TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00039-CV

Avalon Investments, LLC, Appellant

v.

Jean Penick Spiller, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT
NO. 08-0128-A, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

In 2006, appellant Avalon Investments, LLC purchased approximately thirty acres from John Kimbro, using a promissory note secured by a deed of trust. About one month later, Kimbro assigned the note to JHX2, Ltd. On January 1, 2008, acting on Kimbro's direction, the substitute trustee foreclosed on the property, selling the property to Kimbro, who one week later sold a one-half interest in the property to appellee Jean Penick Spiller. Alleging that Kimbro did not have the right to initiate foreclosure and that the foreclosure was therefore void, Avalon sued Kimbro and Spiller for fraudulent conveyance. Spiller moved for summary judgment as to the claims against her. The trial court granted the motion and severed the claims against Spiller into a separate cause number. Avalon then filed this appeal. We affirm the trial court's granting of summary judgment in favor of Spiller.

Factual and Procedural Background

In December 2006, about one month after Avalon bought the property, executing a promissory note payable to Kimbro and securing the loan with a deed of trust, Kimbro assigned the note to JHX2 as collateral. In the Collateral Transfer of Note, which was filed in the county's deed records, the parties agreed that Kimbro would not cause the trustee to post the property for foreclosure without JHX2's "prior written consent." On December 3, 2007, the substitute trustee issued notice that the property would be sold at a foreclosure sale on January 1, 2008, stating that Kimbro had asked that the property be posted for sale. On December 31, 2007, the president of JHX2 signed a Consent of Secured Party authorizing Kimbro to post the property for foreclosure and a Release of Collateral Transfer of Note, stating that JHX2 was re-transferring the note back to Kimbro. Both the consent and the release were "[e]xecuted this 31st of December 2007 to be effective December 1, 2007." The substitute trustee conducted the sale on January 1, and Kimbro bought the property. On January 8, 2008, Kimbro sold a one-half interest in the property to Spiller.

Avalon sued Kimbro and Spiller, contending that Kimbro did not have the right to initiate foreclosure and that the foreclosure was therefore void.[1] Spiller moved for summary judgment, asserting that she was a bona fide purchaser and that she had no actual or constructive knowledge of Avalon's claims against the property at the time of her purchase. As evidence of this affirmative defense, Spiller pointed to her deposition, in which she stated:

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[1] Avalon sued Kimbro on January 18, 2008. It amended its petition to include Spiller as a defendant almost three years later, in October 2010.

- she learned about the property from her son, who said that Kimbro, Spiller's agent when she sold another piece of property in late December 2007, thought it would be a good investment for her;
- she visited the property before she bought her interest in it;
- the purchase of her interest in this property was the first time she bought property for investment purposes;
- closing took place at Independence Title Company, and Spiller purchased title insurance on Kimbro's recommendation;
- when she purchased her interest, she was given a deed reflecting her half-interest, she presumed the deed was recorded in the deed records, and the title company took care of that filing;
- Kimbro never told her how he acquired the property or that he had just bought it in a foreclosure sale;
- Kimbro never told her that there were any problems related to the title to the property;
- when she bought her interest, she was unaware of any disagreement or dispute related to the foreclosure; and
- Kimbro never told her that he had been sued by Avalon, and she first learned about any issues related to the property when she was sued in 2010.

Avalon responded to Spiller's motion, asserting that because the Collateral Transfer and related documents were on file in the public records, she "at the very least" had constructive notice of documents showing that Kimbro had transferred Avalon's note to JHX2, that Kimbro did not obtain JHX2's proper prior consent as mandated by the Collateral Transfer before directing the trustee to post the property for foreclosure, and that Kimbro was not the owner of the note at the time the foreclosure sale was posted. Thus, Avalon argued, there was a fact issue as to Spiller's status as bona fide purchaser.

Discussion

Avalon argues on appeal that there is a fact issue as to whether Spiller established as a matter of law that she was a bona fide purchaser. It asserts that the documents filed in the public records—the Collateral Transfer, JHX2's consent to foreclosure, JHX2's release of the Collateral Transfer, and the substitute trustee's deed—put Spiller "on notice of questions and suspicions regarding the legality of the foreclosure" and about Kimbro's right to sell Spiller an interest in the property and that Spiller was therefore not entitled to summary judgment. We disagree.[2]

Spiller sought summary judgment based on the affirmative defense that she was a good-faith, bona fide purchaser who had no knowledge of the claims raised by Avalon. A person is a bona fide purchaser if she buys the property "in good faith, for value, and without notice of any third-party claim or interest," whether that notice is actual or constructive; constructive notice is notice "imputed to a person not having personal information or knowledge." *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001). "Status as a bona fide purchaser is an affirmative defense to a title dispute." *Id.* Recorded instruments in a property's chain of title generally establish an "irrebuttable presumption of notice." *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 617 (Tex. 2007); *see Hue Nguyen v. Chapa*, 305 S.W.3d 316, 324 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("A purchaser is bound by every recital, reference, and reservation contained in or fairly disclosed by an instrument that forms an essential link in the chain of title under which he claims.").

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[2] We review a trial court's granting of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When reviewing the granting of a traditional motion for summary judgment, we take as true all evidence favorable to the nonmovant and indulge all reasonable inferences and resolve any doubts in its favor. *Id.* Summary judgment is properly granted when the evidence establishes that the movant is entitled to judgment as a matter of law because there are no genuine issues of material fact. Tex. R. Civ. P. 166a(c).

In attempting to raise an issue of fact as to constructive notice, Avalon pointed to evidence establishing that Kimbro transferred the deed to JHX2; that the transfer document required Kimbro to obtain prior written consent from JHX2 before asking that the property be posted for a foreclosure sale; and that JHX2's consent was dated after the trustee's notice of foreclosure sale was issued. These documents, Avalon argues, raise a fact issue as to whether Spiller should have guessed that there would be disputes related to the propriety of the foreclosure.

Avalon's argument relies upon an assumption that Kimbro's request that the trustee post the property for sale was invalid because JHX2 had not yet given prior written consent for such posting. However, the consent, signed by JHX2 's president on December 31, 2007, expressly states that it was effective December 1, 2007, before the date the trustee posted the property for foreclosure. Avalon has presented no authority to establish that JHX2 could not give Kimbro written permission retroactively and thus ratify his foreclosure request. *See Disney Enters., Inc. v. Esprit Fin., Inc.*, 981 S.W.2d 25, 31 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.) (ratification is entity's affirmance of prior act, which did not originally bind it but which was professedly done on its account, that gives act effect as if originally authorized by entity; ratification usually occurs in agency relationship but is not limited to such relationships; "because ratification is not a form of authorization, the ratification of an act of a stranger will not create an agency relationship, it will only bind the ratifier to the specific transaction that is ratified"); *see also Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980) ("Ratification may occur when a principal, though he had no knowledge originally of the unauthorized act of his agent, retains the benefits of the transaction after acquiring full knowledge."); *Texas First Nat'l Bank v. Ng*, 167 S.W.3d 842,

861-62 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.) (discussing ratification); Restatement (Second) of Agency § 82 (1958) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.").[3]

Conclusion

Spiller's deposition testimony established that at the time of her purchase, she was unaware of Avalon's claims against Kimbro contesting the validity of the foreclosure sale. Avalon did not produce any evidence to rebut that testimony, and on appeal it asserts only that the public records should have raised a reasonable person's "suspicions" about whether the foreclosure was proper. We have resolved those issues against Avalon.

Spiller established that she was a bona fide purchaser of her half-interest, *see Madison*, 39 S.W.3d at 606, and the trial court properly granted summary judgment as to the claims Avalon leveled against Spiller. We affirm the trial court's granting of summary judgment in Spiller's favor.

[3] We agree with Spiller that Avalon, which was in no way a party to the agreements between JHX2 and Kimbro, may not rely upon the prior-consent clause to invalidate the foreclosure sale that was ratified and given approval by JHX2 before the sale took place. *See Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (third party may only enforce contract it did not sign if parties to contract entered agreement with "clear and express intention of directly benefitting the third party"; if contract confers "only an indirect, incidental benefit, a third party cannot enforce the contract," and "Texas courts have maintained a presumption against third-party beneficiary agreements"). Even if there was an issue with the retroactively given consent, Avalon has not shown that JHX2 was somehow barred from retroactively transferring the property back to Kimbro's possession, which removed the need for Kimbro to have obtained written prior consent for the sale.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: February 11, 2016