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MORTGAGES: WHEN IS AN ABSOLUTE CONVEYANCE A MORTGAGE?

Rosenthal v. LeMay, 72 So.2d 289 (Fla. 1954)

Plaintiff judgment debtor conveyed by deed his one-half interest in a building to defendant, the owner of the other half-interest. The consideration was $40,000, which plaintiff used to discharge the judgment, while the interest conveyed was worth more than $100,000. In the same transaction defendant gave plaintiff an option to re-purchase the one-half interest in two years at a price equivalent to the $40,000, plus interest, less the approximate rent that defendant would receive from the one-half interest during that period. The agreement stated specifically that the transaction was not a mortgage, but the trial court upheld plaintiff's contention that it actually was a mortgage. On appeal, HELD, the transaction was a conditional sale and plaintiff had only the right to repurchase according to the terms of the option. Judgment reversed with instruction to allow plaintiff to exercise the option.

The proper interpretation of an instrument purporting to convey property is an ever-recurring problem; one court has said that "there is no other single question upon which there is a greater diversity of opinion among the courts . . . ."[1] The Florida Legislature has attempted to alleviate the problem by providing that all conveyances of property for the purpose of securing the payment of money shall be considered as mortgages.[2] This statute, however, is of little help, since it is still necessary for courts to determine the actual intent of the parties to the conveyance. In the final analysis this intent is determinative of the construction to be given the instrument.[3] In ascertaining the requisite intent the Florida Court has looked beyond the actual wording of the conveyance, ignoring phrases contained in the instrument such as " 'the deeds executed . . . are not mortgages but are absolute deeds . . . .' "[4] Similarly, the North Dakota Supreme Court, in holding an instrument to be a mortgage, ignored the fact that the wording of the conveyance expressly provided that the grantee was to receive a fee simple title at the end of the option period.[5]

[1]Miracle v. Stone, 190 Ky. 610, 615, 227 S.W. 1011, 1013 (1921).

[2]FLA. STAT. §697.01 (1953).

[3]Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925); First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657 (1887).

[4]Connor v. Connor, 59 Fla. 467, 470, 52 So. 727, 728 (1910).

[5]Mechtle v. Topp, 78 N.D. 789, 52 N.W.2d 842 (1952).

The principal factor that has led the Florida Court, and other courts, to construe a doubtful transaction as a mortgage is the existence of an indebtedness between the grantor and grantee, arising either prior to the conveyance or as a result of it.[6] To have this effect the debt must be enforceable by the grantee;[7] in other words, there must be an obligation on the part of the grantor to exercise his right to repurchase as well as the obligation of the grantee to reconvey upon payment of the specified price. Courts, upon proof of the existence of such a debt, usually have little reluctance to hold that a mortgage was intended by the parties.[8] The Florida Court will recognize the difference in the bargaining positions of grantor and grantee.[9] Thus, when a wife conveyed by an "absolute deed" to a man from whom her husband had embezzled funds, the Court held it a mortgage for the purpose of securing repayment of the embezzled money.[10]

Pennsylvania has adopted an essentially different rule. Decisions there indicate that any conveyance containing an option allowing a grantor to repurchase is held to be a mortgage, regardless of the actual intention of the parties.[11] Florida probably will hold the conveyance a mortgage when doubt or ambiguity exists.[12] The Court, however, looks to conditions indicative of the intent existing between the parties at the time of the conveyance and will admit parol evidence to bring these conditions to light.[13]

When the existence of a debt is questionable, possession of the

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[6]*E.g.*, Perdue v. Bell, 83 Ala. 396, 3 So. 698 (1888); Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925); Franklin v. Ayer, 22 Fla. 654 (1886); Miracle v. Stone, 190 Ky. 610, 227 S.W. 1011 (1921); see 4 POMEROY, EQUITY JURISPRUDENCE 576 (5th ed. 1941).

[7]*E.g.*, Lindsey v. Hamlet, 235 Ala. 335, 179 So. 234 (1938); Brumick v. Morris, 131 Fla. 46, 178 So. 564 (1938); Holmberg v. Hardee, *supra* note 6; Smith v. Hope, 47 Fla. 295, 35 So. 865 (1904).

[8]*E.g.*, Stovall v. Stokes, 94 Fla. 717, 115 So. 828 (1927); Elliott v. Connor, 63 Fla. 408, 58 So. 241 (1912).

[9]Stovall v. Stokes, 94 Fla. 717, 738, 115 So. 828, 836 (1927) (dictum).

[10]Elliott v. Connor, 63 Fla. 408, 58 So. 241 (1912).

[11]Kerr v. Gilmore, 6 Watts 405 (Pa. 1837); Brown v. Nickle, 6 Barr 390, 391 (Pa. 1847) (dictum).

[12]Marcus v. Hull, 142 Fla. 306, 316, 195 So. 170, 174 (1939) (dictum); Hull v. Burr, 58 Fla. 432, 462, 50 So. 754, 764 (1909) (dictum); Franklin v. Ayer, 22 Fla. 654, 661 (1886) (dictum).

[13]Markell v. Hilpert, 140 Fla. 842, 192 So. 392 (1939); De Bartlett v. De Wilson, 52 Fla. 497, 42 So. 189 (1906).