

1969

**American Savings & Loan Association v. Wayne T. Blomquist, and Ruth E. Blomquist, His Wife, William G. Fowler, Trustee of the Estate Of Guaranty Trust Deed Corporation, A. Corporation, and A. D. Sellars and Mrs. A. D. Sellars : Brief of Appellants Blomquist**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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AMERICAN SAVINGS & LOAN ASSOCIATION :  
a corporation,

Plaintiffs, :

-vs-

Case No. 11631

WAYNE T. BLOMQUIST, and RUTH E. :  
BLOMQUIST, his wife, WILLIAM G. :  
FOWLER, Trustee of the Estate :  
of GUARANTY TRUST DEED CORPORATION, :  
a corporation, and A. D. SELLARS :  
and MRS. A. D. SELLARS, his wife, :

Defendants. :

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BRIEF OF APPELLANTS BLOMQUIST

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An Appeal From the Judgment of the  
District Court of the Third Judicial  
District, the Honorable Marcellus K.  
Snow, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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-vs-

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and MRS. A. D. SELLARS, his wife,

Defendants.

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STATEMENT OF NATURE OF CASE  
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This action was commenced by American Savings & Loan Association, which sought to foreclose a mortgage (trust deed) against both appellants and respondents as parties holding some interest in the subject parcel of residential realty. Appellants (Blomquist) had sold the property to respondents (Sellars) on a Uniform Real Estate Contract, subject to the mortgage. After service of process by the mortgagee, respondents cross-claimed against appellants. In turn, appellants counterclaimed against respondents, asserting that respondents were in default under the terms of said real estate contract.

## DISPOSITION OF CASE BELOW

After the trial court had earlier disposed of the original mortgage foreclosure action by entering summary judgment in favor of the mortgagee, the claims of appellants and respondents came on for trial. Upon stipulation of the parties in open court, it was agreed that certain facts were uncontroverted, which facts were embodied in the court's Findings of Fact and Conclusions of Law. The court then determined that both parties were in default and that neither was entitled to relief, whereupon the court dismissed the claims of both parties.

## RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of dismissal of their claims against respondents.

## STATEMENT OF MATERIAL FACTS

On the 6th day of December, 1965, appellants entered into a Uniform Real Estate Contract with respondents. (F.F. No. 2, R. 168) At that time, appellants were in the fact position asserted in the complaint of plaintiff American Savings & Loan Association and finally determined by judgment in favor of said plaintiff dated October 30, 1968. (F.F. No. 3, R. 168)

Respondents made regular monthly payments until they were served with summons by said plaintiff in the above-entitled action, at which time they discontinued regular payments.

FF No. 4, R. 168) Respondents were served with summons by said plaintiff on February 16, 1967. (R. 64)

On or about February 27, 1967, appellants declared that respondents were in default by failure to make said payments, and appellants demanded immediate payment of the full contract balance in the amount of \$33,885.87. (R. 76) Simultaneously, appellants elected to treat the contract as a mortgage, as provided in paragraph 16C of said contract (R. 32), and proceeded to foreclose same. (R. 75)

After said discontinuation of payments in February, 1967, respondents commenced payments only upon the appointment of a receiver. (FF No. 4, R. 168) The receiver was appointed by order dated November 14, 1967. (R. 96-97)

On October 30, 1968, the court entered summary judgment in favor of plaintiff mortgagee and against all of the other parties, foreclosing the plaintiff's mortgage, declaring all other interests inferior to those of plaintiff, and allowing a deficiency judgment against appellants (FF No. 1, R. 168) The total judgment against appellants amounted to \$32,775.92, including attorney's fees and costs of suit. (R. 139) Appellants took no appeal from that judgment, which left open the claims between appellants and respondents. (R. 141)

On January 3, 1969, the latter claims came on for trial before the Honorable Marcellus K. Snow. Although the parties were prepared to testify, upon stipulation the parties agreed to certain undisputed facts which the court adopted as its Findings of Fact. (R. 167-68) From those facts the court concluded that respondents were in default under their contract with appellants. (C.L. No. 4, R. 169)

The court also concluded that appellants were:

"in default of the contract at the time it was entered into and were subsequently foreclosed and precluded from any further interest therein for the reason that the provisions in the contract were dependent and could not be enforced while in default and that the said Blomquists were not entitled to foreclose the title to property they had previously been foreclosed out of themselves."

(C.L. No. 4, R. 169-70)

Consequently, the court entered judgment dismissing appellants' claims against respondents, on the ground of "no cause of action." (R. 172) For that reason, the court concluded that it was unnecessary to take testimony as to damages. (C.L. No. 4, R. 169)

#### ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIM, AS STATING NO CAUSE OF ACTION, WHERE RESPONDENTS-VENDEES WERE CLEARLY IN DEFAULT UNDER THEIR REAL ESTATE CONTRACT WITH APPELLANTS-VENDORS AND THERE WAS NO SHOWING THAT VENDORS COULD NOT HAVE CONVEYED GOOD TITLE UPON RECEIPT OF THE PAYMENTS REQUIRED OF VENDEES UNDER THE CONTRACT.



The court below apparently proceeded on the assumption that any default by the vendor with respect to the payment of an underlying obligation against the subject real property necessarily excused the vendee from his obligations on the contract. That is not the law, here or elsewhere.

The basic rule has been clearly stated by this Court:

"(W)e acknowledge our accord with the rule . . . that the vendor in a real estate contract generally not obliged to have full and clear marketable title at all times during the pendency of his contract of sale because, ordinarily, title need not be conveyed until the final payment is made or tendered. . . ."

Leavitt v. Blohm, 11 U.2d 220, 357 P.2d 190, 192-93 (1960) (emphasis added).

Similarly, in Woodard v. Allen, 1 U.2d 220, 265 P.2d 398 (1953), this Court held that a contract vendee could not justify his refusal to make payments under his contract by claiming that the vendor could not deliver good title, since there was no requirement for conveyance of title until the vendee had made the payments required of him by contract.

Accord: McKellar Real Est. & Inv. Co. v. Paxton, 62 U. 97, 218 Pac. 128 (1923); 55 Am. Jur., Vendor and Purchaser § 280, 1 pp. 724-25; Annot.-Time for Questioning Vendor's Title, 109 ALR 242 et seq.

Arguably, some support for the decision below could be

land in Tremonton Inv. Co. v. Horne, 59 U. 156, 202 Pac.

541 (1921), where this Court excused a defaulting vendee

who reasonably feared that if he went on paying under the

contract he would lose both his payments to an insolvent

vendor and the land to a foreclosing lienor. However, certain

critical facts distinguish that case from ours:

"It should be borne in mind that the premises described in the contract between Romney and the defendant included only a part (in fact a small part) of the premises in the contract given by McEwan to Romney. Romney was not able to meet the payments due under his contract with McEwan merely by the defendant continuing to make the monthly payments provided for in his contract. This is not, therefore, a case in which the defendant might have the right to demand that his payments should be applied in removing any encumbrance upon or curing any defect in the vendor's title."

202 Pac. at 549.

Thus, in Horne there was no prospect of paying off all encumbrances on the large tract of land of which the contract in question pertained only to a small part, looking only to the contract payments, whereas in our case if respondents had paid the \$33,885.87 balance demanded by appellants after respondents had defaulted, appellants could easily have paid off the mortgagee who, after another year of litigation, finally wound up with a total judgment of \$32,775.92 (including attorney fees and costs).

Does a vendor have the right to rely upon payment by a defaulting vendee to pay off encumbrances on the clear title to which the vendee is entitled if the contract is enforced? The California Court of Appeals has so held:

"Plaintiff asserts that he was not tendered a merchantable title, because . . . the vendor did not tender him a deed to the property free from encumbrance.

\* \* \*

"As to the fact that the record showed the property to be incumbered with a deed of trust . . . we are of the opinion that this defect was remedied by the tender to the plaintiff by the vendor's agent of the reconveyance by said trustees. This reconveyance was properly drawn and acknowledged; and it was handed to the vendor's agents with the understanding that upon repayment of the amount of the loan they were to take the necessary steps to release the property from the incumbrance. The vendor had a right to rely on the purchase money to liquidate the indebtedness secured by the deed of trust.

Webster v. Kings County Trust Co., 80 Hun. 420, 30 N.Y. Supp. 357; Ziehen v. Smith, supra. The \$4,650 due at the time of the tender, and the \$1,350 already in the hands of the vendor's agents, were more than sufficient for this purpose."

Griesemer v. Hammond, 18 Cal. App. 535, 123 Pac. 818, 820 (1912)(emphasis added).

Does it change the result when the vendor has defaulted on an underlying encumbrance so as to precipitate a foreclosure action? No, the California Court of Appeals has applied the same rule even after a sheriff's sale has

occurred:

"We believe that it is entirely clear that the seller was not required to have title to the property at the time of making the contract of sale, but was only required to be able to convey title to the purchaser at the time fixed by said contract for such conveyance. . . . Under the terms of said contract, the seller was not required to convey except 'upon receiving the full purchase price' in installment payments with interest as therein provided, or, at the option of the purchaser, upon payment of the entire unpaid balance of the purchase price at any time prior to default by the purchaser. But here respondent ceased making his payments shortly after the foreclosure sale and at least ten months before the period for redemption had expired and never made a tender of the balance of the purchase price or any part thereof. This was a breach of the contract by respondent unless the mere permitting of the foreclosure sale constituted a prior breach on the part of appellants relieving respondent from this obligation to continue such payments. In our opinion, it did not . . . . In the present case there was no unremovable defect in the title because of the foreclosure sale, and the seller had a right to rely upon the purchase money to redeem from said sale. In this connection it may be stated that while the indebtedness secured by the mortgage was less than \$5,000 at the time of the sale, the evidence showed that there was \$10,000 remaining unpaid on the outstanding contracts of sale."

Lloyd v. Locke-Paddon Land Co., 5 Cal. App.2d 211, 42 P.2d 367, 368-69 (1935)(emphasis added).

In our case, paragraph 19 of the Uniform Real Estate Contract provides that "the Seller on receiving the payments herein reserved to be paid at the time and in the manner

above mentioned agrees to execute and deliver to the Buyer  
or assigns, a good and sufficient warranty deed conveying  
the title to the above described premises free and clear of  
all encumbrances . . . ." (R. 32) (Emphasis added.)

Under the authorities we have cited, the trial court  
erred in dismissing appellants' claims against respondents.

#### CONCLUSION

Appellants are entitled to a reversal of the judgment  
of dismissal below, and the case should be remanded for trial  
on the issue of damages or other appropriate relief.

Respectfully submitted,

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