FILED
JUN 24 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD A. ERB and KATHRYN J. ERB,

Appellees,

vs.

BERL MORRIS,

Appellant.

BERL MORRIS,

Cross-Petitioner,

vs.

U. S. HOMES, INC.,

Defendant to Cross-Petition.

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Filed June 24, 1977

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No. 2-58632

Appeal from Mills District Court -- Leroy H. Johnson, Judge.

Defendant purchased property first; plaintiffs, although purchasing the same piece of property later, recorded first. The trial court held that first recording prevailed in absence of knowledge by the first buyer - AFFIRMED.

Michael E. Kelley, of Glenwood, counsel for appellant.

Peter J. Peters, of Peters, Campbell & Pearson, of Council Bluffs, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

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DONIELSON, J.

The defendant-Berl Morris appeals judgment quieting title to two lots in the plaintiffs, Richard and Kathryn Erb. The defendant claims that the evidence is insufficient to support a finding that the plaintiffs did not know the defendant had already purchased the lots.

There remains pending a cross-petition by appellant-Morris against the seller of the property, U. S. Homes, Inc., which we were informed, in oral argument, still remains to be disposed of after receiving this court's decision.

In equity matters, such as this, our review is de novo, rule 334, Rules of Civil Procedure. It is our responsibility to review the facts as well as the law and determine from credible evidence those propositions properly presented provided the issue has been raised an error, if any, preserved. While weight will be given to the findings of the trial court, this court does not abdicate its function as trier de novo on appeal. Rule 344(f)(7), R.C.P. See Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 289 (Iowa 1975).

The two lots in dispute were owned by U. S. Homes, Inc. on June 1, 1974. The defendant dealing through Donald Radar, the sales manager for U. S. Homes, Inc., gave a check as down payment for the purchase of the lots. Later in June or July, Radar delivered the abstract to the defendant who obtained a title opinion.

On September 21, 1974, the plaintiffs contacted Boyd Nuckolls, a local banker, concerning the availability of any lots in the area. The lot in question adjoined his property. Nuckolls placed a call to U. S. Homes, Inc. and was advised that the subject lots were available and a price was quoted. The plaintiffs sent U. S. Homes, Inc. a check and received a

warranty deed executed September 24, 1974. The plaintiffs' deed was recorded on September 27, 1974. On September 25, 1974, defendant's warranty deed was executed on the subject lots and recorded on October 9, 1974.

The defendant testified at trial that Erb and Nuckolls had express knowledge and notice that U. S. Homes, Inc. had sold the lots to the defendant and was, therefore, not a good faith subsequent purchaser whose title would be protected by §558.41, The Code, which reads as follows:

> "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless filed in the office of the recorder of the county in which the same lies as hereinafter provided."

The issue of notice has been of major concern for many years. See Wilson v. Miller et al, 16 Iowa 111 (1864). A buyer's duty of inquiry to ascertain existing rights is one of reasonable diligence which focuses on the examination of county recorder office records, other public records and inspection of the land itself. Bartels v. Hennessey Brothers, Inc., 164 N.W.2d 87, 94 (Iowa 1969). The examination of the *Bartels* three criteria would not have given the plaintiffs any notice of the defendant's alleged interest in the lots.

Therefore, the defendant contends that Erb had actual notice of accreditable information indicating the defendant's ownership of said lots. Raub v. General Income Sponsors of Iowa, Inc., 176 N.W.2d 216, 219 (Iowa 1970). This contention was specifically denied by the plaintiffs.

The court entered a judgment finding that the evidence was insufficient to support the affirmative defenses in the issues raised by the defendant, and concluded that the record was

devoid of any evidence that plaintiffs had any knowledge of claim of ownership by the defendant. The court concluded that the title be quieted in the plaintiffs. We agree with the trial court.

AFFIRMED.