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Vaughn L. Warr v. The Van Kleeck-Bacon Investment Company et al : Sur-Reply Brief of Plaintiffs and Respondents

Utah Supreme Court

Pugsley, Hayes and Rampton; Attorneys for Plaintiffs and Respondents;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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VAUGHN L. WARR, MARY ILEENE WARR McKOWAN, ETHEL WARR REED, KATHERINE WARR HAMILTON and EMMA WARR HAMILTON,

Plaintiffs and Respondents,

-vs-

No. 7872

THE VAN KLEECK-BACON INVESTMENT COMPANY and THE VAN KLEECK MORTGAGE COMPANY,

Defendants and Appellants,

JAY LARSEN,

Appellant and Intervener

- -

SUR-REPLY BRIEF OF PLAINTIFFS AND RESPONDENTS

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I N D E X

Cases Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

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VAUGHN L. WARR, MARY ILEENE WARR McKOWAN, ETHEL WARR REED, KATHERINE WARR HAMILTON and EMMA WARR HAMILTON, Plaintiffs and Respondents, -vs- THE VAN KLEECK-BACON INVESTMENT COMPANY and THE VAN KLEECK MORTGAGE COMPANY, Defendants and Appellants, JAY LARSEN, Appellant and Intervener.	:	No. 7872

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SUR-REPLY BRIEF OF PLAINTIFFS AND RESPONDENTS

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There are a few points raised by the appellants in their Reply Brief which the respondents believe require answer. Leave of the Court is therefore requested to file this Sur-Reply Brief.

POINT I

The respondents alternately treat the two Van Kleeck companies as separate companies or as one company, depending upon how it meets their conv[illegible] regard to the particular point

being argued. We do not believe that such an approach is logical. Regardless of the interlocking directors the two companies may have, so far as the State of Utah is concerned they are two separate and distinct corporations. Therefore, in answer to Point One raised in the appellants' reply brief, the facts of the case are clearly as stated in the respondents' answering brief.

The Van Kleeck-Bacon Investment Company was qualified in Utah at the time that it took delivery on the deed and executed the reconveyance agreement; however, The Van Kleeck Mortgage Company was not qualified to do business in Utah at the time it took the mortgage. In view of the fact that the mortgage was many years later released however, the invalidity thereof becomes important only if the respondents attempt to cite the extinguishment of the void mortgage as a consideration for the delivery of the deed. As has been pointed out before, it was not consideration, first because the mortgage itself was void, and secondly, because, according to the deposition of Ross Bray, president of both companies, there were no inter-corporate transactions between the two companies involving the mort

POINT II

Again in Point Two in their Reply Brief, the appellants have failed to distinguish between the position of the two companies. They have cited the case of First National Bank of Price v. Parker, 57 Utah 290, 194 Pac. 661 to the effect that a deed to a non-qualified corporation is void and that a subsequent transfer by such corporation to a purchaser in good faith would likewise be void. This case might have some persuasive value, if in fact, The Van Kleeck-Bacon Investment Company had not been qualified when the deed was delivered. The fact remains that the Investment Company was qualified to do business in the State of Utah. The invalidity of the deed arises not from the incapacity of the corporation to accept it, but first from the fact that it was not supported by a consideration, and the further fact that it was accompanied by a reconveyance agreement which makes of it an equitable mortgage as has been argued in our answering brief. While both of these defects are available as against the original grantee

in the deed, neither of these are available as against a subsequent purchaser in good faith for value. Therefore, as we have previously argued at some length, Jay Larsen's title is not in privity with the title of the defendant companies, and a successful defense by Jay Larsen would avail the defendant companies nothing in this action.

POINT III

The appellants, under their Point Three, maintain again that if they merely generally state that they have a good defense in their answer, the question of meritorious defense is taken care of. Once again we wish to state that we do not believe this to be true under the present rules of pleading where the complaint and answer are supplemented by depositions, admissions and other papers. The record is in such a state at the present time, based upon the admissions of the defendant companies' officers in their depositions that the plaintiffs would be entitled to a summary judgment. Under this point the appellants attempt to distinguish the case of Dunn v. Utah Serum

Company on the grounds that in that case the note was to be paid in Utah, whereas in the present case the note was to be paid in the State of Colorado. With this latter contention, we do not agree, but even if it were true, we are not here concerned with the validity of a note, but the validity of a mortgage which was a mortgage on Utah property, recorded in the State of Utah and which could be foreclosed only in the Utah courts.

POINT IV

Under their Point Four, the appellants take the position that on its merits the present case should be governed by the case of Thornley Land and Livestock Co. v. Gailey, 105 Utah 519, 143 Pac (2) 283, rather than by Bybee v. Stuart, 112 Utah 462, 189 Pac (2) 118, previously quoted by the respondents. In making this argument, the appellants once again shift their position as to the corporate identity of the defendant companies and take the position that they were in effect one company. The Thornley case held that a deed absolute should not be construed as an equitable mortgage because of the fact that the deed in

that case was given to satisfy an already existing mortgage. We wish to point out in this case first that there was no pre-existing mortgage in favor of the Investment Company, but only a void mortgage in favor of the Mortgage Company. Futhermore, it affirmatively appears that this mortgage was never assigned or in any way transferred from the Mortgage Company to the Investment Company. Prior to the execution of the deed and the reconveyance agreement, the Investment Company never acquired any interest, security or otherwise in the subject property, and subsequent to the execution of the deed and the reconveyance agreement, it never at any time acquired such an interest from the Mortgage Company even if we assume that the Mortgage Company acquired any interest by virtue of the void mortgage.

Respectfully submitted,

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