COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2849 **Cir. Ct. No. 2007CV32**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ROLLAN F. FULLER AND DEBORAH J. FULLER,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT G. GABERT,

DEFENDANT-APPELLANT,

CAVALRY SPV II AND PLATINUM FINANCIAL SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Gabert appeals a judgment of foreclosure, asserting Rollan and Deborah Fuller do not have a valid mortgage upon which they can foreclose. We agree and, accordingly, reverse the judgment.

Background

¶2 In 1996, Gabert sought to purchase a 15.8-acre parcel from the Fullers. Deborah handwrote a "land contract," using another land contract as a template, but making a few customizations. The contract specified a purchase price of $75,000 and provided for payments of $200 per month until a final balloon payment was due in December 2006. Alternatively, the contract provided that Gabert could make payments totaling $5,000 prior to the balloon payment due date. The contract was signed in September 1996.

¶3 Gabert obtained a $20,000 loan from Green Tree Financial for the real estate and used that money as a down payment.[1] To obtain the loan, however, Gabert needed clear title to the real estate. Thus, at closing in November 1996, the Fullers conveyed the property to Gabert by warranty deed. The land contract, however, also provided that if Gabert defaulted, he would "be responsible for the deed to be changed back" to the Fullers.

¶4 Gabert made, at most, payments totaling $800, and when he failed to make the balloon payment in December 2006, the Fullers sought to foreclose. The court orally denied Gabert's motion for summary judgment and the matter was

[1] Cavalry SPV II and Platinum Financial Services, Gabert's co-defendants, are Green Tree's successors. Also, Gabert had sought additional financing from Green Tree to purchase a mobile home from another vendor.

tried to the court. Ultimately, the court found the purchase price was $75,000[2] and the land contract "constitute[d] a second lien" against the real estate. The court concluded the property had been mortgaged and Gabert owed $106,040.41 to the Fullers. The court set a three-month redemption period and then ordered a sheriff's sale if Gabert failed to redeem. On a motion for reconsideration of the redemption period, the court stated it did not believe there was a land contract and clarified, "I think I have to hold them to the fact that this has to be treated as a mortgage foreclosure case rather than a land contract foreclosure case…." Gabert appeals.

Discussion

¶5 Gabert asserts the court erred in finding there was a note and mortgage upon which to foreclose. This requires us to consider the warranty deed as well as the land contract document. Interpretation of a deed is question of law, as is interpretation of a contract. ***Schorsch v. Blader***, 209 Wis. 2d 401, 408, 563 N.W.2d 538 (Ct. App. 1997).

¶6 A warranty deed is permitted to contain reservations or exceptions. *See* WIS. STAT. § 706.10(5)(2005-06). We will ordinarily attempt to reconcile the deed with the stated reservations. ***Lucareli v. Lucareli***, 2000 WI App 133, ¶7, 237 Wis. 2d 487, 614 N.W.2d 60. If the reservations are inconsistent with or repugnant to the nature of the estate's conveyance, the grant controls. ***Id.***

[2] The closing statement associated with the loan from Green Tree indicated a purchase price of $20,000.

¶7 The Fullers conveyed their property to Gabert with a warranty deed that contained no reservation of rights. It mentioned no lien or mortgage or otherwise indicated a security interest held by the Fullers. Indeed, the Fullers knew Gabert needed clear title to obtain financing and noted, in the contract, that certain paperwork was only for Green Tree's benefit. When the Fullers conveyed the property by unreserved warranty deed, they warranted the property was unencumbered by a lien. Whether they intended to or not, the Fullers thereby extinguished any security interest they might have held under the land contract. Further, any tacit agreement permitting a security interest not listed in the deed is inconsistent with the nature of conveyance by warranty deed, and the plain language of the deed controls.

¶8 The Fullers try to avoid this result by asserting we can look to their intent and convert the arrangement with Gabert to a mortgage.[3] This is evidently what the court attempted to do: with a mortgage, the mortgagor holds both legal and equitable title. ***Glover v. Marine Bank of Beaver Dam***, 117 Wis. 2d 684, 691-92, 345 N.W.2d 449 (1984). The mortgagee, who is usually a lender, becomes a lien holder with a security interest. ***Id.*** Under a land contract, the buyer acquires equitable title to the property while the seller retains legal title as security for the unpaid balance. ***Republic Bank of Chicago v. Lichosyt***, 2007 WI App 150, ¶17, 303 Wis. 2d 474, 736 N.W.2d 153. Because the Fullers had

[3] The Fullers make this argument despite the fact that, as will be noted below, they actually intended to create a land contract.

conveyed title to Gabert with a deed, the court construed the contract between them as a note and mortgage and granted a remedy under mortgage law.[4]

¶9 To support their appellate argument that we should interpret their arrangement as a mortgage, the Fullers rely principally on ***Maslowski v. Bitter***, 12 Wis. 2d 337, 107 N.W.2d 197 (1961). Bitter loaned Maslowski $1,520. ***Id.*** at 339. Later, to secure the loan, Maslowski and his wife executed an assignment to Bitter of one-half their interest in land in Cedarburg, listing as consideration the loan amount. ***Id.*** at 340. A week later, the Maslowskis executed a quitclaim deed to Bitter. ***Id.*** Neither document indicated it was intended as security for a loan. ***Id.***

¶10 When the Maslowskis offered to repay the loan, Bitter refused the funds, wanting his interest in the land instead. The Maslowskis sought a declaration that the deed was intended only for security, not as a conveyance. The court agreed, noting that the $1,520 was inadequate as a purchase price and that Bitter had not paid toward an outstanding mortgage, taxes, or interest. The court stated that a deed, "though absolute in form, may be shown by parol [evidence] to have been intended as security and, between the parties, will have the effect of a

[4] The remedy in a mortgage situation is foreclosure. "A foreclosure suit has been said to be merely a proceeding for the legal determination of the existence of the mortgage lien, the ascertainment of its extent, and the subjection to a sale of the estate pledged for its satisfaction." ***Glover v. Marine Bank***, 117 Wis. 2d 684, 693, 345 N.W.2d 449 (1984) (quoting 55 AM.JUR.2D *Mortgages* § 553 (1971)). Under a land contract, there are multiple remedies to choose from, including: suing for the unpaid purchase price; suing for specific performance, in which case the property is sold at judicial sale; ending the contract and bringing an action to quiet title; or strict foreclosure, wherein the vendor forgoes the right to collect outstanding debt and instead recovers the property. ***Republic Bank v. Lichosyt***, 2007 WI App 150, ¶¶18-19, 303 Wis. 2d 474, 736 N.W.2d 153.

mortgage." ***Id.*** at 341. It is on this language which the Fullers rely to argue they intended for this arrangement to be secured by the land.

¶11 However, in ***Maslowski***, it was the borrowers who, already holding title to the real estate, conveyed a deed to their lender as security for a loan. Here, the Fullers as the vendors conveyed their deed to their buyer. Asking us to consider their arrangement a mortgage turns the ***Maslowski*** deed-as-mortgage notion on its head. As sellers, the Fullers have nothing to secure with a deed; that is, they are not the parties promising repayment by pledging their land.[5]

¶12 The circuit court erroneously concluded there was a mortgage on which the Fullers could foreclose. The warranty deed extinguished any security interest the Fullers had, whether under a mortgage or a land contract, because a warranty deed with no reservations indicates the real estate is unencumbered. The Fullers may or may not have other remedies available, such as an action in

[5] In fact, we think it evident the parties never contemplated a mortgage, only a land contact. First, the contract itself, although not dispositive on its own, suggests the parties contemplated a land contract and not a mortgage, as Deborah modeled the document after the Fullers' own land contract. Second, a mortgage usually involves two virtually simultaneous conveyances: first, a deed from the seller to the purchaser, who needs title in order to give a mortgage, then the mortgage note from the purchaser-mortgagor to the lender-mortgagee. *See* ***Gonis v. New York Life Ins. Co.***, 70 Wis. 2d 950, 959 n.6, 236 N.W.2d 273 (1975). There was no simultaneous transfer here. Instead, the Fullers retained title for two months before conveying the property to Gabert. Gabert then executed an actual mortgage, but to Green Tree. Nothing in the facts of the transaction suggests the parties contemplated a mortgage between the Fullers and Gabert, and the Fullers ignore Gabert's argument that a simultaneous deed exchange is a mandatory component of a mortgage. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

contract to collect on the purchase price, but foreclosure is not one of those remedies.[6]

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Gabert additionally complains the Fullers failed to file a lis pendens, and he notes there is no record from the trial court to support a conclusion that they did. This argument was raised for the first time on appeal—the trial court therefore had no opportunity to make a record. Also, the judgment indicates a lis pendens was filed, and we must presume the judgment is accurate in that respect. ***Manning v. McClurg***, 14 Wis. 379, 382-82 (1861). Finally, even if there were no lis pendens filed, it is not fatal to the Fullers' case against Gabert because Gabert, as a party to the action, has actual notice of the dispute. *See* ***Gaugert v. Duve***, 2001 WI 83, ¶¶24-27, 244 Wis. 2d 691, 628 N.W.2d 861.