ARTHUR DOREY, JR. ET AL v. HARRY McCOY AND MONTE NE SHORES, INCORPORATED

5-4952 442 S.W. 2d 202

Opinion Delivered June 9, 1969

1. **New Trial—Amount of Recovery as Ground—Statutory Provisions.**—Under the statute a new trial may be granted when there is error in the assessment of amount of recovery where the action is upon a contract or for injury or detention of property. [Ark. Stat. Ann. § 27-1901 (Repl. 1962).]

2. **New Trial—Discretion of Trial Court, Abuse of—Review.**—Whenever a trial judge grants a motion for new trial, his rul-

ing will not be reversed on appeal unless there appears to have been an abuse of discretion.

3. **Ejectment—Right of Action—Sufficiency of Title.**—In order to sustain an action in ejectment, plaintiff must establish that he is legally entitled to possession of the property and must succeed on the strength of his own title and not depend on weakness of defendant's title. [Ark. Stat. Ann. § 34-1401 (Repl. 1962).]

4. **New Trial—Insufficiency of Evidence to Support Verdict— Review.**—Trial court's action in granting a new trial **held** not an abuse of discretion where there was not a clear preponderance of the evidence as to the location of the lots in relation to the road.

5. **Appeal & Error—Harmless Error—Review.**—Any error which may have occurred in granting a motion for reduction of the verdict was rendered harmless by the granting of a new trial which was not an abuse of trial court's discretion.

6. **New Trial—Motion for Judgment N.O.V.—Operation & Effect.** —Motion for judgment notwithstanding the verdict did not at common law preclude a motion for new trial.

Appeal from Benton Circuit Court; *Maupin Cummings,* Judge; affirmed.

Davis Duty for appellants.

Hardy Croxton for appellees.

JOHN A. FOGLEMAN, Justice. Appellants instituted an ejectment action in which they claimed that appellees had constructed a road across appellants' lands (consisting of lots 20, 22 and 40) for a connection with appellees' adjacent lands. Included in the complaint was a prayer for damages in the sum of $5,000. It was not seriously disputed that appellees had caused such a road to be constructed, the old road having been inundated by the waters of Beaver Lake. The principal items in dispute were the location of the particular lots in relation to the road and the amount of damages. During the trial the court permitted the jury to view the premises. The court instructed them to stay together under the charge of the bailiff and to talk to no one about the case.

One of the jurors left the group and proceeded to the site on his own in advance of the others.

Appellants introduced the testimony of Harold J. Pranter, who was a consulting engineer and land surveyor, together with a survey of the lands in question prepared by him. The survey indicated a road superimposed over portions of lots 20, 21, 22, 30 and 40. On cross-examination the witness indicated that the lot lines were not certain from an engineering standpoint because the plats available did not contain bearings or distances. He testified that his survey was predicated on calculations based on the Corps of Engineers' estimate of where the original town of Monte Ne was placed on their grid map. Mr. Pranter calculated that the portion of the road shown on his survey constituted roughly 12,000 square feet and was 300 feet long.

Marvin Head, who was in the earth moving business, testified on behalf of appellants that removal of the entire road would involve moving 2,000 yards of material at a cost of $1.00 to $1.10 per yard.

Arthur Dorey, Jr., one of the appellants, testified on cross-examination that approximately one-quarter of the road is in lot 21 which they did not claim.

Appellees' witness Bob Crafton, civil engineer and land surveyor, testified that no lot on the W. T. Patterson plat could be located with any degree of accuracy and that basically everything in Monte Ne is a guess. He stated that by the method of scaling and estimating and assuming some information he could possibly get within five hundred feet but that he could not get as close as a hundred feet to the actual lines.

At the close of the evidence the case was submitted to the jury which returned a verdict in favor of appellants for damages in the sum of $1,800 and a judgment ejecting appellees from the lands in question. There-

after, appellees made a motion which alleged that the undisputed testimony established that $2,200 was the maximum figure introduced into evidence for the cost of removing the entire road and that appellees had admitted on cross-examination that one-quarter of the road was on lot 21 which appellees did not claim; therefore the judgment should be reduced to $1,650 notwithstanding the verdict of the jury. The court granted this motion and a judgment was entered in the amount of $1,650 against appellants.

Subsequently, appellees made a motion for a new trial and as grounds therefor alleged, among others, that the verdict or decision was not sustained by sufficient evidence and was contrary to law, and that after entry of said judgment it became known to appellees that a member of the jury had, in violation of specific instructions of the court, independently proceeded to the situs of the property and arrived there approximately one hour prior to the other jurors. Accompanying the motion was an affidavit by the bailiff which reiterated the substance of the allegation in the motion. The court granted the motion for a new trial on the grounds that the verdict was excessive and because of the action of the juror in leaving the body of the jurors in violation of the court's instruction. Appellants appeal from the granting of the new trial and from the granting of the motion to reduce the jury verdict from $1,800 to $1,650.

Appellants argue that the trial court erred in granting appellees' motion for a new trial for excessiveness of the verdict. Arkansas Statutes Annotated § 27-1901 (Repl. 1962) provides, in part, that a new trial may be granted when there is "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property." Whenever a trial judge grants a motion for a new trial we will not reverse his ruling unless it appears that he abused his discretion. *Bobbitt* v. *Bradford*, 241 Ark. 697, 409 S.W. 2d 339; *Meyer* v. *Bradley*, 245 Ark. 574, 433 S.W. 2d 160.

In order to sustain an action in ejectment plaintiff must establish that he is legally entitled to possession of the property. Ark. Stat. Ann. § 34-1401 (Repl. 1962). Plaintiff must succeed, if at all, on the strength of his own title and cannot depend on the weakness of the defendant's title. *Bunch* v. *Johnson,* 138 Ark. 396, 211 S.W. 551; *Knight* v. *Rogers,* 202 Ark. 590, 151 S.W. 2d 669. The evidence in this case does not establish by a clear preponderance where lots 20, 22, and 40 are in relation to the road. Appellants' witness admitted his survey, which purported to show those portions of the lots which had been taken by the road, had been prepared upon the assumption that the Corps of Engineers' plat was correct, and he stated that he had no personal knowledge whether it was correct or not. He further testified that if he were told to locate lot 1, block 54, or any lot in any part of Monte Ne, he could not find and stake out that lot with any reasonable degree of certainty. He admitted that his survey was based on the only available information. This witness's testimony actually agreed with appellees' witness, Bob Crafton, except that they differed as to the degree of error likely in trying to locate the lots in question. Because of this uncertainty, the trial judge obviously felt there was error in the amount of damages awarded. We cannot say that he abused his discretion in granting a new trial.

Inasmuch as the court's action in granting a new trial on the basis of insufficient evidence to support the verdict was not an abuse of discretion, we need not consider the question of whether the granting of a new trial because of the actions of the juror was an abuse of that discretion.

Appellants argue that it was error for the court to grant the motion for a new trial after it had already granted the motion to reduce the jury award. Appellants style the first motion as a motion for a judgment notwithstanding the verdict and argue that it is inconsistent to grant both. Actually, the first motion was

in the nature of a request for a remittitur such as is provided for in Ark. Stat. Ann. § 27-1903 (Repl. 1962) and not a motion for judgment notwithstanding the verdict. See *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W. 2d 49. The two motions would not be inconsistent because, under the statute, the alternative to remittitur is a new trial. If there was error in granting the motion for reduction of the verdict it was harmless error in view of the fact that the trial judge did not abuse his descretion in granting a new trial.

Even if this motion were considered as one for a judgment notwithstanding the verdict it would not have been inconsistent with a motion for a new trial. In *Montgomery Ward & Company* v. *Duncan,* 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147, it was said, "A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for new trial. And the latter motion might be, and often was presented after the former had been denied."

The judgment is affirmed.

BYRD, J., concurs.