

1976

Bank of Ephraim v. Halbert Davis et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Bank of Ephraim v. Davis*, No. 14514 (Utah Supreme Court, 1976).
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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF EPHRAIM,	:	
A Utah Corporation,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	Case No. 14514
	:	
HALBERT DAVIS, STEVIE KAY	:	
STEINMANN, BABYLON CORPORATION,	:	
PRUDENTIAL FEDERAL SAVINGS,	:	
FIRST STATE BANK, THE UTAH	:	
TAX COMMISSION, and	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant-Respondent.	:	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
IN AND FOR SANPETE COUNTY, UTAH
THE HONORABLE DON V. TIBBS, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BANK OF EPHRAIM,
A Utah Corporation,

Plaintiff-Appellant,

-vs-

HALBERT DAVIS, STEVIE KAY STEINMANN,
BABYLON CORPORATION, PRUDENTIAL
FEDERAL SAVINGS, FIRST STATE BANK,
UTAH STATE TAX COMMISSION, AND UNITED :
STATES OF AMERICA,

Defendants-Respondents.

:
:
:
Case No. 14514
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BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an appeal from a decision of the Sixth
Judicial District Court as to the priorities of certain
judgment creditors on a Judgment and Decree of Foreclosure.

DISPOSITION IN LOWER COURT

The District Court awarded Judgment on a Decree of
Foreclosure to the judgment creditors, Bank of Ephraim,
Babylon Corporation, Prudential Federal Savings and Loan

Association and the Utah State Tax Commission as per the Complaints of each creditor. The rights of the defendant Steinmann were previously assigned to defendant Babylon Corporation. The defendants First State Bank and United States of America were previously dismissed as parties defendant to the action.

In its judgment and decree of foreclosure the District Court in addition to awarding Judgments to the judgment creditors, assigned priorities to the judgments of each creditor, as is set forth in the Statement of Facts. It is from these priorities that the plaintiff appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Supreme Court declare that the trial court was in error in granting the defendant Babylon Corporation and Prudential Federal Savings priority on their judgments ahead of the entire judgment of the plaintiff.

STATEMENT OF FACTS

There are generally no controversies concerning the facts of the case which are basically as follows:

The case involves three parcels of property described below:

PARCEL 1

Beginning at a point 1.94 chains North from the Southwest corner of Block 57 as platted in Plat "A" Manti City Survey, thence East 4.20 chains, thence North 33° West, along Manti City Creek, 1.10 chains, thence West 3.55 chains, thence South 1.00 chain to the place of beginning.

PARCEL 2

Beginning at a point 234.96 feet South, thence 129 feet East from the Northwest corner of Block 57, as platted in Plat "A" Manti City Survey, thence North 48° East 14 feet, thence North 40.25 feet, thence East 66 feet, thence South 49.50 feet, thence West 76.33 feet to beginning. 0.465 acres.

PARCEL 3

All of Lot 9, Block 44, Plat "A", Manti City Survey, Sanpete County, State of Utah, containing 0.60 acre, more or less

Parcels 1 and 2 have a cafe known as Hals Palace Cafe, as an improvement and shall be hereafter referred to as the cafe property.

Parcel 3 is a trailer court and shall hereafter be referred to as the trailer property.

CAFE PROPERTY:

On the 7th day of August, 1970 the defendant, Halbert Davis mortgaged to the Bank of Ephraim the Cafe Property and signed a note at the time for the sum of \$2,400.00.

On the face of the mortgage is typed a clause which reads:

"This mortgage covers all additional advances on this loan, the total principal amount not to exceed \$3,000.00."

Paragraph 2 of the printed portion of the mortgage reads:

"To secure payment of any and all extensions or renewals and successive extensions or renewals, of the notes above described, or of the indebtedness represented by the same, and of any other indebtedness at any time existing from the mortgagor to the mortgagee, whether represented by notes, drafts, open account or otherwise, and all the interest on all of the same, all of which extensions or renewals shall be optional with the mortgagee, but at the mortgagee's option may be made by new notes or otherwise and at, before or after maturity, and for all of which this mortgage shall stand as a continuing security until paid."

On August 7, 1970 the defendant Halbert Davis gave a second mortgage to Steven Kaye Steinmann and signed a Promissory Note in favor of Steven Kaye Steinmann in the sum of \$14,500.00. Both the note and the mortgage were subsequently assigned to the defendant Babylon Corporation.

The mortgage to Steven Kaye Steinmann expressly set forth the fact that it was secondary to the mortgage to the Bank of Ephraim.

On June 6, 1972 the defendant Halbert Davis executed a Promissory Note to the Bank of Ephraim in the sum of \$35,555.89.

On June 21, 1972 defendant Davis executed an installment note and mortgage to Prudential Federal Savings & Loan Association in the sum of \$4,073.40. This amount was later absorbed in the subsequent installment note and mortgage of October 19, 1972 in the sum of \$10,228.80.

On April 5, 1973 the defendant Halbert Davis executed a Promissory Note to the Bank of Ephraim in the sum of \$2,000.00 and on June 19, 1974 Davis executed a Promissory Note to Bank of Ephraim in the sum of \$5,384.00.

Further, on March 19, 1974 defendant Davis delivered to Plaintiff, Bank of Ephraim, its note in the sum of \$5,500.00 which is set forth in the Plaintiff's Third Claim for Relief.

The interest of the Utah State Tax Commission is represented by delinquent tax warrants for delinquent sales, unemployment and Income Tax.

At the time of the trial on January 5, 1976 all the parties presented evidence which the court took under advisement and later awarded judgment as follows:

(a) To the Bank of Ephraim, \$43,037.00 Principal, \$6,536.75 interest and \$3,000.00 attorney's fees for a total judgment of \$52,573.75, and Decree of Foreclosure on the cafe property.

(b) To the Babylon Corporation, \$13,269.52 principal, \$1,126.00 interest, \$40.00 title report, \$2,000.00 Attorney's fee for a total judgment of \$16,435.52 and a Decree of Foreclosure on the Cafe property.

(c) To Prudential Federal Savings, \$5,833.33 principal, \$25.00 title report, \$900.00 attorney's fees for a total Judgment of \$6,750.33 and a Decree of Foreclosure on the Cafe property.

(d) To the Utah State Tax Commission, \$2,766.73.

(e) To the Bank of Ephraim on its Third Cause of Action, \$5,500.00 principal, \$900.00 attorney's fees and \$996.11 interest for a total Judgment of \$7,396.11 and a Decree of Foreclosure on the Cafe property.

The court then assigned the following priorities on the Cafe Property:

- | | |
|--|------------|
| (1) Bank of Ephraim
Plus interest at 10% per annum from
2/22/74 | \$3,000.00 |
| Plus reasonable attorney's fee of | 600.00 |
| Plus costs of Court in the sum of | 27.11 |
| (2) Babylon Corporation | 14,395.50 |
| Plus reasonable attorney fees of | 2,000.00 |
| Plus interest at 8% per annum from
date | |
| (3) Prudential Federal Savings and Loan
Association | 5,833.33 |
| Plus interest at 10% per annum | |
| Plus Sttorney's fees | 900.00 |
| (4) Balance of Judgments to Bank of Ephraim
including amounts found due on its
Third Cause of Action | |
| (5) State of Utah Tax Warrants | 2,766.73 |

TRAILER COURT PROPERTY:

On March 15, 1971 defendant, Davis, executed a Promissory Note in the amount of \$4,000.00 in favor of the Bank of Ephraim, which was secured by a mortgage on the trailer park property.

On the fact of this mortgage is typed a clause which reads:

"This mortgage covers all additional advances on this loan, the total principal amount not to exceed \$6,000.00."

Paragraph 2 of the printed portion of the mortgage reads:

"To secure payment of any and all extensions or renewals, and successive extensions or renewals, of the note above described, or of the indebtedness represented by the same, and of any other indebtedness, at any time arising from the mortgagor to the mortgagee, whether represented by notes, drafts, open account or otherwise, and all the interest on all of the same, all of which extensions or renewals shall be optional with the mortgagee, but at the mortgagee's option may be made by new notes or otherwise and at, before, or after maturity, and for all of which the mortgage shall stand as a continuing security until paid."

On June 21, 1972, defendant Davis obtained a loan from Prudential Federal which was superceded by its subsequent loan on October 16, 1972. This loan is the same as the loan covered by the Cafe property above, Prudential's mortgage covering both parcels of property.

Thereafter, on July 31, 1974 by an additional Promissory Note, Halbert Davis borrowed an additional \$1,508.41 on the trailer court property from the Plaintiff.

The interest of the Utah State Tax Commission is the same as on the cafe property.

The defendant Babylon Corporation is not an interested party in the trailer court property.

The evidence on the trailer court was submitted to the court as was done on the Cafe property and the court

awarded judgment as follows.

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(a) To the Bank of Ephraim, \$5,508.41 principal, \$941.48 interest, \$750.00 attorney's fee for a total judgment of \$7,229.89, and a Decree of Foreclosure on the trailer property.

(b) To Prudential Federal Savings the same judgment as given on the Cafe property.

(c) To Utah State Tax Commission - same judgment as on Cafe property.

The court then assigned the following priorities on the trailer property:

- | | | |
|-----|---|------------|
| (1) | Bank of Ephraim | \$5,508.41 |
| | Plus interest of | 971.46 |
| | Plus reasonable attorney fee of | 750.00 |
| | and interest at rate of 8% from date of Judgment until paid | |
| (2) | Prudential Federal Savings | |
| | Same as in Cafe property. | |
| (3) | Bank of Ephraim | |
| | Balance of indebtedness owned on all obligations | |
| (4) | Utah State Tax Commission | |
| | Same as in Cafe property | |

It is from the decision of the Court assigning the priorities as to the Cafe property from which the plaintiff takes this appeal. Plaintiff does not contest the priorities of the court as they apply to the trailer property.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN PARAGRAPH 2(a) OF THE FINDINGS OF FACT IN AWARDING THE JUDGMENTS OF DEFENDANT BABYLON CORPORATION AND PRUDENTIAL FEDERAL SAVINGS PRIORITY OVER THE BALANCE OF THE INDEBTEDNESS TO THE BANK OF EPHRAIM.

The Plaintiff's position as supported by the authorities cited below is that all the promissory notes and mortgage by which the notes are secured are a first priority over all other lien claims.

The plaintiff admits at the beginning that the advances made by the Bank of Ephraim were optional and not obligatory under the mortgage.

The contention of the Defendant Prudential Federal Savings at the time of trial was that since the advances made by the bank were optional, that the lien priority is determined as of the time the advances were actually made, and that in no event should the lien priority exceed \$3,000.00 as set forth on the face of the mortgage.

The problem with this is that the bulk of the advances made by the Bank of Ephraim on the Cafe property were prior to the time Prudential Federal Savings made its loan. This is obviously why Prudential urges the \$3,000.00 limitation.

To adopt this position, however, one has to take the position that we should hold to one clause of the mortgage and not to another. Paragraph 2 of the mortgage plainly includes all other loans of whatever nature.

The defendant Prudential and all other claimants had notice of that clause, for it was on file and they only

had to inquire of the Bank of Ephraim as to any amounts loaned under the mortgage before they extended any money themselves.

Moreover, the finding of the court in regard to priorities is a little conflicting. The court holds the Bank of Ephraim has a valid mortgage against the defendant Davis for the full amount of the monies loaned, but says that the priorities extend to only \$3,000.00. If Paragraph 2 of the mortgage is binding upon the defendant Davis, why isn't it binding on the other parties defendant? Plaintiff's contention is that its priority is not limited by the \$3,000.00 figure in the mortgage and that it should be given priority at a minimum for the advances made before intervening encumbrances were made. Plaintiff further contends that Paragraph 2 of the mortgage is sufficient to give it priority over all lien holders.

A number of cases in various jurisdictions have dealt with the above situation and while some of these cases have held that advances made on a first mortgage after a second mortgage are secondary to the second mortgage in terms of priority, it is likewise true that a number of cases have held that a mortgage of property given in good faith to secure future advances is not regarded as invalid as against the holder

of intervening subsequent interests. Kentucky Lumber & Mill Co. v. Kentucky Title Sav. Bank and T. Co., 184 Ky 244, 211 S W 765; Batten v. Jurist; 306 Pa. 64, 158 A 557.

The generally prevailing doctrine seems to be that advances made under a recorded mortgage given to secure further optional advances will not be denied priority in lien merely because the intervening encumbrancer could not have determined from the mortgage, without extraneous inquiry, the true amount of the indebtedness of advances secured thereby. Hurst v. Flynn-Harris-Ballard Co. 143 SE 503; Exerist v. Carter 202 Iowa 498, 210 NW 559; Merchants State Bank v. Tufts 14 ND 238, 103 NW 760; Lawn Sprinkle Merc. Co. v. Hause Tex Civ App 184 SW 737.

The case before the bar is very similar to the above in that Prudential Federal Savings could have determined the amount of indebtedness on the Bank of Ephraim mortgage by a simple inquiry of the Bank.

Although there is contrary authority, the rule laid down in most cases is that an advance, though purely optional, made pursuant to a mortgage of which subsequent parties had record or other sufficient notice, is a lien or charge superior to an encumbrance intervening between the giving of the mortgage and the making of the advance, if the mortgagee

had no knowledge and no actual notice of the intervening encumbrance. Savings & Loan Soc. v. Burnett, 106 Cal.514 30 P. 922, Schmidt v. Zahrndt 148 Ind. 447, 47 NE 335, Passaic Nat Bank & Trust Co. v. Owens., 111 N J Eq 486 162 A 879, Hall v. Williamson Aro. Co. 69 W Va 671, 72 SE 76.

While the Bank of Ephraim may have had constructive notice by reason of the recording of the Prudential mortgage they had no actual notice and in fact, the lionshare of the advances made by the plaintiff Bank were prior in time to those of Prudential Federal Savings.

Even if the Plaintiff had had actual notice of the Second Mortgage, there is authority to support the proposition that the lien of an advance made under a mortgage to secure optional future advances (of which mortgage subsequent persons had record or other sufficient notice) takes priority over an encumbrance intervening between the giving of the mortgage and the making of the advance, even though the mortgagee had actual notice or knowledge of the intervening encumbrance. Gray v. Helm 60 Miss 131, Witczinski v. Everman, 51 Miss 841; First Nat. Bank v. Zarafonetis (Tex. App) 15 SW 2d 155.

The general rule would seem to be that before a holder of a mortgage to secure future advances can be deprived of his superior equity on the ground of notice of

intervening interest, actual notice thereof must be brought to his attention. Farmers Union Warehouse Co. v. Barnett Bros. 273 Ala 435, 137 So. 176, Topia v. Demartini 77 Cal 383, 19 P 641; Corn Belt Trust & Sav. Bank vs. May. 197 Iowa 54, 196 NW 735.

No where in the record is there any evidence that the plaintiff had any actual notice of the mortgage to Prudential Federal Savings.

It is further of interest that the Utah Supreme Court seems never to have squarely come to grips with this question. Utah Savings and Loan Association v. Mecham 11 U 2d 159, 356 P 2d 281 seems to uphold the position of Prudential Federal Savings on first reading, but a more careful reading shows two things,

1. That the actual holding of the court was to remand the case back to the District Court for more definite findings and thus any statement made as to priority of liens is dicta.

2. That the case actually involved the question of priority of liens of a mortgage and subsequent liens on material men under our mechanics lien statute.

Thus the Utah Courts have never actually determined the question of priority and the only case may be clearly seen as not being in point.

As a matter of fact, nearly all the cases which hold for the position of Prudential Federal Savings have dealt with priority as it exists between the mortgagee and intervening materials men.

There are some very good reasons to distinguish the materials men cases from the case at hand, one being the fact that in a materialsmen case the mortgagee making the subsequent advances has every reason to know or believe that the money he advances will be used to make improvements which immediately raises the probability of a materialsmen lien. This is not the case with a second mortgagee.

The Steinmann or Babylon mortgage is no different than the Prudential Mortgage except that the advances by the Bank were all made after the giving of the Steinmann mortgage by the defendant Davis.

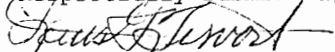
It is evidently clear that Steinmann knew of the mortgage to Bank of Ephraim as she expressly made her mortgage secondary to the mortgage of the Bank of Ephraim. She not only had construction notice by actual notice of the mortgage but was aware of the Provisions of Paragraph 2 of the mortgage.

She further knew that the defendant Davis was paid to make a cash out of the property, and that the Plaintiff would be advancing large sums of money to the defendant for the needed improvement of the property.

CONCLUSION

The contention of the Plaintiff Bank of Ephraim is that Paragraph 2 of its mortgage does not place dollar limitations on it which limits its priority, that there is further clear authority to support the priority of its advances over any intervening liens and that on the basis of the notice and our statutes, this court should grant priority to the plaintiffs over all the lien claimants and remand the case back for Findings of Fact consistent therewith.

Respectfully submitted,



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