1978

William T. Blodgett and Florence G. Blodgett, His Wife v. Joe Martsch, Betty Purcell, Aka Betty Purcell Martsch, Doyle Nease, Raco Car Wash Systems, Inc., A Utah Corporation, Wayne A. Ashworth, Trustee, Karl W. Tenney, Valley Bank and Trust Company, A Utah Banking Corporation, First Security Bank of Idaho, N.A., State of Utah, and John Does, 1-10 : Brief of Respondent, Wayne A. Ashworth

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM T. BLODGETT and FLORENCE G. BLODGETT, his wife,

Plaintiffs and Appellants,

-vs-

JOE, MARTSCH, BETTY PURCELL a/k/a BETTY PURCELL MARTSCH, DOYLE NEASE, RACO CAR WASH SYSTEMS, INC., a Utah corporation, WAYNE A. ASHWORTH, trustee, KARL W. TENNEY, VALLEY BANK & TRUST COMPANY, a Utah banking corporation, FIRST SECURITY BANK OF IDAHO, N.A., STATE OF UTAH and JOHN DOES, 1 through 10,

Defendants and Respondents.

Case No. 15608

BRIEF OF RESPONDENT, WAYNE A. ASHWORTH

APPEAL FROM SUMMARY JUDGMENT AGAINST APPELLANTS IN THE CIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE

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FILED

MAY 22

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM T. BLODGETT and FLORENCE G. BLODGETT, his wife,

Plaintiffs and Appellants,

-vs-

JOE, MARTSCH, BETTY PURCELL a/k/a BETTY PURCELL MARTSCH, DOYLE NEASE, RACO CAR WASH SYSTEMS, INC., a Utah corporation, WAYNE A. ASHWORTH, trustee, KARL W. TENNEY, VALLEY BANK & TRUST COMPANY, a Utah banking corporation, FIRST SECURITY BANK OF IDAHO, N.A., STATE OF UTAH and JOHN DOES, 1 through 10,

Defendants and Respondents.

Case No. 15608

BRIEF OF RESPONDENT, WAYNE A. ASHWORTH

APPEAL FROM SUMMARY JUDGMENT AGAINST APPELLANTS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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BRIEF OF RESPONDENT, WAYNE A. ASHWORTH

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STATEMENT OF THE NATURE OF THE CASE

The appellant seeks reversal of the Summary Judgment issued in the District Court against the appellants and in favor of the respondents. The respondent, Wayne A. Ashworth, seeks to have the Judgment granted against the plaintiffs and in his favor affirmed by this Court.

DISPOSITION IN THE LOWER COURT

The respondent, Wayne A. Ashworth, agrees with the appellant's statement of disposition in the lower Court.

RELIEF SOUGHT ON APPEAL

The respondent, Wayne A. Ashworth, seeks to have the Judgment of the District Court of Salt Lake County affirmed and for his costs on appeal.

STATEMENT OF FACTS

On November 5, 1971, the appellants, together with Raco Wash Systems, Inc., a lessee of the appellants, executed and delivered to Valley Bank & Trust Company a Trust Deed covering the subject property. The Trust Deed was security for a Promissory Note of the same date to obtain funds for the construction costs of a car wash to be built on the property owned in fee by the appellants.

On March 23, 1973, Valley Bank & Trust Company, the beneficiary and trustee under the Trust Deed, substituted Wayne A. Ashworth as trustee. Notification of Substitution of Trustee was sent to the appellants by the substitute trustee on April 5, 19[illegible] together with a Notice of Default as required by the statute. Those instruments were duly recorded in the office of the Salt Lake County Recorder and receipt of the same is not denied by the appellants. (William T. Blodgett Deposition, page 24, lines [illegible] page 25, line 4.) Thereafter, on August 10, 1973, a Notice of Sale was issued by the substitute trustee. This Notice of Sale was published and posted in substantial compliance with the terms of the Trust Deed and Utah Code Annotated, 1953 as amended, [illegible]

Again, receipt of this Notice is not disputed by the appellants. (William T. Blodgett Deposition, page 26, line 5-7). Thereafter, on September 20, 1973, at shortly after 10:00 a.m., the sale was held. Two bids were received. The first was from Valley Bank & Trust Company in the amount of the delinquency ($29,548.96), and the second bid was received on behalf of Joe Martsch in the sum of $30,000.00. The property was then sold to Mr. Martsch. (Pace Deposition, pages 4-8.) The sale was not closed, however, until the following morning, September 21, 1973, shortly after 9:00 a.m. (Sawaya Deposition, pages 10 & 11).

ARGUMENT

POINT I

THE TRUSTEE'S DUTY UNDER A TRUST DEED IS TO CARRY OUT THE TRUST IN ACCORDANCE WITH THE TERMS THEREOF

The appellants talk of fiduciary relationships and duty to advise, but they lose sight that the principal duty of the trustee under a Trust Deed is to deal with the property in a manner which is fair to both sides. One of the objects of a Trust Deed is to secure an indebtedness. Upon delinquency, the result which occurs is that the subject property will be sold to satisfy the indebtedness.

It should be noted that until his appointment as successor on March 23, 1973, the respondent, Wayne A. Ashworth, was a total stranger to not only the transaction, but most of the parties thereto. Indeed, Mr. Blodgett, in his deposition at page 33 beginning at line 15, states:

"Q. Mr. Blodgett, have you ever met Mr. Ashworth.

A. No.

Q. Have you ever seen him before?

A. No.

Q. Do you recall seeing him in the new Court Building the day of the sale.

A. I didn't know him, no.

Q. Have you ever had any business dealing with him other than this transaction?

A. No."

And at page 34 beginning line 3:

"Q. And do you have any reason to believe that he has any connection with Valley Bank other than this transaction?

A. No."

And again at page 36, line 14:

"Q. Do you claim that Mr. Ashworth took part in any of the negotiations that led up to the execution of the Trust Deed?

A. Will you say that again?

Q. Do you claim that Mr. Ashworth took any part in any of the negotiations that led up to your execution of the Trust Deed?

A. No.

Q. Do you claim that Mr. Ashworth had any relationship with this transaction prior to being appointed substitute trustee?

A. No."

Mrs. Blodgett, in her deposition, stated at page 21, beginning at line 21:

"Q. Do you have any reason to believe that Mr. Ashworth

part in any of the negotiations leading up to the execution of the Trust Deed in 1971?

A. I have no reason to think that.

Q. Do you claim that he prepared the note or the Trust Deed?

A. I don't know.

Q. Do you have any information from which to base a belief that he was employed by Valley Bank in any capacity?

A. No, I have no way of knowing who he is employed by.

Q. So the only transaction you know about is his acting in the capacity of a substitute trustee for Valley Bank?

A. If that is how he was acting, I don't know anything about that.

Q. Other than the instant transaction, you have no knowledge or have had any dealing with Mr. Ashworth?

A. No."

From this evidence, it would be impossible for reasonable minds to conclude that the respondent, Wayne A. Ashworth, was a party to any fraudulent acts, if any there were, which took place in 1971. The most that he would be chargeable with are acts committed by himself or a failure to act where the law imposed a duty on him to act.

In this regard, it should be noted that the respondent, Wayne A. Ashworth, and his attorney at the time had several contacts with the appellants' then attorney, Robert M. Dyer. (See Mr. Blodgett's deposition, page 26, line 10:

"Q. What did you do with the Notice of Sale?

A. I can't remember.

Q. Did you take that to your attorney?

A. I took that to the attorney."

And again, at page 30, line 13, in discussing property descri... the following should be noted:

"Q. But you had discussed that with your attorney befor...

A. Yes".

Under this statement of facts, it would be highly presumptuous ... the trustee to presume to advise the trustor, who, at that ti... was represented by counsel.

It is interesting to note, however, that Mr. Dyer's confu... over the property descriptions extends not only to his clients' property, but as to the location of the Courthouse. In Mr. Dy... Deposition at page 28, line 18 and following:

"Q. Was your attorney at the sale?

A. No, he wasn't.

Q. You were waiting for him to come, weren't you?

A. Yes, we were.

Q. But he never did show up?

A. No, and I asked him about it and he said he had gone ... to the County Building, to the old building and so he was... there.

Q. Did you ever request that the sale be postponed or ... for any time until your attorney got there?

A. No.

Q. Did you attempt to stop the sale in any way?

A. No, I didn't.

Q. Did you say anything about the sale being completed?

A. No."

POINT II

THE SALE BY THE TRUSTEE WAS IN ALL RESPECTS PROPER AND SHOULD NOT BE DISTURBED BY THE COURTS

The appellants make much of the clerical omission of two calls in the description contained in the Notice of Sale, but ignore the fact that the Notice of Sale also makes reference to the Trust Deed which contains the description of the property, together with the location of its recording in the office of the Salt Lake County Recorder by date, entry number, book and page. Also referred to in the Notice of Sale is the Notice of Default, together with its date of recording, entry number, book and page. Any ambiguity in the description contained in the Notice of Sale could be quickly resolved by resort to the Recorder's Office.

In that regard, few members of the public (and perhaps few members of the Bar) find a metes and bounds description meaningful without recourse to the Recorder's Office.

Further, while Utah Code Annotated (1953 as amended) 57-1-28[1] makes recitals concerning mailing, personal delivery and publication of the Notice of Default, any mailing and the publication and posting of the Notice of Sale and the conduct of the sale, prima facie evidence of such compliance and conclusive evidence thereof in favor

in favor of bona fide purchasers and encumbrancers for value a without notice, the agreement of the parties found as an exh to plaintiffs' Amended Complaint in paragraph 11 makes such r conclusive proof as to the truthfulness thereof. Approved in Sorensen v. Hall, 28P. (2d) 667 (Cal. 1934). Here, the parti have agreed by contract to a provision which is stricter than state law. They should not now be allowed to complain that th has worked to their disadvantage.

Appellants seek reversal of the Summary Judgment and a tri on the merits in spite of their failure to tender to the Court amount of the indebtedness. The appellants, who were in substa default in payment of the debt secured by the Trust Deed and a time showed their ability or willingness to pay the obligatio are not entitled to set the sale aside on grounds of irregular of the sale. This is especially so where they have not tender the amount of indebtedness to the Court and where the Trust Dee contains a provision making the recitations in the Trustee's De conclusive proof of the truthfulness thereof. Leonard v. Ban America, 60 P. 2D, 325 (Cal. 1936).

Nor should they be allowed to complain that the constable public officer, failed to post in three places within the pre where that, in and of itself, has not prejudiced them. After they acknowledged receipt of the Notice of Sale and did in fa appear at the sale and permit, without objection, the full co of the sale. In Stevens v. Plumas Eureka Annex Mining Co.,

41 P. 2d, 927 (Cal. 1935) the California Supreme Court held that defects in the Notice of Sale under a Trust Deed were waived where the appellants attended the sale and did not object to manner of notice (at page 928).

The appellants now complain that the trustee should have sold the property as two parcels. This procedure is permitted both by paragraph 11 of the contract and by Utah Code Annotated (1953 as amended) 57-1-27. Paragraph 11 makes this a matter of discretion on the part of the trustee, while the Statute requires the trustee to follow the direction of the trustor in this regard. Again, it should be noted that the appellants were present at the sale and voiced no objection to the proposed sale of the parcel without a division into its component parts. Golden v. Tomiyasu, 387 P. 2d, 989 (Nevada, 1963)

See Mr. Blodgett's Deposition, page 35, line 16:

"Q. (By Mr. Sawaya) I suppose what I am really asking is whether you claim that Mr. Ashworth sold any more or any less than that included in the Trust Deed, within the four corners of the Trust Deed.

A. To what I know now, no.

Q. Did you ever contact Mr. Ashworth to discuss the description of the properties contained in the documents that you received from him?

A. No, I didn't."

At the risk of being repetitious, it should be pointed out that at this time, the appellants were represented by counsel.

In every foreclosure sale, some element of loss falls upon the trustor. It is a rare case where the sale of the subject property will bring an amount in excess of the indebtedness and there becomes a surplus to pay over to the debtor.

The vast body of case law is to the effect that inadequacy of price at a forced sale, standing alone, will not justify the setting aside of such sale without a showing of fraud. Further that the fraud must have some connection with the inadequacy of price. See Crowfoot v. Tarman, 305 P. 2d, 56 (Cal, 1957); Pendy v. Dowse, 1 U. 2nd, 283, 265 P. 2d, 644 (1954); (While appellants cite these cases, they neglect to point out that both also require a showing of fraud as well); and Stevens v. Plumas, etc., Supra. Fraud, in this state, must be proven by clear and convincing evidence. Pace v. Parrish, 247 P.2d, 273 (Utah 1952); and In Re Estate of Rose 493 P. 2d, 112 (Arizona 1972). The plaintiffs/appellants in their depositions, offered no evidence of any fraudulent conduct on the part of respondent, Wayne A. Ashworth, and for this reason the allegations of fraudulent conduct as to him must fail.

The allegation that the sale was improperly postponed from September 20, 1973, to September 21, 1973, is not supported by facts which do not show a postponement of the sale, but rather a delay in its closing. The sale occurred on September 20, 1973 the Courthouse when the property was struck off to the high bid It was closed September 21, 1973, shortly after 9:00 a.m. when Deed was delivered to the purchaser in exchange for a cashier

check in the amount of $30,000.00 (the bid price). This allegation was dealt with by the Supreme Court of the State of California in Sorensen v. Hall, 28 P. 2d, 667 (1934). In that case, a similar allegation was raised, and the Court replied as follows: "..... that the sale was not consumated because the actual cash was not paid at the precise time of sale [is] so lacking in merit that a discussion of [it] is unnecessary."

CONCLUSION

There is no evidence before the District Court to show that the respondent, Wayne A. Ashworth, had practiced any fraud against the appellants, nor does the evidence show anything but a substantial compliance with the requirements of the Trust Deed and of Chapter 1, Title 57, Utah Code Annotated (1953 as amended). The record below fully supports the Judgment of the District Court. This Court is respectfully urged to affirm that Judgment.

Respectfully Submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief to counsel listed below on the 24th day of May, 1978, postage prepaid.

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