

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA JACKSON,

Plaintiff-Appellant,

V

LAKER GROUP, L.L.C., and KROLL
CONSTRUCTION COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 3, 2005

No. 261588
Oakland Circuit Court
LC No. 04-058216-CH

LAKER GROUP, L.L.C.,

Plaintiff-Appellee,

v

GLORIA JACKSON,

Defendant-Appellant.

No. 261594
Oakland Circuit Court
LC No. 04-058945-CK

Before: White, P.J., and Jansen and Wilder, JJ.

WHITE, P.J. (*dissenting.*)

I respectfully dissent. I would reverse in both cases.

The majority fails to present and view the facts in a light most favorable to plaintiff, thus to its factual recitation I would add that about one month after Kroll Construction purportedly finished the remodeling work, the bathroom tiles began cracking, and other problems with Kroll's workmanship emerged as well. Jackson contacted Kroll Construction several times for the work to be repaired, but it was not.

I would also add that Jackson's complaint to quiet title, filed in the circuit court, asserted that she was not required to pay defendant Kroll Construction until the bathroom remodeling work was completed, which it was not, and that she received no notice of the impending foreclosure sale. Jackson alleged that because she was unaware of the sheriff's sale, she did not attend the sale or take action during the six-month statutory redemption period following the sale. Jackson alleged that when Laker purchased the property from defendant Kroll

Construction, Laker had knowledge that the property had been sold at a sheriff's sale and that Jackson was in possession of the property. Jackson alleged that Laker should have inquired further into her interest in the property, and that Laker was not a bona fide purchaser because it knew she was in possession of the property, and because it purchased the property for far less than its fair market value. Jackson maintained that because a sheriff's deed on a foreclosure sale of a mortgage on which no money is owing passes no title to the purchaser, neither Kroll nor Laker obtained title to the property.

The circuit court concluded that the mortgage gave defendant Kroll Construction the power of sale, which became operative when plaintiff failed to fulfill her obligations, and that there was no issue of fact that the foreclosure sale followed the required statutory procedures.

Jackson presented evidence to support a finding that defendant Kroll Construction's power to sell was not invoked because the mortgage installment payments, which were due upon completion of the remodeling work, never became due because the remodeling work was not completed. There was thus a material issue of fact whether her failure to make payments to defendant Kroll constituted a default in the mortgage.

"Foreclosure sales by advertisement are defined and regulated by statute. Once the mortgagee elects to foreclose a mortgage by this method, the statute governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993). MCL 600.3204 sets forth the prerequisites of a foreclosure by advertisement, which include "(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative"

There is no dispute that Jackson's first payment on the mortgage was not due until "completion" of the bathroom-remodeling job. The form contract¹ defendant Kroll used at the time of contracting with Jackson, which defendant Kroll produced below in lieu of the actual contract Kroll entered into with Jackson, states:

In consideration of the said work and services to be done by the Contractor, the Owner agrees to pay the Contractor THE SUM OF ____ () as follows: \$____
As a deposit: \$____ **on completion of said work:** and the balance of \$ ____
payable in ____ equal consecutive monthly payments of \$ ____ first payment shall
commence ____ days **after completion.**

* * *

¹ In answers to interrogatories, Kroll stated: "Kroll Construction Company gave its records of the construction contract it entered into to Pines Investment for collection of the Gloria Jackson account. Kroll Construction does have standard construction contracts executed during the same time frame that Gloria Jackson entered into her construction that exemplify the standard construction contract entered into with Gloria Jackson."

It is further agreed that Contractor shall have the right at any time to sell, transfer or assign this contract and the monies to be paid under the contract for value, and in the event of such assignment the Owner hereby agrees that he has no defense in whole or in part to the payment of the sum agreed by him to be paid as evidence by the **note signed herewith**. [Emphasis added.]

The only promissory note defendant Kroll produced, which was signed by Jackson, was payable to the order of National City Bank. This promissory note required Jackson to begin payment “60 days from the date **a signed completion certificate is delivered** or disbursement of the Loan proceeds, whichever is later.” [Emphasis added.] Jackson’s affidavit stated that Kroll never had her sign a certificate of completion indicating the bathroom remodeling job was complete, and Kroll does not dispute that it did not request from Jackson, or obtain from her, a signed completion certificate. Avery Warnick, a Kroll representative, testified at deposition that it is not Kroll’s business practice to have customers sign certificates of completion, and that Jackson would therefore not have been asked to sign one.

Defendant Kroll Construction conceded below that Jackson contacted it because the remodeling job was unsatisfactory and requested that the work be corrected. Defendant Kroll Construction maintained that the remodeling job was completed, relying on the affidavit of Kroll employee, Scott Johnson. Johnson’s affidavit states that after the completion of the remodeling, Jackson had some minor complaints; that he returned to Jackson’s home while Jackson was there and “resolved all workmanship issues;” and that Jackson was satisfied with the completed bathroom-remodeling job.

Jackson submitted documentary evidence below, including her deposition testimony, that about a month after the tile floor was installed, the tiles started cracking, and that she called Kroll to complain and Kroll said they would send someone to her house, but never did. Jackson further testified that she called Kroll a second time, that they returned her call and said they would send someone out, but never did. Jackson also submitted an affidavit below stating that there were still unresolved workmanship issues to be completed by Kroll, and that she had never been satisfied with the remodeling job. Jackson submitted the report of builder Leon Mancour, who examined the bathroom and took sixteen photographs, also submitted below. Mancour’s Inspection Report, dated April 14, 2004, stated in pertinent part:

The bathroom had been completely remodeled. Ms. Jackson said it had been done in 2001. The problem I am listing should not have occurred in three years. All of these things should hold up for 10 years or more. The floor tile ceramic was cracked heavily in the middle of the floor (picture #14). The ceramic in the shower surround was cracked heavily in both corners (pictures # 9 and 10). The window trim was open approximately ¼” in one corner (picture #5). Both the vanity faucet and the tub faucet leaked (pictures # 4 and 7). The toilet was very loose from the floor and leaking (pictures #3, 8 and 11). The tub drain and or tile were also leaking (picture #12). There were tissue holders and towel bars pulled off the wall . . . The door on the vanity was peeling off on the face . . . The clothes

chute door was coming off . . . The toilet leak and the tub leak had caused some problems in the sub floor (pictures # 11 and 12).

Mancour's inspection report included estimates of costs to repair Kroll's work, totaling \$2,800.²

I conclude that Jackson presented evidence from which a reasonable fact-finder could conclude that she did not default on the mortgage. The circuit court's conclusion that she had defaulted was erroneous when a question of fact remained on that issue. If Jackson did not default, one of the statutory prerequisites for foreclosure by advertisement was not present, and the foreclosure sale was improper.

A sheriff's deed on foreclosure of a mortgage on which nothing is due at the time of foreclosure passes no title to the purchaser. *Bowen v Brogan*, 119 Mich 219; 77 NW 942 (1899). If Jackson did not default on the mortgage, Pines Investment was not entitled to institute a foreclosure sale by advertisement, no title would have passed to defendant Kroll Construction after the foreclosure, and Laker would thus acquire no title from Kroll.

Jackson also asserts that Laker was not a bona fide purchaser. "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 297; 537 NW2d 258 (1995). Possession by another may disqualify a person from being a bona fide purchaser for value. See Cameron, 1 Michigan Real Property Law 3d ed, § 11.25, p 402. "Open, manifest, and unequivocal possession of premises constitutes constructive notice of the rights of one in such possession as effectively as compliance with the recording law." *Kastle v Clemmons*, 330 Mich 28, 31; 46 NW2d 450 (1951). "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." *Id*.

Jackson submitted evidence below that Laker was not a bona fide purchaser of the property because it had constructive notice of Jackson's presence on the property. Jackson submitted below the Title Commitment Laker obtained, dated August 19, 2003, which stated that two mortgages Jackson had on the property, executed on September 29, 1995, had to be discharged. Jackson also submitted below excerpts of the deposition testimony of Allen Saulter, an agent of Laker, in which Saulter testified that before purchasing the property, he was aware that Jackson was living there. Saulter also testified that he did wonder why there was a sheriff's deed taken in 2001 and the property was not being transferred until November of 2003, but made no inquiries of Jackson. I conclude that Jackson's evidence raised a genuine issue of fact whether Laker knew she was in possession of the home, and thus whether Laker was a bona fide purchaser.

² Mancour's estimate list included \$2,300 to replace the ceramic floor and sub floor and to remove and reinstall the toilet and vanity, and \$500 to regROUT the tub area, replace two cabinet doors, and repair the trim and accessories.

I would reverse the grant of summary disposition to defendants Kroll Construction and Laker in Docket No. 261588. In Docket No. 261594, I would reverse the grant of summary disposition to plaintiff Laker. I would remand for further proceedings consistent with this opinion.

/s/ Helene N. White