

1964

Mary Abraham v. Rue Abraham & Gloria Abraham et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

**of the
STATE OF UTAH**

FILED
MAR 3 - 1964

MARY ABRAHAM,

Plaintiff and Respondent,

- VS. -

**RUE ABRAHAM and GLORIA AB-
RAHAM, husband and wife,**

Defendants,

**GRANT SHAW and ILA MAY SHAW, UNIVERSITY OF UTAH
husband and wife,**

Defendants and Appellants.

Case No.
10014

JUN 30 1964

APPELLANTS' BRIEF

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**Appeal from Decree of Foreclosure in the
Sixth Judicial District Court in and for Sevier County,
Honorable Ferdinand Erickson.**

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IN THE SUPREME COURT
of the
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MARY ABRAHAM,
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- VS. -

RUE ABRAHAM and GLORIA AB-
RAHAM, husband and wife,
Defendants,

GRANT SHAW and ILA MAY SHAW,
husband and wife,
Defendants and Appellants.

Case No.
10014

APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE

This is an appeal from a Decree of Foreclosure, dated the 24th day of September, 1963, by Honorable Ferdinand Erickson. The decree granted Respondent a prior right to the proceeds from the sale of the real property in the amount of \$8,506.00, and gave Appellants no right to any sum. Appellants object to the amount to which Respondent was granted priority.

DISPOSITION IN LOWER COURT

In the lower court, the Judge entered judgment determining that the property covered by a mortgage to the plaintiff should be sold and that from the sale of said property the plaintiff should recover a judgment of \$8,506.00, which included interest and \$1,000.00 attorney's fees, together with costs. Appellants' second mortgage was adjudged to be inferior to the lien of Respondent and granted no right.

RELIEF SOUGHT ON APPEAL

Appellants seek to reverse the Decree of Foreclosure and to have this Court determine that in the exercise of equity and good conscience Plaintiff is not entitled to a judgment in the amount of \$8,506.00, but is only entitled to a judgment for the actual amount of money which she advanced as consideration for the mortgage which is foreclosed and on which judgment is entered by the trial court. The amount advanced by Plaintiff being the sum of \$350.00.

Defendants, Rue Abraham and Gloria Abraham, and Plaintiff, Mary J. Abraham, are son and daughter-in-law and mother, and have all been represented by the same attorney in this litigation. On behalf of the mother, Mary J. Abraham, counsel filed a complaint, seeking to foreclose a mortgage securing a promissory note dated the 22nd of December, 1958. It was filed the 6th day of February 1959. Just 46 days after the mortgage and promissory note had been given. Defendants Rue Abra-

ham and Gloria Abraham did not answer the complaint of the mother, Mary J. Abraham, and a default judgment was permitted to be taken against them. The appellants, Grant and Ila Shaw, answered. Thereafter they filed an amended answer, seeking to have the equitable rights of Plaintiff and Appellants determined, and seeking to have the rights of the respondent, Mary J. Abraham, limited to the \$350.00 which she had advanced at the time the mortgage was given to her. They claim that their second mortgage is prior in right to the first mortgage of Mary J. Abraham, except for the amount of \$350.00.

This matter has been in the court on a prior occasion on an appeal by the defendants, Rue Abraham and Gloria Abraham, from a judgment in favor of Appellants setting aside this mortgage and granting judgment against the defendants, Rue Abraham and Gloria Abraham. In that appeal this Court set aside the trial court's judgment and determined as a matter of law that the evidence did not show fraud on the part of Rue Abraham and Gloria Abraham. In the prior case, District Court Case No. 5039 and Case No. 5044 were consolidated for trial and for appeal.

Neither the appellate court nor the trial court determined how much of an equity Mary J. Abraham had in the property on which Appellants have a second mortgage. This is the question now before the Court.

The retrial of this matter in the District Court was to determine the equitable rights of Plaintiff and Appellants Grant Shaw and Ila Shaw. The trial court determined that even though Mary J. Abraham gave only \$350.00 to her son, Rue Abraham, and his wife, Gloria Abraham, for the promissory note and mortgage in the face amount of \$5,850.00, that she was still entitled to foreclose the mortgage and collect the full amount of the promissory note, together with interest, costs and attorney's fees.

The promissory note was given by the defendants to secure antecedent indebtedness, except for \$350.00 advanced to defendants in making their deal with Appellants.

The property on which the mortgage was given belonged to Appellants. They have never been paid the price of their property. The title to the property was transferred to Defendants Rue Abraham and Gloria Abraham on the same day as the promissory note and mortgage were given and for the purpose of enabling the defendants, Rue Abraham and Gloria Abraham, to obtain a downpayment for the purchase of the property. Other property consisting of water stock and a farm were also transferred by Appellants.

Defendant Rue Abraham then sold the water stock and obtained the money for the downpayment and did

not use the home of Appellants for that purpose. After paying Appellants the proceeds from the sale of their water stock, Defendants Rue Abraham and Gloria Abraham paid no further sum on the purchase price of the property Appellants were selling to them.

There remains due and owing \$12,000.00 from the defendants, Rue and Gloria Abraham, to the appellants, Grant and Ila Shaw.

Plaintiff has obtained a Decree of Foreclosure ordering that the sum of \$7,488.00, principal and interest, to the 22nd of August, 1963, and attorney's fees in the sum of \$1,000.00, and costs in the sum of \$18.00, a total of \$8,506.00, be adjudged as a lien on the property. That the property be sold and out of the sale price, after payment of costs and disbursements, she receive the sum of \$8,506.00, together with interest at the rate of 8% per annum on said sum from the date of judgment. For this judgment she paid only \$350.00.

Appellants' contention is that Plaintiff should receive from the sale of the property only \$350.00, interest and attorney's fees. They claim a lien on the property for their second mortgage in the amount of \$5,000.00, subject only to the amount of \$350.00. The mortgages were both filed on the same day at the same time, December 29, 1958, at 4:30 p.m.

ARGUMENT

POINT NO. 1

THE DECISION OF THE TRIAL COURT REACHES AN INEQUITABLE RESULT AND GIVES TO THE PLAINTIFF-RESPONDENT A WINDFALL AT THE EXPENSE OF THE DEFENDANTS-APPELLANTS.

The record is clear and without dispute that the only consideration advanced by Respondent for the promissory note and mortgage on Appellants' property was \$350.00, this being given by Respondent to her son for the purpose of financing in part the transaction between himself and Appellants. The difference between the \$350.00 consideration and the face amount of the promissory note of \$5,850.00, Respondent and her son both testified, was as the result of antecedent indebtedness owing by the son to the mother and which had been accumulated over a number of years. (See page 101 of Original Transcript of Trial and page 19 of the Record on Appeal.) The antecedent indebtedness in no way related to Appellants or had anything to do with the transaction which was consummated on December 22, 1958.

It is Appellants' position that this antecedent indebtedness is not sufficient consideration to justify the Court in depriving them of their rights to the proceeds from the sale which exceed the sum of \$350.00, the amount actually advanced by Respondent.

Want of consideration is a good defense for the mortgagor in an action on the mortgage, and a junior mortgagee is privileged to defeat the lien of a senior

mortgagee by showing that it was executed without consideration. This principle seems to be without serious dispute and is recited by the textbook writers in approximately the language set forth (See: *Wiltsie, on Mortgage Foreclosure, including Law of Mortgages*, 5th Ed., Vol. 1, sec. 93, page 173).

The same source states, as a principle of mortgage law, that a creditor is not a bona fide purchaser for value and is not protected against prior equity (supra, sec. 94, page 174).

The law seems clear that where two mortgages are executed and delivered on the same day they will rank equally and without priority or preference one to another.

See:

Dahlstrom v. Unknown Claimants, 156 Iowa 187,
135 N.W. 567;
Sanely v. Crapenhof, 1 Nebr. 8, 95 N.W. 352;
Swayze v. Schuyler, 59 N.J. 75, 45 Atl. 347;
Franks v. Moore, 48 Ohio App. 403, 194 N.E. 39,
59 C.J.S., p. 290, sec. 220.

It is also a general rule of law that under circumstances, such as set forth, the mortgagees may show which of the two mortgages recorded simultaneously shall have superior equity to the other

See:

Schaeppi v. Glade, 195 Ill. 2, 62 N.E. 874;
Utley v. Dunkelberger, 86 Iowa 469, 53 N.W. 408;
Abrams v. Wingo, 9 Kan. App. 884, 59 P. 661;

Boies v. Benham, 127 N.Y. 620, 28 N.E. 657;
 14 L.R.A. 55 (Discussion of lien priorities is in
 point facts closest to case at bar);
 41 C.J., p. 514, note 75;
 59 C.J.S., p. 290, sec. 220.

It also seems to be a general rule that equity will enjoin the sale of property where it appears that the power is being exercised in an oppressive manner. Such rules have been evoked where the mortgage was given without consideration.

See:

Briggs v. Langford, 107 N.Y. 680, 14 N.E. 502.
 (Held purchaser could attack mortgage for want of consideration where mortgage was prior to sales agreement);

In *Pinnis v. Maryland Casualty Company*, 214 N.C. 760, 200 S.E. 874, 121 A.L.R. 871, the rule is clearly set down that a junior mortgagee may attack the senior mortgagee's position on question of amount due.

There can be no doubt that this Court has recognized its powers as a court of equity to do justice between the parties. This general principle is recited in *Valcarce v. Bitters*, 12 U.2d 61, 362 P.2d 427. There this Court stated:

“We are in accord with the plaintiff's contention that it is the responsibility of a court to rectify injustice and see that equity is done.”

This Court in a very recent decision exercised this power and realigned certain security rights to do justice between the parties and to effect an equitable decision. In *Utah Savings & Loan Association v. Mecham*, 11 U.2d 159, 356 P.2d 281, a decision written by District Court Judge Jones, the Court considered the right of a mortgagee to foreclose its mortgage and have a priority over lienholders who had performed work and furnished materials on the premises covered by the mortgage, and the court's decision stated as follows (p. 163):

“If the mortgagee had knowledge that the money was being borrowed for the purpose of creating improvements on the property, and that materials were being furnished under circumstances that it reasonably should know that materialmen or labor were relying on being paid from such funds, and further knew that such moneys were being diverted into other purposes or projects foreign to the one for which the loans were made, with the result that the materialmen would not be paid, then under such circumstances the mortgagee should not be accorded a priority as to those funds advanced after a given materialman commenced delivering buliding supplies onto the properties.”

There are numerous case in Utah where the Supreme Court has held that language contained in a uniform real estate contract will not be strictly applied, because it would create a penalty forfeiture. The Court has used its equitable powers to do justice between the parties.

See:

Jacobson v. Swan, 3 U.2d 59, 278 P.2d 294;
Perkins v. Spencer, 121 U. 468, 249 P.2d 446;
Malmberg v. Baugh, 62 U. 331, 218 P. 975;
Young v. Hansen, 117 U. 591, 218 P.2d 666.

There is no disagreement in the present case concerning the facts. The basic proposition presented for the Court to decide is whether or not the trial court decision was so inequitable that this Court should reverse it and should enter a judgment which does equity between the parties. Appellants submit equity requires Respondent be granted only the amount of money which she actually advanced at the time she secured her mortgage and promissory note, namely, \$350.00. Appellants should be granted the difference between said amount and the sale price of the property up to their mortgage amount of \$5,000.00, plus interest, attorneys fees and costs.

CONCLUSION

It is respectfully submitted that this Court should reverse the trial court's judgment and order that the property on which foreclosure is sought be sold; that the plaintiff be paid the sum of \$350.00, together with interest at the rate of 6% per annum and a reasonable attorney's fee on said sum; that all sums in excess of

said amount should be paid to the appellants on their mortgage until the same is paid in full with interest, costs and attorney's fees.

RESPECTFULLY SUBMITTED this day of
....., 1964.

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