

1964

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

Utah Supreme Court

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JUN 10 1964
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IN THE SUPREME COURT

of the

STATE OF UTAH

MARY ABRAHAM,

Plaintiff and Respondent,

vs.

RUE ABRAHAM & GLORIA ABRAHAM,

husband and wife,

Defendants,

GRANT SHAW & ILA MAY SHAW,

husband and wife,

Defendants and Appellants.

FILED
JUN 11 - 1964

Clerk, Supreme Court, Utah

**Case No.
10014**

RESPONDENT'S BRIEF

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

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Defendants,

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

Case No.
10014

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

The Appellants, Defendants in the trial court, have taken an appeal from a Decree of Foreclosure, entered on the 24th day of September, 1963 by the Honorable Ferdinand Erickson. The decree granted the Respondent a prior right to proceeds from the sale of real property in the amount of \$8,506.00 and gave the Appellants any proceeds over that amount.

DISPOSITION IN LOWER COURT

The District Court entered a judgment determining that the Plaintiff below, Respondent here, had a prior mortgage on the real property being sold, which was superior to the mortgage of the Defendants, Grant Shaw and Ila May Shaw, and awarding a total judgment of \$8,506.00.

RELIEF SOUGHT ON APPEAL

The Appellants seek to reverse the Decree of Foreclosure on the theory that there was an inadequate consideration to support the first mortgage.

STATEMENT OF FACTS

The Plaintiff was granted a mortgage upon real property, which was the subject matter of the foreclosure proceedings. The property had been originally acquired by Rue Abraham and Gloria Abraham from Defendants Grant Shaw and Ila May Shaw. Grant Shaw and Ila May Shaw entered into a contract in which they agreed to sell the property involved to Rue Abraham and Gloria Abraham. One of the terms of the contract was that the property would be conveyed to Rue Abraham and Gloria Abraham, and the purchasers would place a first mortgage on the property for \$5,850.00 in favor of Mary J. Abraham. The agreement described the property involved and also specifically provided that a second mortgage would be granted to Grant Shaw and Ila May Shaw in the sum of \$5,000.00. The following is the language used in the agreement between the parties:

“As additional security to assure the payments on said real estate contract the second party (Rue Abraham

and Gloria Abraham) have this day given to the first party a mortgage of \$5,000.00 subject to a previous mortgage for \$5,850.00 in favor of Mary J. Abraham on the house and .85 of an acre above described, a deed with abstract on a vacant lot as follows:" (R. 116).

In addition to the agreement of the parties concerning the priority of the mortgages and the amount of mortgages, the mortgage of the Plaintiff was recorded prior to the recordation of the mortgage of the Defendants.

The mortgage of Plaintiff was for a present consideration of \$350.00 paid at the time the mortgage was granted and the release of antecedent indebtedness due her in the sum of \$5,500.00. (R. 19).

ARGUMENT

Point No. 1

THE DECISION OF THE TRIAL COURT REACHED A CORRECT LEGAL RESULT.

We agree with the Appellants that the promissory note and mortgage granted to the Respondent was for the consideration of \$350.00 cash and the further consideration of a release of antecedent indebtedness in the amount of \$5,500.00. The priority of the mortgage granted to the Respondent and the exact amount of the mortgage was the subject of a contract between the makers of the note and mortgage and the Appellants, Grant Shaw and Ila May Shaw. In the agreement executed by them shown at Page 116 of the Record and already reviewed by this court in the case of Shaw vs. Abraham, 12 Utah 2d 150, 364 P2d 7, the following language was included after considerable negotiations:

“As additional security to assure the payments of the real estate contract the second party (makers of the note and mortgage) has this day given the first party a mortgage of \$5,000.00, subject to a previous mortgage of \$5,850.00 in favor of Mary J. Abraham on the house and .85 of an acre above described, a deed with abstract on a vacant lot specified as follows:”

The agreement was prepared by Mr. Ben Boyce, a real estate agent representing the Appellants. He specifically discussed the matter of priority of mortgages with the Appellants. On cross examination he testified as follows:

Record Page 321, commencing at Line 9:

“Q Now specifically I am referring to this provision: ‘As additional security to insure the payments of said real estate contract, the second party has this day given the first party a mortgage of \$5,000.00, subject to a previous mortgage of \$5,850.00 in favor of Mary J. Abraham,’ and then it goes on and describes the house and lot the second mortgage is to be on.

“A Yes.

“Q Now this was discussed with you prior to your leaving Richfield to go back and prepare the agreements?

“A Yes, sir.”

Since the Appellants were parties to a contract determining the priority and the amount of the mortgage to be granted to Mary J. Abraham, they are not now in a position to raise these questions.

Although we are of the opinion that the Appellants are estopped from raising the question of lack of consideration, we will discuss that defense. The question is not lack of consideration, but whether the release of antecedent indebtedness is sufficient consideration to support a promissory note and mortgage. This problem has been resolved in Utah both by statute and by decisions of this court. Section 25-1-3, UCA 1953 puts the problem at rest with the following language:

“Fair consideration. Fair consideration is given for property, or obligation:

- (1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or,
- (2) When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small when compared with the value of the property or obligation obtained.”

The proof at the trial was conclusive as to the matter of consideration, and it was that there was an advance of \$350.00 cash and a release of antecedent indebtedness of \$5,500.00. No evidence was offered by the Respondent concerning the matter. It should be noted that the Respondent had the burden of proving by clear and convincing proof that there was no consideration. Section 44-1-25, UCA 1953 requires a person attacking a promissory note which is in negotiable form to assume the burden of showing that it was not given for valuable consideration. The section reads:

“Presumption of consideration. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon, to have become a party thereto for value.”

The Utah case of *Hudson vs. Moon*, 42 Utah 377, 130 Pac. 774, holds that under the section quoted the production of the note and proof of signature make it prima facie case of valuable consideration, placing the burden on the Defendants of producing evidence to overcome this presumption.

A further review of the Utah authorities on the question of whether antecedent indebtedness is a valid consideration should be commenced with a review of Section 44-1-26, UCA 1953, which states:

“Consideration, what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such, whether the instrument is payable on demand or at a future time.”

Many Utah cases have considered the foregoing statutory provision, and each case has consistently held a pre-existing indebtedness is a valuable consideration. In the case of *Helper State Bank vs. Jackson*, 48 Utah 430, 160 Pac. 287, it was held that a note given in payment of a discharge of a pre-existing debt was such consideration that the payee was a holder for value. In *Dern Investment Company vs. Carbon County Land Company*, 94 Utah 76, 75 P2d, 660, a pre-existing debt was found sufficient consideration for a maker's obligation under a note. See also *Great American Indemnity Company vs. Berryessa*, 122 Utah 243, 248 P2d 367.

This court also considered the question in the case of Ned J. Bowman vs. White, 369 P2d 962, 13 Utah 2d 173, in which an action was filed by a judgment creditor to set aside a debtor's mortgage to his father. It was held that evidence supporting the finding that a note and mortgage was made to secure a pre-existing obligation, and that the release of the antecedent indebtedness was a valid consideration.

The matter of a pre-existing indebtedness as consideration is also extensively considered in an annotation in 39 A.L.R. 2d commencing at page 1088. The annotation seeks to determine the authorities on the question of whether an antecedent debt amounts to "value" within the rule that one who asserts it becomes a bona fide purchaser of property. The annotation summarizes its review of authorities throughout the United States by stating that a pre-existing indebtedness is a good, valid consideration for a mortgage. The annotation contains the following statement at page 1089:

"It would appear to be a matter of well-settled law that, as a general principle, a mortgagee who, as consideration for the mortgage, has extended the time for payment of a pre-existing debt is a bona fide purchaser, entitled to priority as such."

CONCLUSION

It is respectfully submitted that the Appellants agreed in a written contract to the priority granted to the mortgage of Mary J. Abraham and also to the amount of that mortgage. Further, the mortgage of Mary J. Abraham was

granted for good and valuable consideration, and the trial of the court was correct in its determination of the matter.

We submit the decision of the trial court should be sustained.

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