493 S.W.2d 343
Court of Civil Appeals of Texas,
Austin.

AUSTIN LAKE ESTATES RECREATION CLUB, INC., et al., Appellants
v.
Robert S. GILLIAM et al., Appellees.

No. 12015.
|
April 4, 1973.
|
Rehearing Denied April 25, 1973.

Suit by recreation club which owned lake shore lot and by certain owners of shares of stock in club to quiet title to the club's lot. Owners counterclaimed and filed cross petition praying that lot be declared permanently impressed with trust for benefit of owners of subdivision lots seeking access across club's lot, and that deed conveyed to trustees, 'their heirs and assigns,' not fail for reason that no cash consideration was received by the club for the deed or by reason that deed, recorded the next day, was not physically delivered to trustees, deed created an irrevocable trust. The 126th District Court, Travis County, Jack Roberts, and Ralph Meyers, J., entered judgment for owners and plaintiff appealed. The Court of Civil Appeals, Phillips, C. J., held that quitclaim deed to portion of lake shore lot conveyed by recreation club, which deed was delivered to court by owners and was recorded, was sufficient to create irrevocable trust for benefit of owners of subdivision lots, and that deed was not void for lack of consideration.

Affirmed.

West Headnotes (13)

[1] Trusts
Conditions or reservations in instrument creating trust

Statute providing that every trust shall be revocable unless expressly made irrevocable does not require that the trust instrument contain specific words of irrevocable trust, but rather trustor's intent to make t
Vernon's Ann.Civ.St. art.

5 Cases that cite this hea

[2] Deeds
Want of consideration

Lack or failure of consideration is voiding an executed deed showing of fraud or undue

1 Cases that cite this hea

[3] Trusts
Consideration
Trusts
Transfer of legal title

Quitclaim deed to portion of lake shore lot conveyed by recreation club, which deed was delivered to court by owners and was recorded, was sufficient to create irrevocable trust for benefit of owners of subdivision lots seeking access across club's lot, and deed was not void for lack of consideration. Vernon's Ann.Civ.St. art.

4 Cases that cite this hea

[4] Deeds
Intent of parties

Question of delivery of a intention of the grantor.

1 Cases that cite this hea

[5] Deeds
Effect of record or deli

Upon recordation of a deed is that the grantor did so a conveyance, and no furth required.

1 Cases that cite this headnote

[6] Trial
Reopening Case for Further Evidence

Where original description to portion of land to trustees presented from efforts of person who was not a surveyor to measure off portion of lot with a metal tape, which efforts resulted in a legal description which conveyed portion of a building, a result not intended by grantors and grantees, trial court, in its discretion, properly permitted surveyor to be recalled and present description prepared by him which approximated that in the quitclaim deed but excluded the building. Vernon's Ann.Civ.Rules of Civil Procedure, rule 270

2 Cases that cite this headnote

[7] Reformation of Instruments
Mutuality of Mistake

A misdescription of land in a deed, as a result of a mutual mistake, may be reformed to transfer the land intended to have been conveyed. Vernon's Ann.Rules of Civil Procedure, rule 270

1 Cases that cite this headnote

[8] Easements
Ways

Easement imposed on lake shore and egress to lake front was an easement upon roads over the lot.

Cases that cite this headnote

[9] Easements
Termination in General

Attempted revocation of express easement of record was ineffective without the consent of those persons entitled to the easement.

Cases that cite this headnote

[10] Clubs
Officers and committees

Where president of incorporated club refused to call a vote on stated reason that he wanted counsel before he proceeded and "refused to act" and vice president properly assumed presidency and called for a vote on the matter,

Cases that cite this headnote

[11] Corporations and Business Associations
Consideration

Findings that shares of stock without the full amount of such shares having been paid for corporation were supported by evidence. V.A.T.S. Bus.Corp.Act, art. 2.

1 Cases that cite this headnote

[12] Trial
Objections and exceptions

If parties to suit involving the opinion that members of corporation have been misled by use of in special issue have been made to the abbreviation employed in the charge.

Cases that cite this headnote

[13] Appeal and Error
Failure to Object

Point of error not supported by authority will be considered.

5 Cases that cite this headnote

Attorneys and Law Firms

*345 Sam Bass, Jr., Freeport, for appellants.

Thomas B. Cowden, Stayton, Malone & Babb, Austin, for appellees.

Opinion

SHANNON, Justice.

This appeal concerns a declaratory judgment suit filed by appellants[1] against appellees[2] in the district court of Travis County to quiet and try title to a lot situated on Lake Austin in Travis County. Upon trial to a jury, judgment was entered for appellees based upon the answers of the jury to special issues and upon facts heard by the court, but not submitted to the jury. We will affirm that judgment.

Review of this case has been made more difficult by the failure of appellants to discharge their burden to supply in their brief a general statement of facts covering the entire litigation, supported by record references. Such statement would have assisted the Court in obtaining an overall view of the appeal.

The facts necessary to understand and decide this appeal follow. Appellant, Austin Lake Estates Recreation Club, Inc.,[3] was organized and chartered in 1959 for the purpose of operating and maintaining a private club and restaurant. In October of 1959, the club acquired by deed from Austin Lake Estates, Inc., its title to the property in question, Lot No. 4 in Cedar Ranch, Lakeview Acres, which is situated on the shore of Lake Austin and upon which a clubhouse and other improvements were built. This conveyance was subject to all 'rights and privileges' of the owners of lots in Austin Lake Estates, Section one, two and three, and Austin Lake Estates, Inc., grantor, reserved the right to grant the same rights and privileges to future lot purchasers out of those existing subdivisions and future subdivisions in an adjoining 826.16 acres. The deed to the club was also subject to those easements of record previously granted by Austin Lake Estates, Inc., by Charles A. Duffy and wife, Edna J. Duffy, and their predecessors in title.

Among those 'rights and privileges' previously granted and enjoyed by the lot owners was the use of Lot No. 4 for having picnics, for swimming, fishing, and for landing boats. Also, the lot owners had an easement of ingress and egress over *346 feet of Lot No. 4 to enjoy their use of the lot. Such arrangements in subdivisions near lakes and waterways are not unusual and serve as an inducement for customers to buy lots away from the shore of the lake. In such instances the developer usua

sets aside some water front ar
park or reserve so that all bu
assured of frontage.

During November of 1966, the
acquired large blocks of sto
December of 1966, a new set o
the club which required one vo
Before that date the practice
club to vote their stock on a
regardless of the number of sh

In November of 1968, and June
of directors meetings, Wroe O
Ila Belle Mayberry proposed to
Despite the fact that the boar
authorize its sale, a part of
J. W. Moore with a realtor.

In January, 1969, J. W. Moore
club, without approval from th
the clubhouse, the swimming p
land of Lot No. 4, to Bruce F
[illegible]
the arrangement with Parmelee by
permitted to use the clubhouse
Nos. 4 unless they paid a fee
[illegible]
a fence around the premises
lot owners from launching their

Area lot owners, being of the
use and enjoy Lot No. 4 was v
lease, presented a resolution to
of directors meeting of the c
directors were present for the
Director Vivian Worden propos
westernmost 303 feet of Lot N
the lot owners and all future
Lake Estates subdivision, and
conveyed to certain named tru
The resolution was then submit
directors for a vote, and
During the same evening,
Gilliam, [illegible] convey
westernmost 303 feet of Lot No
and the deed was recorded in the
the County Clerk of Travis County

In August appellants filed t
before this Court. As ground

quitclaim deed to the trustees, appellants pleaded that on June 23, 1969, the board of directors voted illegally and without authority to convey the portion of Lot No. 4 to the named trustees, and that on August 11, 1969, the board of directors by resolution rescinded, cancelled and officially declared' the trust and quitclaim deed 'to be Ab initio.'

In response to appellants' petition, appellees filed a cross-petition praying among other things, that Lot No. 4 be declared permanently impressed with an easement for ingress and egress in favor of the present and future lot owners in the Austin Lake Estates subdivisions, and that the shares of stock in the club acquired by Ila Belle Mayberry, J. W. Moore, Hazel Moore, and Wroe Owens be cancelled.

The case was submitted to a jury upon special issues. By its answers the jury found that J. W. Moore, Hazel Moore, Ila Belle Mayberry, and Wroe Owens entered into a combination to acquire control of the club by changing the by-laws from one vote for each shareholding family unit to one vote for each share of stock in order to exclude the minority shareholders from effective participation in the business affairs of the club. The jury further *347 found that the individual appellants entered into a combination to control all or a portion of Lot No. 4 and to restrict the minority shareholders of the club of their right of ingress and egress across that lot. In addition, the jury answered that the shares in the club held by Wroe Owens were acquired without any consideration being received by the club. With respect to the shares of J. W. Moore and Hazel Moore, the jury answered that the club did not receive consideration for the issuance of those shares.

The judgment recognized the existence of a perpetual easement for ingress and egress over Lot No. 4 to the waters of Lake Austin in favor of all the present and future owners of lots subdivided out of the original 862.16 acre tract adjoining that subdivision. In response to undisputed testimony from surveyors, after the court had received the jury's verdict, the judgment reformed the legal description contained in the quitclaim deed. Also by the terms of the judgment, the shares of stock of Wroe Owens, J. W. Moore, and Hazel Moore were cancelled.

Appellants attack the judgment
the principal contention bein
holding as a matter of law tha
irrevocable trust.

An examination of the quitcla
land was conveyed to the trust
forever so that neither said
and assigns shall have any ri
in such property premises or
thereof at any time hereafter.

[1] Tex. Trust Act, Vernon's Ann. Civ. St. Art. 7425b—41 specifically provides tha
revocable unless expressly ma
point will be overruled as t
terms, referred to above, cre

Appellants next complain by tw
court erred in holding as a ma
paid 'a sufficient considerat
and in holding that the quitcl
trustees.

[2] As no cash consideration w
for the deed, appellants argue
of the property. Gilliam testi
in consideration for the trus
the property for the lot owne
proof, there exists another re

Burgess v. Hatton, 209 S.W.2d

exact time. On the day followi
the deed of record in the offi

[4][5] The question of delivery of a deed is one of intention of the grantor. Stanford, 108 Tex. 340, 193 S.W. 661, 663 (Tex.1917); Rains, 157 Tex. 65, 299 S.W.2d 287 (1957). Upon delivery of a deed the presumption is that the grantor did so intend, and the burden is on the party who asserts the contrary to show that no delivery was made. Hackel, 124 Tex. 402, 77 S.W.2d 1043 (1935); Berg v. Anderson, 146 Tex. 302, 206 S.W.2d 217 (1947).

That we, Chas. A. Duffy, Edna Duffy, owners of Lots (4), and Fourteen (14) of Lakeview Acres, as shown by the recorded plat of said Lots No. 4 and Fourteen, (14) to the they shall be used as an ingress and egress to the

[6] In point of error five appellants complain of the court permitting the testimony to be reopened and the amendment of the property description in the quitclaim deed by judgment. The original description in the deed resulted from the efforts of Gilliam, who was not a surveyor, to measure off the 'west ... most 303 feet of Lot 4. . . .' with a metal tape. Those efforts resulted in a description which conveyed a portion of the clubhouse, a result not intended by the grantor nor the grantees. The court permitted the surveyor, who had prepared a surveyor's description of the clubhouse, to be recalled, and present the description prepared by him which approximated the quitclaim deed, but excluded the clubhouse.

[7] Texas Rules of Civil Procedure provides that '. . . in trial court to permit additional testimony to be offered where it clearly appears necessary to the due administration of justice. . . .' (Emphasis added) convinced that the court properly permitted the evidence to be offered since a misdescription, or mistake, as a result of a mutual mistake the land intended to be conveyed. Morrow v. Shotwell, 477 S.W.2d 538, 541 (Tex.1972).

[8] By their point of error number six appellants contend that the court erred in declaring that the resolution 4 a perpetual easement for ingress and egress of Lake Austin, for the reason, in appellants' say, original grantors of the easement, and under the wife, Edna Duffy, gave only an easement upon Lot 4 over Lot 4.

An examination of the original deed from Chas. A. Duffys dated November 10, 1948, shows that the instrument did not restrict the right of ingress and egress No. 4 to roads. That easement reads as follows:

[9] In June of 1960, Charles A. Duffy executed an instrument to revoke the original easement attempted revocation of an ex was ineffective without the entitled to the easement. See and Licenses s 101.

By the prior reservation in the deed, coupled with the undisputed fact that appellants purchased their lots with knowledge of the reservation in the deed, the quitclaim deed was a valid act of the club.

[10] Article 3, paragraph 6 o provides that '. . . in the event that the Board of Directors shall find it necessary to the proper protection of the interests of the Association, to enforce collection of any delinquent assessments, it may foreclose the lien herein retained, in the manner provided for the foreclosure of liens on real property, and may bid for and purchase said property at such foreclosure sale, and acquire, hold, lease, mortgage and convey the same.'

The record shows that appellants Moore and the 26 shareholders of the Club, signed a petition requesting the Board of Directors to call a special meeting of the Club for the purpose of considering the removal of the Board of Directors and the election of a new Board. The petition stated the reasons for the requested action as follows:

To special issues six and seve

'SPECIAL ISSUE NO. 6
Do you find from a preponderance of the evidence that the 28 shares of stock (Nos. 366 through 393) were issued to J. W. Moore on November 16, 1966, without the full amount of the consideration for such shares having been paid to ALERC, Inc.?
Answer 'We do' or 'We do not'.'

'SPECIAL ISSUE NO. 7
Do you find from a preponderance of the evidence that the 26 shares of stock (Nos. 394 through 419) were issued to Hazel Moore on November 16, 1966, without the full amount of the consideration for such shares having been paid to ALERC, Inc.?
Answer 'We do' or 'We do not'.'

In connection with terms used in special issues six and seven the court included the following definition in the charge:
'The term 'consideration' or 'consideration for such shares of ALERC, Inc.' means money paid to or on behalf of the corporation, labor done for the corporation or property actually received by the corporation.'

The club charter set the par value of each share of stock at $10.00 each. On November 16, 1966, a total of fifty four shares of stock in the name of the Moores was issued by the club treasurer in exchange for the cancellation of two notes totaling $470.00. Moore claimed that in addition to the cancellation of the notes, the issuance of the shares of stock was, in part, a reimbursement for petty cash advances for postage and envelopes. Dillard Vickers, treasurer in November of 1966, could not recall that the issuance of the shares of stock to the Moores was in reimbursement for cash advances.

[11] Tex. Bus. Corp. Act Ann. art. 2.16 provides in part that 'Shares may not be issued until the full amount of the consideration, fixed as provided by law, has been paid.' (Emphasis supplied). In deciding that the exchange of the notes was not the full payment of the consideration for the shares, the trial court made a finding of fact to the effect that it was of the opinion that the answers of the jury to special issues six and seven were not supported by the evidence.

[12] Points of error ten and eleven complain of the refusal of the trial court to enter judgment for appellants on the verdict that J. W. Moore and Hazel Moore did not fully pay for shares of the stock issued to them. Appellants argue that the evidence was conclusive that the shares were issued in exchange for the cancellation of the notes, and that the jury must have been somehow misled, they say, by the abbreviation being employed in the charge.

[13] Appellants' point of error twelve complains that the trial court erred 'in overruling plaintiffs' motion for judgment notwithstanding the verdict of the jury in special issues six and seven.' As to this point, appellants state in the brief, five blank pages are devoted to argument, and no authority is cited. The point is overruled. Rule 418(d), Texas Rules of Civil Procedure.

Appellants cite no authority in support of points of error twelve and thirteen, and these points do not more than state the proposition that the Moores acquired the shares of stock in exchange for the cancellation of the notes. Such acts are tantamount to a just compensation for the shares of stock. Boisy v. Blackstock, 466 S.W.2d 59 (Tex.Civ.App., n.r.e.).

The judgment is affirmed.

All Citations
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Footnotes
1 Appellants are Austin Lake Estates Recreation Club, Inc., Ila Belle Mayberry, J. W. Moore and wife, Hazel Moore. Wroe Owens was a party plaintiff, but did not perfect an appeal.
2 Robert S. Gilliam, Vivian Worden, John Rose, and Marlene Anglin in thier individual capacities, and I. K. Farley, Emmett R. Fry, Dillard L. Vickers, and Charles C. Petterson, individually and as trustees.

3 In this opinion, Appellant, Austin Lake Estates Recreation Club, Inc., will usually be referred to as the 'club.'