2001

LYRAD McCONKIE and ILENE McCONKIE, his wife,v. FLOID C. HARTMAN and RUTH A. HARTMAN, his wife : Brief of Plaintiffs-Appellant

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Brant H. Wall; Attorney for Appellants.
L. Ridd Larson; Ray, Quinney & Nebeker L. Ridd Larson; Attorneys for Defendants and Respondents.

LYRAD McCONKIE and
ILENE McCONKIE, his wife,

Plaintiffs and Appellants,

vs.

FLOID C. HARTMAN and
RUTH A. HARTMAN, his wife,

Defendants and Respondents.

Case No.
13614

Brief of Plaintiffs-Appellants

Appeal from Judgment of the Fourth Judicial District Court for Duchesne County, Uath
Honorable J. Robert Bullock, Judge

BRANT H. WALL
Attorney for Plaintiffs and Appellants
Suite 500 Judge Building,
Salt Lake City, Utah 84111

RAY, QUINNEY & NEBEKER
L. RIDD LARSON
Attorneys for Defendants and Respondents
400 Deseret Building,
Salt Lake City, Utah 84111

TABLE OF CONTENTS

CASES CITED

AUTHORITIES CITED

INSERT

IN THE SUPREME COURT OF THE STATE OF UTAH

LYRAD McCONKIE and ILENE McCONKIE, his wife, Plaintiffs and Appellants,	)	
v.	(	Case No. 13614
FLOID C. HARTMAN and RUTH A. HARTMAN, his wife, Defendants and Respondents.	)	

CORRECTIONS MADE FOR BENEFIT OF LYRAD McCONKIE and ILENE McCONKIE, Plaintiffs Appellants.

INSERTION TO BE MADE ON PAGE 13 AFTER PARAGRAPH ENDING WITH QUOTATION FROM SMITH V. EDWARDS and BEFORE PARAGRAPH BEGINNING WITH "IT IS EVIDENT...."

ADDITIONAL AUTHORITIES SUPPORT THE

PROPOSITION THAT:

FRAUD APPEARING OF RECORD AND PRACTICED ON ONE HOLDING AN EXISTING INTEREST IN LANDS TOLLS THE RUNNING OF THE STATUTE OF LIMITATIONS UNTIL ACTUAL DISCOVERY AND THAT RECORD NOTICE DOES NOT AFFORD NOTICE TO ONE HOLDING AN EXISTING INTEREST.

ADDITIONAL AUTHORITIES SUPPORTING THE PROPOSITION ARE AS FOLLOWS:

STOCKLASSA V. KINNAMAN, 269 P.2 1080, at 1081-1082, (OKL. 1928) WHEREIN THE COURT STATED:

> "No duty rests upon the grantee to examine the records with reference to the title of the land after it was purchased, and hence the public record thereof is not such constructive notice as will set the statute of limitations in motion in an action for relief on the ground of fraud.*****
>
> In the instant case, plaintiff read his deed after it was executed and acknowledged. He saw it delivered to the escrow holder, no doubt, for the purpose of putting it beyond the control of his grantor. The deed conformed to the agreement

at that time, and plaintiff had a right to rely on its remaining in that form. The deed.was first received by the bank, and sent to be recorded by it at the directions of plaintiff. The evidence does not disclose that the bank had any information as to how the deed was to be drawn. The deed was returned to the bank, and kept there until February or March, 1924, at which time some one who desired to purchase the mineral rights on said land informed plaintiff of the reservation. Plaintiff lived some distrance from Shawnee where the deed was kept, and never saw it until he received the information about it containing the reservation, and, so far as the evidence discloses, he had no occasion to go to inspect the deed, until in February or March, 1924. We are aware of the former holding of this court that fraud is usually deemed to have been discovered within the statute of limitations when, in the exercise of reasonable diligence, it could have been discovered. This merely means that one cannot shut his eyes to obvious facts, or, where he has information or knowledge, which, if pursued with reasonable diligence, would lead to a discovery of the true facts."

AGAIN IN FLOWERS V. STANLEY, 316 P.2d 840, at 847 (OKL. 1957) THE COURT STATED:

"Where no duty is imposed by law on a person to make inquiry, and where under the circumstances a prudent man would not be put on inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them do not debar him from relief when thereafter he shall make actual discovery. In order to warrant a denial of recovery to a person who has been defrauded, the circumstances must have been such that inquiry became a positive duty and failure to make the inquiry was an omission of a duty."

IN HOLLAND V. MORETON, 353 P.2 989 at 993 (UTAH 1960) THE SUPREME COURT OF UTAH STATED:

"The averment that the plaintiffs had notice by the recordation of Moreton's deed is unsound. It imparts notice only to parties who have some duty to search the record, such as purchasers or others acquiring a subsequent interest in the property."

FINALLY, IN GATES V. KANSAS FARMERS UNION ROYALTY CO. 111 P2d 1098, AT 1103-1104 (KANSAS 1941) THE COURT STATED:

"Appellants point out that the deed was recorded November 24, 1930, and they stress the contention that plaintiffs, by examining the recorded deeds any time after they were

recorded could have ascertained the fact that by them a share of the mineral rights passed to the Flag Oil Company, hence could have learned that fact much earlier than two years before the action was brought. In support of this argument they cite many of our cases in which it has been held in effect that the recording of a fraudulent deed is constructive notice of the fraud
* * * * *

Even if this contention were held to be well taken we think it would be of no avail to appellants in this case because there are three groups of fraudulent representations found by the court to which the principle would not apply. Each of the cases cited by appellants may be distinguished from the one before us. None of the cases was brought by the owner of property who had executed a deed thereto to set it aside because of the fraudulent inclusion therein of the name of a grantee. An owner of real property is not bound in such a way as to start the running of the statute of limitations by the constructive notice of the recording of a deed to which his name as grantor has been forged (Cox v. Watkins 149 Kan. 209, 87 P.2d 243); neither is the recording of a deed executed by the owner of a property constructive notice to the grantor of the fact that there had been fraudulently included in the deed a description of property other than that which the grantor had intended to convey so as to start the running of the statute of limitations.
* * * *

Normally an owner of the property who executes a deed therefor has no occasion to examine the record after the deed is recorded to ascertain if a fraud has been committed upon him by the inclusion of additional real property or an additional grantee. Certainly we think that would be true in the absence of any fact or circumstances which would cause a reasonably prudent grantor to suspect fraud practiced upon him in that manner."

IN THE SUPREME COURT OF THE STATE OF UTAH

LYRAD McCONKIE and
ILENE McCONKIE, his wife,
Plaintiffs and Appellants,

vs.

FLOID C. HARTMAN and
RUTH A. HARTMAN, his wife,
Defendants and Respondents.

Case No. 13614

Brief of Plaintiffs-Appellants

PRELIMINARY STATEMENT

All italics are ours and are added for emphasis. The parties will be referred to as in the Trial Court. "R" refers to Record and "TR." refers to Transcript of Record.

NATURE OF THE CASE

The Plaintiffs instituted action in three counts seeking in the alternative: (1) Reformation of Deed of Conveyance to comply with provisions of contract of sale; (2) Decree of Quiet Title in Plaintiffs, and (3) Specific Performance of Uniform Real Estate Contract based on Fraudulent Conveyance.

The Defendants asserted that they had performed the contract and that in any event the Plaintiffs were not entitled to relief because of laches and the Statute of Limitations.

DISPOSITION IN LOWER COURT

The case was tried to the Court sitting without a jury, the Honorable J. Robert Bullock, presiding. At the conclusion of trial and argument of counsel the trial Court rendered its Memorandum Decision holding the Plaintiff's action was barred by reason of the Statute of Limitations (R. 71-72). Thereafter Plaintiffs filed a Motion for a New Trial (R. 73-90) which was denied (R. 103).

RELIEF SOUGHT ON APPEAL

Plaintiffs' appeal from the Judgment of the Trial Court denying their Motion for a New Trial or in the alternative that the Judgment of the Lower Court be reversed and Judgment ordered for Plaintiffs or that a New Trial be ordered.

STATEMENT OF FACTS

The Plaintiffs are residents of Duchesne County, State of Utah, and reside at Altamont, Utah (TR. 9).

The property which is the subject to this suit consists of three separate parcels of land near Altamont, Utah, and comprise a total of 292 acres. (Exhibits "Pltf. #2" and "Pltf. #3") (TR. 10-11).

On March 19, 1959, the Defendants entered into a contract to sell a major portion of the subject properties to Arthello Clark, et ux, and Richard D. Titensor ,et ux, excepting an 80 acre tract (W. ½ of SE ¼ of Sec. 1, T 2 So., Range 4 West, Uintah Special Meridian), which sale also included personal property and livestock (TR. 128). This contract did not contain any mineral reservations (Ex. "Def. no. 6") (TR. 17, 59, 60, 103, 104, 106, 110).

Notwithstanding the omission of the 80 acre tract in the original contract of March 19, 1959, the buyers occupied and farmed the total 292 acre tract (TR. 107), and sometime later filed suit against the Hartmans, Defendants in this action, for various alleged misrepresentations in the contract. This action is identified as Civil No. 3389 in the District Court of Duchesne County, Utah, which action the Trial Court took judicial notice of. The issues in this suit were still unresolved at the time Plaintiffs began negotiations to acquire the subject properties (TR. 67, 107, 108).

On or about September 20th to 25th, 1960, the Plaintiffs executed an "Agreement of Purchase" to acquire the interests of the Clarks and Titensors in the 292 acres of land (Ex. "Def. no. 4") (TR. 22, 23). This was later reduced to a more formal agreement on or about October 31, 1960 (TR. 25) (Ex. Def. no.

5"). Prior to executing any Agreement of Purchase the Plaintiffs in this action had seen the original contract of March 19, 1959, and were aware that no mineral reservations were contained therein (TR. 60).

Following preliminary negotiations and contacts between the Plaintiffs and the Defendants, the Hartmans, Clarks, Titensors, and McConkies met at the First Security Bank at Roosevelt ,Utah, to conclude the matters relating to purchase of the subject properties by the Plaintiffs (TR. 63-65). Hartmans and Clarks had not yet resolved all differences and were engaged in a long conference at the Bank on that date trying to resolve various issues while Mr. McConkie was kept waiting in the lobby of the Bank (TR. 63-65, 110, 111). Late in the afternoon of that date Mr. Hartman emerged from the conference and suggested to Mr. McConkie that a new contract be drafted between the Hartmans and McConkies which would increase the interest rate permissible for mortgages which could be maintained on the subject properties and would reflect the new terms and conditions of sale between the Plaintiffs and Defendants for the land only. Mr. McConkie acquiesced in this proposal and the new contract was drafted and executed by the Parties to this suit (TR. 67-69, 73-75, 114-117) (Exhibit "Pltf. #1").

During the negotiations at the Bank on November 1, 1960, the Hartmans were represented by counsel, George Stewart of Roosevelt, Utah, and gave instructions relative to the preparation of the Uniform Real

Estate Contract (Ex. "Pltf. no. 1") (TR. 115, 116, 128). At no time did Defendants ever inform Plaintiffs that mineral rights were to be reserved or that they claimed any of the mineral interests in the land (TR. 125-127).

The Defendant, Floid Hartman, had held a real estate license and was conversant with Uniform Real Estate Contracts and matters pertaining to conveyancing (TR. 128).

The McConkies, Plaintiffs in the subject action, took possession of the subject properties in October of 1960, and occupied and possessed said premises thereafter exclusively and paid all taxes assessed thereon (TR. 11, 12). On May 15, 1970, Plaintiffs sold a one-half acre tract of the subject properties to their son-in-law and on February 13, 1967, they sold 160 acres of the subject property located in Section 32, to one Roy Warren by Warranty Deed (TR. 11, 12, 52) (Ex. "Def. no. 12").

On December 8, 1961, the Defendants, without notice to or knowledge on the part of the Plaintiffs prepared or caused to be prepared and executed two Warranty Deeds covering the subject properties which Deeds reserved to the Grantors various mineral rights, which are still owned by Defendants (TR. 134-135) (Pltfs. Ex. no. 2 and 3). On the same date that the Deeds were prepared the Defendants caused the same to be deposited with the First Security Bank at Roosevelt, Utah, and gave no notice thereof to the Plaintiffs. (TR. 119, 120, 134). The Plaintiffs had no knowledge of the existence of the two Deeds which had been placed in Escrow by the Defendants, and did not receive or learn of the contents and reservations of said instruments until sometime within a year after 1970 with reference to Exhibit no. 2, and within a year prior to the trial of this case as to Exhibit no. 3 (TR. 12-16). Plaintiffs performed under the Uniform Real Estate Contract of November 1, 1960, until approximately February, 1964, at which time they negotiated a new mortgage loan with Travelers Insurance Company and made arrangements to pay the Defendants the balance due them for the subject properties. The Defendants at that time instructed the First Security Bank with reference to the unpaid balance agreed upon with the Plaintiffs and authorized a final settlement of the Escrow (TR. 120, 121). At no time did Defendants ever discuss the reservation of mineral rights with the Plaintiffs or notify the Plaintiffs of same (TR. 126, 127).

The Travelers Insurance Company had requested that the title insurance work to be performed in conjunction with their mortgage loan be conducted by Security Title Company (TR. 36-39). On or about the latter part of February, 1964, a representative of the Security Title Company by the name of Anderson called at the home of the Plaintiffs and obtained the signatures of the Plaintiffs on the various mortgage loan documents required by Travelers Insurance Company (TR. 43). Thereafter the representative of the title insurance company concluded the mortgage loan transaction for the Travelers Insurance Company (TR. 46, 47, 48) and the Defendants were paid the sums due to them for the balance of the purchase price of the property. The two Warranty Deeds covering the subject properties (Pltfs. Ex. no. 2 and Pltfs. Ex. no. 3) were recorded in the Office of the County Recorder of Duchesne County, State of Utah, on the 26th day of February, 1964. Neither of these Deeds were returned to the Plaintiffs nor did they have any knowledge of the contents or reservations thereof until 1970 or thereafter as stated above (TR. 12-16). *The Plaintiffs believed that title of the premises would be held by the Mortgagee until the mortgage was paid in full* (TR. 50, 55). In October of 1972, the Plaintiffs through counsel, directed a Demand Letter to the Defendants requesting that they convey the mineral interests which had been reserved contrary to the provisions of the contract, and this Demand was rejected. (TR. 7 and 8). Following the rejection of the demand the Plaintiffs instituted this suit.

ARGUMENT

POINT I.

FRAUD APPEARING OF RECORD AND PRACTICED ON ONE HOLDING AN EXISTING INTEREST IN LANDS TOLLS THE RUNNING OF THE STATUTE OF LIMITATIONS UNTIL ACTUAL DISCOVERY.

The general effect of fraud upon the running of the statutory period in most, if not all, jurisdictions ". . . is that the fraudulent concealment of a cause of action from the one to whom it belongs, but the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action." 51 Am. Jur., 2d Section 147, p. 717, see also *Attorney General v. Pomeroy*, 93 Utah 426; 73 P.2d 1277; Also, *Esponda v. Ogden State Bank*, 283 P. 729, 731 (Utah 1929), wherein the Utah Supreme Court stated that ". . . in the case of fraud, the statute of limitations does not begin to run until the fraud is discovered by the injured person." See 51 Am. Jur. 2d, Section 147, at p. 717, wherein the rule is stated that the statutory period begins to run ". . . from the time when the facts were discovered or should with reasonable diligence have been discovered."

What then constitutes knowledge sufficient to put a prudent man upon inquiry and what constitutes diligence in such an inquiry?

The jurisdictions in the United States are divided as to their interpretation of what constitutes diligence on the part of the defrauded party and what constitutes sufficient facts to put him upon inquiry. A minority of jurisdictions are of the opinion that diligence by a defrauded party in an action such as this means that a party

". . . is chargeable with notice of that which was of record, or which presumably he would have discovered by a diligent investigation prosecuted in the light of the facts of record, whether or not under the particular circumstances reasonable diligence would have led to an examination of the records. When the rule intended to be laid down by the cases is merely a rule of diligence, propositions with reference to matters of record add little to it, since, of course, where reasonable diligence requires a search of public records, the party would be chargeable with what in the exercise of such diligence is something distinct from, and in addition to, the rule of diligence, it charges with notice regardless of whether under the circumstances an ordinarily diligent person would have examined the records, and does so wholly without regard to whether or not anything had come to the knowledge of the defrauded party of a character to put him on inquiry. *Those courts which have at times laid down this more rigorous rule of record notice have experienced some difficulty in adhering to it, because it is a rule of thumb, rather than a live principle of law, and it takes no account of the numerous forms in which fraud may appear and its varied devices and circumstances of concealment.*" 37 Am. Jur. 2d, Fraud and Deceit, Section 411, pp. 558, 599. (Emphasis added)

The majority rule, however, although no Utah cases have been found directly on this point, is:

". . . taken as a whole, the cases justify the conclusion that for purposes of the running of the statute of limitations, a distinction is to be observed as between cases where the fraud was involved in a transaction wherein title or rights were acquired by the defrauded party (or would have been acquired but for the fraud) and cases where the fraud was practiced on an owner with reference to property held by him. Thus, when the ground of recovery relied on is the commission of a fraudulent act, and it appears that facts showing or sufficiently suggesting the fraud were of public record at the time plaintiff acquired the title or rights to which the fraud relates (or would have acquired them but for the fraud), the ruling made, under most circumstances, is that the records are to be regarded as constituting sufficient notice of the fraud to start the running of the statute. *But ordinarily, reasonable diligence does not require that one having no cause of suspicion shall examine the public records to determine whether or not others have committed acts of fraud affecting his existing property or rights, and accordingly, as to fraud of that character, it is usually held that the public records alone are not such notice as will start the running of the statute.*" 37 Am. Jur. 2d, Fraud and Deceit, Section 412, pp. 560-561 (Emphasis added).

It is evident from studying the decisions of the copious jurisdictions which adhere to this latter rule that for the period to begin running the circumstances must be such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, *Warner v. Republic Steel Corporation*, 103 F. Supp. 998 at 1009 (1952), and in that regard it is important to note that these same jurisdictions hold that the fact that an investigation would have revealed the falsity of a misrepresentation will not alone bar recovery by the injured party. *Schaefer v. Berinstein*, 4 Cal. Rptr. 236

(1961). Some courts have even gone so far as to hold that when fraud is involved, public records do not constitute constructive notice to a defrauded party even though he may have had some reason to check the records. See *Gross v. Needham*, 7 Cal. Rptr. 664 (1961).

See also ***Bush v. Stone***, **500 S.W.2d 885 at 891** (**Texas, 1973**), where the Texas court stated that:

> "the mere fact that the plaintiff had the opportunity or power to investigate the fraud is not sufficient in law to charge him with knowledge. The defrauded party must be cognizant or aware of facts as would have caused the ordinarily intelligent and prudent man to investigate. Where, as here, a party is guilty of an affirmative fraudulent misrepresentation of a fact, he should not be permitted to urge that the defrauded party could have discovered the truth had he diligently made an investigation."

The California courts have spoken on the issue of constructive notice many times. In the case of *Sime v. Malouf*, 212 P.2d 946 (1950), the Second District Court of Appeals For California stated, at page 960, that for the rule of constructive notice to run

> ". . . there must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter. Circumstances that are dubious or equivocal are not sufficient to take the place of actual notice. * * * The rule imputes notice only of those facts that are naturally and reasonably connected with the facts known, and of which the known fact or facts can be said to

> furnish a clue. It does not impute notice of every conceivable fact and circumstance however remote which might come to light by exhausting all possible means of knowledge. * * * The circumstances must be such that further inquiry is an imperative duty, and failure to make it constitutes a negligent omission."

The rationale for these cases is thus apparent, i.e., constructive notice constitutes notice only to those who would have a need or interest to check the record. Once certain facts are present, e.g., a proposed purchase of property, a hint of fraud, etc., such circumstances as these would cause a reasonably prudent man to search the record. However, a person who is holding an existing interest in a piece of land, *who has no reason to believe fraud has been committed*, is under no obligation to continually return to the recorder's office to check the record on his property to make sure no fraud has been perpetrated since he obtained his interest.

The Supreme Court of Colorado has also adopted this reasoning. In the case of *Greco v. Pullava*, 444 P.2d 383, at 384 (Colo. 1968), the court stated that

> "in some jurisdictions a fraudulent conveyance of real estate is conclusively presumed to be discovered, therefore constituting notice, when the fraudulent conveyance is filed for record. * * * However, in Colorado the record of a Deed of Trust or other instrument is notice only to those persons claiming under the same chain of title who are bound to search for it."

See also *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474; *Fish v. East*, 114 F. 2d 177 (10th Cir.). Again, to reiterate, a person holding an interest is under no obligation, absent something putting him on notice, to check on a periodic basis his chain of title. The case of *Smith v. Edwards*, 82 Utah 244, 27 P.2d 264 (1932), gives support to the rationale for the above mentioned decisions. The Court in that case at page 270, in quoting with approval from *Duxbury v. Boice*, 70 Minn. 112 1130, 72 NW 838, states that

> "to ascertain what constitutes a discovery of the facts constituting the fraud reference must be had to principles of equity. * * * Hence, in actions in equity, the rule was that the means of knowledge are equivalent to actual knowledge; that is, *that a knowledge of the facts would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of fraud, was equivalent to actual discovery.*" (Emphasis Added)

It is evident from these authorities that the purpose of the recording acts is to put prospective buyers, creditors, etc., on notice and is not to give notice to those holding existing interests in the property.

An additional problem with this issue with which we are here concerned is whether or not the Plaintiff is charged with notice by virtue of the notice to Security Title Company and/or Travelers Insurance Company. It was shown by the evidence presented that no agency relationship existed between either Security Title Company or Travelers, and the Plaintiff.

Does then notice to a third party known by Plaintiff but who is not an agent constitute notice to the

Plaintiff? This has been answered in the negative by *Madsen v. Madsen*, et al, 72 Utah 96, 269 P. 132 (1928), wherein the third party was an independent contractor where no agency existed.

The Court therein stated and held that:

> "Appellant contends that knowledge on the part of the stray gatherer of Appellant's possession of Respondent's sheep was notice of that fact to Respondent and regardless of all other considerations, the statute of limitations ran from the date of such notice; giving the testimony its most favorable interpretation in that regard we cannot so hold. He was a stray gatherer for both parties to this suit, for other sheep men and his field of activity seems to have been limited only to the territory which he might be able to cover. He was an individual contractor, merely, and notice to an independent contractor does not bind the principle."

In summarizing this point, I should like to refer to one final, important statement in 137 ALR at 272 wherein the authors state the general rule on this point as follows:

> ". . . a purchaser of property or of a claim thereon is, ordinarily, for purposes of statutes of limitations, charged with notice of facts of record bearing on the truth of representations made by the seller in reference to title or encumbrances, since prudence usually requires a purchaser to consult the records as to such matters at the time of making his purchase . . .; *but it is not so plain that where one has once acquired property or rights he must in all circumstances refer to the*

records to determine whether or not fraud, known or unknown, suspected or unsuspected, has deprived him thereof . . ." (Emphasis added).

CONCLUSION

It is evident from the facts that the Plaintiff, Mr. McConkie, at no time had any reason to believe because of any representations, actions or otherwise by the Defendants or any other party that the Defendants were adversely or fraudulently claiming any reserved mineral interests in the subject property. He therefore, had no need nor occasion to inquire into the status of the interests of the various parties which were on record.

Plaintiff at no time had any indication or warning from any source that the recorded interest was contrary to the interest which he had negotiated, acquired and agreed to in the contract and we therefore respectfully submit that the statutory period should not have commenced to run until the occasion or warning did arise which caused him to examine the record.

Respectfully submitted,

Brant H. Wall
Attorney for Plaintiffs-
Appellants

MAILING CERTIFICATE

I hereby Certify that two (2) copies of the foregoing Brief of Appellant ~~was~~ were mailed to Ray, Quinney & Nebeker (L. Ridd Larson), Attorneys at Law, 400 Deseret Building, Salt Lake City, Utah, postage prepaid, this .... day of June, 1974.

Brant H. Wall
Attorney