1970

E. Penn Smith v. Fred W. Royer And Western Surety Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

E. PENN SMITH,

Plaintiff,

vs.

FRED W. ROYER and WESTERN SURETY COMPANY,

Defendants.

Case No. 12243

BRIEF OF APPELLANT

Appeal from judgment of the Third Judicial District Court for Salt Lake County, Honorable Gordon R. Hall, Judge

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AUTHORITIES AND STATUTES CITED

CASES CITED

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NATURE OF THE CASE

This is an action for forfeiture of a replevin bond. The defendants wrongfully replevied the automobile of plaintiff and said plaintiff seeks damages against defendants in the amount of their bond.

DISPOSITION IN LOWER COURT

Plaintiff and defendant motioned for Summary Judgment. The trial court found that there were no disputed issues of fact and granted defendants' Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the trial court's Summary Judgment in favor of defendant and a Judgment in plaintiff's favor.

STATEMENT OF FACTS

The facts in this matter are relatively simple and undisputed. On or about the 27th day of July, 1965, Austin Smith, either individually or as President of Gold Bar Resources, contracted with E. Penn Smith for the lease of certain land owned by E. Penn Smith in Washington County, State of Utah. (Affidavit of E. Penn Smith).

On September 16, 1966, and pursuant to said lease agreement, Austin Smith arranged to deliver to E. Penn Smith, one 1966 Oldsmobile, serial number 358396 X 105139, as credit against the lease payments. At that time, Austin Smith told E. Penn Smith that title to said automobile would be given to to E. Penn Smith when the contract on the car was paid off. On the same day, September 16, 1966, and without the knowledge of E. Penn Smith, Defendants' evidence shows that Intermountain Gas and Oil Company was listed as the owner of the automobile by Austin Smith. (Affidavit of E. Penn Smith).

Austin Smith took possession of the leased premises in Washington County, Utah and E. Penn Smith took possession of the above described Oldsmobile car, and kept possession from September, 1966, until January of 1968. (Affidavit of E. Penn Smith).

Prior to January of 1968, a dispute occurred between Austin Smith and this Plaintiff, E. Penn Smith. Austin Smith abandoned the lease, transferred title of the Oldsmobile from Intermountain Gas and Oil to this defendant, Royer, and Royer demanded the car. (Affidavit of E. Penn Smith).

E. Penn Smith refused to deliver the car and a Replevin action was instituted. The car was taken through the replevin action and that action was found to be wrongful on the 10th day of October, 1968, by Judge C. Nelson Day. The writ of replevin was ordered quashed and set aside. (Affidavit of E. Penn Smith).

The action instituted in Washington County by Fred W. Royer, Civil No. 3872, was dismissed ex parte under Rule 41 (a) of the Utah Rules of Civil Procedure on or about the 10th day of June, 1970.

Plaintiff is seeking Summary Judgment as to the liability of these defendants, either jointly or severally; the replevin was wrongful and plaintiff seeks damages.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT DEFENDANTS WERE ENTITLED TO EXCLUSIVE POSSESSION OF THE AUTOMOBILE IN DISPUTE.

This case comes to the Supreme Court on a Motion for Summary Judgment in favor of defendants, and this court has often stated law similar to that expressed in

Welchman v. Wood, 9 Ut. 2d 25, 337 P. 2d 410 (1959), concerning the fact that:

> "* * * summary judgment should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law."

In the instant case when the facts are viewed in the light most favorable to the plaintiff we find:

1. A lease agreement between Austin Smith and E. Penn Smith.

2. Delivery to E. Penn Smith of one (1) 1966 Oldsmobile, serial number 358396 X 105139, by Austin Smith, on September 16, 1966.

3. On that same day, title to said car was placed in the name of Intermountain Gas and Oil and Austin Smith said the title would be delivered to E. Penn Smith when the car was paid for.

4. Austin Smith took possession of the leased premises and E. Penn Smith took possession of the car.

5. In January of 1968, Austin Smith abandoned the lease and as representative for Intermountain Gas and Oil, transferred the car title to Fred Royer, who demanded the car.

E. Penn Smith, at the time Royer demanded the car, had possession of said car. E. Penn Smith also had completed full performance of an oral agreement, giving him ownereship of the car in every particular, expect paper title. The replevin in this case could not be effective unless

Fred Royer had the exlusive right to the automobile in dispute.

The law is well settled that replevin depends upon the strength of the title of the party bringing the action and not upon the weakness of the title of the party against whom the action is brought. *Jones v. Commercial Invest. Trust,* 64 U. 151, 228 P. 896 (1924). In this case, defendant Royer had paper title and the plaintiff, E. Penn Smith, had possession and the claim of an agreement with full performance.

A decision concerning the relative strengths of the title is not appropriate at this time as it is undisputed that E. Penn Smith had possession and an interest in the car at the time of repossession. The California courts have held that the party bringing the action must have the right to immediate and exclusive possession. *Bruce v. Churchman,* 55 C.A. 2d 850, 132 P. 2d 8 (1942). At the time this illegal replevin was instituted, Defendant Royer did not have the right to immediate and exclusive possession. In the Idaho case of *Morrison v. Quality Produce, Inc.,* 92 Idaho 448, 444 P. 2d 409 (1963), the Supreme Court of that state held that the party bringing the replevin action must show a right to immediate possession of the property at the time the action is commenced and title alone may or may not give rise to that right.

In this case, defendants contend that they had the immediate and exclusive right to possession because they have a Certificate of Title transferred to them by Austin Smith or Intermountain Gas and Oil. The Utah courts have held that this is not conclusive. *Jackson v. James,* 97 U. 41, 39 P. 2d 235 (1939), stands for the proposition

that the Utah Motor Vehicle Act provides for a Certificate of Title which is some evidence of Title. A certificate of title is not conclusive under the cases of *Heaston v. Martinez,* 3 Ut. 2d 259, 282 P. 2d 833 (1956) or *Swartz v. White,* 80 U. 150, 13 P. 2d 643 (1932). In both the *Heaston* and the *Swartz* cases, the Supreme Court of the State of Utah stated that a Certificate of Title alone is not conclusive and these cases also said that it is generally true that the transferor cannot transfer any better title than he actually has.

In this action, the defendants rely on the Certificate of Title and nothing else. That certificate is not conclusive and these defendants did not have the immediate and exclusive right to the vehicle at the time it was taken. Because of the nature of the Summary Judgment when considered in connection with the facts of this case, the trial court could not have found, as a matter of law, that these defendants should prevail.

POINT II

THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Defendants have brought before this court a paper title and rely solely on that certificate. Plaintiff relies on possession of the automobile and full performance of an oral agreement.

The facts clearly show that defendants did not have the right to immediate and exclusive possession of the car at the time is was replevied.

The writ of replevin was quashed by District Judge C. Nelson Day and under the case of *Bankers' Commercial Security Co. v. District Court of Box Elder County,* 60 U. 601, 211 P. 187 (1922), the plaintiff, E. Penn Smith, is entitled to have the property returned or a forfeiture of the band of defendant, Western Surety Company.

46 *Am Jr, Replevin, Section* 128, concludes that a majority of the cases take the view that upon dismissal of an action in replevin by a plaintiff who has obtained possession of the property, a Judgment may be rendered in favor of the defendant, in this case plaintiff, for the return of the property or its value.

Defendant Royer dismissed the original suit in Washington County, under Rule 41 (a), Utah Rules of Civil Procedure. In that suit, said defendants would have the burden of proving exclusive right to immediate possession and that burden cannot now be shifted.

The facts are clear, E. Penn Smith had a claim and a lawful right to the possession of the car at the time the Writ of Replevin was issued. The Writ of Replevin was wrongful and was quashed. E. Penn Smith was entitled to a return of the property at that time, and is now entitled to a return of the bond.

CONCLUSION

Looking at these facts in the light most favorable to plaintiff, it is clear that E. Penn Smith had possession of the disputed automobile and a right to possession at the time of the wrongful replevin. The burden was on these

defendants to prove their right to exclusive and immediate possession. The defendants failed in this burden choosing to dismiss their cause of action in Washington County. Their replevin was wrongful and plaintiff should be compensated.

Respectfully submitted,

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By .....

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