

1980

Wayne B. Baker v. Charles W. Taggart, A Single)
Man; H. B. Wade and Edna) Wade, His Wife;
Valley Bank) & Trust Company; and)
Commercial Security Bank : Brief of Plaintiff-
Appellant Wayne B. Baker

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WAYNE B. BAKER,)
)
 Plaintiff and)
 Appellant,)
)
 -vs-) Case No. 16857
)
 CHARLES W. TAGGART, a single)
 man; H. B. WADE and EDNA)
 WADE, his wife; VALLEY)
 BANK & TRUST COMPANY; and)
 COMMERCIAL SECURITY BANK,)
)
 Defendants and)
 Respondents.)
)

BRIEF OF

PLAINTIFF-APPELLANT WAYNE B. BAKER

Appeal from the Judgment of the
District Court of Salt Lake County
Hon. David K. Winder, Judge

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Plaintiff asserted in his Complaint in this action, that the real property which had been previously owned by Taggart was conveyed to Defendant, H. B. WADE (hereinafter "Wade") as security for a loan made by Wade to Taggart. Plaintiff also asserted that the transfer occurred at a time when Taggart was insolvent.

DISPOSITION IN LOWER COURT

Upon Motion for Summary Judgment or by Default, the claims of all Defendants to the property other than the claims of Defendants H. B. Wade and Edna Wade were found to be inferior to the claims of the Plaintiff. At trial, the assertion of Defendants Wade that a sale of the subject property had occurred, was upheld.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the District Court's Judgment in favor of the Defendants Wade.

STATEMENT OF FACTS

The evidence at trial established that Plaintiff Wayne B. Baker obtained a judgment in the Third Judicial District Court for Salt Lake County, State of Utah, Civil No. 222226, against Defendant Taggart for approximately \$45,800.00 (Exhibit P-1) and that at the date of trial of this action, Defendant Taggart was indebted to Plaintiff Baker for approximately \$60,000.00.

It was further established that Taggart executed and delivered a Quit-Claim Deed to Defendant H. B. Wade dated the 19th day of March, 1975. (Exhibit P-2) At the same time and as part of the same transaction, Taggart executed a promissory note in the sum of \$20,000.00 payable to Wade Finance (H. B. Wade's investment company), which promissory note set forth that it was "secured by a deed on property located at 234 Seventh Avenue, Salt Lake City, Utah." (Exhibit P-3) Although Taggart received only \$10,000.00 from Wade at this date, Wade executed an "option" permitting Taggart or his assigns for a period of 90 days to "repurchase" the property at 234 Seventh Avenue for \$10,900.00. (Exhibit P-4) Wade testified that he was not required to advance any further monies to Taggart until such time as the option held by Taggart had expired. Notwithstanding this "purported sale", Taggart continues to this date to occupy the real property making monthly mortgage payments of approximately \$450.00 as his sole "rent".

Subsequent to the expiration of the "option", Wade on two separate occasions advanced additional monies to Taggart totalling \$7,000.00. At each time, Taggart executed a promissory note made payable to H. B. Wade for the amount of the monies advanced. The first such

promissory note dated October 15, 1975 stated it was "secured by home at 234 Seventh Ave., S.L.C., Utah", with the second promissory note dated November 28, 1975, indicating on its reverse side that it was for the "Balance in Full for Equity in Home located at 234 Seventh Ave., Salt Lake City, Utah."

Additionally, Taggart testified that he had "no assets in 1975" and that the value of the real property in March, 1975 was between \$45,000.00 and \$50,000.00. It was also established by introduction of a transcript of prior testimony that on July 7, 1975, Taggart testified while under oath before the Honorable Bryant H. Croft that he had given a deed to his home as security for a loan. To date, Taggart has deducted upon his individual income tax returns interest paid by him with respect to the mortgages upon the real property while the Defendant Wade, at least for the years 1977 and 1978, did not report any rental income from the subject property or take any interest deduction with respect thereto.

ARGUMENT

THE EXISTENCE OF AN EQUITABLE MORTGAGE IS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

It is plaintiff's contention that the purported conveyance of real property by Taggart to H. B. Wade on the 19th day of

March, 1975 was in actuality the grant of a security interest or an "equitable mortgage". It is conceded by the plaintiff that the existence of an equitable mortgage must be established by clear, satisfactory and convincing evidence. Corey v. Roberts, 24 P.2d 940, 942 (Utah 1922). The facts and exhibits established at trial and set forth herein meet that level of proof requiring this Court to reverse the judgment of the District Court.

In determining whether or not a deed, absolute on its face, is intended by the parties as a mortgage, the Utah Supreme Court in Corey v. Roberts, supra at 942-43, set forth some of the essential elements to be considered:

Whether or not there was a continuing obligation on the part of the grantor to pay the debt or meet the obligation which it is claimed the deed was made to secure; the question of relative values; the contemporaneous and subsequent acts; the declarations and admissions of the parties; the form of the written evidences of the transactions; the nature and character of the testimony relied upon; the various business, social or other relationship of the parties; and the apparent aims and purposes to be accomplished.

An examination of the evidence in light of these elements establishes by clear and convincing evidence the existence of an equitable mortgage at the date of execution and delivery of the Quit-Claim Deed. (Exhibit P-2)

A. Continuing Obligation of Grantor to Pay Debt. Defendant Taggart executed at the insistence of defendant H. B. Wade, not one, but three promissory notes, each by its terms providing an obligation on the part of Taggart to pay to Wade the amounts set forth therein.

B. Relative Values. As of the date of the conveyance, Taggart testified at trial that the value of the real property was "around \$45,000 to \$50,000" with outstanding encumbrances of "approximately \$25,000 or \$30,000". (Taggart Cross-Examination, page 41) Thus, at the time Wade advanced the first \$10,000 and at a time when Wade did not have to advance any additional monies in the event Taggart exercised his option to repurchase, Taggart had an additional equity interest in the real property from \$5,000 to \$15,000.

C. Contemporaneous and Subsequent Acts of the Parties. The most notable contemporaneous act of the parties was the drafting and execution of a promissory note (Exhibit P-3) which was used to make "a record of what our transaction was". (Wade Direct Examination, pages 60-61) This record unequivocally shows upon its face that a deed was given upon the subject property as security for the promissory note. Simultaneously with the creation of this instrument, the parties drafted and Wade executed an option (Exhibit P-4) allowing Taggart to "repurchase" the property within 90 days for \$10,900. (Incident-

ally, interest at the rate of 18% upon \$20,000 for 90 days equals \$900.) Even after the option period set forth in Exhibit P-4 had expired, two additional promissory notes were executed by Taggart. One note, Exhibit P-7, also sets forth that it was secured by the real property.

Of equal importance to the existence of promissory notes establishing secured obligations is evidence that Taggart is and has been in constant possession of the real property since the purported conveyance. His only "rent" as the defendants Taggart and Wade would characterize it, is the payment of the first and second mortgage payments (including reserves) secured by the real property. Defendant Wade has expended nothing further with respect to the real property or any encumbrances thereon. (Wade Direct Examination, pages 73-74)

Finally, the testimony of the parties and exhibits P-12 through P-15, inclusive, strongly support the existence of an equitable mortgage rather than a sale. The individual income tax returns of both defendants Taggart and Wade as prepared and filed with the Internal Revenue Service are inconsistent with the assertions that a sale of real property occurred. Taggart claims as an itemized deduction interest paid upon the first and second mortgage with American Savings, payments which he and Wade claim are rental payments and which are not deductible as such. Wade for the years 1977 and 1978 neither shows any

rental income from Taggart or the real property nor claims any interest deduction for the mortgage payments. (Wade Direct Examination, pages 77-78)

D. Declarations and Admissions of the Parties. Taggart characterized the transaction on many occasions. On July 7, 1975, before the Honorable Bryant H. Croft, Taggart, while under oath, conceded that he had borrowed money from Wade and had given as security therefor, a quit-claim deed to his home. (Taggart Direct Examination, pages 24-25 and Exhibit P-11) When presented with testimony from his deposition that the transaction was a loan, Taggart tried to explain.

[Deposition Question] "You felt it was basically a loan and he [Wade] was secured by the deed. Is that correct?"

A. "No, we treated it as I said in my first testimony, as a loan. But he [I] had the option and I hoped to be able to pay it back. If I couldn't pay it back --"

Q: "He had the property?"

A: "He had the property, of course."

Q: But your testimony there does say it was treated as a loan?

A: Well, I--maybe I said that, but in my mind, I may have treated it as that, but in actuality, he owned the property.

When questioned regarding the terms of the option which Wade had given, Taggart testified:

I know at the time this --- at the time that I borrowed the money, I had no idea what was happening to me. (Taggart Direct Examination, page 15, Emphasis added.)

When asked how much he had to pay to obtain the house back upon exercise of the option, Taggart stated: "I had to pay Mr. Wade the amount lent to me plus the \$900.00 option plus the 18% interest". (Taggart Direct Examination, page 19)

Wade's testimony, as elicited by his attorney, also suggests the existence of an equitable mortgage rather than a sale.

DIRECT EXAMINATION

BY MR. FERRARI:

Q: Mr. Wade, I show you the document, which has been marked as Plaintiff's Exhibit 2 in this matter, which is a Promissory Note signed on March the 19th, 1975. You took part in the preparation of that document, did you not?

A: Yes, sir.

Q: Okay. What did you intend that document to reflect?

A: That reflected the deal that Mr. Taggart and I made.

Q: Okay. What was that deal to your understanding?

A: The deal was that we'd gone through this. I was given \$20,000 and an option. Didn't give it all to him, then. Then--and he was to buy back for this amount of money. So, he couldn't come back and say, well, this should have been twenty-five or thirty. It was evidence there of what the deal was.

So, when I advanced him the \$10,000 with option to repurchase it with the understanding if he couldn't--if he couldn't pay the option, then I would pay him the balance of this money.

Q: Now, would you tell us why you chose to memorialize an arrangement by which you would pay him \$20,000 for his home, and he would receive an option to buy it back in the form of a Promissory Note?

A: Well, I had to have something drawn up to know where we were going. And he knew, and I knew that if he didn't exercise that option, he was to get \$20,000. And if he paid it back, he was to pay the \$20,000 back with stipulations on it.

(Wade Direct Examination, pages 86-87)

Wade's reference to "paying it back" is language of a loan, not language of a sale.

E. Written Evidence. The promissory note of March 19, 1975 (Exhibit P-3) leaves no doubt regarding the intentions of the parties surrounding the conveyance of the real property. Admittedly part of the same transaction, the note provides:

This note and the interest thereon is secured by a deed on property located at 234 7th Avenue, Salt Lake City, Utah.

Wade Testified that he "more or less . . . contributed the language of it". (Wade Direct Examination, page 61). Because most of the language of the note was preprinted, there was no accident in his choice of words regarding the secured status of the note. He must now be held to that very language he chose and at trial insisted upon ignoring.

A second promissory note, Exhibit P-7, much like Exhibit P-3 also evidences that the transactions were not intended as a conveyance but was to be treated as an equitable mortgage.

Finally, the option signed by Wade and given to Taggart evidences an understanding among the parties that Taggart, upon repayment of \$10,000 plus an option fee (interest) could obtain or redeem the property. Although the existence of a right to redeem is not conclusive that a mortgage was intended, the Court held in Gibbons v. Gibbons, 135 P.2d 105 (Utah 1943) that without the right there can be no mortgage. Consequently, the option further supports the existence of an equitable mortgage.

F. Nature of and Character of Testimony Relied Upon. As is most readily apparent to the Court, plaintiff has been required to prove his case from the mouths of two biased defendants. Although defendants asserted at trial that their transaction was a sale rather than a loan, the written documentation and part of their testimony suggest the contrary. The best evidence, the written documentation created at the date of the purported conveyance, is the clearest indication of the parties' intention at the date of the transaction. Although defendants' oral testimony says that a sale occurred, the written documentation is in direct conflict with this assertion. Would defendants now have this Court disregard the clear language drafted by them contained in the promissory note (Exhibit P-3) that the note was secured by a deed.

G. Relationship and Aims. The relationship and aims of the defendants Wade and Taggart are best illustrated by their own testimony. Taggart concluded that plaintiff had commenced this action to get "his pound of flesh". (Taggart Cross-examination, page 35) and that he would have to move out if plaintiff prevailed in this suit. (Taggart Redirect Examination, page 43) However, if Wade's claims of sale were upheld, Taggart would be able to retain possession of the property at least for an additional eighteen months. (Taggart Cross-Examination, page 38, Wade Direct Examination, page 89) Wade estimated the value of the real property to be from \$100,000 to \$115,000. (Wade Direct Examination, page 78) Thus, if a sale were found to exist, Wade would receive a substantial return upon an investment of \$17,000, while if his assertions are wrong, he would only receive a return of his \$17,000 together with interest. Consequently, the difference in the outcome of this case meant in excess of \$50,000 to Mr. Wade after excluding the amount of the encumbrances.

In summary, each of the elements set forth herein when considered in light of the facts of this case show the existence of an equitable mortgage. A case similar to the facts and issues presented in this case also supports this conclusion.

In Orlando v. Berns, 316 Pl2d 704 (Cal. Ct. of App., 1957), the plaintiff sought declaratory relief claiming that a conveyance of real property had actually been a secured loan transaction rather than a sale and option to repurchase. Plaintiff had become substantially indebted and was in danger of losing his real property. He had encountered difficulty in obtaining a loan to satisfy his debts and thereafter sought the assistance of the defendant. Negotiations resulted in plaintiff deeding his property to defendant who in turn gave plaintiff a written option to repurchase the property, conditioned however upon the payment of a stated sum and the execution of a contract to repurchase. Defendant thereafter obtained a loan and used the proceeds and some additional money to satisfy plaintiff's debts. Plaintiff later exercised his option and executed a contract of repurchase. At trial the defendant testified that the price used for repurchase was an amount based upon the amount expended by defendant together with a stated return thereon rather than an amount determined by ascertaining the value of the land and buildings to be conveyed. The court concluded that this was the "thinking of a lender" and therefore upheld the trial court's determination that the transaction was in fact a loan and not a sale.

A similar method of determining Taggart's repurchase price was used in this case. Wade wanted an amount equal to the

money advanced together with interest equal to the rate set forth in the Promissory Note, which had been committed to Taggart.

In a case considered by the Utah Supreme Court, Bybee v. Stuart, 189 P.2d 118 (Utah 1948) the Court concluded that a deed was given as security where a contemporaneous written agreement was entered into which set forth that the conveyance was made to obtain a loan. The court stated at page 122:

But where, as here, there is a written agreement between the parties, contemporaneous with the deed, which shows the deed to have been given for security purposes, the court will look to the real transaction, and treat it as a mortgage.

In this case, the parties also executed a contemporaneous agreement, a Promissory Note (Exhibit P-3) which shows that the deed was given for security purposes.

CONCLUSION

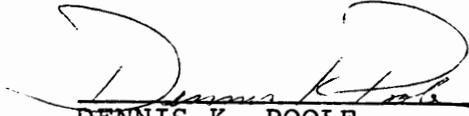
Plaintiff's action in asserting the existence of a mortgage is an action in equity. As such and as set forth in Corey v. Roberts, supra at page 942, it is the duty of the Supreme Court to examine "all questions of law and all facts revealed by the record". Plaintiff respectively asserts that such a review establishes by clear and convincing evidence the existence of an equitable mortgage. Although the defendants offered explanations of their conduct, these explanations are properly characterized as were the explanations offered in Corey v. Roberts, supra at page 948.

Some explanations and reasons have been suggested, but we deem them of the character that usually arise after a change of intention has taken place in the hope of making them fit a situation firmly fixed before the explanation was thought of.

It is therefore requested that the judgment of the trial court be reversed holding that an equitable mortgage was created in favor of the defendant Wade and that plaintiff's judgment is therefore a lien upon the real property of the defendant Taggart.

Respectfully submitted this 3rd day of April, 1980.

WATKISS & CAMPBELL


DENNIS K. POOLE
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiff-Appellant Wayne B. Baker were served upon the Defendants and Respondent, H. B. and Edna Wade, by mailing the same, postage prepaid, to Ricardo B. Ferrari, 1200 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, Attorney for H. B. and Edna Wade, this 3rd day of April, 1980.

