

FILED

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CLERK SUPREME COURT
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IN THE COURT OF APPEALS OF IOWA

FULLERTON LUMBER COMPANY,

Plaintiff-Appellee,

vs.

**SIEGFRIED A. BRUESCHKE and BEVERLY
A. BRUESCHKE, Husband and Wife,
FORT DODGE SAVINGS AND LOAN**

Defendants,

**KEITH E. DORRELL, and MARGARET A.
DORRELL, Husband and Wife,**

Defendants-Appellants.

Filed April 30, 1985

5-58
84-983

Appeal from the Iowa District Court for Webster County, R. K. Richardson,
Judge.

In litigation arising out of a foreclosure of real estate defendant title
holders appeal from a decree establishing priority of plaintiff's mortgage.
AFFIRMED.

Rick Engel of Hamilton & Engel, Fort Dodge, for defendants-appellants.

Frederick E. Breen of Price, Goode, Breen & Breen, Fort Dodge, for
plaintiff-appellee.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

OXBERGER, C.J.

The issue in this appeal is whether the plaintiff's interest in an apartment building is superior to that of defendant's. The trial court held that plaintiff's mortgage had priority and we affirm.

Defendants Siegfried and Beverly Brueschke were owners of an apartment building in Fort Dodge and Siegfried was also an independent contractor. Brueschke had been having trouble paying debts to one of his suppliers, Fullerton Lumber Company, the plaintiff. A credit of \$15,000 had been extended to Brueschke and Fullerton began exerting pressure on him to provide security for the debt. Brueschke agreed to provide Fullerton with a mortgage on his homestead and shop but Brueschke's wife refused to sign the mortgage. The debt owed to Fullerton arose from three separate projects. The time for filing liens on two of the projects had elapsed. The third project involved improvements to the Warden Plaza and neither Brueschke nor Warden Plaza representatives wanted a lien filed on the work. Brueschke then determined he would give Fullerton a mortgage on the apartment building. Meanwhile, he had placed the building for sale and on June 11, 1980, he was given an offer by the defendants, Keith and Margaret Dorrell. The offer was accepted June 12, but the contract was not recorded. June 13 Brueschke agreed to give Fullerton a mortgage on the same property. On June 18 the note and mortgage to Fullerton was signed and delivered. It was recorded June 20. The contract with the Dorrells was closed July 1 and then recorded.

The Dorrells had arranged for an abstract to be completed on the property and it covered the time up to June 16, 1980, and did not disclose the mortgage given to Fullerton, recorded four days later. The mortgage to Fullerton indicated it was free from any liens.

The facts we have recited are undisputed by the parties, but they hotly contest whether any alleged statements were made by Brueschke regarding his actions. Brueschke says he told the realtor who sold the property to the Dorrells about the Fullerton mortgage prior to closing the deal. Bernice Webb, the realtor, flatly denies any such statement was made to her. Brueschke also says he told Fullerton of the sale to the Dorrells prior to giving the company a mortgage, but the three Fullerton representatives involved in dealings with Brueschke also deny he informed them of the sale. Fullerton admits it was informed that the building was for sale but denies any knowledge that the apartment had, in fact, been sold.

The court found that Brueschke's version was not credible and determined that Fullerton did not have notice of the unrecorded sale. The court also determined that good consideration had been given by the company for the mortgage, and that Fullerton's interest was superior since it was a bona fide subsequent purchaser for value without notice of the prior interest.

Our review of the court's action is de novo since the action is one in equity. Iowa R. App. P. 4. We give weight to the trial court findings of fact, particularly concerning the credibility of witnesses, but are not bound by the court's fact findings. Iowa R. App. P. 14(f)(7).

The defendants Dorrells claim a number of errors by the court in stating the extent of inquiry required by the parties. A bona fide subsequent purchaser for value has been described as one who acquires title to real estate for valuable consideration without notice of outstanding equities. Raub v. General Income Sponsors of Iowa, Inc., 176 N.W.2d 216, 219 (Iowa 1970). The purchaser who fits this description takes title to the property divested of such equities. Id. The purchaser cannot have actual or constructive notice for the rule to apply. Id.

The Dorrells claim several statements made by the court in its findings show that they were held to a higher standard than required by law in showing the company had notice. Specifically they point to language indicating, "The Fullerton mortgage was filed of record and as such is a superior lien to the Dorrell contract unless Fullerton had knowledge of the Dorrell contract prior to receiving the mortgage. . ." and another statement that, "The only other issue then is whether or not Fullerton was aware of the Dorrell contract when they accepted the mortgage." These two statements, defendants claim, show that the Dorrells had to prove the company had actual notice, when instead constructive notice would suffice.

Constructive notice occurs when there are circumstances which would lead a reasonably prudent person to check whether there are outstanding interests hostile to the grantor's title. Id. In its opinion the court commented, "The Court does believe that Brueschke advised the parties that the property was for sale, but that fact alone would not affect the rights of the parties; and a check of the title to the property would clearly show any sale or outstanding obligations." We believe that the court was indicating here that the circumstances of this case would not lead a reasonably prudent person to inquire further, and that there was no constructive notice. Therefore, the Dorrells were not improperly held to an actual inquiry standard only, but considered constructive notice as well.

The Dorrells further complain that the court allegedly held them to a "comparative inquiry" standard. They say the court was indicating the Dorrells were under a duty to inquire further when it stated, "If Dorrell had knowledge of the Fullerton mortgage, certainly they would have made inquiry concerning this mortgage before making final settlement. . ." Again, taken in context, we do not believe this is the case. The court here appeared to be merely providing support for its decision not to believe that Brueschke informed any of the parties of the

existence of other interests, since if he had informed the Dorrells of the Fullerton mortgage, it seems unlikely they would have closed the contract without further action. The Dorrells also point to other language of the court where it was stated, "No one on behalf of the Dorrells checked to find out whether or not there were additional filings concerning the title to this real estate between June 16, 1980, and July 19, 1980; and the Dorrells were unaware of the Fullerton Mortgage." This sentence came during a review of the facts of the case, and appeared to be merely a recitation of facts and not an application of law. Finally, the Dorrells claim the court's holding regarding their 179(b) motion clarifies that it was indicating that the Dorrells were under a duty to make further inquiry when it stated, "The Court believes that had the Dorrells filed their contract, then Fullerton would have been on notice and the fact that Fullerton did file their mortgage prior to the final settlement by the Dorrells put them on notice of the Fullerton lien." This appears to be a restatement of which lien was recorded first and we do not believe it indicates the court did not understand the law in this area regarding a duty to inquire.

Defendants claim the court erred in finding there was no notice to Fullerton. We find there was ample evidence to support the court's conclusion. We agree that it would not be logical for either the company or Dorrells to complete their negotiations with Brueschke if they had actual notice of the other's interests.

We also agree that the circumstances presented in this case would not lead a reasonably prudent person to further inquire regarding hostile interests. The circumstances which the defendants indicate should have alerted the company include the fact that they knew the apartment was for sale and knew that Brueschke was being pressured to come up with security for his debt. Knowing the apartment was for sale alone would not lead a person to do more than the

company did; search the title for prior interests. We do not agree knowledge of the pressure on the seller would lead the plaintiffs to inquire further when they received a warranty of title from him. As plaintiffs point out, even if there had been further inquiry, the Dorrell interest would not have been revealed. The Dorrell interest was not recorded prior to delivery of the note and mortgage and there is nothing in the record to show the first mortgagee, Fort Dodge Savings and Loan, was aware of any of the other interests and could have enlightened Fullerton. We also find the situation unlike that described in Hayne v. Cook, 252 Iowa 1012, 109 N.W.2d 188 (1961) which defendants claim applies here. Although the court held the subsequent purchasers should have made several calls to find out if there were other interests in the property bought, the purchaser there knew that an offer to buy had been made, knew who the offeror was, and knew who the real estate agent was who handled the matter. Id. at 1029, 109 N.W.2d at 197. The company here knew none of the facts concerning the sale. We find the trial court's holdings in this regard were proper.

The final claim of error by the defendants is that plaintiffs did not pay valuable consideration for their interest in the property. They cite a number of cases where it has been held that an antecedent debt is insufficient consideration to permit the plaintiffs to have priority in their interest. However, our courts have held that an extension of time to pay an antecedent debt is good consideration. Chase Investment Co. v. Kramer, 243 Iowa 1369, 1375, 55 N.W.2d 467, 47 (1952); Panama Savings Bank v. Arkfield, 228 Iowa 313, 318, 291 N.W. 182, 184 (1940). Those cases cited by defendants deal with exchange of an interest in property for a preexisting debt without an extension of time to pay, or involved an obligation to be performed in the future or entirely different circumstances. Bell v. Pierschbaher, 245 Iowa 436, 448, 62 N.W.2d 784, 791 (1954)(obligation to be

performed in the future); McCarty v. Hunting, 230 Iowa 317, 319, 297 N.W. 307, 308 (1941)(claim of an attachment creditor); Knapp v. Baldwin, 213 Iowa 24, 26, 238 N.W. 542, 543 (1931)(involving mechanic's lien); Senneff v. Brackley, 165 Iowa 525, 528, 146 N.W.24, 25-26 (1914)(preexisting debt exchanged for mortgage without extension of time to pay); Lillibridge v. Allen, 100 Iowa 582, 583-84, 69 N.W. 1031 (1897)(preexisting debt for wages owed, no extension of time); Phelps v. Fockler, 61 Iowa 340, 341-42, 14 N.W. 729, 730 (1883)(antecedent debt without extension of time not sufficient consideration).

In Phelps the court stated that a mortgage to secure an antecedent debt was not sufficient consideration since it was agreed to prior to the mortgage without an extension to pay; it also held that an agreement to provide wheat was not sufficient consideration because it was a future obligation. Id. at 341-42, 114 N.W. at 730. The court explained that a note and mortgage were executed on the land in exchange for an extension to pay a loan of money. Id. at 341, 14 N.W. at 730. That plan was abandoned and another mortgage and note were executed to secure the loan. Extension of time to pay had already been granted. Id. The court concluded the mortgage was not given to a bona fide subsequent purchaser for value since the extension of time to pay was made before the second mortgage:

The indebtedness secured was manifestly a pre-existing indebtedness, and whatever extension was agreed upon appears to have been agreed upon at the time the surrendered note and chattel mortgage were executed, which was prior to the execution of the mortgage in question. If this were all, it is manifest that the plaintiff's equity could not be deemed superior to that of the defendant's.

Id. Plaintiff says this shows that if the extension of time had occurred at the same time the mortgage was given, then the consideration would have been sufficient. This interpretation is verified by a supplement to the opinion written after a rehearing. The court stated:

How long a time elapsed between the two plans does not appear, nor do we deem it material. It is sufficient, we think, that, so far as the execution of the first plan was concerned, nothing remained to be done. There is no pretense that, at the time of the delivery of the first note and chattel mortgage, there was any agreement to give the mortgage in suit. There were two successive transactions. The time was extended in the first one, and no other time was agreed upon.

d. at 343. We believe this case confirms that an extension of time to pay an antecedent debt is good consideration for a mortgage in order to meet the definition of a bona fide subsequent purchaser for value. This holding is in line with the statements of authorities which indicate:

The question whether one who takes real property in satisfaction of, or as security for, a pre-existing debt is entitled to protection as a bonafide purchaser for value is one concerning which there is a conflict of authority. Many courts hold that since such a purchaser parts with nothing at the time of his purchase, he is not in the proper sense a purchaser for value and therefore is not entitled to protection under the rule protecting bonafide purchasers of land. The ground on which this is placed is that the creditor does not irrevocably lose anything except his bargain, because if he is compelled to surrender the property, the debt will revive, and he will still have his claim and will be in no worse condition than he was before. Other courts hold, however, that a conveyance in discharge and payment of a preexisting debt falls within the rule protecting bonafide purchasers for value. In any event, it is generally held that if the circumstances accompanying the discharge of the debt are such that the purchaser has changed his legal position to his detriment, so that if his claim of title fails he is left in a worse position than he was before, he has given value for the property sufficient to satisfy this requisite for protection as a bonafide purchaser.

77 Am. Jur.2d Vendor and Purchaser § 701 (1975)(emphasis added). An extension of time to pay an antecedent debt put the purchaser in a worse position than when he started. In this case Fullerton's extension of time to Brueschke caused it to lose its legal right to sue Brueschke since time for filing the last mechanic's lien passed and Brueschke later filed for bankruptcy.

We find there was no error on the part of the court and uphold its findings of fact.

AFFIRMED.