Moore v. De Bernardi

47 Nev. 33 (1923) | Cited 6 times | Nevada Supreme Court | April 7, 1923

Kate Moore, a married woman, in her own right as owner, sued Rick De Bernardi to recover possession of a certain parcel of land in Washoe county, situate near the western limits of the city of Reno, which bears the name of "Rick's Resort" or "Roadhouse," and demanded in her complaint judgment for $150.00 per month as rental from the 22d day of July, 1920, until possession be delivered. The defendant answered, and by way of counterclaim interpleaded the Washoe County Bank as a party defendant, and alleged facts to show that said bank and plaintiff hold the land in trust for his use and benefit.

Upon extended findings of facts following closely the averments of the counterclaim, which are too lengthy to be set out, the trial court concluded as a matter of law that the conveyance of the land by the Washoe County Bank to Kate Moore, on the 22d day of July, 1920, if permitted to stand, would operate as a fraud upon the rights of the defendant; that, in virtue of an agreement, set up in the counterclaim, between the bank and the defendant, a constructive trust had arisen in defendant's favor in the land; and that plaintiff, Kate Moore, purchased the property from the bank with full knowledge of said agreement. Thereupon it was adjudged, ordered, and decreed that said parties convey to the defendant the land in controversy, free and clear from all incumbrances, upon condition that the defendant pay to the Washoe County Bank $6,336.09, or deposit that amount of money into court for its use and benefit, and that the bank, on the payment of said sum, cancel of record a certain mortgage given it by Kate Moore and her husband, M. B. Moore, which bears date on the 22d day of July, 1920. The Washoe County Bank has not appealed, but Kate Moore, the plaintiff, appeals from said judgment and decree, and also from an order denying and overruling her motion for a new trial.

While numerous errors are assigned upon exceptions taken to rulings in the course of the trial with respect to the admission and rejection of evidence, the material assignments of error, reduced to precise terms, are: First, that the agreement set up in the counterclaim and purported to be established by the findings was, in fact, a mere parol agreement entered into by one of the firm of attorneys for the bank, who had charge of the bank's action brought against one Constance Parker and Rick De Bernardi to foreclose a mortgage on the land, which had been given the bank by Constance Parker in her own name, in May, 1914, and that said agreement was made and entered into by said bank's attorney without its authorization and ratification. Second, that, if said agreement was established by sufficient and legal evidence, it not being in writing, it was within the condemnation of the statute of frauds. Third, that the evidence is insufficient to support the finding that Kate Moore purchased the property in dispute with notice of the defendant's claim of right and interest in the property.

If there be merit to the last proposition, it is decisive of the appeal, because, if Kate Moore was a purchaser in good faith and without notice, she acquired by her deed a higher right, and took the property relieved of any trust that may have been created by the alleged agreement between her grantor and the defendant. The finding with respect to actual notice, and averred in the counterclaim, is, in substance, that on the 19th day of July, 1920, the defendant notified Kate Moore, by and through her husband, M. B. Moore, who acted as her agent, that the Washoe County Bank purchased the property for the defendant's use and benefit at a sheriff's sale thereof, and that the defendant would insist upon his rights under his contract, and at the same time informed said agent of the terms and conditions of the agreement existing between the defendant and the bank, and that prior to July 22, 1920, plaintiff was fully aware of the fact that the bank had purchased the property at a sheriff's sale for the use and benefit of the defendant.

The evidence in support of the finding is based solely on the testimony of James T. Boyd, an attorney of record in this case, the substance of which was that M. B. Moore visited his residence for the purpose of ascertaining from him what his client, Rick De Bernardi, intended doing about the property in dispute. The evidence opposed to his testimony in this particular is that of the witness M. B. Moore, who testified, in substance, that no such conversation was ever had at the time and place stated by Boyd, or at all. The testimony of these witnesses in all material respects is not only in sharp, but irreconcilable, conflict on the material fact of notice. Hence, in order for the trial judge to have found that the witness Boyd, on the date mentioned, informed the witness Moore of the existence of the agreement in question, and of its terms and conditions, he must have acted upon the truth of the testimony of Boyd and rejected the testimony of Moore. There being, then, a substantial conflict in the evidence, under the rule, the finding is conclusive upon this court. Dixon v. Miller, 43 Nev. 280, 184 Pac. 926, and cases cited.

It has been repeatedly held that, in cases tried by the court without a jury, the same consideration is given the court's findings as to a verdict, and the same rules apply as to reversing them on appeal, on the ground that they are contrary to the evidence, as apply to a verdict. In such a case the rule is the same as that which governs the court in reviewing a judgment entered upon the verdict of a jury, which is that the jury must be deemed to have found to be true the evidence that is most favorable to the prevailing party. Canda v. Totten, 157 N. Y. 286, 51 N. E. 989. We, therefore, in the absence of anything to show that the court reached a wrong conclusion, decline to disturb the finding that Kate Moore was not a purchaser without notice of the defendant's claim to the property.

In this connection it is proper to state that we ignore the argument that Kate Moore had constructive notice of the defendant's right and claim to the property by reason of his long-continued occupancy and possession thereof, for the reason that it is not within the issue, which was that Kate Moore had actual notice of the agreement existing between the defendant and her grantor when she purchased the property and gave a mortgage back to the bank to secure the balance due on its purchase price. The relief granted defendant was upon the ground that a constructive trust was created by the agreement between the defendant and the bank, which the latter was bound to execute, of which

agreement creating the trust Kate Moore had actual notice.

It is next argued on behalf of Kate Moore, as the successor in interest of her grantor, the Washoe County Bank, that the agreement between said bank and the defendant, upon which the relief as prayed in the defendant's counterclaim was granted, is not established by sufficient or legal evidence, and, in the next place, if said agreement was so established, it is not in writing, and therefore within the rule of the statute of frauds. We are of opinion that the agreement was established by sufficient and competent evidence, but the question of whether the conclusion of law that a constructive trust had arisen by virtue of the agreement which the Washoe County Bank was bound to execute is worthy of discussion.

It requires no argument to convince us that an attorney's authority to bind his client extends only to such acts and agreements as are necessary for the due prosecution of the cause or business in connection with which he has been employed; he has no implied power to bind his client by an agreement collateral to and independent of the subject-matter of his employment. A client is not bound by an unauthorized agreement of his attorney to convey land. Thornton on Attorneys at Law, § 202. But we do not understand the case or the finding of the trial judge to be that the agreement in question was not authorized and ratified by the bank, but, on the contrary, that it was so authorized The finding is based solely upon the testimony of the defendant's attorney, Boyd, who testified, in substance, that, before the agreement was consummated by him with one of the firm of attorneys for the bank, he was first assured by the cashier of the bank, after stating to him his reasons for soliciting the agreement on behalf of his client, that any agreement entered into by the witness with the bank's attorneys would be entirely agreeable and satisfactory to the bank. It appears that at the time the proposition was made to the bank, which culminated in the agreement, the bank had commenced an action (in January, 1918) in the court below to foreclose a mortgage on the land in controversy, which had been given it in 1914 by one Constance Parker to secure the payment of her note to the bank for $3,000, and De Bernardi was made a party defendant to the action. It is conceded, or must be conceded, that De Bernardi had an interest in the property which he had a right to protect and preserve from being completely extinguished by the foreclosure of the bank's mortgage. It appears that he was then in possession of the property, and had been in its continuous occupancy under a claim of right since 1906, and, in order to protect and preserve his interest from entire loss, and to obtain the advantage of having the legal title to the land conveyed to him through the foreclosure proceeding, upon the authority of the cashier of the bank, De Bernardi's attorney entered into an arrangement or agreement with R. M. Price, the attorney who had in charge the foreclosure proceeding, whereby it was agreed that the bank should and would proceed with the foreclosure of its mortgage for the defendant's use and benefit, and, upon acquiring legal title thereto through its foreclosure proceeding, convey the land to De Bernardi, and, in consideration for its promise to convey, De Bernardi agreed not to appear in the action and permit his default to be taken, and not to become a bidder at the sheriff's sale of the property, or take any other step, by action or otherwise, to protect his interest in the property. The foreclosure took place, and upon the expiration of the time for redemption the sheriff of Washoe county delivered to the bank a sheriff's deed to the

property. The bank thereafter refused to carry out its promise to convey the property to De Bernardi.

The cashier of the bank, as a witness in the case, testified, in substance, that he had no knowledge or recollection of having ever authorized the agreement, as testified to by the witness Boyd. There is no doubt that the witness may honestly have been of opinion that, if he had authorized the agreement, he would have recalled the fact, and would never have dealt with Kate Moore. But the cashier's nonrecollection, or the bank's repudiation of the agreement by its conveyance of the property to Kate Moore, does not justify the deduction that the agreement was not authorized by the bank's cashier. The cashier's failure to remember or recollect the fact does not amount to a contradiction of the positive testimony of the witness Boyd that the agreement was authorized by the cashier of the bank; neither does the conveyance of the property amount to such a contradiction, because the repudiation of the agreement was but the conclusion of the officers of the bank that no such agreement had been authorized. There being, then, no substantial conflict in the evidence upon which the finding of the court is based, we decline to disturb the finding.

The agreement having been established the inquiry arises: Does the agreement and circumstances of the case create a trust which a court of equity can enforce. In support of the affirmative counsel for De Bernardi rest their case on the principle, which has become almost a maxim in equity, that the statute of frauds, intended as a protection against fraud, shall not, in equity, be perverted to its consummation. We are in accord with what is said in Moseley v. Moseley, 86 Ala. 292, 5 South. 732, that this principle, which may now be regarded as a maxim, has been carried in many cases so far beyond the first intention as to amount to annihilation of the statute of frauds. It is certain that the principle has been overworked by the defendant in this case. The mere refusal to perform a parol agreement, void under the statute of frauds, may be a moral wrong, but it is in no sense a fraud in law or in equity. Wheeler v. Reynolds, 66 N. Y. 234.

In the present case no specific averment of fraud is alleged in the pleadings, but the court concludes fraud in law from its findings, manifestly upon the assumption that to permit the parties to hold the land in face of the agreement and the circumstances would be to support a breach of trust, and a fraud in law. If from this it is to be understood, as argued by the defendant, that the refusal of the bank to carry out its agreement constituted such a fraud as calls for the intervention of a court of equity, we should be impelled to conclude that there is no such element in its breach as to take it with out the rule of the statute of frauds. On examination, however, of the material findings, in connection with the evidence in the case, we are satisfied that the court's conclusion of law is warranted, not because the bank refused to carry out its parol agreement, but for the reason that it appears, as above stated, that the defendant had an existing interest in the land, which, in reliance on the promise contained in the agreement, he omitted to protect, and by its terms expressly precluded himself from protecting from entire loss by the foreclosure of the prior mortgage of the bank. In reliance on the agreement, he omitted and refrained from taking any other step to protect his interest, and, furthermore, by the bank's failure to carry out the agreement he lost the advantage of having the legal title transferred to him in its perfected state, which, apparently, was one of his

motives in soliciting the agreement. We are of opinion that, the defendant having an interest in the land, the subsequent denial of the confidence reposed was such a surprise and fraud as operates to convert the bank into a trustee ex maleficio, which trusts are excepted from the operation of the statute of frauds. 3 Pomeroy, Eq. Jur. (4th Ed.) § 1055, note 1.

The rule is established by a number of authorities that, where one having an interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee ex maleficio. In the case of Chadwick v. Arnold, 34 Utah, 48, 95 Pac. 527, the writer of the opinion industriously collates the numerous authorities in support of this proposition. In addition, we cite the cases supporting the text, 39 Cyc. 180. As remarked in Cutler v. Babcock, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 882, the distinction upon which cases such as this have been made to turn is as between one having an interest in the premises to protect by the parol agreement and a mere stranger to the title and estate seeking to enforce such agreement. We readily concede that, if defendant had no interest in the property in controversy, no constructive trust was created by the agreement, and without that interest the agreement would clearly be within the rule of the statute. The defendant, however, having an interest, and in reliance upon the bank's parol agreement to purchase and convey to him the land on receipt of the legal title, the refusal of the bank to carry out the agreement and the subsequent denial of the confidence reposed in it was such a fraud as to make the bank a trustee for the defendant.

It is manifest that M. B. Moore, as agent for his wife, before he negotiated with the bank for its purchase, had actual notice of the defendant's claim of interest in the property, but obviously was of the opinion that the defendant's interest had been completely extinguished by the foreclosure of the bank's mortgage and the sheriff's deed, and therefore her deed would operate as her protection from the claim of the defendant. But this position, unfortunately for Mrs. Moore, was overcome by the court's finding that her agent, prior to the date of the deed, had actual notice that her grantor had promised and agreed to convey the legal title to the land to the defendant. She was not, therefore, a purchaser in good faith without notice.

While it is not incumbent upon this court to answer argument, some of the contentions of counsel for Mrs. Moore deserve special mention. It is urged that no confidential relation existed between the bank and the defendant, and in the foreclosure of its mortgage it did nothing more than what it had the right to do; that the bank's promise, at most, was but a gratuitous undertaking, without consideration, unenforceable, and binding on no one; that the inducement for the promise moved from the defendant to the bank, and not from the bank to the defendant, and no fraud or imposition was practiced upon the defendant.

It is not indispensable that the conventional relation of trustee and cestui que trust, or any express fiduciary relation, should exist between the original wrongdoer and the beneficial owner of the land

to create a constructive trust. They arise in invitum for the purpose of working out justice in the most efficient manner. Millard v. Green, 94 Conn. 597, 110 Atl. 177, 9 A. L. R. 1610. It will not do to say, as said in Sandfoss v. Jones, 35 Cal. 487, quoting from Soggins v. Heard, 31 Miss. 428, that the party promising was moved merely by friendly or benevolent considerations, and may therefore, at his option, decline a compliance with his agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted.

For the reasons and upon the authorities hereinabove stated, we are of the opinion that the evidence is sufficient in this case to support the findings, and the court's conclusions of law are warranted thereby. The decree appealed from is therefore affirmed.

DUCKER, C. J., and COLEMAN, J., concur.