STATE OF MICHIGAN

COURT OF APPEALS

EDWARD JOSEPH VERNIER,

Plaintiff/Counter-Defendant-Appellee,

v

MARK V. SIPE and CHARLENE L. SIPE,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
February 14, 2008

No. 276037
Macomb Circuit Court
LC No. 2006-001457-CZ

Before: Gleicher, P.J., and O'Connell and Kelly, J.J.

PER CURIAM.

Defendants/counter-plaintiffs ("defendants")[1] appeal as of right the trial court's order granting summary disposition in favor of plaintiff/counter-defendant ("plaintiff"), denying defendants summary disposition, and quieting title to the subject lots in plaintiff. We reverse and remand.

I. Basic Facts

Sipe entered into a verbal residential real estate development deal with Donald James Vernier, Jr., whereby Sipe purchased two lots ("the subject lots" or "the subject properties") at a tax sale and recorded the deeds. In March 1999, at Donald's request, defendants executed and delivered a quitclaim deed for the subject lots to Franklin A. Holtz ("the Holtz deed"), Donald's accountant. The undisputed purpose of this transaction was for Holtz to use the subject lots as collateral for a loan Holtz guaranteed for Donald in an unrelated business matter, and this deed was not recorded. Holtz executed a mortgage, Donald paid off the loan, and the subject lots were released. However, Holtz never returned the deed to Sipe, even though he testified that, after Donald paid off the bank loan, Holtz had no further interest in the subject properties.

When the business relationship between Sipe and Donald ended, Donald believed that he owned the subject lots as part of their verbal settlement agreement. Donald asserted that, at his

[1] Throughout this report, we will refer to defendant Mark V. Sipe as "Sipe."

request, Holtz executed a quitclaim deed transferring the subject lots to Christopher Carmody ("the Carmody deed") because Donald had a business deal with Carmody to build on the lots. Donald was unsure what, if anything, Carmody paid anything for the subject lots, and no date was provided. The Carmody deed was not recorded, and a copy was not produced during discovery. According to Donald, Carmody subsequently changed his mind about the business deal and executed a quitclaim deed to plaintiff in August 2003. Plaintiff, who is Donald's cousin, testified that he purchased the subject lots from Carmody. Holtz testified that he executed a quitclaim deed for the subject lots to plaintiff in January 2005, and he never mentioned Carmody during his deposition. Plaintiff testified that he received a second deed to the subject lots from Holtz.

II. Analysis

Defendants argue that the trial court erred in granting plaintiff summary disposition. We agree. We review de novo decisions in equitable actions to quiet title, *Special Property VI v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007), and a trial court's decision on a motion for summary disposition, *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Id*. Summary disposition is appropriately granted if, except for the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

The trial court found that the Holtz deed constituted an equitable mortgage because it was only given as security for Donald's loan and was not intended to transfer title. Because there was no evidence that plaintiff had any knowledge of the business dealings between Sipe, Donald, and Holtz, the trial court concluded that plaintiff was a bona fide purchaser of the subject lots. Therefore, the trial court granted plaintiff summary disposition, denied defendants summary disposition, and quieted title to the subject lots in plaintiff.

Defendants contend that the trial court properly found that the Holtz deed was an equitable mortgage, but plaintiff disputes this determination. An equitable mortgage, which "places the substance of the parties' intent over form[,]" is generally found "when what appears to be an absolute conveyance on its face was actually intended as a mortgage." *Burkhardt v Bailey*, 260 Mich App 636, 659; 680 NW2d 453 (2004). Contrary to plaintiff's argument, an equitable mortgage circumvents the statute of frauds' requirement for a writing. *Schultz v Schultz*, 117 Mich App 454, 458; 324 NW2d 48 (1982). "[T]he controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties." *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). Plaintiff correctly notes that there is a presumption that an instrument represents a transaction in its entirety, but this presumption may be overcome by clear and convincing evidence that the deed was actually made as security for a loan. *Ellis v Wayne Real Estate Co*, 357 Mich 115, 118; 97 NW2d 758 (1959). Holtz, Sipe, and Donald all testified in their depositions that the Holtz deed was executed so that Holtz could use the subject lots as collateral for a loan Holtz guaranteed on Donald's behalf. Therefore, the intent of the parties was for the transaction to be a mortgage, and the trial court properly found that the transaction was an equitable mortgage.

An equitable mortgage vests the grantee-mortgagee with the right to bring a foreclosure action if the obligation of the grantor-mortgagor was not performed. *In re Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973). In the instant case, Holtz was the grantee-mortgagee, Donald was the mortgagor, and defendants were the grantors.[2] To discharge an equitable mortgage, the grantee-mortgagee typically deeds the property back to the grantor-mortgagor after the mortgage is satisfied. *Fletcher v Morlock*, 251 Mich 96, 98-99; 231 NW 59 (1930). However, if the mortgagee, i.e., Holtz, transfers the property to a bona fide purchaser for value, the interest of the equitable mortgagor, i.e., Sipe, is defeated. MCL 565.32; *Van Duzer*, *supra* at 578; 1 Cameron, Michigan Real Property Law (3d ed), § 18.8, p 685. Although Donald paid off the loan, Holtz did not transfer the deed back to Sipe. Therefore, the trial court properly proceeded in making a determination regarding whether plaintiff was a bona fide purchaser for value.

A bona fide purchaser is one who has acquired a property interest for consideration and without notice of claims of interest in the property by a third party. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006); 1 Cameron, Michigan Real Property Law (3d ed), § 11.20, pp 395-396. Notice may be actual or constructive and has been defined as follows:

> "When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed." [*Richards*, *supra* at 539, quoting *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).]

A purchaser of real estate has a duty to investigate the seller's title as follows:

> "It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused, but, if he fails to use due diligence, he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed." [*American Fed S&L Ass'n v Orenstein*, 81 Mich App 249, 252; 265 NW2d 111 (1978), quoting *Schweiss v Woodruff*, 73 Mich 473, 477-478; 41 NW 511 (1889).]

There is evidence that plaintiff received two deeds to the subject lots, one from Carmody in August 2003 and one from Holtz in January 2005.[3] It is undisputed that Sipe recorded the deed

---

[2] Although Holtz subsequently mortgaged the subject properties to a bank, we consider him to be the mortgagee because he received the deeds with the intent of using his name to secure financing on behalf of Donald, the beneficiary of the transaction. This does not change our analysis regarding the existence of an equitable mortgage.

[3] The grantee of a quitclaim deed acquires only the right and title that the grantor owned at the time the deed was executed, and nothing more. *Richards*, *supra* at 540-541. The grantor of a (continued…)

he received from Harrison Township, but neither the Holtz deed nor the Carmody deed was recorded. Plaintiff failed to exercise due diligence by conducting a title search, which would have revealed Sipe's interest. A title search also would have disclosed the fact that neither seller's interests was within the chain of title. Therefore, plaintiff is chargeable with notice of Sipe's interest, and the trial court erred in concluding that he was a bona fide purchaser. See *Orenstein*, *supra* at 252.

Moreover, to the extent that plaintiff relied on the deed he received from Holtz, this reliance is misplaced. Plaintiff asserted that he had received two different deeds to the subject properties from two different sellers on different dates. Knowledge that two different people were claiming an interest in the subject properties sufficient to transfer it to plaintiff would have led an honest person, using ordinary caution, to make further inquiries. See *Richards*, *supra* at 539. As discussed, *supra*, a title search would have revealed Sipe's interest, and plaintiff, who failed to conduct this inquiry, was chargeable with notice of Sipe's interest when he received the second deed to the subject properties from Holtz. Plaintiff therefore was not a bona fide purchaser under the deed he received from Holtz.

Further, there is a question of fact regarding whether plaintiff gave consideration for the subject lots. Donald testified that Holtz transferred the subject lots to Carmody, but Donald could not recall whether Carmody paid anything, what amount he may have paid, or what form of payment he may have given. Plaintiff and Donald testified that plaintiff received a deed for the subject properties from Carmody, and the copy contained in the lower court record indicates that plaintiff paid Carmody $60,000. If Holtz transferred the subject properties to Carmody, there is a question of fact regarding whether Carmody paid anything for the subject properties. Holtz, on the other hand, never mentioned Carmody's name in his testimony. Plaintiff and Holtz testified that Holtz deeded the subject properties directly to plaintiff, but there is no evidence that plaintiff paid Holtz anything. Regardless who gave plaintiff a deed to the property, there is a genuine issue of material fact regarding whether plaintiff gave consideration for the subject properties.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

(…continued)

quitclaim deed does not make any warranties regarding title. *Id.* at 541. Holtz testified that, after Donald paid off the bank loan, he had no further interest in the property. The Carmody deed was a quitclaim deed, and the deeds plaintiff obtained from Carmody and Holtz were both quitclaim deeds. Therefore, Holtz could only transfer the right and title that he possessed and nothing more. Once the loan had been repaid in full, Holtz no longer had any ownership interest in the subject lots. Therefore, when he executed the Carmody deed, as alleged by Donald, and the January 2005 deed to plaintiff, he conveyed nothing. When plaintiff received the deeds from Carmody and Holtz, he received nothing.