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Blair Enterprises, A Utah Corporation v. M-B Super Tire Market, Inc., A Corporation, Alvin I. Smith, And Tom N. Soter : Respondent's Brief On Appeal

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Irwin Arnovitz ; Attorneys for Respondents

In The Supreme Court of the State of Utah

BLAIR ENTERPRISES,
a Utah corporation,
Plaintiff-Appellant,

vs.

M-B SUPER TIRE MARKET, INC., a corporation,
ALVIN I. SMITH and
TOM N. SOTER,
Defendants-Respond[illegible]

Respondent's Brief [illegible]

Appeal from the Summary [illegible]
Third District Court for [illegible]
Honorable Marcellus K. [illegible]

IRWI[illegible]
OF AR[illegible]
& NIE[illegible]

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In The Supreme Court of the State of Utah

BLAIR ENTERPRISES,
a Utah corporation,
Plaintiff-Appellant,

vs.

M-B SUPER TIRE MARKET, INC., a corporation, ALVIN I. SMITH and TOM N. SOTER,
Defendants-Respondents.

Case No. 12590

Respondent's Brief On Appeal

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Appellant brought this action for rescission (Appellant's Brief, Page 4) of a Real Estate Purchase Contract that it, as Seller, had entered into on March 1, 1965, with the M - B Super Tire Market, Inc., hereinafter referred to as M - B, as Buyer. On July 12, 1968, M - B assigned its Buyer's interest in that Contract to Respondent Smith. Under the Contract, no payment or performance by the Buyer is required until March 1, 1975. (R-8).

The basis for the rescission action is stated by the Appellant on Page 4 of its Brief in these words: "The Appellant not desiring to have the property (described in the real estate contract) encumbered by said Agreement until 1975, brought an (this) action, invoking the equity jurisdiction of the trial court for an order rescinding the Agreement on the basis of the impossibility of Respondent (meaning M - B Super Tire Market, Inc.) meeting its obligations and declaring that the Respondent, Alvin I. Smith, had no interest in the real property by virtue of his assignment inasmuch as his assignor had no mortgagable interest."

Appellant omitted reference in his Brief to a basis pleaded by it in Paragraph 7 of its First Cause of Action (R-1) that the assignment contract, Exhibit B, is of no force and effect because of the provisions of subparagraph b of Paragraph 3 of the assignment contract, which reads:

(R 2)

> "b. That the Assignee shall have the right to perform said contract as Buyer but does not assume the obligation imposed on the Buyer or on the guarantor to pay the purchase price."

Apparently Appellant has abandoned this basis for rescission as well as the basis of "the impossibility of the Buyer, M - B, meeting its obligations" since it fails to argue either point in its Brief.

A further contended-for legal basis for the relief sought by Appellant was not pleaded, but is a theory developed by the Appellant's counsel during the hearings on various Motions, and urged orally and in the Briefs addressed to the District Court. That is the sole basis now argued by the Appellant. That point is stated by the Appellant as follows: (Page 4 of Appellant's Brief):

> "THE TRIAL COURT ERRED IN FINDING THAT THE 'ASSIGNMENT' FROM M - B SUPER TIRE MARKET, INC., WAS A VALID, LEGAL AND EFFECTIVE ASSIGNMENT OF SAID CONTRACT, WHEN THE FACTS SHOW SAID ASSIGNMENT TO BE A MORTGAGE."

Appellant prays that the Contract and the Assignment be rescinded and be declared to be of no force and effect, that is, that the rights of the Buyer under the Contract now assigned to the Respondent be declared to be forfeited.

Respondent Smith does not contend that he has an interest in or a lien upon real property of the Appellant, but only that he has a right to perform the terms of the contract assigned to him by M - B. This appears from the prayer of Respondent's counterclaim (R-31), which is as follows:

"Defendant prays:

(a) That an order of the Court be made and entered declaring said real estate contract, Exhibit 'A', in full force and effect and that by virtue of said assignment, Exhibit 'B', he has title thereto (that is the Buyer's right in the purchase contract) with the right to perform the provisions thereof."

UPON THE PLEADINGS BEING CLOSED, RESPONDENT MOVED THE COURT FOR JUDGMENT ON THE PLEADINGS IN FAVOR OF RESPONDENT ON HIS COUNTERCLAIM UPON THE GROUND THAT ON THE UNDISPUTED FACTS APPEARING FROM THE PLEADINGS, RESPONDENT SMITH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. (R-38).

DISPOSITION OF CASE IN LOWER COURT

The judgment of the District Court (R-94) in favor of Respondent Smith, is that the contract is in full force and effect and that the assignee has the right to perform the contract. Respondent seeks affirmance of that judgment.

STATEMENT OF FACTS

We agree with Appellant "that the facts are quite simple and generally uncontested" (bottom of Page 2 of Appellant's Brief). We also agree with Appellant's statement of the facts, as it sets them out on Page 3 of its Brief, but not with the conclusions in the last sentence of the first paragraph. However, two matters must be pointed out:

First, Appellant's quotation of the inducement clause of the "Assignment of Contract" should be supplemented by Paragraph I of the provisions of the contract, which reads: (R-15, 16)

> "1. That the assignor, in consideration of the payment of Ten and no/100 Dollars ($10.00), and other good and valuable consideration, the receipt of which is hereby acknowledged, assign(s) to the assignee, all its right, title and interest in and to the above described property *as evidenced by the aforesaid Uniform Real Estate Contract, dated March* 1, 1965, *concerning the above described* property." (Emphasis ours)

Second, of the last two sentences of the first paragraph of the Statement of Facts, there is only one fact stated, namely, "at the time of the purported assignment, the assignor had paid nothing on said contract", the rest of those two sentences state conclusions of law with which we do not agree.

A concise statement of the facts is that Appellant, as Seller, and M - B, as Buyer, entered into a Real Estate Purchase Contract in the general form of the Uniform Real Estate Contract form in general use in this state. The contract requires no down payment and no performance of the Buyer until March 1, 1975. The Buyer, M - B, assigned all its rights under that contract to Respondent Smith. No payment has been made by the Buyer or the assignee of the Buyer, the Respondent.

The facts stated in Paragraphs 8 and 9 of the First Cause of Action do not concern the matter on appeal. Those paragraphs are pleaded as against the Defendant Tom M. Soter, in order to wipe out another option that had been given by M - B to Soter and to clear that cloud on Appellant's title.

ARGUMENT

Point I.

APELLANT APPARENTLY TAKES NO ISSUE WITH THE PROPOSITION THAT THE REAL ESTATE CONTRACT AT THE TIME OF EXECUTION WAS A VALID CONTRACT.

Appellant, in its Brief, page 4, states that it brought this action invoking the jurisdiction of the trial court for an order *rescinding the agreement on the basis of the impossibility of Respondent meeting its obliga-*

tions and thus acknowledges that the contract was valid 'Ab Initio'. Appellant is seeking a forfeiture of the contract, but there is no breach of any provision of the contract on which a forfeiture can be based.

Point II.

THE BUYER, M - B, HAS MADE A VALID ASSIGNMENT OF THE CONTRACT TO RESPONDENT SMITH. A PROVISION IN THE ASSIGNMENT THAT THE ASSIGNEE DOES NOT ASSUME THE OBLIGATIONS OF THE CONTRACT TO PAY THE PURCHASE PRICE DOES NOT INVALIDATE THE ASSIGNMENT OF THE CONTRACT.

Appellant pleaded that the "Assignment of Contract" did not transfer to the assignee the rights of the Buyer for the reason that it contains the following provision (R-16), Subparagraph (b) of Paragraph 3, which reads as follows:

> "That the assignee shall have the right to perform said contract as Buyer, but does not assume the obligations imposed thereunder on the Buyer, or on the guarantor, to pay the purchase price."

The legality and validity of the assignment of the equitable interest to Smith is supported by the following authorities:

4 *Am. Jur. Paragraph* 2 229

"Assignment is ordinarily limited in its application to transfer of intangible rights, including x x x rights in or connected with property as distinguished from the property itself."

American Law Institute Restatement, Contracts 151

"A right may be the subject of effective assignment unless (a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance, or (b) the assignment is forbidden by statute or by the policy of the common law, or (c) the assignment is prohibited by the contract creating the right."

92 *C J S* 194 *Paragraph* 311 (*b*)

"On an assignment of a contract for the sale of land by the purchaser the equitable title of the purchaser passes to the assigned. The title acquired by the assignee under the assignment is vendible. The assignment creates a privity of *estate* between the assignee and vendor, but does not in the absence of agreement, create a privity of *contract*."

The fact that the assignee of the Buyer specified

that he was not assuming the obligations in no way invalidates the assignment, because such a provision merely restates General Applicable Law.

4 *Am. Jur. Paragraph* 102, *Page* 310

> "It is a general principle that an assignment of a contract does not operate to cast upon the assignee liabilities imposed by the contract on the assignor, in the absence of an assumption of such liabilities. (Cases cited)".

55 *Am. Jur. Paragraph* 427, *Page* 838

> "The general rule is that the acceptance by an assignee of an assignment made by the purchaser, of a contract to sell real property, does not of itself impose on the assignee a personal obligation to the vendor to perform the contract. While the assignee cannot compel the vendor to convey without the payment of the purchase money, this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can only result from some express or implied contract of the assignee and is not implied from the mere assignment of the original contract. x x x In support of these rules, it has been declared that the acceptance of the assignment does not place the assignee in privity of contract with the vendor, and that the stipulation in the original contract to pay the price is a personal,

not a real, covenant, and does not pass with the purchaser's equitable interest."

92 *C J S* 198

"The mere assignment of a contract for the sale of land does not impose on the assignee a personal liability to the vendor under the contract; x x x The rule is based on the ground of lack of privity of contract between the assignee and vendor, and on the ground that the promise of the purchaser is not itself a covenant running with equitable estate of the purchaser."

Defendant does not claim by virtue of the assignment that he has presently some equitable interest in and to the real property. He does claim, however, the irrevocable right to purchase the real property or as the cases say "a conditional right to a conveyance of the property". As he exercises this right by making the payments on or before the due dates, he will acquire an equitable interest in and to the real property.

RESPONDENT'S REPLY TO POINT I IN APPELLANT'S BRIEF WHICH ARGUES THAT THE "ASSIGNMENT OF CONTRACT" IS NOT A VALID ASSIGNMENT OF THE PURCHASER'S INTEREST IN THE CONTRACT, BUT IS A MORTGAGE.

Plaintiff's argument is premised on a bald assumption that the Assignment is not an Assignment but a pledge or mortgage given as security for a debt. Then erroneously having set up a straw man, counsel proceeds to argue that the equitable interest assigned cannot be assigned.

(1) Respondent quotes the conclusion reached by counsel for the Appellant: "The facts herein indicate that the assignment was in fact given as security for debt and hence should be construed as a mortgage. M - B Super Tire Market, Inc., has not paid one dollar on the contract, nor has it taken permanent possession. Therefore, it would appear that its attempted mortgage is a nullity, there being vested in M - B Super Tire Market, Inc., no mortgageable interest" (Page 10 of Appellant's Brief).

The sole basis for Appellant's position is that "Exhibit B", the assignment is not an assignment for the benefit of creditors but is a mortgage. Appellant states that the assignor and the assignee intended the assignment to be a mortgage. The document itself is titled an assignment, not a mortgage, and so indicates that the parties intended the document to be an assignment.

It is conceded that an assignment, as well as a mortgage, can be given as security. That alone does not convert it into a mortgage. Exhibit "B" has no word or provision indicating that it was given as security. On the contrary it is an absolute transfer of an interest in a real estate contract giving the assignee the unquali-

fied title to exercise the same right to purchase that the assignor had.

> 59 *C J S* 34
>
> "In ascertaining whether the parties intended an agreement to be a mortgage or some other form of transaction, consideration should be given to the circumstances under which the agreement was made, including the situation of the subject of the instrument and of the parties to it, and to the practical construction which the parties placed on the instrument; and effect should be given as far as possible to the instrument as a whole, and separate paragraphs should be construed a integral part of the entire instrument."

Plaintiff has failed to cite one case in which the court has construed an assignment such as Exhibit "B" to be a mortgage. The following cases, in our opinion, are exactly on the point at issue:

Flagg v. Walker 113 *U.S.* 659, 28 *L.Ed.* 1072

An insolvent debtor conveyed all his real property and assigned his choses in action to an attorney under a trust agreement giving him free and unobstructed ownership and control of the property, and to be the sole judge of the time and manner of disposing of it. If after disposing of it and his paying debts and expenses,

anything should remain, he was to pay one half to the grantor.

The Supreme Court of the United States held this was not a mortgage.

> "In view of the declaration of trust made by Walker on April 12, 1875, it is clear that the transaction between Flagg (assignor) and Walker (trustee) was not a mortgage. A mortgage is a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money or do some other act therein specified ,at a day certain, the grant shall be void. *Conrad* v. *Ins. Co.,* 1 Pet., 386; *Montgomery* v. *Bruere,* 1 South. (N.J.), 268; *Erskine* v. *Townsend,* 2 Mass., 495; *Lund* v. *Lund,* 1 N.H., 41. * * * The conveyance was made to secure neither the payment of any money nor the performance of any act by Flagg. All the money to be paid was to be paid by Walker; all the acts to be done were to be done by him. There was no agreement by Flagg to pay Walker any money in any event. Flagg never owed Walker any money by reason of the matters shown by the record in this case, and never came under any obligation to him. Walker was to re-imburse himself out of the property conveyed to him by Flagg, and the parties never contemplated a reconveyance by Walker to Flagg of the prop-

erty in question. We are not required to apply to such a transaction the rules prescribed by the Statute of Illinois for the foreclosure of a mortgage."

Kollock v. Bennett, et al., 53 *Ore.* 395 100 *P.* 940

"If grantee has full power to sell property, execute deeds to purchasers, apply proceeds in cancellation of claims, and account for any sum remaining, he is not a mortgagee, but a holder of the legal title."

All application of the principles outlined by the annotators makes clear the difference between an assignment and a mortgage.

4 *Am. Jur. Par.* 3, *Page* 340

"There is a well-defined distinction between a mortgage and an assignment for the benefit of creditors. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance, whereas an assignment is an absolute conveyance of title to the grantee for the purpose of raising a fund to pay the debts of the grantor."

In the instant case we have previously shown the assignment to Smith was not given as security, but as

means of his purchasing and reselling the property so that a fund would be available to pay the assignor's creditors. It was not conditional, but absolute; it only becomes void, if Smith does not exercise the right to purchase.

The distinction between a mortgage and an assignment for the benefit of creditors has been discussed most often in cases where it is claimed that a mortgage constitutes an assignment, rather than the other way around, as claimed here. See 4 Am. Jur. 357, Sec. 40.

Defendant submits that Exhibit "B" is an Assignment for the benefit of creditors, and as such, is effective against the vendor Plaintiff. That M - B had the right to make such an assignment is clear.

6 *Am. Jur.* (2) *Par.* 18, *Page* 337

> "The general rule is that a debtor may transfer by assignment for the benefit of creditors any species of property which he could by any means lawfully sell or convey, or which could be taken in execution on judgment against him."

Although we do not claim this is a statutory Assignment for Benefit of Creditors, Section 6-1-1, UCA, 1953, does provide that an insolvent debtor may execute an assignment of property to one or more assignees in trust.

The legal distinction between a mortgage and assignment for the benefit of creditors was stated in a

Supreme Court of United States decision, cited by Plaintiff, Jennison V. Leonard, 21 Wall 302, 22 Law Ed. 302. One of the significant parts of that case, as in the instant case, was that the Buyer made no down payment, but acquired an equitable interest by agreeing to $27,000.00 for the real property, payable $10,000.00 one year after the execution of the contract, $10,000.00 in two years, and $7,000.00 in three years.

The court held:

> "This was one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee.
>
> The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest, as notice, an agreement of the parties, a surrender, an abandonment, places the vendor where he was before the contract was made."

The Supreme Court of Utah in the case of Intermountain Association vs. U. S. 14 U (2) 389, 384 Page (2) clarifies the distinction between a mortgage and an assignment for the benefit of creditors. Here the debtor gave a note and chattel mortgage to the Plaintiff, representing creditors, in consideration of an extension of time. Internal Revenue secured a tax lien and asserted its lien took priority over the mortgage, arguing that it was not a mortgage, but an assignment for benefit

of creditors. Under an assignment, the tax claim would have had priority. Our court held that there is a difference, and the facts control.

> "Two primary characteristics of a mortgage are that the mortgagor retains the right to control the property mortgaged and that he has the right to redeem it. In an assignment, on the other hand, possession and control are given to the assignee, and there is no right to redeem, except to the extent that payment of all creditors would defeat the purpose of the assignment."

In the instant case Smith has the possession and control of the right to purchase the property; he can sell this right, or exercise it, pay the purchase price, then sell the property at a profit and pay gain to the creditors. His assignor, M - B, has transferred its Buyer's interest; only by payment of the claims of creditors, for whose benefit Smith is acting, can it reacquire the rights of the Buyer under Exhibit "B".

Exhibit "B" being an assignment and not a mortgage, the remainder of Plaintiff's arguments are immaterial.

We are in agreement with the rationale and quotations of the decisions cited at Pages 7 and 8 of Appellant's Brief—but we do not believe that they are germane to any issue in this case. Moreover the holding in ***First Mortgage Corporation of Stuart v. DeGive***, 177 So. 2d 741, was based on a Florida statute, 697.01

Fla. Stat. F.S.A. which provides that all conveyances for securing payment shall be deemed mortgages.

RESPONDENT'S REPLY TO POINT II OF APPELLANT

Appellant in its Brief states there was no evidence introduced pertaining to the reasonableness of the attorney's fee awarded to Respondent's attorney. The judgment of the court recites: (R-94)

> "Testimony having been presented to the court that the reasonable attorney's fee which accrued from enforcing this agreement or in pursuing the remedy afforded to the Defendant, Alvin I. Smith, is the sum of $1,500.00, and
>
> The court further finds that the sum of $1,500.00 is a reasonable attorney's fee."

There is nothing in the record on appeal that shows that there was no testimony respecting the reasonable value of the attorney's fee.

The record on appeal (R-91) shows that notice was given to the Appellant that the Respondent would present evidence as "to the amount of a reasonable attorney's fee to be awarded to the Defendant for enforcing the terms of the Real Estate Contract".

Accordingly, we see no merit in Appellant's Point II.

CONCLUSION

In its conclusion (App. Brief—P. 12), Appellant states there are sufficient facts in the pleadings to sustain a judgment for the Appellant and Respondent agrees with the earlier statements of counsel for Appellant (App. Brief—Pg. 2), that "the facts are quite simple and generally uncontested". We respectfully submit that the judgment on the pleadings is correct and should be affirmed.

Respectfully submitted,

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