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 Respondent's and Cross-Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN SAVINGS & LOAN ASSOCIATION, a Corporation,

Plaintiffs,

vs.

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,

A. D. SELLARS and MARIE L. SELLARS, his wife,

Cross-complainants,

vs.

WAYNE T. BLOMQUIST and RUTH E. BLOMQUIST, his wife,

Cross-defendants.

Case No. 11631

RESPONDENT'S AND CROSS-APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court for Salt Lake County, Honorable Marcellus K. Snow.

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STATEMENT OF KIND OF CASE

This is an action for damages suffered by vendees who purchased property under a Uniform Real Estate Contract from vendors then in default on their mortgage, who concealed such default from the vendees, and who suffered the mortgagee to foreclose the vendors' mortgage.

DISPOSITION IN LOWER COURT

American Savings & Loan Association, the mortgagor, was granted summary judgment foreclosing appellants' mortgage. The court concluded that appellants (Blomquist) were in default, and that respondents (Sellars) were in default for failure to make certain payments on the Uniform Estate Contract. For that reason, the court concluded that neither party had a cause of action against the other and dismissed their respective claims.

RELIEF SOUGHT ON APPEAL

Respondents (Sellars) seek reversal of the judgment of dismissal of their claim against appellants (Blomquist).

STATEMENT OF FACTS

Appellants (Blomquist) and respondents (Sellars) contracted for the sale and purchase of certain real property pursuant to a Uniform Real Estate Contract. (R. 26, 27; F.F. 2, R. 168) At the time of the contract appellants (Blomquist) were in default to American Savings & Loan Association on their mortgage, as determined by adjudication and judgment in favor of American Savings & Loan Association. (R. 81, No. 21; R. 90, No. 21; R. 2, No. 3; F.F. 3, R. 168).

Respondents (Sellars) had made regular monthly payments in accordance with the terms of the Uniform Real Estate Contract until they were served with a Summons and Complaint in the foreclosure action brought by American Savings & Loan Association, at which time they discontinued regular payments and commenced payments only upon appointment of a receiver, thereafter, making regular payments directly to the receiver. (F.F. No. 4, R. 168; R. 187) Respondents (Sellars) were served with American Savings & Loan Association's Summons and Complaint on February 16, 1967 whereby they first learned of appellants' (Blomquist) default on the mortgage with American Savings & Loan Association and concomitant breach of the terms of Paragraph No. 11 of the Uniform Real Estate Contract (R. 64; R. 2, No. 3, and R. 3, No. 4; R. 26, No. 11) On March 8, 1967, respondents (Sellars) filed a third party complaint against appellants (Blomquist) for default on the Uniform Real Estate Contract resulting from appellants (Blomquist) failure to make their payments on the mortgage. Respondents' (Sellars) third party complaint was subsequently dismissed without prejudice. (R. 28-30; R. 56) On May 4, 1967 respondents (Sellars) filed a cross complaint against appellants (Blomquist) for breach of the Uniform Real Estate Contract (R. 60, 61). Appellants (Blomquist) subsequently, on May 22, 1967, answered respondents' (Sellars) cross complaint, and cross counter-claimed to foreclose the Uniform Real Estate Contract as a mortgage. (R. 74-77)

On May 9, 1967, American Savings & Loan Association moved for appointment of a receiver for rents on the property, which motion was apparently not pursued. A receiver was appointed November 14, 1967, pursuant to a subsequent motion by appellants (Blomquist) for appointment of a receiver which was filed on October 26, 1967, and American Savings & Loan Association's joinder in appellants' (Blomquist) motion for appointment of a receiver dated October 27, 1967. (R. 71-73; R. 94, 95; R. 92, 93; R. 96, 97) Respondents (Sellars) then commenced making monthly payments to the receiver (F.F. No. 4, R. 168) On October 30, 1968, the court granted the motion of American Savings & Loan Association for summary judgment and decree of foreclosure, foreclosing appellants' (Blomquist) rights in the property and decreeing respondents' (Sellars) claim to be subject to, subordinate and inferior to American Savings & Loan Association's mortgage lien. (R. 140, No. 4; R. 141; F.F. No. 1, R. 168) On May 1, 1968, the statutory period during which appellants (Blomquist) might have redeemed the property expired.

On January 3, 1969, respondents' (Sellars) claim against appellants (Blomquist) came on for trial before the honorable Marcellus K. Snow. (R. 167) The parties were prepared to testify with respect to the various issues in the case, but upon consultation between the court and counsel, certain facts were stipulated to by the parties and subsequently adopted by the court as its findings of fact:

"1. That a judgment was entered on October 30, 1968, in favor of the plaintiff, American Savings and Loan Association, and against all defendants, declaring the plaintiff's trust deed to be a first trust deed and declaring all defendants' interests to be inferior in interest thereto; and further, foreclosing the said trust deed and note supporting said trust deed as against Wayne T. Blomquist, Ruth E. Blomquist, and other defendants; and for an order allowing the plaintiff a deficiency judgment on the notes against the defendants, Wayne T. Blomquist and Ruth E. Blomquist; and that no appeal has been filed from said judgment.

2. That on the 6th day of December, 1965, Wayne T. Blomquist and Ruth E. Blomquist entered into a Uniform Real Estate Contract with A. D. Sellars and Marie L. Sellars, the form of which contract was agreed to by the parties and their counsel at the time of trial, a copy of which was presented at that time and agreed to by counsel as being a copy of the contract between the parties.

3. That at the time the parties entered into the Uniform Real Estate Contract, the Blomquists were in the fact position which was the basis of the plaintiff's, American Savings & Loan Association, cause of action and were the facts which supported the theory upon which the judgment of October 30th, 1968, rested.

4. The Sellars commenced making monthly payments and had made regular monthly payments until they were served with a summons in

the above entitled action, at which time they discontinued regular payments and commenced payments only upon the appointment of a receiver, and paid the amount presently in the possession of the said receiver.

5. There is presently on hand in the possession of the reeciver, the amount of

6. A judgment of foreclosure was entered on the 30th day of October, 1968, and a foreclosure sale was set for January 7th, 1969, at the hour of 12:00 noon." (R. 168)

The court concluded from the facts stipulated to, that the appellants (Blomquist) were in default to American Savings & Loan Association at the time they entered into the contract with the respondents (Sellars), and "were subsequently foreclosed and precluded from any further inteerst therein for the reason that the provisions in the contract were dependent and could not be enforced while in default and that the said appellants (Blomquists) were not entitled to foreclose the title to property they had been previously foreclosed out of themselves." (C.L. No. 4, R. 169)

The court rendered judgment the 5th day of March, 1969, dismissing appellants' claim against respondents for failure to state a cause of action and dismissing respondents' claim against appellants for failure to state cause of action. (R. 172)

ARGUMENT

POINT 1

THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANTS COULD NOT FORECLOSE RESPONDENTS' TITLE TO THE PROPERTY FOR THE REASON THAT APPELLANTS WERE IN DEFAULT OF THE CONTRACT AT THE TIME THEY ENTERED INTO IT.

Appellants were wilfully in default on the Uniform Real Estate Contract at the very instant they set their pens to the paper. Paragraph No. 11 of the Uniform Real Estate Contract prepared by appellants own hand provides that:

> "The seller hereby covenants and agrees that there are no assessments against said premises except the following: "None" (typed into the printed form)
>
> The seller further covenants and agrees that he will not default in the payment of his obligation against the said property." (R. 26)

By their own admission respondents knew that they had been in default of their mortgage with American Savings & Loan Association, since at least October 15, 1964. (R. 81, No. 21; R. 90, No. 21) This court has followed the rule that a vendee can not attack a vendor's title

in advance of tender of the final payment. *Woodward v. Allen,* 1 U.2d 220, 265 P.2d 398 (1953); *Leavitt v. Blohm,* 11 U.2d 220, 357 P.2d 190 (1960). In *Woodward v. Allen, supra,* the defendant signed an agreement with the plaintiff for the purchase of real property on one evening, delivering a $500.00 check as down payment, then stopped payment on the check the next morning. Defendant attempted to justify this action on the basis of certain quiet title suits prosecuted by the county to resolve all doubt as to the validity of certain tax deeds, which were links in the chain of title to the property.

The court noted that it believed that "defendants' objections were received after the stop payment and were designed to avoid a bargain regretted," and that under the facts of the case, "plaintiffs were not obliged to prove marketable title simply because defendant raised the point." The facts of this case clearly support the court in its conclusion that, "defendants' attack on the marketability of plaintiffs' title was premature." Its judgment in favor of plaintiff, compelling specific performance on the contract, is a remedy such as could not be rendered in this case, since plaintiff has no title to convey in any event. The court in *Leavitt v. Blohm, supra,* agreed that "the purchaser can not use a claimed deficiency in title as an *excuse* for refusing to keep a commitment to purchase property, as was attempted in the case of *Woodward v. Allen*" (emphasis supplied by the court. The court distinguished the case before them from the *Woodward* case. "We see no impropriety in

the trial court's view that where the [plaintiffs] had permitted their interest in the property to become involved in such a way that the buyer did not have the quiet and peaceable enjoyment of it, coupled with the further fact that the circumstances justified forebodings that they would not be able to extricate themselves from their difficulty and be in a position to convey title, [defendant] was not obliged to continue payments, but could take such measures as seemed necessary and prudent to protect herself." The facts of the *Leavitt* case, which the court here regarded as distinguishable from *Woodward,* were briefly, that defendant contracted to purchase property from plaintiff, which plaintiff had acquired as the last of a series of transactons involving the property, and the contract for which they were in default. That is, a situation substantially identical to that in the instant case. The court said that:

> "The effect of [the trial court's determination] was to recognize [defendant's] right to regard the contract as breached by the [plaintiff] and to justify her refusal to perform."

The court might well find in this case that the hiatus in respondents' payments was not "designed to avoid a bargain regretted," nor even an absolute refusal to perform, such as was found by the court to be justified in *Leavitt v. Blohm,* but rather a mere attempt to avoid making payments to one who possibly had no rights with respect to the payments.

The California Court of Appeals in *Lloyd v. Locke-Paddon Land Co.*, (5 Cal. App. 2d 211, 42 P.2d 367) (1953), examined the question, whether a seller who permitted a foreclosure sale thereby committed such a breach as to relieve the buyer of his obligation to continue payments on the contract. The court said that the purchasers' failure to continue payments "was a breach of the contract . . . unless the mere permitting of the foreclosure sale constituted a prior breach on the part of appellants relieving respondent from his obligation to continue such payments." The Court added,

> "In the present case it was not alleged, nor did it appear that the seller had done or suffered any act prior to the default of the purchaser which rendered the seller incapable of performing the contract." And

> "We do not wish to be understood as holding that a purchaser must, in all cases, continue to make his payments throughout the period of redemption where the seller has permitted the property to be sold under foreclosure. Such a rule would no doubt work a hardship in cases where the seller, due to insolvency or other cause, is wholly incapable of performing on a contract even upon a tender by the purchaser."

Appellants' reliance on this case is misplaced for the reason that the plaintiff-purchaser in the cited case was attempting to recover payments made to a conditional vendor, whereas in the instant case the appellant-vendor

is attempting to forcelose. In *Lloyd, supra,* the vendee entered into a contract with the vendor at a time when the vendor was not in default. When the vendor defaulted such that a foreclosure action was initiated against him, the vendee stopped making payments, and never did re-commence making payments. The effect of the vendee's failure or refusal to continue making payments after the default was a disavowal or abrogation of the contract. Having put himself in the best possible posture, free from further liability, free from further expense, he then attempted to recoup sums paid under a valid, good-faith contract.

Respondents (Sellars) have shown no such duplicity. Having contracted, bonafide on their part for the purchase of a home, they became understandably apprehensive about their home and investment when they were served with documents aimed at foreclosing their vendor's right and interest in the property. Respondents stopped making payments to Appellants (Blomquist). But, and this is the telling factor, they resumed payments to a receiver well within the period within which appellants (Blomquist) might have redeemed. Respondents (Sellars) did not seek to avoid the contract; they did not cast off their obligations; they did not act in bad faith at any time herein.

POINT 2

APPELLANTS' FAILURE TO DISCLOSE TO RESPONDENTS THEIR THEN EXISTING DEFAULT ON THE MORTGAGE GIVEN TO AMERICAN SAVINGS & LOAN ASSOCIATION CONSTITUTED FRAUD AND WILFUL DEFAULT JUSTIFYING THE TRIAL COURT'S DECISION DISMISSING APPELLANTS' CLAIM FOR FAILURE TO STATE A CAUSE OF ACTION.

Elder v. Clausen, 14 U.2d 379, 384 P.2d 802 (1963), was an action to rescind a contract for the sale of farm land which was under quarantine the vendor had failed to give the vendee. The court concluded "that here there was a suppression of the truth, which the party with superior knowledge had a duty to disclose, which amounted to fraud.

'One of the fundamental tenants of the Anglo-American Law of Fraud is that fraud may be committed by the suppression of the truth . . . as well as the suggestion of falsehood. . . .'

Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor determining that a duty of disclosure is owing. There is much authority to the effect that if one party to a contract or transaction has superior knowledge or knowledge that is not within the fair and

reasonable reach of the other party, and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both the parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain." This case, of course, deals with the quality of the property in question; the relief sought was rescission. In the *Elder* case, the vendees had had no experience in farming or ranching: they relied on the representations of the vendor, who did have such experience, that the noxious weeds could be easily destroyed and presented no problem. In this case Respondents (Sellars), a mechanic and housewife, relied on the representations of appellant (Blomquist), an experienced investment and real estate broker, that Respondents (Sellars) did not need the advice of an attorney as they had proposed, since he (Blomquist) was fully qualified and experienced in such matters, to disclose to respondents thefact that respondents might, as a result of the foreclosure action, have no title to convey to respondents regardless of whether or not resopndents had tendered the full purchase price. In addition, appellants executed in the Uniform Real Estate Contract a provision whereby appellants covenanted and agreed that there were no assessments against the property, and that they would not default in the payment of their obligations against the property. Appellants knew at that time, and were

obligated to so inform the respondents, that they were in default on their mortgage, and in danger of foreclosure.

POINT 3

THE TRIAL COURT ERRED IN DISMISSING RESPONDENTS' CLAIM AS FAILING TO STATE A CAUSE OF ACTION WHERE THE RESPONDENTS HAD SUSPENDED PAYMENTS FOLLOWING DISCOVERY OF APPELLANTS DEFAULT AND RESUMED PAYMENTS TO A COURT APPOINTED RECEIVER.

This court, in *Leavitt v. Blohm, supra,* strongly supported the right of a vendee to at least temporarily discontinue making payments where the actions of the vendor had jeopardized the vendee's equity. The court said:

> "It is to be kept in mind that the obligations of such contracts run both ways. It is true that if the buyer fails to make his payments he can not enforce his rights. By the same token, if the seller fails to meet his commitments, he likewise can not expect the buyer to perform. An important attribute of the ownership of real property, . . . [is] the right of the quiet and peaceable enjoyment of it. She (the vendee) had a right to look to [the vendors] not to leave her vulnerable to being disturbed therein. Her responsibil-

> ity to make payments to them was dependent upon their fulfillment of this duty to her. . . . The [vendee] knew that unless the [vendors] made the payments she was exposed to the risk of a judgment in the suit by the vendors' mortgage."

Respondents ceased making payments to appellants only when it was apparent that their title was in extreme danger owing to appellants' default on the mortgage; they resumed making payments when the court appointed a receiver; respondents' suit was grounded on the fear that their efforts and expenditures would be irrevocably lost to an insolvent seller who would be ultimately unable to convey *any* title at all. Respondents have not even sought recision to avoid the contract; their good faith is further shown by their resumtpion of payments to a court-appointed receiver upon whose integrity, regarding distribution of the moneys paid him, they knew they could rely.

CONCLUSION

Respondents respectfully submit that the trial court correctly dismissed appellants' claim for failure to state a claim upon which relief could be granted, in light of the fact that appellants entered into the contract of sale with full knowledge that their own mortgage on the same property was in default, and of the fact that the subsequent foreclosure of that mortgage deprived them of

any title or right which they might convey; that the trial court erred in dismissing respondents' claim for failure to state a claim upon which relief might be granted, in light of the fact that the Uniform Real Estate Contract executed by and between respondents and appellants had been breached by appellants even at the moment of execution thereof, and at least, prior to the time respondents discontinued making payments directly to appellants. Respondents are entitled to a judgment reversing the dismissal of respondents' claim and for a trial to determine the question of damages.

Respectfully submitted,

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