing, filed in the cause;

(3) By oral consent in open court, entered in the minutes."

It has always been the law of this state in accordance with the above adopted rule, that unless findings of fact and conclusions of law are made the judgment has no validity, (see Thomas v. Farrell, 26 P 2d 328, 330, 82 U 535; Dillon Implement Co. v. Cleaveland, 32 U 1, 88 P 670, 671), and a new trial should be ordered.

Further, whether it be an action at law or in equity, as the present case, the rule is the same. (See, In re Thompson Estate, 72 U 17, 35; 269 P 103).

The record is clear that there was no waiver of the making of findings and conclusions by the court and no such a construction of the record as would fulfill the requirements of a waiver within the above quoted rule can be implied.

POINT II. THE JUDGMENT IS VOID AS IT IS SUPPOSEDLY BASED UPON A PRE-TRIAL HEARING TO WHICH THE COURT MADE NO PRE-TRIAL ORDER AS REQUIRED BY THE UTAH RULES OF CIVIL PROCEDURE, *OR IF THIS COURT HOLDS THAT THE JUDGMENT RENDERED IS THE "PRE-TRIAL ORDER"* THEN SAID JUDGMENT AND ORDER ARE VOID AS THEY ARE NOT SUPPORTED BY THE STIPULATION PRESENTED AT THE PRE-TRIAL HEARING.

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Rule 16, Utah Rules of Civil Procedure, provides:

> "Pre-Trial Procedure; Formulating Issues
>
> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
>
> * * * * *
>
> "The court shall make an order which recites the action taken at the conference, * * * and such order when entered controls the subsequent course of the action * * * "

The language of the rule is explicit in that it requires that: "The court shall make an order * * * " It would appear that the same stringent reason for requiring findings of fact and conclusions of law to be made before entry of judgment, apply to the entry of a "pre-trial" order. The present case is a perfect example of the jumbled mess that can result when such an order is neglected. The parties in the present case without such an order are left to argue over the meaning of a stipulation, read into the record, and to which stipulation each party attributes his own meaning. The very reason for the rule is to obviate different meanings and constructions being placed upon the evidence submitted by the parties to the action.

If this court holds that the judgment rendered is the "pre-trial order" then said judgment and order are void as they are not supported by the stipulation presented at the pre-trial hearing.

In the first place, the stipulation entered into at the pre-trial hearing May 23, 1952, was never intended by

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the parties, and was never intended by the court, to be the basis for the judgment or "pre-trial order" which the court signed. At the end of the stipulation (R. 46) the court states:

> "THE COURT: Excuse me. Then shall I just hold this case until you have made those transfers, and then you will join in petitions to dismiss?
>
> MR. BACKMAN: I think that will be well.
>
> MR. BAYLE: That is agreeable.
>
> MR. BYBEE: Satisfactory."

It is thus quite apparent that it was the intention of all parties and the court that the only action by the court would be the granting of the "petition to dismiss" the action. Nine months elapsed before the court again entered into the record of the proceedings and that was when a proposed judgment was filed with the court. (R. 43). One only has to read the plaintiffs' objections to become aware that the stipulation intended to settle the matter between the parties was being given different interpretations by the parties. How then can the court take it upon itself to render a judgment, deciding for itself what the parties intended? The portion of the stipulation above quoted demonstrates that it was never the intention of the parties to have the court render such a judgment, and the court never intended to do so at the time of the pre-trial hearing. The court should have vacated the stipulation and set the case down for trial, for whatever the stipulation meant, there was no agreement between the parties.

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The stipulation is ambiguous and cannot be made to support the judgment rendered. For example, Paragraph 2 (R. 54) of the judgment provides that the plaintiffs shall convey by warranty deed a good one-half of the property under the contract of sale before the purchase price is paid, and then Paragraph 1 provides that plaintiffs shall enter into a contract of sale for the balance. Where the court can find that in the stipulation is beyond comprehension. Plaintiff's objections speak for themselves, (R. 47, 48, 59, 60) as they must do, for there are no facts or evidence in the record. The only thing available is the court's interpretation of an ambiguous stipulation. It is useless to attempt to argue that legal descriptions are wrong; that the property to be conveyed is not within the fence lines; that the plaintiffs never intended to convey a portion of the property under contract without the full purchase price being paid. The court precluded the plaintiff from doing this when it made its own interpretation of the pre-trial stipulation. It is ludicrous to state, as the judgment does, R. 53, " . . . the issues being discussed by the respective attorneys for the parties, and a meeting of the minds having been arrived at, a stipulation was made by the respective counsel settling all the issues raised in the pleadings in said case, and the court being fully advised and approving the stipulation entered into by the respective counsel, it is hereby ORDERED, ADJUDGED and DECREED as follows: * * * ."

POINT III. THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO VACATE THE

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STIPULATION ENTERED INTO AT THE PRE-TRIAL HEARING MAY 23, 1952, AND IN FAILING TO SET THE ACTION DOWN FOR TRIAL.

In addition to the reasons set forth in plaintiffs' Point II, which are also applicable to the present argument, it is plaintiffs' contention that the lower court abused its discretion in failing to vacate the pre-trial stipulation and set the matter down for trial.

The law, with respect to the granting of relief from stipulations, is fairly set forth in 50 American Jurisprudence 613, par. 14 — Stipulations:

> "Relief from Stipulations. The rule is generally recognized that trial courts may, in the exercise of sound judicial discretion and in the furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, and that upon appeal the determination of the trial court as to the propriety of granting such relief will not ordinarily be interfered with, except where a manifest abuse of discretion is disclosed. Courts have frequently granted such relief in the case of stipulations which the parties have entered into improvidently, inadvertently, mistakenly or as a result of fraudulent inducements, especially if the enforcement thereof would work an injustice. A stipulation by an attorney as to closing the evidence and submitting the case may be set aside upon the request of one of the parties on the ground of improvidence or inadvertence alone, if both parties can be restored to their original status. In all cases the power to relieve from a stipulation should be exercised solely to promote justice. The making of stipulations tending to expedite the trial should

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> be encouraged by the courts and enforced unless good cause is shown to the contrary. Parties will not be relieved from stipulations in the absence of a clear showing that the fact or facts stipulated are untrue, and then only when the application for such relief is seasonably made and good cause is shown for the granting of such relief. If a stipulation relating to the conduct of a pending case is fairly made, it will not be set aside where such action will be likely to result in serious injury to one of the parties.
>
> "The proper procedure to vacate a stipulation is by motion, and not by an independent action."

The plaintiffs, being faced with a proposed judgment (R. 39-43) which did not conform to their understanding of the pre-trial conference, filed with the court a motion and affidavit to set aside the pre-trial stipulation and set the case down for trial (R. 49-52). It cannot be said that any of the parties had relied upon the stipulation to their injury because apparently the parties were never able to get together under the stipulation and then "move the court for dismissal of the action." No transfers had been made or contracts or deeds entered into pursuant to the stipulation. (R. 44-46). Certainly no one can complain that they would have been injured if the case had been set down for trial and a hearing had on the merits.

The affidavit filed with the motion is short and reads as follows: (R. 51-52)

> "ARTHUR R. JOHNSON and EVA JOHNSON, being each duly sworn on oath depose and

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say that they are residents of Salt Lake County, State of Utah; of lawful age and that they are the plaintiffs named in the within action; that on the 23rd day of May, 1952, when the stipulation was entered into at the pre-trial of the within cause before the Honorable A. H. Ellett, these plaintiffs understood that if a new contract was to be entered into by them as Sellers and the said Ebba E. Finlayson as the Buyer that the description of the property to be included in the new contract would conform with the descriptions as determined by George W. Cassity, Registered Engineer and Land Surveyor, as to the fence lines and that the new contract would be an agreement to sell to the said Ebba E. Finlayson the real property within the fence line description; that the new contract would carry the same terms of payment as the existing contract which calls for the payment of Five Hundred and no/100 ($500.00) or more on the 30th day of each December including interest at the rate of four per cent per annum; that in entering the balance remaining to be paid on said contract that the balance owing together with interest on the existing contract was to be computed to the date of the entering of the judgment by this Court; that in agreeing to accept the sum of $25.00 from the Reids and the further sum of $25.00 from the Kartchners that it was upon the advice of their attorney, LeGrand P. Backman, who was not informed of the fact that these plaintiffs were not in the chain of title as grantors of the property now in the possession of the said Reids and Kartchners, and that the strip of land 86.33 feet wide and 880 feet long (approximately 1.74 acres) in the possession of the said Reids and Kartchners and claimed by the plaintiffs had not been held

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adversely by the said defendants Reids and Kartchners and that the sum of $25.00 to be paid by each of the defendants Reid and Kartchner was wholly inadequate and inequitable in relation to the amount of $1000.00 demanded by the said Ebba E. Finlayson for ⅔ of an acre shortage between the property actually within the fence lines of the property in the possession of the said Ebba E. Finlayson and the property as described in the existing contract; that the plaintiffs were not in any way consulted in reference to the conveyance to Reids and Kartchners as to any other property than the 86.33 feet by 880 feet above referred to; that there was a definite misunderstanding between these plaintiffs and their attorney as to a conveyance of any portion of said property and these plaintiffs did not understand that any portion of said real property was to be conveyed to the said Ebba E. Finlayson at this time; that said stipulation was entered into improvidently and inadvertently and if enforced will work an injustice on these plaintiffs; that these plaintiffs aver that all parties should be placed in their former status and the matter should be tried on its merits and that all the facts and circumstances should be brought to the attention of the court."

A casual reading of the affidavit of the plaintiffs demonstrates they were clearly mistaken as to the meaning of the stipulation, *if it means what the courts judgment says it does.* Whether it is said that the stipulation was entered into mistakenly, improvidently, inadvertently, or whatever nomenclature the court decides to use, it is clear, beyond doubt, that plaintiffs never construed the stipulation in the same way the court did. This

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coupled with the fact that the stipulation is so vague in its terms and was never intended as a basis for such a judgment or "pre-trial order," makes it hardly possible to believe that the court would not vacate it.

The injustice to the plaintiffs by reason of the failure of the court to vacate the stipulation is apparent. Pursuant to the judgment (Par. 2, R. 54) the plaintiffs must convey, or have the court do it for them, at least one-half of the property under the contract of sale, and then maintain the contract on the balance of the property. In other words, the plaintiffs must convey one-half of the real property before the full purchase price is paid. This is ordered under the judgment notwithstanding the fact that the original contract of sale (R. 19-22) provides just the opposite. Can a court be upheld in such action unless there is clear evidence that such was the intention of the parties? Yet, the lower court, upon the vague facts presented in the stipulation, and faced with a motion and affidavit clearly stating that such was never the intention of plaintiffs, goes ahead and renders a judgment or "pre-trial order" and sets aside and violates the provisions of contract of sale entered into between the parties. The court has decided, without reason, that the plaintiffs only needed half as much security for their contract as was agreed to in the contract. The injustice rendered the plaintiffs by the lower courts action cannot be condoned by this court. The lower court should have a great deal of discretion in deciding issues as here presented, but when presented with facts and circum-

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stances such as in the present case, it is clearly an abuse of that discretion when the court fails to set aside such a stipulation and order a trial of the action.

Here again the motion and affidavit of plaintiffs speak for themselves, as they must do, for there are no facts evidenced in the record. The only thing available is the vague and ambiguous stipulation entered into at the pre-trial and the court's interpretation thereof. The plaintiffs are in effect precluded from arguing fence lines, legal descriptions and correct contract terms.

CONCLUSION

It is plaintiffs' contention that the serious error presented in this case is the failure of the lower court to pursue correctly the pre-trial procedure. Pre-trial practice is an expeditious and should be a sought-after means to settle law suits. It is of equal benefit to client, attorney and the court to settling complicated and vexatious law suits. However, it is this very benefit that can also render such injustice to the parties concerned unless the court is fully apprised and a *complete and detailed record* made of the action taken. Party litigants frequently settle their differences before a matter is ever presented to the court. However, once a court is appealed to because of the failure of the parties to settle their differences, it is the duty of the court to jealously safeguard the rights of both parties. Perhaps this appeared to be a long, complicated and unnecessarily vexatious law suit to the lower court and taxed the

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court's patience to the ultimate limit, still the procedure that was followed at the pre-trial and subsequent thereto dealt injustice to the plaintiffs which this court cannot permit to stand.

Perhaps the fault lies with this court and it would be well to review the rule of pre-trial practice and set forth in greater detail the requirements necessary if this means of settling law suits is to be pursued.

For the reasons stated herein, the judgment of the lower court should be declared a nullity and the case remitted to the lower court for a new trial.

Respectfully submitted,

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