

1970

**William L. Pollei and Estrid L. Pollei v. James W. Burger and
Lenore M. Burger : Petitin For Rehearing**

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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. : Case No. 11775

JAMES W. BURGER and LENORE M. :
BURGER, his wife, :

Defendants and :
Appellants. :

PETITION FOR REHEARING

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In support of this petition respondents submit the following brief argument with citation of authorities:

1. THE VENDOR'S LIEN WAS KEPT ALIVE IN THE WURST ACTION.

In the Court's opinion reference is made in the fourth paragraph to the action which the Polleis brought against the Wursts in which they attempted to collect the balance owing on the contract, whereas in the present action the Polleis are seeking foreclosure of the vendor's lien on the property, as to which the opinion observed: "a theory not asserted against the Wursts in the previous action. Nor did Polleis join the defendants Burger in the Wurst action by virtue of any such theory or cause of action."

Since the Wurst pleadings were not before the Court in connection with this argument but they were before the District Court, that file has been requested

and is now available to this Court as a matter of judicial notice. In the trial of the Burger action counsel for the Polleis asked the Court to take judicial notice of the file in the Wurst action which was Case No. 166302. Counsel for the Burgers were asked if they had any objection and stated that they had "no objection." Thereupon the Court stated: "The Court will take judicial notice of the file referred to." (Tr. 43). The lis pendens filed in connection with the Wurst action was also offered in evidence and was made Exhibit 6 in the principal action (Tr. 44). As to the reason for these documents counsel stated: "I don't know there is any particular grounds made of the circumstances of this action. Under the pleadings I am not sure what they claim as to their grounds of waiver, and that is why I am including this complaint, and the lis pendens." and thereafter no point

was made of waiver and we assumed the matter was taken care of, except that it was revived by this Honorable Court in its opinion.

Examination of that file discloses that in Paragraph 8 of the complaint the Polleis specifically pleaded that they had retained an interest as vendors "and are entitled to have a vendor's lien declared junior only to the first mortgage as security for the payment of the accruing installments." and in the stipulation for judgment in that action it was stipulated specifically that the judgment left open and unprejudiced the right of the plaintiffs against subsequent purchasers of the property in the event defendants failed to pay the judgment and also any rights which the subsequent purchasers might have against the Wursts if the Wursts failed to pay the judgment. We suggest that this is important not only as negating the waiver, but as indicating that

the Burgers might well have a cause of action against the Wursts for breach of warranty, or even for fraud which would survive bankruptcy, if the Wursts failed to pay the judgment.

The notice of lis pendens which was filed with reference to action No. 166302 and which is Exhibit 6 in the action at bar specifically stated that the Polleis claim "a vendor's lien for unpaid purchase price."

And as further evidence that there was no waiver or abandonment insofar as the Burgers are concerned Exhibit 5 was put in evidence in the case at bar, which the Burgers acknowledged receiving (Tr. 43, 54, 59) which letter was dated May 12, 1966, only fourteen days after the warranty deed from Wursts to Burger by which the Wursts were advised, with certified mail

copy to the Burgers, that unless the monthly payments were made the interest of the Wursts (and the Burgers) in the property would be forfeited.

2. A WARRANTY DEED ABSOLUTE IN TERMS DOES NOT PRECLUDE A VENDOR'S LIEN.

The existence of a vendor's lien after giving a warranty deed is established by this court in McMurdie v. Chugg, et al., 99 Utah 403, 107 P2d 163, 132 ALR 435. There Anderson, the vendor, agreed to sell to the Chuggs for \$3,500.00 certain property. The Chuggs paid a part of the purchase price and gave notes for the balance, whereupon Anderson executed a warranty deed in 1929. In 1933 the parties agreed that \$440.00 was still due and the Chuggs then gave two unsecured promissory notes for \$140.00 and \$300.00 providing for attorneys fees upon collection action. Anderson died in 1939 and McMurdie was appointed

administrator and brought the action. The plaintiff obtained judgment, but it was held that there was no vendor's lien. The plaintiff appealed contending that the vendor's lien persisted and was not cut off by the defendants' claim of homestead and had not been waived or abandoned.

This court had before it first the question of the validity of a statute providing for execution of the purchase price against a homestead and secondly, "whether a seller retains his vendor's lien on land until he is fully paid even though he takes promissory notes in the amount of the unpaid purchase price." This court upheld the vendor's lien despite the giving of the notes, but held that the attorneys fees provided in the replacement notes were inferior to the claim of homestead, saying:

"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."

The court also relied on Harris v. Larsen, 24 Utah 139, 66 Pac. 782, where acceptance of a number of hogs as a part of the purchase price was held not to extinguish or be a waiver of a vendor's lien.

In the annotation at 132 ALR following the reprinting of the McMurdie case appears this statement:

"The general rule is that where a vendor of property takes no other form of security than the vendee's own note, bond, covenant, bill or other promise, as a recognition of the amount owing on the purchase price, his vendor's lien remains in full force, and is not waived or

discharged, unless an intention to the contrary is expressed or clearly evidenced from the circumstances."

The court cites Petrofesa v.

D. & R.G.W.R. Co., 110 Utah 109, 169 P.2d 808

as somehow indicating that a vendor's lien does not survive a warranty deed. It holds that a water right is an appurtenance and is conveyed by a statutory warranty deed. No vendor's lien was involved in that case and we respectfully submit that McMurdie expresses the law in Utah that the giving of a warranty deed does not preclude the existence of a vendor's lien. This rule is amply supported by the other cases cited herein.

The court also refers to Peterson v. Carter, 11 Utah 2d 381, 359 P.2d 1055 which was discussed by both appellants and respondents in their briefs. The Peterson case recognizes the existence of a vendor's

lien following the giving of a warranty deed, but goes off on the question of waiver and estoppel for the reason that the vendor handled the funds arising from the later sale of the properties involved and had ample opportunity to discharge the vendor's lien which it failed to do. The court concluded its opinion in Peterson by saying:

"* * *it was plaintiffs' own failure to protect themselves, and that they had waived any claim to any real or illusory vendor's lien."

3. THE POLLEIS DID NOT WAIVE THEIR VENDOR'S LIEN.

There was no waiver by the Polleis in this case by abandonment of the vendor's lien in failing to mention it in the action brought against the Burgers, because the complaint there plainly recites the vendor's lien in paragraph 8.

The intention of the Polleis to assert the vendor's lien was also plainly

evidenced by Exhibit 6 which was a lis pendens claiming vendor's lien in the Wurst (or first) action.

According to the authorities, agreeing that part of the purchase price would be paid by a mortgage on the property itself, is not a waiver of the vendor's lien as to the unpaid portion of the purchase price, which is admittedly inferior to the mortgage lien:

"Where the vendee mortgages the property in order to obtain money for part payment of the price, of which the vendor had knowledge, such mortgage does not waive or destroy the vendor's implied lien, in the absence of conduct on the part of the vendor showing an intention otherwise * * *." 92 C.J.S., Vendor and Purchaser, § 409, page 353.

The note cites two Florida cases and an Indiana case and the supplemental annotations cite a North Dakota case.

In Koppinger v. Implement Dealers
Mutual Insurance Co. (North Dakota 1963),
122 N.W.2d 134, a vendor's lien was established
by statute, with no reference to the giving
of a deed, which was done.

"The evidence shows that the
Candeels, with Koppinger's
consent, executed a mortgage
and obtained a loan of \$2,700.00
on the premises. It is argued
that this act on the vendor's
part constituted a waiver of
the vendor's lien that completely
extinguished it. This is clearly
not the case. The effect of the
consent was to waive the priority
of the vendor's lien so that it
became subject to the mortgage.
It did not destroy the lien. * * *

"At the time the sale was made,
there remained of the purchase
price the sum of \$1,500.00 that
the buyer was obligated to pay
the vendor. This sum was
unsecured and evidenced by the
personal note of the buyer. Under
the provisions of Section 35-20-01,
N.D.C.C. the vendor had a statutory
lien on the property sold for that
amount. The lien was not extin-
guished by the mortgage given
by the buyer with the consent
of the vendor, although the

priority of the lien was
waived as to that mortgage."
Pages 136, 137.

There is a similar holding in Old First
National Bank & Trust Co. v. Scheuman, 13
N.E.2d 551, 214 Ind. 652, 119 ALR 1165.

In that case there was a contract for payment
of the purchase price on a tract of land
with provision for a mortgage following
the giving of a deed which did not reserve
a vendor's lien, and also with provision
for outside security as to part of the
debt as well as inclusion of some personal
property with the real estate. The court
carefully considered all of these as claimed
waivers of the vendor's lien, noting that
the burden was on the vendee to repel the
presumption and held that the vendor's
lien was not waived. At page 557 of 13
N.E.2d the court considered the agreement
to apply for a loan on the premises as
to which it said:

"But we do not think that this fact would amount to a waiver of the lien. There is no evidence that any mortgage was ever given on the real estate described except the mortgage existing at the time of the sale. The waiver, if any, would only be the extent of the mortgage made and would not take effect unless the mortgage was in fact made." (citing authorities)

The court cited Jones on Liens, Vol. II, paragraph 1079, as saying that if a mortgage had been given the "lien will still attach to the equity of redemption of the vendee, and upon the surplus."

In Patton v. Meddick, 122 S. 710, 97 Fla. 1073, the court thus refers to the vendor's lien at page 711:

"It is a right given to the vendor of land who has conveyed title and reserved no lien nor taken security for the purchase price other than the grantee's personal obligation where the rights of others are not injured and it is equitable to sustain the lien. Even where the vendor knew that the purchaser borrowed money to make a payment and gave a mortgage to secure the loan, such transaction does not destroy

or waive the vendor's lien where no conduct of the vendor causes a waiver. Even where by direction of the purchaser the title is conveyed to another, the vendor's lien follows the land without any special agreement."

In McGreevy, et al. v. Constitution Life Insurance Co. (District Court of Appeals), 47 Cal. Rptr. 711, the court considered the persistence of a vendor's lien in a complicated sale involving part cash, a promissory note, part out of oil royalties and part out of stock to be sold from a public offering, followed by an agreement for production of part of the price from a mortgage of the oil and gas leases involved. The court proceeded on the assumption that the vendor's lien is presumed to exist and that the vendee has the burden of showing that the vendor intended to waive his lien:

"Upon the transfer of title of

any real property, the seller has a vendor's lien for so much of the price as remains unpaid. (Civ. Code, paragraph 3046.) A bona fide purchaser or encumbrancer for value takes precedence over the seller's lien. But, otherwise, the lien is good, unless it has been waived. (Citing cases) A waiver may be affected without the observance of any particular formality. But the burden of proof is upon anyone who claims that a waiver has taken place. Any action which shows an intent by the seller to waive the vendor's lien, such as taking independent security for the payment of the balance due for the land, or entering into an agreement which shows by its terms that the seller desires to waive the lien, is sufficient to establish the right of later lien holders to rely upon their security as prior to the vendor's lien."

A case similar to the case at bar was Johnson v. Fugate (Okla. 1956) 293 P.2d 559, 55 ALR 2d 1115. A parcel of land was sold for \$8,000.00 of which \$6,000.00 was produced by a mortgage given by the purchaser following the giving of the deed by the vendor, which deed made no reference

to a vendor's lien. The question before the court was whether the vendor's lien survived the deed and the mortgage and was prior to the mortgage. The District Court held that the vendor's lien was prior to the mortgage, which decision was reversed by the Oklahoma Supreme Court which decreed that the defendant's mortgage lien was "prior and superior to the lien asserted by plaintiff for the unpaid balance of the purchase price." (Page 1118) This case in 55 ALR 2d is followed by an annotation at page 1119 considering "priority as between vendor's lien and mortgage or deed of trust to third person furnishing purchase money." The conclusion of the annotation is that priority depends on the circumstances of each particular case, but all recognize that the vendor's lien survives the giving of a mortgage to the purchaser which furnishes part of the purchase price.

CONCLUSION

Respondents submit that Utah recognizes a vendor's lien which survives the giving of a warranty deed. The authorities hold generally that such a vendor's lien persists when the purchaser mortgages the property and uses the proceeds to pay part of the purchase price. The question of priority as between Zions First National Bank and the vendor does not arise in this case, since the vendors concede priority to the mortgage.

The conduct of the Polleis has been consistent only with the maintenance of the lien and in the conduct of their litigation they have carefully preserved the claim of lien and at the same time have preserved for these defendants a possible cause of action against the original purchasers who became judgment proof or under their

title insurance. (Tr. 54)

The court is urged to grant a rehearing from its decision of January 20 in view of the nonwaiver of the vendor's lien which is shown by the pleadings in the Wurst action now brought before the court and before the District Court by consent of all the parties. The claim of waiver was not urged in the District Court, presumably because the facts showed that there had been no waiver. The matter of waiver was not urged upon this court by appellants and for that reason the file in the Wurst action was not previously made available to this court.

Respectfully submitted,

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