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Lavell Kemp and Thelma Alice Kemp v. Zions First National Bank : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LaVELL KEMP and THEMA ALICE KEMP, his wife,

Third Party Plaintiffs and Appellants,

vs.

ZIONS FIRST NATIONAL BANK,

Defendant and Respondent.

Case No. 11671

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County Honorable Merrill C. Faux, Judge

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PRELIMINARY STATEMENT

The Third Party Plaintiffs, LaVell Kemp and Thelma Alice Kemp will be referred to hereinafter as Appellants and the Defendant, Zions First National Bank, will be referred to as Respondent. All italics are added for emphasis.

STATEMENT OF KIND OF CASE

This is an action to determine the priority of two separate mortgage liens effecting certain parcels of real property situate in Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

This case was tried to the Court sitting with a jury. At the conclusion of trial, special interrogatories were propounded to the jury, and the Court thereupon entered judgment on the verdict in favor of the Respondent and against the Appellants.

RELIEF SOUGHT ON APPEAL

Respondent asks affirmance of the Trial-Courts judgment.

STATEMENT OF FACTS:

Sometime between September and the early part of November, 1964, Dr. Joseph W. Noble contacted the Appellants for the purpose of purchasing their interest and title in two separate parcels of real property located in the vicinity of Draper, Salt Lake County, State of Utah (R. 63-65). After some negotiations Appellants agreed to sell the said properties, and on the 19th day of November, 1964, executed and delivered a War-

ranty Deed, without restrictions, to the said Joseph W. Noble and Eilene S. Noble, his wife, as joint tenants, relative to the subject property (Ex. 9-P) (R. 71). At the time said Warranty Deed was executed, Appellants knew that Grantees in said Deed were in the process of obtaining mortgage financing from the Respondent with which to obtain funds to purchase the subject properties, and that the said Respondent contemplated a mortgage loan upon said properties as security for said loan (R. 175, 176, 177). On November 20, 1964, the Nobles executed and delivered a Deed of Trust in favor of the Respondent, covering the subject properties, to secure the repayment of a loan in the amount of $35,000.00, evidenced by a Promissory Note of even date (Ex. 19-D, and 20-D) (R. 145, 146, 147, 148). On November 21, 1964, the Appellants called at the office of the Respondent, reviewed a Closing Statement (Ex. 10-D) and affixed their respective signatures to said statement in approval thereof, and thereafter obtained the balance of the monies reflected as due the Seller (R. 91, 92, 164).

In late November 1964, Appellants received in the mail a Promissory Note in the principal sum of $29,000.00 dated *November 30, 1964,* and a mortgage dated *November 20, 1964,* bearing the signatures of the said Joseph W. Noble and Eilene S. Noble (Ex. 7-P and 8-P) (R. 66). When Appellants received the note and mortgage they "just put them away" (R. 67) and failed to record the said mortgage until February 9,

1966, more than fourteen months following the date of receipt of said instruments.

It was not until after the Nobles had defaulted in the mortgage indebtedness in favor of the Respondent that the Kemps called the bank and advised them that they held a "second mortgage" on the property and wanted to know what they should do because they understoood that the bank was foreclosing or threatening foreclosure of its mortgage lien (R. 153). At no time prior thereto had the Appellants or any other party ever given the Respondent notice of any claim or asserted interest of the Appellants nor the fact that any additional sum remained unpaid upon the purchase price of the properties. (R. 153).

The Respondent, to facilitate the closing of its mortgage loan with the Nobles, obtained a Preliminary Title Report from Security Title Company of Salt Lake City, Utah (Ex. 16-P) and utilized said report in the closing of said loan to obtain Deeds of Conveyance and other appropriate documents as evidence of a clear, marketable title in the Nobles (R. 145). Instructions for the preparation of the closing statements were given by the Borrower, Dr. Noble, and all statements of account were made pursuant to the instructions of the Borrower and in conformance with the aforesaid Preliminary Title Report. It was not until after the Respondent had instituted proceedings to foreclose its Deed of Trust that the Appellants came forward and asserted their claim.

ARGUMENT

There can be no argument as to the rules of law applicable in the instant case. Neither can there be any doubt as to the identity of the rules which are determinative of the issues. The Purchase Money Mortgage, considered to be a creature of equity and to be accorded priority, must meet certain standards and requirements. In general, a Purchase Money Mortgage has been defined as:

> "A mortgage given *concurrently* with a conveyance of land, by the vendor to the vendee, on the same land, to secure the unpaid balance of the purchase price." See 6 A.L.R. 1420, Ladd & Tilton Bank v. Mitchell, 93 Oreg. 668, 184 P. 282, 284.

To avoid confusion in dealing with real property, the State of Utah has enacted a statute intended to put at rest the issue of priorities of liens and interests in real property. Title 57, Chapter 1, Section 6 of the Utah Code Annotated, 1953, is the controlling statute on this point. It is therein stated:

> "Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the Recorder of the County in which said real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledg-

ments, certification, or recording, and as to all other persons who have had *actual notice.* * * * (Emphasis added.)

It is stated in 45 Am.Jr., Section 172, RECORDS and RECORDING LAWS, that:

> "The intention of the acts requiring deeds to be recorded is to secure subsequent purchasers and encumbrancers against prior secret conveyances and fradulent encumbrances; and therefore, when a person has notice of a prior convenance it is not a secret conveyance by which he can be prejudiced. It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. As a general rule, an unrecorded deed or other instrument affecting the title to land is valid, therefore, against a subsequent purchaser taking with knowledge or notice of the existence of the instrument; and while this exception is usually the result of construction, yet it is sometimes expressly declared by the statute."

From the foregoing, it is evident that where a recording statute has been enacted, that the same governs in the case of parties who deal with property without *actual notice* of any outstanding or conflicting interest.

A landmark case in point involving issues of the instant case is that of *John Jackson v. W. E. Reid,* 30 Kans. 10, 1 P. 308. The identical issue as to which of two mortgages was entitled to priority was raised in that case. The court there stated that under the circumstances, where the party who had recorded the first and

prior mortgage without *actual notice* of the alleged purchase money mortgage was entitled to priority. The court there stated:

> "In such a case the burden is on the holder of the prior unrecorded mortgage to prove the exceptions named in the section. Prima facie, it is subordinate to the latter recorded mortgage. So it developed upon Jackson to show that Turner had *actual notice.* * * * So far as the registry laws affect the question, a mortgage stands upon the same platform as a deed. * * * The unrecorded instrument, whether deed or mortgage, is void except as between the parties, and those who have *actual notice,* and a party ignorant of an unrecorded instrument may purchase of one holding recorded title or mortgage of interest without fear of being disturbed by the claimant of such unrecorded instrument. Mott v. Clark, 9 Pa. State 399, Wade Notice, Section 262; Choteau v. Jones, 11 Ill. 300; Lightner v. Mooney, 10 Watts, 407. * * * But the fact that a mortgage is given for purchase money, does not place it outside the provisions of the Registry Act or give it priority to which it would not be entitled under said Act."

From the foregoing authority it is of interest to note that the Utah statute on recording appears to contain the same identical language as the Kansas statute.

It is further stated in 59 C.J.S., Section 245, on MORTGAGES:

> "In the absence of a statute or special circumstances taking the case out of the general rule, and in the absence of special equities growing out of questions of notice, good or bad faith, want

of consideration, or the like, the rule of priority as between two independent mortgages on the same property at different times to different mortgages, is that the one first recorded is a superior lien to the other, whether it was executed before or after such other. * * *

Of further interest on the issue of purchase money Mortgages is the language contained in 59 C.J.S., Section 246(b), wherein it is stated:

> "* * * the fact that an unrecorded mortgage is for the purchase money of land will not necessarily give it priority over a later mortgage recorded before the purchase money mortgage; if the holder o fthe purchase money mortgage voluntarily withholds it from record and meanwhile money is lent on another mortgage which is recorded with due diligence, the usual rule will apply and give priority to the mortgage first recorded, and a purchase money mortgage may be subordinated to valid intervening liens acquired without notice that the mortgage was for purchase money for the latter, although recorded, does not recite that it is such a mortgage. A purchase money mortgage is not prior to a previously recorded mortgage of which the holder of the purchase money mortgage had both constructive and actual notice. There is also authority to the effect that a purchase money mortgage is not entitled to priority over a second mortgage which is filed first, although the second mortgagee has notice of the purchase money mortgage."

It is of interest to note that from the testimony adduced in the trial of the instant case, the Kemps did in fact have actual notice of the existence of the mortgage

in favor of Zion's First National Bank, and if not actual notice, they were charged with constructive notice. Unquestionably, the Kemps voluntarily withheld their mortgage from the public record; and under the rules announced in the foregoing authorities there can be no doubt but what the mortgage lien of Zion's First National Bank is entitled to a priority over the mortgage lien of the Kemps.

Another case in point is that of *Farmers & Merchants State Bank of Cawker City v. Higgins, et al.*, 149 Kans. 783, 89 P. 2d 916. In that case the landowner gave a deed of the subject property to his daughter and thereafter gave the bank, for valuable consideration, a mortgage covering the same land without the bank having *actual notice* of the prior deed. The mortgage was filed of record prior to the deed, and the court there sustained the mortgage as having priority under the recording statutes of the State of Kansas, which statute is essentially identical with the statute of the State of Utah. The court there stated:

> "The plaintiff being a purchaser for value without notice the statute gives the mortgage of plaintiff priority of the deed of defendant."

As further authority on the issue, I invite the court's attention to 105 A.L.R. at page 889, where, in discussing the issue of priorities of equitable title against otherwise prior liens of mortgages, it is stated:

> "Appellees assert an equitable title against the otherwise prior liens of the mortgagees. They

thus assumed the burden of showing that the mortgagees had knowledge of their rights at the time they took their mortgages, or that, through appellee's possession, appellants had means of knowledge which they ignored. * * * There is a finding that appellants had no actual knowledge of the rights or possession of appellees. There is no finding that the mortgagees were not good faith holders, without notice and no facts are found which are sufficient as a matter of law to impute knowledge to appellants and therefore appellees did not sustain the burden which was upon them. Under all the facts specially found, the mortgagees must be treated as having taken their mortgage liens in good faith and without notice of appellee's equities."

36 Am.Jur. at Section 209 of MORTGAGES states:

"It is a general rule in equity that where a person having rights, and knowing these rights, sees another person taking a mortgage upon property, without disclosing his title, he shall not be allowed afterward to set up his title to defeat the mortgage. A fortiori, a strong case of estoppel is made out when, by conduct or representation, an owner encourages another to believe that a third person is the owner of land and thereby induces the other to take a mortgage on the property. Similarly, a mortgagee may lose priority because of circumstances which constitute a waiver, or which estop him from asserting such priority. This is particularly true where there is fraud or *negligence* on the part of the mortgagee. Such estoppel may result where the party claiming the benefit of the estoppel was misled

by a specific statement of the party alleged to be estopped."

Section 210:

> "While there are cases in which silence alone is held not to affect the rights of a mortgagee, as a general rule a mortgagee who stands by and sees another lending money on the same estate without giving him notice of his prior mortgage will be held to be estopped from asserting his encumbrance as a prior lien against the party whom he permitted to make the advance of further loan. In such cases it is declared to be inequitable to allow the mortgagee to profit by his own wrong in concealing his claim, thereby lending encouragement to the new loan. The conclusion that the holder of a first mortgage shall be disbarred from asserting his priority is particularly applicable where he was affected with notice that the person who accepted the later mortgage would not have advanced the loan except upon the terms that such loan should constitute a paramount charge upon the property in question."

A review of the testimony and evidence in the instant case conclusively demonstrates that the Kemps by their silence and their conduct have waived any priority of mortgage lien which they now assert; and furthermore, that under the rules of equity they should not now be permitted to reap the advantages and benefits of a first mortgage lien in the light of their conduct of standing idly by and permitting the bank to advance its moneys upon the subject property without disclosing to the bank that they claimed an interest paramount to

that of the bank, or any interest at all. The doctrines of estoppel and waiver seem abundantly available as defenses to the claims of the said Kemps.

A landmark case in the State of Utah involving the identical issue of purchase money mortgage as asserted in the instant case, is that of *State v. Johnson,* 71 Utah 572, 268 P. 561. In that case the issue involved was a determination of priority of two mortgages upon the same tract of land. The court there discussing the matter of purchase money mortgages states:

> "A mortgage for purchase money, to be entitled to preference, must be executed *simultaneously* with the deed of conveyance from the vendor. If an interval of time is left between the two transactions, then preference is lost." There citing 1 Jones on MORTGAGES, Section 583. (Emphasis added).

The court further noted that in that case, where the moneys from the first mortgage had been utilized to pay the vendor, that such a mortgage was as much a purchase money mortgage as the other, and that the equities of the two mortgages were equal. In the light of the facts of the instant case, where the deed of conveyance from the Kemps to the Nobles was dated, executed, and delivered on the 19th day of November, 1964, and the date of the obligation representing the vendor's lien was November 30, 1964, the mortgage securing the same dated November 20, 1964, delivered in late November, 1964, and not recorded until February 9, 1966, there can be no doubt but that under the rule of law in the

Johnson case aforesaid, the mortgage lien of Zion's First National Bank dated November 20, 1964, and recorded December 4, 1964 would, as a matter of law, be entitled to and should be accorded priority over the Kemp mortgage.

36 Am.Jr., Section 231 on MORTGAGES further states:

> "The reason most frequently advanced for the rule giving preference to purchase money mortgage of outstanding interests acquired through the mortgagor is that the execution of the deed and mortageg are *simultaneous acts* so that no claim or lien arising through the mortgagor can attach before the purchase money mortageg. * * * (Emphasis added) (See 117 Kan. 717; 232 P. 1060)

A further statement of the law relevant to the issue involved in the instant case is in Ogden's California Real Property Law, page 650, Section 17.32, wherein it is there stated:

> "A mortgage given by the purchaser to secure a portion of the purchase price of the property covered thereby takes a special priority, i.e., it is superior to all other liens created against the purchaser, *subject to the operation of the recording laws.* * * * (Tolman v. Smith, 85 Cal. 280).

In the case of *Rogers v. Tucker* as cited in 137 A.L.R. at page 572, the purchase money mortgage was accorded priority where the second mortgage to a third person was recorde d prior to the purchase money mort-

gage by the second mortgagee who had knowledge of the existence of the unrecorded mortgage.

Of simliar significance is the case of *Corning* v. *Murray*, 3 N.Y. 652, wherein it was stated:

> "Where parties had knowledge of all the circumstances, subsequently recorded purchase money mortgage had priority as between parties, but a transferee of the mortgage which was first recorded having no notice of existing equities in favor of the purchase money mortgage, had a right to rely upon the record."

It is interesting to note from all of the foregoing authorities that in order for the purchase money mortgage to be entitled to priority, the deed of conveyance and the purchase money mortgage must be executed simultaneously. There must be *actual notice* of the existence of the purchase money lien and the purchase money mortgage must not be withheld from the public record in such manner as to mislead other parties dealing with the subject property.

CONCLUSION

In conclusion, an analysis of the evidence and testimony in this case clearly preponderates in favor of the conclusion that the mortgage of Zion's First National Bank is a first and prior lien, and that the mortgage lien of the Kemps is and should be decreed to constitute a junior and subordinate mortgage against the subject properties.

When we consider that the jury in the instant case, sitting in an advisory capacity to the court, found from a preponderance of the evidence that the Zion's First National Bank did not have *actual notice* of the existence of the Kemp mortgage at any time prior to the recordation of the Bank's lien; and the further admitted fact that the Kemps negligently omitted to disclose their position with reference to the subject property until February of 1966; that the said Kemps accepted the benefits of the mortgage proceeds obtained from the said Zion's First National Bank; and that the mortgage in favor of the said Bank was with due diligence made a matter of public record, and the funds advanced thereon, there can be put one conclusion under the prevailing rules of law as hereinabove announced; and that is, that the mortgage lien of Zion's First National Bank is entitled to preference and priority to the mortgage lien of the Kemps.

Respectfully submitted,

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