

1969

William L. Pollei and Estrid L. Pollei v. James W. Burger and Lenore M. Burger : Respondents 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

RESPONDENTS' 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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RESPONDENTS' BRIEF

FURTHER STATEMENT OF FACTS

The facts surrounding the acknowledgment of Exhibit P-1 are not recited in appellants' statement of facts but at pages 7 and 8 of appellants' brief.

Exhibit P-2, the warranty deed, was acknowledged by Ruth I. Smith on May 28, 1962, and the mortgage to Zions Savings Bank (Exhibit P-3) was acknowledged the same date by the same person. The Uniform

Real Estate Contract dated May 26, 1962 was acknowledged January 7, 1964 before Helen R. Fife.

Mr. Pollei testified that he was in Elko when the contract was signed as it was just a formality with him, and he doesn't know Helen Fife (R-50). He further testified that it was he who had the Uniform Real Estate Contract recorded in January 1964 and that he was present when the notary signed it (R-51). He also testified that the property prior to sale was in the name of his wife (R-50).

Mrs. Pollei testified at first that Helen Fife was at the bank (R-47), that the contract was signed at the bank with the Polleis and Wursts all present (R-48). Upon further questioning she testified that Helen Fife is secretary to Peter Lowe and that she and her husband went there to have the contract acknowledged (R-48) and that Des Townsend and Verda Lynn sent them there (R-50).

ARGUMENT

Point 1. Are the respondents precluded under Utah law from asserting a vendor's lien?

Point 2. Was there a defective acknowledgment of the contract?

Point 3. Are plaintiffs estopped to assert or have they waived a vendor's lien?

Point 1. Are the respondents precluded under Utah law from asserting a vendor's lien?

The contract (Exhibit P-1) provides:

“The Buyers shall obtain a \$25,000 loan from Zion's First National Bank and apply the net proceeds therefrom to the purchase of this property. The Buyers shall assign a \$10,000 contract known as the Lawrence R. Grover contract to the Sellers. The balance of \$5,000 shall be paid at the rate of \$56.15 per month beginning on July 1, 1962, and on the first day of every month thereafter until fully paid.”

This plainly provides that a first mortgage must be given to Zion's First National Bank and that the balance is to be paid in two different ways, by assignment of a contract which is the equivalent of a payment of \$10,000 with a final balance of \$5,000 to be paid monthly.

To carry out this contract a warranty deed was given immediately (Exhibit P-2) and simultaneously with the mortgage to Zion's First National Bank (Exhibit P-3), both dated May 28, 1962, and recorded May 29, 1962. Then the vendees made the payments of \$56.15 per month until in 1964 there was some difficulty about collection (R-40, 41). The real estate contract was then recorded upon the advice of an attorney and a real estate broker (R-42, 50), and then payments continued until 1966 (R-40), appellants having purchased the property in April 1966 (Exhibit P-8). The District Court held that the plaintiffs had a ven-

dor's lien of which the defendants had constructive notice through recordation and that plaintiffs were entitled to foreclosure of their lien (R-20, 21).

Existence of a vendor's lien is recognized in 92 CJS, Vendor and Purchaser, §396 and §401, the latter citation in paragraph (b) (2) says in part:

“Where a conveyance or purchase-money note reserving a vendor's lien is recorded, a subsequent purchaser takes with notice of the implied lien. Where an instrument executed by the purchaser showing that he withholds a portion of the purchase price, is recorded, a subsequent purchaser takes with notice of the lien.”

45 *Am. Jur.*, Records, §87, p. 469 is similar.

Vendor's lien is recognized in *Bell v. Jones*, 104 Utah 306, 139 P2d 884, and in *McMurdie v. Chugg*, 99 Utah 403, 107 P2d 163, 132 ALR 440; and in *Peterson v. Carter*, 11 Utah 2d 381, 359 P2d 1055, cited by appellants.

In *McMurdie* (supra) vendors made an agreement to sell property to Chugg and thereafter executed a warranty deed conveying the property, leaving part of the purchase price unpaid and evidenced by promissory notes for the balance due under the contract. Vendor's administrator brought the action to foreclose the vendor's lien as having priority over claim of homestead by the Chuggs and the court held the vendor's lien to be valid.

Peterson v. Carter (supra) does not deny the exist-

ence of a vendor's lien, but simply holds that the vendor was precluded from asserting liens of the vendor where the vendor and vendee had gone into a joint undertaking with the land, the vendor controlling the funds which were due him and he disbursed them to others and then sought to hold the vendee.

In *Larson v. Metcalf*, 201 Iowa 1208, 207 N.W. 382, 45 ALR 344, the court recognized the vendor's lien against a subsequent purchaser, holding that the lien "follows the property sold into the hands of the heirs, and even future vendees with notice," which notice can be either actual or constructive.

The recording of the Uniform Real Estate Contract was more than two years before purchase of the property by the defendants-appellants. Such recordation, under Section 57-3-2 U.C.A. 1953

" * * * shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice."

Point 2. Was there a defective acknowledgment of the contract?

The plaintiffs, who gave the acknowledgment on the uniform Real Estate Contract (Exhibit P-1), were the vendors and were the claimants of the lien, or in the position of equitable mortgagors. Section 57-1-6 U.C.A. 1953 provides in part:

“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 such real estate is situated, * * * ”

The form of acknowledgment is established by Section 57-2-7, which was used by the notary on Exhibit P-1.

It is true that an alternate form is established by Section 51-2-8 where the grantor is unknown to the officer, but appellants adduced no facts to establish those facts. Mr. Pollei said he didn't know Helen Fife (R-50) ; but Mrs. Pollei knew her (R-48, 50) and there was no testimony that Helen Fife did not know both of the Polleis. It is the notary's lack of acquaintance with the signers and not the lack of acquaintance of the signers with the notary which permits the use of the alternate form.

There are no facts in this case which bring it within the authority cited by appellants in their brief on page 8.

Point 3. Are plaintiffs estopped to assert or have they waived a vendor's lien?

In *McMurdie v. Chugg* (supra) this court stated:

“It is a well-established rule of law that a vendor does not waive his vendor's lien for the

purchase price simply by taking the vendee's own personal note for the amount due. If the vendor accepts the obligation of a third party or if he expressly waives his lien it may be extinguished but the taking of the personal unsecured promissory note of the buyer cannot be held to be a waiver of the lien."

At 55 *Am. Jur.*, Vendor and Purchaser, §338, p. 767, it is stated:

"Contractual provisions as to the consideration to be paid by the purchaser are ordinarily not merged in the deed, and accordingly, evidence of such contractual provisions is admissible to show what consideration is to be paid by the purchaser although a deed has been accepted. In case of deeds, the recital of the consideration is not conclusive as regards the actual consideration, and it may be shown by oral evidence that a different or greater consideration was agreed to be paid."

It is also stated in 55 *Am. Jur.*, Vendor and Purchaser, §462, that existence of an action at law to recover the purchase price does not preclude an equitable action to establish a vendor's lien. In their action against the original vendees the plaintiffs in no way released the vendor's lien, which had been recorded two years after the giving of the original warranty deed. It appears that in this case the appellants' title examiner simply failed to pick up the recordation of the real estate contract (see testimony of Larsen of McGhie Land Title Company, R-59, 60, Exhibit D-10 as of 5 1 66). Plaintiffs acted promptly by notifying the

appellants promptly of the existence of the lien when the appellants moved into the property (R-45-46, 51-52, and Exhibit P-5).

The authorities cited by appellants at pages 8 and 9 are not applicable where the contract, as it does in Exhibit P-1, recites that following the raising of \$25,000 on a first mortgage and acceptance of \$10,000 as a payment in the form of assignment of other interests with a balance of \$5,000 to be paid monthly, showing the limited purpose of the deed and that there is unpaid money due the vendor over a period of three years.

No facts suggest any waiver or relinquishment of the vendor's lien. Without releasing the property the plaintiffs tried in vain to collect the money from the original vendees. There is no evidence that this prejudiced defendants in any way.

Plaintiff-respondents pray for affirmance of the Judgment and Decree of the District Court.

Respectfully submitted,

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