

1969

**William L. Pollei and Estrid L. Pollei v. James W. Burger and
Lenore M. Burger : Appellants Brief**

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM L. POLLEI and
ESTRID L. POLLEI, His wife,
Plaintiffs and Respondents,

vs.

JAMES W. BURGER and
LENORE M. BURGER, His Wife,
Defendants and Appellants.

Case No.
11775

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court in and for
Salt Lake County, State of Utah
The Honorable Joseph G. Jeppson, Judge

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APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Defendants, James and Lenore Burger appeal from a judgment in favor of plaintiffs at the conclusion of a trial without jury in the Third Judicial District of Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson presiding.

DISPOSITION IN THE LOWER COURT

Plaintiffs filed a complaint against the defendants in the District Court of the Third Judicial District, Salt Lake County, State of Utah, on the 2nd day of February, 1969.

On the 27th day of May, 1969, prior to the trial of the above-mentioned matter, defendants moved for a dismissal of the action as a matter of law which was denied; A similar motion was entered at the conclusion of plaintiffs' presentation at trial, which was denied without prejudice by the Court. At the conclusion of trial, the Court rendered a verdict in favor of plaintiffs.

On the 16th day of June, 1969, pursuant to Rules 52 (b) and 59, Utah Rules of Civil Procedure, defendants filed Motions to Amend Findings of Fact and Conclusion of Law and Judgment and also moved for a New Trial. The Motions were heard before the Honorable Joseph G. Jeppson on the 15th day of July, 1969 who denied the same.

RELIEF SOUGHT ON APPEAL

The Appellants submit that the verdict of the Court rendering judgment for the plaintiffs should be reversed, and an order entered that defendants are entitled to the relief prayed for in their Answer to Plaintiff's Complaint as a matter of law.

STATEMENT OF FACTS

On May 26, 1962, respondents entered into a Uniform Real Estate Contract with a Paul and Lathel Wurst, which was admitted in evidence at trial as plaintiff's exhibit No. 1. On May 28, 1962, respondents conveyed the property in question by Warranty Deed to the Wursts. Said deed makes no reference to the afore mentioned Real Estate Contract nor to any interests, liens, or encumbrances as pertains to the property conveyed. Rather, the warranty deed was executed and delivered with no reservations. (See plaintiff's Exhibit No. 2). This Warranty Deed was recorded May 29, 1962.

Almost two years elapsed before the filing of the Uniform Real Estate contract on January 4, 1964. On that same date, said contract was purportedly acknowledged, mention of which will be made in appellants' argument for reversal as a matter of law.

The said Wursts sold said property to the appellants by Warranty Deed dated April 28, 1966, which deed made no reference to the Uniform Real Estate Contract between the Respondents and the Wursts. At the time of this conveyance, the Wursts apparently owed money under the terms of said contract of which the appellants had no knowledge whatsoever.

In July of 1967, the respondents obtained a judgment against the Wursts for the balance owing on said contract in the amount of \$3,477.66 together with attorneys fees and costs.

It was not until after the appellants had purchased and taken possession of the property in question that they received notice that the Wursts owed the respondents the money representing the balance due under said contract.

The action from which this appeal is taken resulted with the filing of the respondent's complaint to impress a Vendor's Lien on February 7, 1968, upon the property in question.

ARGUMENT

POINT I

THE RESPONDENTS ARE PRECLUDED UNDER UTAH LAW FROM ASSERTING A VENDOR'S LIEN UPON THE PROPERTY IN QUESTION DUE TO THE FACT THAT THE WARRANTY DEED FROM THE RESPONDENTS TO THE WURSTS, THE APPELLANTS' GRANTORS, WAS EXECUTED AND DELIVERED WITHOUT MENTION OF THE EXISTENCE OF THE UNPAID OBLIGATION ON THE PURCHASE PRICE UNDER THE UNIFORM REAL ESTATE CONTRACT.

The case of **PETERSON v. CARTER**, 11 Utah 2d 381, 359 P. 2d 1055 (1961), a case almost on all fours factually with the case at hand, unanimously held, that in a suit to impress a vendor's lien on prop-

erty purchased by third parties from the vendee, that because the vendor-plaintiffs executed and delivered Warranty Deeds to the vendee that made no mention of an existing and unpaid obligation by virtue of a RECORDED contract, that the plaintiffs were precluded from asserting said Lien.

The court further stated that the Plaintiffs in that action had waived any claim to a vendor's lien due to their failure to make mention of the same in the Warranty Deeds plaintiff executed to the defendant's grantors. The court specifically made reference to and relied upon Utah Code Ann., 1953, 57-1-12 where it is stated that:

"Any exceptions to such covenants may be briefly inserted in such (Warranty) deed following the description of the land." Examination of plaintiff's Exhibit No. 2, the warranty Deed in question, reveals there is absolutely no mention of any Lien following the description.

This court in the PETERSON case went further to reject the argument made that the fact that the contract was recorded should have given notice of the unpaid obligation on the purchase price. In dicta this court said that if any notice were given by the recordation of the contract, "it was to the effect that would lead a reasonable person to believe and assume that all sums due under the contract had been paid and that all the covenants inuring to the benefit of the plaintiff's had been performed; and that if not, it was plaintiff's

own failure to protect themselves, and they had waived any claim to any real or illusory vendor's lien." **PETERSON v. CARTER**, 359 P. 2d at 1057.

Impliedly, this Court held that the purchasers of the property were bonafide purchasers who purchased in good faith without notice of any encumbrances and were therefore entitled to take free of the existing lien. See also 2 Jones on Liens, 2d Ed., 1084, P. 27, which states that ". . . A Recital NOT in a Deed under which a subsequent purchaser claims title will not bind him." (Emphasis added)

Thus, the fact that, in this case now before the bar, the contract was filed after the warranty deed was recorded is irrelevant. Subsequent purchasers need only look to their grantor's deed. To hold otherwise in this case would result in the ludicrous situation that a vendor, who fails to promptly record his contract, but rather does so two years subsequent to his conveyance by Deed, would prevail.

In light of the above principles and well-settled Utah law on the subject, the lower court in this case now before the bar was clearly in error in rendering its verdict for the respondents.

POINT II

THE FACT THAT THE UNIFORM REAL ESTATE CONTRACT WAS RECORDED DID NOT CONSTITUTE CONSTRUCTIVE NO-

TICE DUE TO THE FACT THAT SAID CONTRACT WAS DEFECTIVELY ACKNOWLEDGED.

The plaintiff's own testimony, see Record, page 45, line 3, discloses the fact that the defendants never received *actual* notice of the unpaid obligation in question. Also, no mention of *actual* notice is made in the plaintiff's findings of Fact and Conclusions of law, pages 18 to 21 of the record. Thus, the question turns on whether the recorded Real Estate Contract constituted constructive notice.

Plaintiff's exhibit No. 1, the contract in question, reveals that the respondents, William L. Pollei and Estrid L. Pollei, signed as the Sellers and that Paul R. Wurst and Lathel Wurst signed as Buyers. But the acknowledgment by the Notary Public, a Helen R. Fife, *only acknowledged the signatures of the Sellers*, the Polleis. Nowhere are the signatures of the Buyers, the Wursts ever acknowledged on the face of the contract.

Utah Code Ann., 1953, Sec. 57-1-6 requires that in order to entitle an instrument to recordation and thereby constitute constructive notice, a proper acknowledgment is required. Conversely, "An instrument defectively executed or acknowledged is not entitled to recordation and its record is not constructive notice." C.J.S., Vendor & Purchaser, ss 341, p. 265.

The acknowledgment is defective in other aspects

as well. The Record, page 50, lines 27-30, reveals that one of the plaintiffs, Mr. William L. Pollei, never knew, talked with, or was familiar with the officer taking the acknowledgment, Helen R. Fife. Thus, when the grantor is *unknown* to the acknowledging officer, Utah Code Ann., 1953, Sec. 57-2-8, specifically requires a particular form of acknowledgment, a form which was not followed on the Real Estate Contract.

The cases are legion and the law is well-settled that defectively acknowledged instruments do not impart constructive notice. 1 Am Jur 2d, Acknowledgments, Sec. 90, p. 505; 59 ALR2d 1309, Sec. 9.

POINT III

BY VIRTUE OF CERTAIN ACTIONS TAKEN BY RESPONDENTS DURING THE TRANSACTION IN QUESTION, THEY ARE ESTOPPED, PRECLUDED AND HAVE WAIVED ANY CLAIM TO A VENDOR'S LIEN.

Plaintiffs exhibit No. 2, the Warranty Deed from the Plaintiffs-Respondents to the Wurst, the Defendants'-Appellants' grantors, as has been previously mentioned, contains no reservations whatsoever of the claimed Vendors Lien. There is, however, a recital of Ten (\$10.00) Dollars as being the consideration for the conveyance. But the law on this aspect is well-settled:

“Where the deed recites payment of the consideration, the vendor cannot enforce his vendor's

lien for the purchase money which is in fact unpaid, as against a subsequent purchaser who was ignorant at the time his conveyance was executed that the purchase money was unpaid." C.J.S. Vendor & Purchaser, Sec. 401, p. 344.

Another action taken by the respondents as revealed by the complaint, at page 2 of the Record, paragraph 4, constitutes a waiver of the claimed Lien. Said pleading states that the plaintiffs give the warranty deed, plaintiffs exhibit No. 2, to the Wursts, appellants' grantors, for the purpose of effectuating the obtaining a mortgage from Zions First National Bank (See plaintiffs exhibit No. 3). However, the law is settled that:

"A conveyance by the vendor for the avowed purpose of enabling the vendee to mortgage the property in order to obtain money for payments due the vendor in order to obtain money for payment due the vendor evinces an intention to rely on an express pledge of the hand and constitutes a waiver of the vendors implied Lien." C.J.S. Vendor & Purchaser, Waiver, Sec. 409, p. 352.

Furthermore, the mortgage itself states that the holder thereof, Zions First National Bank, is the First Mortgagor which further undermines the Respondents' argument that a prior Lien existed on the property.

CONCLUSION

The appellants in this action purchased bona fide from a fraudulent purchaser, by virtue of the fact that they had no actual or constructive notice of the exist-

ence of any claim by the respondents to a Vendors Lien. Being bonafide purchasers, the appellants must prevail in this appeal. The Respondents failed to protect their Lien by numerous omissions and actions as has been previously mentioned and should be precluded from now asserting any claim against the appellants.

In view of the above foregoing facts and well-settled precedents and principles of law, appellants respectfully submit that the lower court should have upheld defendants' motion for dismissal as a matter of law, or found in favor of the defendants at the conclusion of the trial.

This court should reverse the decision of the lower court for relief in accordance herewith.

Respectfully submitted,

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