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George M. Whiteley v. John DeVries, Barbara DeVries, Harry L. Barnum, strevell-Paterson Finance Corporation, M. L. Ewell : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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GEORGE M. WHITELEY,  
*Plaintiff and Respondent,*

vs.

JOHN DeVRIES, BARBARA De-  
VRIES, HARRY L. BARNUM,  
STREVELL - PATERSON FIN-  
ANCE CORPORATION.

*Defendants,*

M. L. EWELL, doing business as  
Ewell Plumbing and Heating,

*Defendant and Appellant*

No. 7314

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## BRIEF OF APPELLANT

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FILED

APR 10

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CLERK, SUPREME COURT, UTAH

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an appeal by the defendant Ewell from a judgment foreclosing two mortgages given by the defendants DeVries to the plaintiff Whiteley and foreclosing as a mortgage a Warranty Deed given by the de-

fendants DeVries to the plaintiff Whiteley for a consideration of \$600.00 and subordinating Ewell's lien for labor and materials to the lien of the two mortgages above referred to. The defendant Ewell has appealed.

The Complaint of the plaintiff is in three causes of action, the first two being for the foreclosure of notes and mortgages dated March 10th and April 15, 1947 for \$4,000.00 and \$1,000.00 respectively, and the third cause of action to declare the Warranty Deed given by the defendants DeVries to plaintiff under date of July 31, 1947 to be a mortgage to secure a loan of \$600.00 made by the plaintiff to the defendants DeVries at that time.

No note was taken by the plaintiff to evidence the claimed loan of \$600.00 at the time of the delivery of the Warranty Deed (Tr. p. 44). A documentary stamp was attached to the Deed and it was recorded on the same day of its date, July 31, 1947 (Exhibit "C").

On June 25, 1947 defendant Ewell had entered into a contract with the DeVries to do the plumbing work on the buildings then being constructed on the premises in question and between June 27th and July 23, 1947 had performed labor and supplied material in the performance of the work to the value of \$724.57 (Exhibit 1). Up to that time he had received no money on account and he refused to proceed further (Record p. 108).

About that time Mr. Gaddis, who was the financial agent for the plaintiff (Record p. 101), called the plaintiff and asked to know if he, the plaintiff, would be interested in letting DeVries have \$600.00 more so that he can get the job finished (Record pp. 124-5). The plaintiff

met DeVries and Gaddis on the job and DeVries told him that the plumber Ewell would not go any further unless he had \$600.00, and if plaintiff would let him have \$600.00 more he would give him a Warranty Deed for the property. Mr. Gaddis said, "We'll take a deed to this property from you if Whiteley will let you have the \$600.00, and at the end of sixty days if you pick up the \$600.00 you can have the Deed back and then the two first and second mortgages will ride." (Record p. 126). Ewell was not present at this conversation.

Later, probably July 31st, DeVries came into Gaddis's office and Gaddis told him, "Mr. Whiteley demands a Warranty Deed to the property if he gives you this third loan of \$600.00." (Record p. 101). Mr. DeVries gave Whiteley the deed which was immediately recorded and Whiteley gave Gaddis the check for \$600.00 for Ewell to return to work and complete the job. He told Mr. Gaddis to pay the plumber and see that the work was done (Record p. 127).

Mr. Ewell did return to the job and from July 31, 1947 until August 22, 1947 he performed additional work and supplied additional materials of a value of \$1838.96, making a total of \$2,463.53 on which only \$600.00 had been paid (Exhibit 1). Mr. Ewell's claim of lien (Exhibit 2) was for an unpaid balance of \$1,514.75, this amount being based upon the original contract price for the work to be done by him.

DeVries abandoned the property after paying Whiteley some \$50.00 on the obligations and without

paying Whiteley the \$600.00 and picking up the Warranty Deed.

In the judgment the court declared the lien of the mortgages for \$4,000.00 and \$1,000.00 with interest and attorney's fees to be prior to the claim of the defendant Ewell and in effect held the defendant Ewell's claim to be prior to the plaintiff's claim on the alleged loan of \$600.00 (Record pp. 65-6).

### STATEMENT OF ERRORS RELIED UPON

1. The trial court erred in making Finding of Fact No. 11 (Tr. p. 58) wherein the court found that the Warranty Deed was in fact a third mortgage to secure the payment of \$600.00.

2. The trial court erred in Finding of Fact No. 10 (Tr. p. 58) that plaintiff's lien is paramount and superior to the liens and claims of all other defendants in this action as to the first and second causes of action.

3. The trial court erred in overruling the objections of the defendant to the conclusions and irrelevant and immaterial questions objected to by the defendant to the questions asked the witness Gaddis.

4. The trial court erred in refusing to strike the conclusions of the witness Gaddis relative to the nature of the transaction, which motions were made by the defendant.

5. The trial court erred in entering judgment against this defendant.

6. The trial court erred in denying defendant's motion for a new trial.

## ARGUMENT

1. *The Trial Court Erred in Making Finding Of Fact No's. 10 and 11 Subordinating Defendant's Lien To Plaintiff's Mortgages.*

The evidence in this case is clear that the plaintiff was desirous of getting the motor court completed and requested and induced Ewell to complete the work. The plaintiff knew on July 31st and before that Ewell had already done considerable work on the property and that he had refused to continue unless he was paid at least \$600.00. In order to induce Ewell to continue the work he gave Gaddis, his own agent, \$600.00 for the purpose, with instructions to pay it to Ewell and continue the work and took from DeVries a Warranty Deed to the property in question with an agreement, of which Ewell had no knowledge, that he would give the deed back to DeVries if DeVries paid him \$600.00 within sixty days.

Under the circumstances the situation is such that the work in effect was done at the plaintiff's request and in order for him, the plaintiff, to obtain the benefit of the work already done and the work to be done thereafter.

This Court has held in the case of *The Cary-Lombard Lumber Company v. Thomas W. Partridge*, 10 Utah 322, 37 Pac. 572 that a lien will attach to a later interest acquired by one who authorizes work. The Court said:

“Such lien under the statute may also be extended to any other or greater interest which such owner may acquire to such property thereafter, and before the lien is established by process of law.”

A case which seems to be most nearly in point on the facts with the case at bar is that of *Lincoln v. Hamilton et al*, 198 N. W. 289, decided by the Supreme Court of Minnesota on April 11, 1924. In this case the Van Sant Trust Company, who claimed to be a mortgagee, appealed from a decision of the lower court holding that its mortgage was subordinate to that of a lien claimant. The trust company had foreclosed a mortgage but the period of redemption had not expired. Plaintiff entered into a contract with a representative of the mortgagor to remodel a home. The trust company assented to the work. The court, in affirming the decision of the lower court, said:

“There can be no doubt at all that both defendant and Hamilton assented to the improvement. A question is made as to whether the former is an ‘owner’ of the premises within the meaning of the mechanic’s lien statute. We think that it is. To be an owner within the meaning of this statute does not require absolute ownership. *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725. It is there pointed out that an owner is ordinarily ‘one having dominion over a thing.’ No one had so much dominion over the real estate in question as defendant Van Sant Company. The title records indicated that it was the absolute owner. Upon the record before us, admirably reduced to its lowest terms by the finding, defendant cannot be permitted now to assert that it is not the owner so as to relieve the property of plaintiff’s lien. *Where the legal title to real estate is in the mortgagee who assents to an improvement, his title is subject to the lien arising from the improvement.*” (Italics ours).

Another case which supports the Appellant's position is that of *Jones v. Mawson-Peterson Lumber Company*, 150 Pac. (2d) 795 decided by the Supreme Court of Colorado July 3, 1944. In this case the Lumber Company furnished lumber to build a garage to one Osborne who had a lease on the property. A Mrs. Siltamaki furnished the money to Osborne for the building. The evidence was in conflict as to whether or not Mrs. Siltamaki authorized the work. The material was furnished during the month of July. In October Mrs. Siltamaki acquired the fee simple title. The court at page 797 says the following:

“That Mrs. Siltamaki had an interest to which the lien would attach is supported by the following cases: *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744, wherein it was held that if a party making improvements on realty holds possession of the land under a lease, or by virtue of a license where its authority is coupled with an interest, such party is the owner of the land within the mechanic's lien act. *Horn v. Clark Hardware Co.*, 54 Colo. 522, 131 P. 405, 45 L.R.A., N. S., 100. See, also, *Home Public Market Co. v. Fallis*, 72 Colo. 48, 209 P. 641, in which we held that an option for a lease which later ripened into a ninety-nine year lease was sufficient ownership on which the lien would attach, and *Bankers' B. & L. Ass'n v. Fleming Bros. Lumber Co.*, 83 Colo. 335, 264 P. 1087.”

## 2. *The Trial Court Erred In Not Sustaining Defendant's Objections And Motions To Strike The Evidence Of The Witness Gaddis.*

It is clear from the record that most of the tran-

sactions were handled for Whiteley by Mr. Gaddis of the real estate company as agent for Whiteley. As to the nature of the DeVries deed, all of Gaddis' testimony are conclusion of the witness and what his understanding was. All of this evidence was objected to or motions to strike were made. This evidence was necessary to show that the warranty deed was in fact a mortgage. It is our position that if this purported evidence had been excluded the plaintiff failed to show what he contends was the nature of the transaction. As an illustration of the conclusions of the witness Gaddis we cite the following in the record, (Record pp. 89-90).

“Q. And did you consult with Mr. Whiteley concerning this additional loan?

“A. *He agreed* to let them have six hundred dollars if they would let him have a warranty deed.

“Q. Did he tell you that he would take the deed only as security?

“A. That is right.

“Q. And Mr. and Mrs. DeVries, when you talked to them, did they understand that?

“A. *They understood* they were to give security for the six hundred dollars.

“Q. *It wasn't intended* as a transfer of the lee (fee) in the property was it?

“A. It was not.”

A motion was made to strike all of the testimony

of Gaddis relating to the condition under which the deed was given (Record pp. 97-99). This motion was denied by the court. At no place did Mr. Gaddis testify as to a conversation which would show the intent of the parties when the deed was given. Everything said by him was his conclusion.

Section 132 of 36 *American Jurisprudence*, page 754 provides:

“The mutual intention of the parties to an instrument which is absolute on its face, that such instrument should operate as a mortgage, must be shown by direct evidence or by the circumstances of the case. \* \* \* \*”

The burden is on the person asserting that a deed is in fact a mortgage.

Section 133 of 36 *American Jurisprudence*, pages 754-755 provides:

“There is authority in support of a presumption that an absolute conveyance with a covenant of warranty and without a defeasance either in the conveyance or in a collateral instrument is what it purports to be. In any event, the authorities are unanimously agreed that the burden of introducing evidence to prove that an absolute conveyance, unaccompanied by any written stipulation for reconveyance, was intended to operate as a mortgage rests on the party alleging that intention.”

In this case upon the execution of the warranty deed no note evidencing the obligation was given nor was there any written agreement for reconveyance. It appears affirmatively that revenue stamps were attached to the

deed and it was recorded. No revenue stamps are required for the recordation of a mortgage. Without the conclusions of the witness Gaddis there is no competent evidence which would sustain the burden of proof imposed upon the plaintiff. We submit that the evidence should have been excluded and that it was reversible error on the part of the court not to do so.

### CONCLUSION

We submit that the plaintiff and his agent by their conduct subordinated the mortgage lien, if any, to the mechanic's lien of the defendant Ewell. The plaintiff did not sustain the burden of establishing that the warranty deed given was in fact a mortgage. The judgment of the trial court should be reversed and the lien of the defendant Ewell be declared paramount to the lien of the plaintiff.

Respectfully submitted,

CRITCHLOW, WATSON and WARNOCK

*Attorneys for Appellant M. L. Ewell*