

SUPREME COURT OF FLORIDA

Ball v. Yates

29 So. 2d 729 (Fla. 1946) · Decided November 29, 1946

OPINION

PER CURIAM.

This is a suit wherein the plaintiff sued the defendant upon an alleged oral contract alleged to have been made with the defendant through his agent, Suttles. Defendant denied the agency and ratification and plead the Statute of Frauds.

The verdict and judgment were for the plaintiff and defendant appealed. Hereinafter the Peninsular Securities Corporation will be referred to as "Peninsular". The Wakiki Beach Corporation will be referred to as "Waikiki", and the St. Johns Beach Development Company will be referred to as "St. Johns".

The land encumbered by the mortgages involved will be referred to as the "beach tract". Marks, Marks and Holt, the holders or representing the holders of the second mortgage bonds, will be referred to as "Marks". Before Peninsular sold its only asset, the beach tract, to Waikiki it was encumbered by a purchase money mortgage to William H. Rogers, as Trustee, dated June 1st, 1925 for \$600,000.00, payable 3 years after date, with semi-annual installments of interest of \$18,000.00 each, maturing December 1st and June 1st of each year.

It was also encumbered by a second mortgage of like date to Farmer's Loan and Trust Company securing \$125,000.00 of second mortgage bonds, maturing two years after date with semi-annual installments of interest of \$3,750.00 each, maturing December 1st and June 1st of each year.

The second mortgage bonds are the bonds involved in this suit. \$50,000.00 of them were owned by Marks, Marks and Holt and they represented the holders of others. In December 1927 Mr. Young organized Waikiki Beach Corporation and that company, in December 1927 acquired the beach tract.

The purchase price was \$2,000,000.00, payable as follows: \$725,000.00 by the written assumption of the first and second mortgages, \$1,225,000.00 in third mortgage notes secured by a third mortgage on the property and \$50,000.00 cash. Of the cash payment Waikiki furnished none; \$25,000.00 was loaned to Young by Suttles and \$25,000.00 by Jacksonville Properties, Inc., the broker which effected the sale.

The *Page 524 second mortgage bondholders then waived and forgave two installments of interest, which had matured June 1st and December 1st, 1927. They also extended the maturity of

the second mortgage bonds to June 1st, 1932. By then Suttles had personally laid out \$108,000.00 cash in the payment of former installments of interest and in other advances in the speculation.

Waikiki owned no property except the beach tract encumbered by mortgages aggregating \$1,950,000.00. Suttles was President of "Peninsular" but the corporation was owned by J.J. Heard and by reason of prior transactions Suttles was a creditor of Heard to the extent of \$108,000.00 resulting from dealings concerning this beach tract — and Suttles also has a one-third interest in the \$200,000.00 in bonds of the third mortgage.

Suttles' interest as of June 1st, 1928 in the transaction was: \$108,000.00 previously advanced to J.J. Heard of Peninsular; \$25,000.00 cash advanced to Young and Waikiki; and \$66,666.00, 1/3 interest in \$200,000.00 third mortgage bonds, totaling \$199,666.00. Young's "Waikiki" sale of Beach Tract to Ball's "St. Johns". — Waikiki was unable to meet its first installment of semi-annual interest maturing June 1, 1928 upon the first and second mortgages.

This brought about Suttles' attempt to sell the property to dupont interest represented by Ball. Suttles offered the equity first for \$250,000.00 and then for \$100,000.00 subject to the three mortgages. Ball told him that (duPont's) Almours was not interested and finally said that he, Ball, might be personally interested enough to organize a corporation to take the title and make the payment of interest that Suttles said would mature around June 1, 1928.

As a result of Suttles negotiations, Ball and Young agreed that Young would have Waikiki transfer the title to the property to a corporation which Ball would organize, that Ball would pay the interest on the first and second mortgages that matured on June 1, 1928 and give to him, or his company, Waikiki, the right within 60 days to redeem and take title to the property.

It was not redeemed. *Page 525 Suttles' deal with Marks re 2nd Mortgage Bonds. — Suttles appears to have advised Marks that the dupont interests — or Ball — had become interested and they would immediately organize a corporation that would be adequately capitalized to take over the tract; that if given the time and opportunity, the new company would take title to the property; that if the bondholders would "sit still in the boat" and not precipitate the maturity of their obligations nor foreclose their mortgage and would accept a delayed payment of their interest when the corporation was formed and would cooperate in a foreclosure suit to clear the title of the property of all liens subordinate to their mortgage then Ball would pay the overdue interest (as well as that on the first mortgage), and meet all future installments of interest and make the second mortgage bonds "as good as Government Bonds".

Marks said he would wait, and did. A statement that an act would be done is not essentially a promise to do it, and not all promises are contractual. Ball organized the new corporation, St. Johns Beach Development Company. All the common stock was issued to him except a qualifying share each to the dummy directors. All the preferred stock that was issued was in Ball's name.

The St. Johns took title to the property from Waikiki and Ball furnished it the money to pay the interest on the first mortgage amounting to \$18,000.00 and the interest on the second mortgage amounting to \$3,750.00, which it paid.

The check for the second mortgage interest was brought to Marks by Suttles, on June 11, 1928. Ball — Peninsular deal. — About June 9th, 1928 negotiations were had between Peninsular and Ball with respect to the Beach Tract. Suttles made a proposal on behalf of Peninsular. It was, in effect, that Peninsular would trade to Ball \$1,025,000.00 par value of the third mortgage notes in exchange for \$763,000.00 par value preferred stock of the corporation which Ball was to form.

Ball accepted. The acquisition of the beach tract by St. Johns and the exchange of Ball's preferred stock in St. Johns for the third mortgage bonds took place about at the same time — June 1928. *Page 526 The facts clearly establish that Suttles was prompted in his initial actions in going to Ball in May and June 1928 by his fear of a default by Waikiki and his prior advances.

He wanted some people with money to take over the property in order that his own personal interest might be protected. Ball as an investor and Suttles as a broker had done business before — Ball was interested in the tract. Ball, realizing the situation with Waikiki defaulting and with the knowledge that default by Waikiki as owner of the tract would jeopardize Peninsular's third mortgage by the hazard of the foreclosure of the first or second mortgages, doubtless conceived the idea of negotiating with Waikiki to get the title to the property and of negotiating with Peninsular to exchange their third mortgage bonds for preferred stock in the corporation to be organized to acquire title.

With these ideas in mind he likely told Suttles to tell Marks that he would make arrangements whereby he would take over the property and make good the interest on the second mortgage bonds which Marks controlled or represented. If he made good the interest on the second mortgage bonds he would of course protect his own interest by paying the interest on the first mortgage bonds which would as an incident thereto likewise protect the second mortgage as against the first mortgage.

Ball proceeded to acquire the tract by Waikiki conveying to St. Johns. Peninsular exchanged its third mortgage for preferred stock in the St. Johns. Ball paid nothing for the preferred stock which was issued to him and which he exchanged for the third mortgage bonds in St. Johns but claimed them as his own. By this suit it is the attempt of plaintiff to impute from the facts and circumstances agency to Suttles with Ball as the principal and from the facts and circumstances to impute a binding promise by Ball through Suttles as agent to pay the second mortgage bonds held and controlled by Marks.

"When one deals with a special agent or an agent who has only special authority to act for his principal, he acts at his peril, for he must acquaint himself with the strict extent of the agent's

authority and deal with the agent accordingly. *Page 527 Such third person must inquire into the extent of the agent's authority; he is not justified in relying upon any appearance of authority except that which is directly deducible from the nature of the authority actually conferred."

2 Am. Jur. p. 77, 8, Agency 96. It is evident that Suttles wanted the property saved from foreclosure. It is apparent that Marks had no desire to foreclose. It is also apparent that Ball had no intention of burdening himself or his one-man corporation (St. Johns) with a promise to pay other than the specified installments of interest. It appears that on each occasion when confronted with any suggestion that he had entered into any agreement of a contractual nature, other than with Waikiki and Peninsular, that he disaffirmed and disavowed.

He states his plan was to proceed so that he could quit at any time without liability and his conduct throughout bears this out. We are of the opinion that the evidence fails to establish facts sufficient to permit an inference that Suttles was the authorized agent of Ball and likewise it is not sufficient to establish ratification.

The various acts and doings of Ball were such as he had a right to do, independent of agency. They were in nowise dependent upon the existence of agency and under the facts and circumstances ratification will not be implied as a matter of law. Every act of Ball was consistent with Suttles not being his constituted agent and no act of Ball was dependent on Suttles being Ball's agent.

Ball also disavowed the agency of Suttles. The acts tending to imply ratification are accounted for by the showing that they were in advancement of expressed or written obligations or were otherwise not dependent on any purported act of agency by Suttles.

Before ratification will be implied of an act of an unauthorized agent it must be made to appear that the principal has been fully informed and that he has approved. The evidential factors tending to establish a contract between Ball and Marks occurred on or before June 1st, 1928 and the factors evidencing ratification occurred after that date. *Page 528 The evidence fails to support an enforceable contract between Ball and Marks prior to June 1st, 1928 and likewise the evidence fails to establish ratification subsequent thereto.

It is likewise apparent that the debt sought to be enforced is that of Peninsular to Marks — the second mortgage bonds. The evidence is insufficient to establish that this debt ever became the debt of Ball. The evidence is likewise insufficient to establish that Ball ever made a "special promise" in writing to "answer" for this debt of the Peninsular or otherwise placed himself within the exactions of the statute of Frauds (Sec.725.01, Florida Statutes 1941, F.S.A.) so as to incur liability for the "debt, default or miscarriage" of Peninsular on the second mortgage bonds held by Marks.

The pertinent provisions of the statute of Florida being, "No action shall be brought... whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person... unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

725.01 Florida Statutes, 1941. Upon the first trial reviewed in the first appeal, *Yates v. Ball*, 132 Fla. 132, 181 So. 341, the trial court had directed a verdict for the defendant at the close of plaintiff's case and the question there was whether or not the evidence adduced in support of the allegations of the declaration were sufficient to support a verdict for plaintiff and this court on appeal held that the evidence presented by the plaintiff was sufficient to establish a prima facie case against the defendant and that it was error for the trial court to direct a verdict for the defendant.

In the second appeal (145 Fla. 537, 200 So. 701) the plaintiff procured a verdict which was reversed and the opinion recited that "the verdict is not supported by the evidence adduced in support of the allegations of the declaration." If to be taken literally this language was inadvertent.

The question then before the court was not whether the evidence adduced in support of the allegations of the declaration was *Page 529 sufficient, but whether the evidence adduced as an entirety supported the verdict. It was the court's conclusion that it did not.

The law of the case is fixed by issues actually adjudicated on appeal and does not extend to such issues as might have properly been adjudicated. If there be any conflict between the law of the case as established by the first appeal with the law of the case as established by the second appeal then in that event the latter will control over the first.

We find that the trial court erred in not directing a verdict for the defendant after all the evidence was in. Upon the going down of the mandate the lower court shall make inquiry of the counsel of record of the respective parties as to whether or not there will be evidence available on a further trial of this cause which would add substantially to the strength of the plaintiff's case.

If it shall appear as the result of such inquiry that upon another trial the evidence to be adduced would be substantially the same as that submitted at the trial hereby reviewed, then and in that event, the trial court shall thereupon so adjudge and enter a judgment for the defendant. Reversed with directions. BROWN, BUFORD, THOMAS and ADAMS, JJ., concur. CHAPMAN, C.J., and TERRELL J., dissent.