STATE OF MICHIGAN

COURT OF APPEALS

LESLIE LONDON,

Plaintiff-Appellant,

v

VIRGINIA L. GREGORY,

Defendant-Appellee.

UNPUBLISHED
February 23, 2001

No. 216473
Oakland Circuit Court
LC No. 98-417091-AV

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order denying plaintiff's appeal and affirming the district court's ruling that the deed granted from defendant to plaintiff constituted an equitable mortgage rather than a conveyance of real property. We affirm.

Defendant owned a piece of real property for which the mortgage was about to be foreclosed. Two days before foreclosure was to occur and the equity of redemption period was to expire, defendant and plaintiff entered an agreement wherein defendant transferred her interest in the property to plaintiff by warranty deed. Plaintiff then redeemed the property for $38,231.69, making her the fee owner, and at the same time, executed an eighteen-month lease agreement with defendant. The agreement provided that defendant remain in possession of the property and pay $400 a month in rent to plaintiff. The agreement also granted defendant an option to purchase the property for $48,239.77 at the end of the lease, with closing to take place on or before December 17, 1997. However, the purchase option was only available if all rent payments were made on a timely basis.

Of the eighteen scheduled rent payments, defendant made one, which was late. On December 16, 1997, plaintiff sent defendant a thirty-day notice to quit and initiated an action for summary proceedings in district court to evict defendant. However, the district court found that the deed from defendant to plaintiff was not a conveyance of property, but rather, an equitable mortgage. An order was entered denying plaintiff's request for possession of the property and ruling that the warranty deed and rental agreement created an equitable mortgage. The circuit court denied plaintiff's appeal, affirming the district court's finding of an equitable mortgage. The circuit court found no error in the district court's refusal to take testimony regarding plaintiff's intent because the information before it, including affidavits of each party, was

sufficient to determine the intent of the parties. The circuit court also found that the deed and rental agreement was not an absolute conveyance, but rather, a mortgage.

Plaintiff now argues that the circuit court both erred in refusing to compel the district court to consider testimony on the issue of intent and erred by ruling, as a matter of law, that the conveyance of property was an equitable mortgage. We disagree. This Court reviews equitable determinations de novo and the findings of fact in support of those equitable decisions for clear error. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997); *Grant v Van Reken*, 71 Mich App 121, 125; 246 NW2d 348 (1976). A trial court's findings are clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *LaFond, supra.*

"The power of a court of equity to decree an equitable mortgage under proper circumstances and to construe an instrument in the form of an absolute conveyance as security for the payment of a debt, or the performance of some other obligation, is well established." *Judd v Carnegie*, 324 Mich 583, 587; 37 NW2d 558 (1949); see also, *Grant, supra* at 125. We agree with the lower courts that the subject transaction constituted a mortgage to secure the repayment of a loan. We also agree that testimony on the intent of the parties was not necessary to reach that decision.

Plaintiff argues that this was not a loan because no loan application was taken nor was defendant's financial condition discussed. Plaintiff further argues that a loan was never discussed and plaintiff was not in the business of mortgage lending. Moreover, plaintiff claims it was error for the district court not to hear testimony on the issue of intent. When determining whether to grant equitable relief, the court "protects the necessitous by looking through form to the substance of the transaction." *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). The controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties. *Id.* However, contrary to plaintiff's arguments that the parties' testimony was required for this determination,

> [s]uch intention may be gathered from the circumstances attending the transaction including the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage. [*Id.* (citations omitted).]

The facts of *Koenig* are remarkably similar to those of the instant case. In *Koenig*, the defendants helped the plaintiff, in financial distress, in saving her home from foreclosure. The plaintiff essentially conveyed the property by warranty deed to defendant Stanley Van Reken for no consideration, while he redeemed it out of foreclosure. The transaction resulted in the plaintiff conveying her equity, worth over $30,000, for less than $4,000. *Id.* at 107. Under their "agreement," the defendant leased the property to the plaintiff with an exclusive option to repurchase the property during the term of the lease. The plaintiff eventually defaulted in her monthly rental payments and was thereupon evicted from the home. *Id.* at 105. This Court found that, "[w]hile financial embarrassment of the grantor and inadequacy of consideration do not provide an infallible test, they are an indication that the parties did not consider the

conveyance to be absolute." *Id.* at 107. This Court held that the transaction constituted a mortgage to secure a loan. *Id.*

Grant, supra, is also similar to this case. The plaintiffs were in financial straits and the mortgages on their home were in the process of foreclosure. *Id.* at 127. The defendant, Stanley Van Reken, the same defendant as in *Koenig*, entered into an agreement with the plaintiffs whereby, in exchange for a warranty deed to the property, the plaintiffs obtained a two-year lease with an option to repurchase the property at any time during the term of the lease. *Id.* at 123. The defendant ultimately expended only $2,300 to redeem and obtain a deed to property worth $25,000. *Id.* at 127. This Court found the inadequacy of consideration for the purported conveyance blatant, and giving great weight to this inadequacy of consideration, and the fact that the plaintiffs were financially embarrassed, determined that the deed, absolute in form, was a mortgage. *Id.*

Applying the principles in these cases to the facts and circumstances surrounding the instant transaction, we find that this deed and rental agreement with an option to repurchase was a mortgage. Defendant was having financial problems at the time of the disputed transaction, as her property was two days away from foreclosure. About to lose her home, defendant entered into an agreement with plaintiff whereby defendant was able to lease the property for eighteen months with the option to purchase at the end of the lease. In exchange for the opportunity to keep her home, defendant conveyed the property to plaintiff by warranty deed for $1. Plaintiff, as the fee owner of the property, was then able to redeem the property for $38,231.69. Through this cash outlay, plaintiff obtained a deed to property worth approximately $120,000.

These facts demonstrate an inadequacy of consideration. Moreover, defendant entered into this agreement two days before foreclosure was to occur and without the assistance of counsel. See *Koenig, supra* at 105; *Grant, supra* at 127. The bargaining position of the parties was anything but equal. See *Grant, supra* at 128. In addition, the fact that defendant remained in possession of the property after granting plaintiff the deed further evidences that this was not an outright conveyance. Defendant thought this arrangement was a loan that would enable her to redeem her property and extend the debt for eighteen months. Although it was not plaintiff's intent to make a loan, it was not defendant's intent to sell her home. For all these reasons, we hold that the transaction at issue in this case was an equitable mortgage. Accordingly, we find no error in the rulings of the district or circuit courts.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper