

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DIVERSIFIED INTERNATIONAL	:	JUDGES:
PROPERTIES, INC.	:	Hon. William B. Hoffman, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 08CAE030010
	:	
TRACY LUKACS, ET AL.	:	
	:	
Defendants-Appellants	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 06CVH030241

JUDGMENT: Judgment Entered

DATE OF JUDGMENT ENTRY: December 5, 2008

APPEARANCES:

For Plaintiff-Appellee

STEVEN E. HILLMAN
425 Metro Place North
Suite 460
Dublin, OH 43017

For Defendants-Appellants

HAROLD R. KEMP
JACQUELINE L. KEMP
88 West Mound Street
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Farmer, J.

{¶1} In 1987, Tracy Lukacs married David Fillmore. Together they purchased a property located on Kilbannan Court in Dublin, Ohio. In 1991, the parties dissolved their marriage.

{¶2} On February 17, 2005, Ms. Lukacs signed a quit claim deed on the Kilbannan property. A notary or witness was not present. Thereafter, Mr. Fillmore had his friend notarize the deed outside of Ms. Lukacs's presence. On February 28, 2005, Mr. Fillmore recorded the deed at the Delaware County Recorder's Office, Volume 588, Page 530. On April 27, 2005, the parties entered into a separation agreement wherein Mr. Fillmore received the Kilbannan property through his corporation, appellee, Diversified International Properties.

{¶3} On August 9, 2005, Ms. Lukacs retained the services of appellant, Kemp, Schaeffer, Rowe & Lardiere Co., L.P.A., to represent her on domestic relations issues. On August 9, 2005, Ms. Lukacs executed a mortgage in the amount of \$25,000 in favor of appellant for attorney fees. On the same day, appellant filed an affidavit attacking the legality of the quit claim deed to appellee. The mortgage was recorded on August 11, 2005.

{¶4} On August 20, 2007, appellee filed an amended complaint for declaratory judgment regarding the quit claim deed. Appellant filed a motion to dismiss on November 7, 2007. An evidentiary hearing was held on January 28, 2008. By judgment entry filed February 15, 2008, the trial court found the quit claim deed was voidable, but not void. Because Ms. Lukacs had conveyed her title in the property to

appellee, the trial court found she had no interest in the property and declared the mortgage to appellant a legal nullity.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT NULLIFIED THE MORTGAGE EXECUTED IN FAVOR OF KEMP, SCHAEFFER, ROE AND LARDIERE CO., L.P.A."

II

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED THE REFORMATION OF THE DEED AS AND BETWEEN TRACY AND DIVERSIFIED."

II

{¶8} We will address Assignment of Error II first as its conclusion bares upon our resolution of Assignment of Error I.

{¶9} Appellant claims the trial court erred in allowing the reformation of the deed.

{¶10} In its judgment entry filed February 15, 2008, the trial court found under the specific facts the deed was not void but voidable:

{¶11} "As both parties in this case testified, it was their intent that Lukacs sign over the property to Diversified as memorialized in their Agreement. See, Exhibit 8. Thus, although the Quit Claim Deed was defectively executed, it was only voidable and not void. As between the parties, since both intended at the time that Lukacs convey

her title interest in the Property to Diversified, there was no fraud. In fact, approximately six months elapsed before Lukacs contested her actions.

{¶12} "The Court, for the above reasons, declares the Quit Claim Deed (Exhibit 5) to be valid and properly recorded, and an effective conveyance of Lukacs' interest in the Property to Diversified, effective February 28, 2005."

{¶13} As noted by the trial court, it was basically undisputed that under the April 2, 2005 separation agreement, Ms. Lukacs agreed to sign over the Kilbannan property to appellee, and she had signed a quit claim deed on February 17, 2005. T. at 9-10; Exhibit 8. A notary was not present at the signing of the deed, nor was any acknowledgment taken. T. at 74.

{¶14} Ms. Lukacs never claimed she was forced or threatened to sign the deed or that she did not do so under her own free will. The intent of Ms. Lukacs and appellee was to transfer the property. This intent has never been disputed.

{¶15} Appellant argues the failure to have a deed signed in the presence of a notary and acknowledged is a critical error that cannot be corrected. Pursuant to R.C. 5301.01(A), a deed must be signed and acknowledged before a notary. Appellant argues reformation of the deed is not applicable sub judice.

{¶16} We agree because the deed was not executed in accordance with R.C. 5301.01, it was defective and legal title did not pass from Ms. Lukacs to appellee. Therefore, what interest did Ms. Lukacs pass to appellee, if any? In *Basil v. Vincello* (1990), 50 Ohio St. 3d 185, the Supreme Court of Ohio reinforced the rule that absent fraud, a defectively executed conveyance is valid between the parties. In reviewing what interest passed between the parties, the *Basil* court reasoned the following at 189:

{¶17} "Vincello and Teague agreed to convey their interest in Parcel No. 2 in exchange for a price. Perrico and Slowey performed their part of the agreement by paying the full consideration required under the contract, \$50,887, but received neither title nor possession in exchange. In such instances, courts have created an equitable interest in the purchaser as having a cause of action for breach of an executory contract or as having a 'vendee's lien' over the property itself.***The 'lien' is based on the assumption that the vendor still holds the legal title, either because he has never conveyed it or because some act has been committed which justifies rescission of the contract and return of the purchase price.***At most then, it can be said that Perrico and Slowey have an equitable interest in the property still titled in Vincello and Teague that was created upon payment of consideration in April 1979, or they have a cause of action for breach of contract arising when the defective deed was executed in September 1979." (Citations omitted.)

{¶18} Therefore, under *Basil*, appellee sub judice has an equitable interest in the Kilbannan property. This specific equitable interest is a contractual one and is enforceable in contract.

I

{¶19} Appellant claims the trial court erred in nullifying the mortgage.

{¶20} Based upon its decision regarding the deed, the trial court found Ms. Lukacs had no interest in the property to mortgage or convey and therefore the mortgage to appellant "is void and a legal nullity." See, Judgment Entry filed February 15, 2008.

{¶21} As we stated in Assignment of Error II, appellee has an equitable interest in the subject property enforceable in contract. Therefore, what is the status of the mortgage between Ms. Lukacs and appellant?

{¶22} It is undisputed Ms. Lukacs gave up her interest in the Kilbannan property by signing the quit claim deed over to appellee. This occurred on February 17, 2005, and was recorded on February 28, 2005. On its face, the recorded deed was not deficient, as it contained a notary signature.

{¶23} On August 9, 2005, Ms. Lukacs executed a mortgage in favor of appellant on the Kilbannan property in the amount of \$25,000, a property she no longer had an equitable interest in because of the deed. Also on August 9, 2005, appellant filed an affidavit attacking the validity of the deed. Appellant recorded the mortgage on August 11, 2005.

{¶24} Pursuant to *Basil* at 191, we find noncompliance with the acknowledgement statute prevents enforcement of an equitable interest against those protected by the statute:

{¶25} "R.C. 5301.03 is a notice statute which permits creation of an equitable interest, and does not protect judgment creditors who have not relied upon the existence and/or ownership of the subject real estate in the extension of credit. *Bank One of Milford v. Bardes* (1986), 25 Ohio St.3d 296, 297-298, 25 OBR 346, 347, 496 N.E.2d 475, 476. '****[The statute] provides that certain language in a deed or mortgage which purports to create an equitable interest will not be sufficient to notify other parties of limitations on the grantee's or mortgagee's powers. Noncompliance with the statute does not defeat the creation of an equitable interest: it simply prevents

enforcement of that interest against the parties named in the statute. Those parties include '***bona fide purchasers, mortgagees, lessees, and assignees for value***,' but not judgment creditors." ' *Id.* (Citing to *Marital Trust of Casto v. Lungaro* [1986], 22 Ohio St.3d 298, 22 OBR 467, 490 N.E.2d 599.)***" (Citations omitted.)

{¶26} As our brethren from the Third District stated in *McGinnis v. Hensley*, Crawford App. No. 3-04-29, 2005-Ohio-2507, ¶20-21:

{¶27} "***By its terms, this statute [R.C. 5301.25(A)] is designed to protect subsequent bona fide purchasers of property. The law is clear that judgment lien creditors are not bona fide purchasers for value.***"

{¶28} "Noncompliance with R.C. 5301.25(A) does not, therefore, defeat the creation of an equitable interest. It merely prevents enforcement of that interest against bona fide purchasers but not against judgment creditors.***" (Citations omitted.)

{¶29} Appellant's status is not as a bona fide purchaser. It is undisputed appellant was aware of the issues surrounding the validity of the deed at the time of taking the mortgage on the property. T. at 60. Appellant was aware that Ms. Lukacs had signed the deed of her own free will, and the deed was part of Ms. Lukacs's separation agreement. T. at 61-62. Appellant was clearly aware that an equitable interest in law was created by the deed, but nevertheless proceeded to take a mortgage interest in the property.

{¶30} "The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy.***The maxim, 'he who comes into equity must come with clean hands,' requires only that the

plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of his suit.***" (Citations omitted.) *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45.

{¶31} Appellant is not a bona fide mortgagee and does not have an interest in the property.

{¶32} Pursuant to App.R. 12, this court enters judgment, declaring appellee has an equitable interest in the property which is enforceable in contract, and appellant's mortgage is indeed a legal nullity.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

JUDGES

