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Clair H. Anderson et al v. American Savings and Loan : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLAIR H. ANDERSON, E. DARLENE ANDERSON, his wife, DIRK C. ANDERSON, and JUDY ANDERSON, his wife, Plaintiffs and Appellants vs. AMERICAN SAVINGS AND LOAN, a Utah corporation, Defendant and Respondant.	CASE NO. 18178

BRIEF OF APPELLANTS

Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Hal G. Taylor, Judge

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Plaintiffs and Appellants	)	
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NATURE OF THE CASE

This is an action for determination and declaration of the respective parties' interest in real property, being lot 17 A-D Westhampton Planned Unit Development.

DISPOSITION IN LOWER COURT

The lower court granted defendant's Motion for Summary Judgment without explanation.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order reversing the Order of the District Court and for determination of the legal issue whether defendant has record priority because its recording number is lower.

STATEMENT OF FACTS

The parties agreed to stipulated facts that include, by adoption, the status of the record of the Salt Lake County Recorder's Office (R 12-18). The depositions of three of the defendants were taken and published at the time of defendant's Motion for Summary Judgment (R 81-154). There are also affidavits of Bruce Hancey, an employee of Utah Title Company (R 19-31); David C. Kimball, an employee of American Savings and Loan Association, the defendant (R 52-65); Clair H. Anderson, one of the plaintiffs (R 72-73); and Dirk C. Anderson, another of the plaintiffs (R 74-75).

Defendant brought a Motion for Summary Judgment, and plaintiff brought a Motion for Partial Summary Judgment. Both parties prepared extensive memoranda in support of their respective Motions and in opposition to the Motion of the other. Defendant's memorandum is included in the record. Plaintiffs' memorandum, a copy of which was filed with the docketing statement as a description of plaintiffs' claims as to the law, is not included in the record for reasons that are not clear to plaintiffs' counsel. A copy of said memorandum was in the hands of Judge G. Hal Taylor at the time of argument on the Motions for Summary Judgment.

The facts are detailed in the Stipulated Statement of Facts. Plaintiffs will here recite in narrative form the most essential of those facts. They are:

Plaintiffs purchased unit #4, Westhampton Planned Unit Development from Great West Development Company. As part of the consideration, said seller agreed to construct a specific 4-plex thereon for an agreed additional price of $95,000.00, which was advantageous to plaintiffs. Plaintiffs later agreed to forego that seller's agreement to construct the 4-plex for that advantageous price and to exchange lot 4 A-D for lot 17 A-D for an agreed price, part of which was paid in cash and part of which was paid by Great West Development Company's promissory note secured by a trust deed on said lot 17 A-D.

Larry Myers and others who were the principals of Great West Development Company gave defendant a trust deed for the peoperty, including lot 17 A-D. They did not have title at that time. The determination of the respective priorities of that trust deed and the trust deed of plaintiffs is what this lawsuit is about.

The date of Great West Development Company's trust deed to plaintiffs was April 30, 1979. By a deed bearing that same date, Great West Development Company conveyed title to the property described in defendant's trust deed to Larry Myers and others who were grantors in defendant's trust deed. On the next day (May 1, 1979) both trust deeds and the conveyance by plaintiffs' grantor (Great West Development Company) to defendant's grantor, Larry Myers and others, were recorded at exactly the same time, to wit: 11:02 a.m. The recording number assigned to defendant's trust deed was lower than the one assigned to plaintiffs' trust deed.

The affidavit of Bruce Hancy (R 19-31) claims that he was present when Larry B. Myers informed plaintiffs that their trust deed would be subordinate to defendant's trust deed and that he was instructed by defendant to record so that defendant's trust deed would be prior. Plaintiffs did not participate in those instructions. Plaintiffs Clair H. Anderson and Dirk C. Anderson each denied having been told that their trust deed would be subordinate, and they each denied agreeing to or acquiescing in such subordination (R 72-75).

In their depositions both Clair H. Anderson (R 117-154) and Dirk C. Anderson (R 81-107) acknowledged that they understood that defendant wanted a first trust deed position, and each vigorously denied that he was told or that he agreed that their trust deed would be subordinate. Both of said plaintiffs made affidavits explaining their understanding of "First Trust Deed Position" was that it was necessary to get title to the entire development project in a common grantor and that anyone that grantor gave a trust deed to would have a "first trust deed" even if that grantor gave consecutive trust deeds (R 72 and R 74). Both of said plaintiffs corrected their depositions to indicate that understanding prior to signing them (R 108 and R 145).

It is also important to note that while each of said plaintiffs said he knew defendant wanted a first trust deed position, (a fact each Plaintiff would still acknowledge) each also says that he did not agree that Defendant should have a

first trust deed position, and both of them vigorously resisted, in spite of defendant's counsel's badgering that they agreed to accept a subordinate position or that they were told that their position would be subordinate (R 99, lines 1-16; R 102, lines 1-18; R 131, lines 9-12; and R 140, lines 1-5).

Plaintiffs acknowledge that they understood that defendant wanted clear title to lot 4 A-D, the lot they exchanged for lot 17 A-D, because that is where the developer intended to begin construction.

The fourth cause of action of plaintiffs' Complaint is a claim that defendant agreed to loan monies for development of the property which was relied upon by plaintiffs when they agreed to exchange the lots and by others; that defendant knew of that reliance and, nonetheless, failed to loan all of the monies it had agreed to and that plaintiffs were damaged thereby.

It is fair to say that plaintiffs' knowledge of the justification for defendant's failure to loan all of the monies it agreed to loan was deficient when their depositions were taken. They merely said they had been told the problems were due to Defendant's holding up on its draws. In their Memorandum on Defendant's Motion for Summary Judgment, plaintiffs advised the court of their desire and intention to do further discovery on that matter. (See plaintiffs' Memorandum attached to Docketing Statement, Point V.) The affidavit of David G. Kimball (R 52 and 53) described Defendant's disbursements in connection with the loan. It is not contradicted.

ARGUMENT

I

PLAINTIFFS' TRUST DEED IS PRIOR TO DEFENDANT'S TRUST DEED.

Plaintiffs agreed to stipulate to the facts to test defendant's contention that defendant's lower recording number was dispositive as against plaintiffs' contention that it had record priority or, at the worst, record parity. On that matter, the facts are contained in the records of the county recorder's office, unchangeable and largely uncolorable by either party. Plaintiffs asked the District Court to make a determination of that issue and now ask this Court to make that determination or to instruct the lower court to do so. If the matter is to be determined on the basis of either the silent or expressed intention of the parties, there is a factual dispute which will require a trial. That matter will be argued more fully in Argument IV.

On the record, plaintiffs received their trust deed from Great West Development Company. Defendant received its trust deed from certain individuals who received title from Great West Development Company. It follows that the world is informed by the record that plaintiffs' trust deed was prior to defendant's trust deed because defendant's grantors received title after those same grantors gave plaintiffs their trust deed. The only other alternative is that plaintiffs' grantors gave title to defendant's grantors and then gave plaintiffs an empty trust deed at a time when they no longer had title, a result that assumes a fradulent conveyance to plaintiffs by plaintiffs'

grantor and defendant's grantor and which plaintiff claims is contrary to usual human experience and, therefore, is unreasonable.

Note all of the documents here relied upon were recorded at the same time, to wit: 11:02 a.m. on May 1, 1979.

Plaintiff urges that the only, or certinly the most, reasonable construction of the record title by this Court or by the world resorting to the record to determine title was that plaintiffs obtained their trust deed from their grantors prior to the time defendant received its trust deed from the grantees of plaintiffs' grantors.

If we consider the problem aside from the record, it is clear the documents were in the hands of Utah Title Company who was instructed by Defendant, and, therefore, was defendant's agent, prior to the documents' being recorded. (See stipulated fact #6 (R 13)). It follows that the presumptions hereinabove urged regarding the record are the same or more emphatic aside from the record--that is, defendant or its agent, Utah Title, must have known that the only reasonable construction of the documents was that plaintiffs received their trust deed prior to defendant's receiving its trust deed. Perhaps more importantly, the obvious expertise of defendant and its agent, Utah Title Company, and their opportunity to recognize the problem before recording and to correct it by obtaining a written subordination agreement from plaintiffs belies their claim that plaintiffs understood or agreed that defendant was to have a prior lien on lot 17 A-D.

ARGUMENT

II

IF PLAINTIFFS' TRUST DEED IS NOT PRIOR TO DEFENDANT"S TRUST DEED FOR THE REASONS URGED IN ARGUMENT I, PLAINTIFFS' TRUST DEED AND DEFENDANT'S TRUST DEED ARE CONTEMPORANEOUS PER THE RECORD BECAUSE THEY WERE RECORDED AT THE SAME TIME.

This is the legal question about which the parties emphatically disagree. Plaintiffs' claim is as stated in the captioned Argument II. Defendant's claim is that because its trust deed, though recorded at exactly the same minute as Plaintiffs' trust deed, to wit: at 11:02 a.m. on May 1, 1979, was accorded lower recording number, it is prior. Defendant simply cites the statute saying the first deed recorded takes precedence over subsequent deeds recorded and then assumes the lower recording number indicates an earlier recording. But, while that analysis may be comforting to defendant, it is not supportable, either practically or legally. Practically, if documents are received by the recorder at the same instant, one must be accorded a higher number than the other, but that is no reason to prefer one over the other by according it a higher priority. As to the law, UCA 57-3-2 is as follows:

> 57-3-2 Record Imparts Notice. Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to land within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in

> the office of the county recorder shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed would purchase and take with notice.

66 Am Jur 2nd, sections 153 to 155 of the title "Records and Recording Laws" describes the rule. A careful reading of sections 154 and 155 discloses that when the instruments are properly recorded within a reasonable time, the priorities will date from the time of filing. The point is made, somewhat brutally to defendant's position, but nonetheless more clearly, in the case of Bonstein v. Schweyer et al, 61 A 447, a 1905 Pennsylvania case. After noting that it is not really a question, but must be passed upon because it had been raised, the Court said:

> These two mortgages were left at the office for record on the same day and at the same moment of time--9:30 a.m., April 14, 1877. Neither had priority over the other. The lien of each commenced at precisely the same moment. There can be no answer to this in the face of the words of the statute, but the appellants contend, and with apparent seriousness, that the lien of the mortgage given to the widow was prior to that of the one given to the daughter, because, according to the pages in the mortgage book, it was recorded first. It was recorded on page 81, and other on page 83, and the position of the appellants, as they state it, is "that the paging in the mortgage book conclusively establishes the priority of entry," and therefore priority of lien. It was impossible to record the two mortgages at the same instant in the same mortgage book. One had to appear there first, but the page on which it appeared had nothing to do with its lien. That commenced the moment the arrival of the mortgage in the recorder's office was noted by the recorder, and in contemplation of law it was recorded from the moment it was left for record. As a matter of universal experience, we know that mortgages and deeds are not actually recorded as soon as they are brought into the office, because it is not possible to so record them. They accumulate in the office for record. Those brought first are first recorded, and in time all are recorded. Under the contention of the appellants, as it must be understood, no mortgagee is safe with the lien of his mortgage, as against other

other mortgagees, until his mortgage is actually recorded in the mortgage book. Of this proposition serious consideration could hardly be expected, and certainly will not be given to it.

While that is an old case, it did address the exact problem presented in this case in a direct way. Plaintiffs are not aware of any cases to the contrary and believe there are none.

ARGUMENT

III

PLAINTIFFS ARE ENTITLED TO PRIORITY BECAUSE THEIRS WAS A PURCHASE MONEY MORTGAGE.

Apparently it is agreed that if plaintiffs' trust deed is fairly characterized as a purchase money mortgage, it is prior and plaintiffs will not here reiterate the law of purchase money mortgages, except to note that it also is applicable to trust deeds.

The problem is that plaintiffs in this case sold one lot of the development and took a trust deed on another lot of the same development. Plaintiffs understood that Great West Development Company, defendant's mortgagor needed clear title to lot 4 A-D and made the exchange in that way to accommodate that need. Defendant has cited the rule as outlined in Am Jur 2nd and simply asserted that this case does not fit. Plaintiffs acknowledge that the case is apparently one of first impression.

The rule from 55 Am Jur 2nd Mortgages Section 348 is as follows:

> §348. Generally
> A mortgage on land executed to secure the purchase money by a purchaser of the land contemporaneously with the acquisition of the legal title thereto, or afterward, but as a part of the same transaction, is a purchase money mortgage.

The black letter print rule in 58 CJS Section 231 a, of Mortgages is as follows:

> §231. Priority of Purchase-Money Mortgages
> a. In General. A mortgage given for unpaid purchase money on a sale of land, as part of the same transaction as the deed, generally takes precedence over all other existing and subsequent claims and liens against the mortgagor.

The statement in American Law of Property IV, Section 16.106 E Purchase Money Mortgages at page 220 is as follows:

> It is familiar learning that a purchase money mortgage, executed at the same time as the deed of purchase of land, or in pursuance of agreement as part of one continuous transaction, takes precedence over any other claim or lien attaching to the property through the vendee-mortgagor.

While it is fairly possible to make defendant's argument using the Am Jur 2nd definition because of the words "the land," it is impossible to make that argument from the CJS definition or the American Law of Property definition. Plaintiffs urge that the Am Jur 2nd definition would be as accurate if the word "the" in "the land" was omitted and that definition would then square with the other two.

But let us talk about the purpose of the rule as applied to the facts of this case. Plaintiffs submit the purpose of the rule was to make it clear that mortgagees such as Plaintiffs received their security interest ahead of claims against the mortgagor that attached automatically upon the vesting of title in that mortgagor, such as execution liens, welfare liens, dower, homestead interests or mortgages executed by the mortgagor previously in anticipation of receipt of title about which mort-

gagees such as plaintiffs could not easily protect themselves for want of knowledge of such interests. In this case, defendant asserts priority based upon a mortgage it received previously from a party who did not have title when it gave the trust deed to defendant as against a trust deed given to plaintiffs by the then owner of the property before it conveyed the property to the party who had given the trust deed to defendant. Note that if or when plaintiffs checked title before accepting their trust deed, their grantor had clear title. Even if plaintiffs knew of defendant's trust deed, which plaintiffs do not concede, they would not have been concerned about it because the grantor of that trust deed did not have title; plaintiffs' grantor had title.

Plaintiffs respectfully urge that they did have a purchase money mortgage under a proper definition of that phrase and that the reasons for the rule giving priority to purchase money mortgagees, such as plaintiffs, that is, to protect them from hidden interests that become effective only on a transfer of title that triggers the competing interest, exist in this case and require a recognition of plaintiffs' priority under the purchase money mortgage doctrine.

ARGUMENT

IV

IF THE MATTER IS TO BE DETERMINED UPON THE BASIS OF THE SILENT OR EXPRESSED INTENTION OF THE PARTIES, THERE IS A FACTUAL DISPUTE AND PLAINTIFFS ARE ENTITLED TO A TRIAL.

Plaintiffs concede that if they agreed or consented that their claim would be subordinate, it is. They cannot dispute defendant's present claim that it intended to obtain priority, but they claim they did not acquiesce or agree to it and that defendant did not communicate it to them. If defendant originally intended that plaintiffs' claim be subordinate, it could easily have prepared an agreement to that effect. Such agreements are usual and extensively used. But defendant did not propose or obtain such agreement. That it did not, strongly belies its claim that such was intended or, at best, indicates it intended to obtain an advantage by silent conduct.

Defendant has seized upon plaintiffs' saying in their depositions that they understood that defendant wanted a first trust deed position as a concession that plaintiffs agreed to subordinate their trust deed. In the first place, plaintiffs' attorney would now stipulate that defendant wanted a first trust deed position--(After all, who doesn't?); but plaintiffs did not agree or consent that their trust deed would be subordinate to effect that result. Defendant's counsel at the same depositions, attempted to establish such agreement, but without success. On page 18 (R 99) of Dirk Anderson's deposition the following exchange between Rappaport and Dirk Anderson occurred:

> Q (By Mr. Rappaport) Could you please answer the question? Did you understand that the trust deed that you and your wife and your mother and father were getting for approximately $31,000 was going to be second to the trust deed of American Savings?
>
> A I understood that that was just to secure our money, that we would still have an interest in that property to secure our money.

Q Right. And you understood that American Savings wanted a first trust deed position on all the lots?

A Right.

Q And that you would be second to their trust deed? Your trust deed would be second to their trust deed? Did you understand that?

A Well, all I understood was that was securing our money.

That issue was picked up by Barnes at page 21 (R 102):

Q Did you have an understanding about the financing? Would that also affect your lot?

A Yeah. It would affect our lot.

Q So you knew that they were buying back those lots so that they could obtain financing?

A Right.

Q And that that financing would also involve your lot; is that correct?

A Yes.

Q What was your understanding about where you would fall in line with the bank? Who would have a first interest, and who would have a second interest?

A My understanding was that we would get paid off as soon as that building was built.

Q But you were aware, also, that the reason for this whole deeding back and receiving an interest in the lot was so that the financing for the Myer project could be arranged?

A Right.

In Clair Anderson's deposition at page 14 (R 131), Rappaport asked again, and again he got a negative answer:

Q You were aware that the bank was going to be having a blanket loan on the whole project, and that your note and trust deed came after that?

A I wasn't aware of that, no.

And at page 20 (R 137), he tried again:

> Q No one told you that you were going to be paid before the loan to American Savings was paid; is that right?
>
> A They never said anything about it.

And at page 23 (R 140), he tried again:

> Q That the American Savings would have clear title and first position?
>
> A Well, I don't know about first position.
>
> Q But clear title?
>
> A Clear title.

It is fair to say that while plaintiffs in their depositions acknowledged that defendant wanted clear title to lot 4 A-D to make their loan and that they wanted a first trust deed position, they consistently refused to agree, although badgered to, that they agreed to take or understood that defendant expected them to take a subordinate position.

Moreover, had they explained to plaintiffs what they meant by a first trust deed position or asked them what they understood by the phrase "a first trust deed position," they would have discovered that plaintiffs' understanding was simply that it was necessary to get title in all of the lots in common ownership and that anyone receiving a trust deed from that owner would have a first trust deed, and further, that that owner could then give any number of first trust deeds. See plaintiffs Clair Anderson's and Dirk Anderson's Affidavits attached hereto (R 72-75), and see plaintiffs' explanations of their answers given at the time of deposition.

Plaintiffs are reluctant to assert a semantic misunderstanding in defense of defendant's claims, but feel they must

because the misunderstanding exists. They also claim that, absent that misunderstanding, all they conceded was a knowledge that defendant wanted a first trust deed position--a concession they would still make. Plaintiffs further contend that their persistant denial of the further questions as to whether they intended to take or even that they understood defendant intended them to take a subordinate position should have alerted defendant's counsel to the communication failure.

Plaintiffs also deny the claim in Bruce Hancey's Affidavit (R 19) that that matter was explained to them. While Dirk Anderson agreed that Myers could have explained that defendant wanted a first trust deed position, he denies that Myers or anyone explained that plaintiffs' position was to be subordinate. (R 74-75)

Plaintiffs urge the Court that if American Savings or its agent Utah Title intended that plaintiffs should have a subordinate position, they could have and should have said so in writing. Both of said institutions are highly expert in dealing adequately with this kind of transaction and knew how to memorialize the agreement that they now claim existed. That they didn't, strongly belies their claim.

Plaintiffs further urge that defendant or its agent Utah Title prepared the documents and recorded them. If they are ambiguous, that ambiguity should be resolved against defendant. Plaintiffs urge the Court to decide the matter based on the objective non-colorable record that is available to it: that is, upon the records of the County Recorder's office. It is some-

how unbecoming of these giants, American Savings and Utah Title, who controlled the creation of the documents and the recording of them to now say they intended, by a sneaky procedure, to put plaintiffs in a second lien position, even though an analysis of the record at the time plaintiffs took their trust deed would have suggested they were getting a first lien position. But since they have failed to accomplish that sneaky result, they now ask the Court to decide that plaintiffs intended all along to get something less than the record, controlled by defendant, gave them. Aside from its uncomliness, it is untrue. Plaintiffs never agreed or intended their trust deed to be subordinate to defendant's.

ARGUMENT

V

PLAINTIFFS' FOURTH CAUSEOF ACTION IS NOT IN POSITION TO BE DECIDED BY SUMMARY JUDGMENT.

Plaintiffs understand another group of parties has sued defendant upon a claim similar to that addressed in plaintiffs' fourth claim. Plaintiffs have asserted that claim because they are in the same class as the other parties, but have not yet initiated discovery regarding that claim. Counsel for both parties agreed to cooperate to dispose of plaintiffs' first three claims by stipulating to the facts that affect them and testing the matter by a Motion for Summary Judgment. That is where plaintiffs' energies have been directed. They still want an opportunity to discover the facts respecting their fourth claim.

Defendant has exaggerated plaintiffs' unconcern and lack of information regarding their fourth claim. At page 18-19 of

Dirk Anderson's deposition (R 99-100), Rappaport asked and Dirk answered as follows:

> Q I'd like to ask you the same question concerning the fourth claim of your complaint. I'd appreciate it if you haven't before, if you could read paragraphs 19, 20, and 21. Can you tell us what specific facts you know or have heard of that support the allegations in paragraphs 19, 20 and 21?
>
> A Spring of '78 -- '77. When I met those two after trying to meet with them several times, that's what they indicated; that they were having a problem, and that American Savings had agreed to give them the money, but they were holding up on their draws, and they couldn't get any money to finish the project.
>
> Q Did they say why American was holding up on its draws?
>
> A No.
>
> Q So that's all that you know is that Larry Myers and Larry Price said American was holding up on the draws?
>
> A Yes.

That is all of Rappaport's examination about plaintiffs' fourth claim. All of Barnes' examination related to the time of closing. Dirk's answers indicated only his understanding at that time. It is much afterward that plaintiffs claim that defendant failed to perform its agreement.

Plaintiffs both testified as to some knowledge of defendant's promises to finance the developer even at the time of the closing (R 99 and R 141). They were informed in substantially more detail at a later time and still wish to investigate the facts of that matter further.

Dirk's father testified that he relied on Dirk in this transaction. He further testified that he understood generally

that defendant had agreed to the development loan and that he had been advised by the developer that defendant had failed to make disbursements and the development failed because of that. (See Deposition, pages 24-25.) (R 141-142) Clair Anderson's answer that he didn't care about the financing or the specific arrangements is not referenced in time. It appears to admit an unconcern and lack of knowledge at the time of the closing and has been corrected to show that.

CONCLUSION

1. Plaintiffs' trust deed is prior to defendant's trust deed and that priority is observable from the record because it was given to plaintiffs by a party prior in title to the party that gave the trust deed to defendant.

2. If plaintiffs' trust deed is not prior, it is contemporaneous because it was recorded at the same time as defendant's trust deed.

3. Plaintiffs' trust deed is entitled to priority because it is a purchase money mortgage.

4. Plaintiffs did not agree to, consent to or acquiesce to take a subordinate position to defendant.

5. Plaintiffs have not initiated discovery per their fourth claim, but still intend to do so. They have not admitted or conceded their claim away. The matter is not in a posture to be determined by Summary Judgment at this time.

Plaintiffs respectfully urge the Court to rule or to in-

struct the lower court to rule that the record title of plaintiffs' trust deed is prior to defendant's trust deed; or, in the alternative, that such record title is contemporaneous.

Inasmuch as Judge Taylor's decision is unexplained, plaintiffs believe they will be required to file a reply memorandum after they discover how defendant justifies Judge Taylor's decision.

Respectfully submitted,

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