Analysis
As of: Sep 09, 2016

FINANCIAL FREEDOM ACQUISITION, LLC *vs.* DOROTHY A. LAROCHE & another.[1]

1 Edward F. Laroche.

15-P-772.

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 1104*; *2016 Mass. App. Unpub. LEXIS 857

August 30, 2016, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).*

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PRIOR-HISTORY: *Fin. Freedom Acquisition v. Laroche, 2015 Mass. Super. LEXIS 5 (Mass. Super. Ct., 2015)*

JUDGES: Vuono, Meade & Carhart, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The dispute before us stems from a home equity conversion mortgage, also known as a "reverse mortgage," between Financial Freedom Acquisition, LLC (Financial) and Dorothy Laroche (Dorothy). The security for the loan was Dorothy's home located in Chicopee, Massachusetts (property). In 2004, two years prior to executing the reverse mortgage with Financial's predecessor,[2] Dorothy deeded the property's fee simple interest to her son Edward Laroche (Edward), retaining for herself a life estate. Financial discovered the deed prior to closing on the reverse mortgage, and noted in its closing documents that a reconveyance from Edward to Dorothy would be required to complete the transaction.

Nonetheless, the closing proceeded without the reconveyance, Dorothy granted Financial a mortgage on the property, and she received proceeds from the loan.

> 2 The two sets of notes and mortgage instruments that collectively form the reverse mortgage transaction list the "lender" respectively as (i) Financial Freedom Senior Funding Corporation, a Subsidiary of IndyMac Bank, F.S.B., (Financial Freedom Senior), and (ii) the Secretary of the United States Department of Housing and Urban Development. It appears from the record that Financial is successor-in-interest to Financial Freedom Senior. Hereinafter, we refer to both entities collectively as Financial, both notes collectively as the note, both mortgages collectively as the mortgage, and the entire transaction as the loan.

Approximately five years later in 2011, Financial again noticed that Dorothy had deeded the property to Edward and requested that Edward transfer the fee simple remainder back to Dorothy. When Edward refused to do so, Financial brought this action seeking a declaration that Edward's remainder fee simple interest is subject to Financial's mortgage. The complaint also alleged unjust enrichment, breach of contract, and equitable subrogation.

Following a jury-waived trial, a judge of the Superior Court dismissed Financial's claims. He found first that Dorothy effectively delivered the deed to Edward and that Edward accepted that deed. He further determined that Edward's acceptance of the deed was not subject to the mortgage granted to Financial because (i) Financial had actual knowledge when it accepted the reverse mortgage that Dorothy did not hold the fee simple interest in the property, (ii) Edward did not consent to bind his interest, and (iii) Edward had no actual knowledge that his interest was potentially subject to Financial's mortgage. The judge also concluded that Financial was not entitled to recover under the theory of equitable subrogation or unjust enrichment. For the reasons that follow, we affirm.

Background. By deed dated April 22, 1966, Dorothy and her now-deceased husband, Robert, took title to the property as tenants by the entirety. When Robert died in 1996, Dorothy became the sole owner of the fee simple in the property. Many years later, for estate planning purposes, Dorothy executed a deed, dated August 3, 2004, conveying the property to Edward, reserving for herself a life estate. That deed was recorded in the Hampden County registry of deeds on August 10, 2004. At that time, Dorothy did not inform Edward about the conveyance, and he was unaware of it.

Approximately two years after she deeded her property to Edward, Dorothy began investigating the possibility of supplementing her income through a reverse mortgage. After receiving counseling as required by the United States Department of Housing and Urban Development (HUD) in May, 2006, Dorothy decided to go forward with a reverse mortgage.

As we have noted, at some point prior to the closing, Financial became aware of the prior deed and, as the closing documents expressly indicate, intended to require that Edward convey his interest in the property back to Dorothy before closing. Dorothy never asked Edward to reconvey the property and he never did so. Despite the absence of a reconveyance of the deed from Edward to Dorothy, the closing proceeded on August 24, 2006. The transaction consisted of the execution of two notes and two mortgages. Financial never recorded the mortgage.

As the judge explained, the note is a nonrecourse debt, meaning that foreclosure on its collateral is the lender's only remedy in the event that the borrower (or, more likely, her estate) does not pay the debt when it is due.[3]

> 3 The note states that Dorothy's debt is due and payable on August 2, 2083, with the lender having an option to demand immediate payment sooner in certain specified circumstances, including the death of the borrower.

After closing, Financial began making payments to Dorothy in accordance with the reverse mortgage. The payments were deposited directly to Dorothy's bank account,[4] which was a joint account with Edward, although Edward did not use the account and never wrote any checks from the account.[5] Dorothy began receiving monthly payments of $426.78 in or about September, 2006.

> 4 Some of the money was used to satisfy an existing mortgage with Peoples Bank in the amount of approximately $23,000. A discharge of the Peoples mortgage was recorded in the Hampden County Registry of Deeds.

5 Edward did receive cash in the amount of $2,800 from the account. The trial judge found, however, that whether this sum came from the proceeds of the reverse mortgage was speculative because Dorothy had other sources of income.

Edward first learned that the property had been conveyed to him when Financial contacted him in 2011 and asked him to deed his fee simple interest in the property back to Dorothy, which he refused to do. At approximately the same time, Edward learned that Dorothy had executed a reverse mortgage on the property. Financial ceased making monthly payments to Dorothy in 2011, making its last payment to her on June 1, 2011.

Discussion. "In reviewing a matter wherein the trial judge was the finder of fact, '[t]he findings of fact . . . are accepted unless they are clearly erroneous[] [and] [w]e review the judge's legal conclusions de novo.'" *Allen v. Allen, 86 Mass. App. Ct. 295, 298, 16 N.E.3d 1078 (2014)*, quoting from *Crown v. Kobrick Offshore Fund, Ltd., 85 Mass. App. Ct. 214, 224, 8 N.E.3d 281 (2014)*. "Thus, '[s]o long as the judge's account is plausible in light of the entire record, an appellate court should decline to reverse it.'" *Allen v. Allen , supra*, quoting from *Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 510, 677 N.E.2d 159 (1997)*.

1. *Delivery of the deed to Edward*. Financial claims that the judge erroneously concluded that Dorothy "delivered" the deed to Edward. We disagree. "T]he issue of delivery is ordinarily one of fact" and "[t]his question depends on the acts done and the intent with which they are performed." *Murphy v. Hanright, 238 Mass. 200, 204, 130 N.E. 204 (1921)*. Our cases have held that effective delivery of a deed requires the establishment of two facts. First, "[i]t must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title." *Hawkes v. Pike, 105 Mass. 560, 562 (1870)*. Second, the deed must be "placed at the disposal of the grantee, or of some other person in his behalf."[6] *Id. at 562-563*. Physical delivery of the deed to the grantee is not, however, required. See *Bianco v. Lay, 313 Mass. 444, 448, 48 N.E.2d 36 (1943)*. "The acceptance may be actual or it may be implied from the grantee's conduct." *Juchno v. Toton, 338 Mass. 309, 311, 155 N.E.2d 162 (1959)*. "But there can be acceptance by conduct only if the grantee had knowledge of the conveyance at the time he acted." *Ibid.* See *Harrison v. Trustees of Phillips Academy, 12 Mass. 456, 461 (1815)* ("For no man can make another his grantee without his consent").

6 Recording in the registry of deeds "itself does not operate as a delivery, nor does it supersede the necessity of proof of a delivery." *Hawkes v. Pike, supra at 563*. The recording statute, *G. L. c. 183, § 5*, however, provides: "The record of a deed, lease, power of attorney, or other instrument, duly acknowledged or proved as provided in this chapter, and purporting to affect the title to land, shall be conclusive evidence of the delivery of such instrument, in favor of purchasers for value without notice claiming thereunder." Because Edward is not a "purchaser[] for value," this section of the recording statute does not apply to him.

The trial testimony established definitively that Edward had no knowledge of Dorothy's deed to him until 2011 when he was contacted by Financial. Accordingly, if the deed was ever effectively delivered, this occurred in 2011 and not before -- regardless of the recording date. See *Juchno v. Toton, supra*.

In *Hawkes v. Pike, supra at 562*, the Supreme Judicial Court stated that, although there is no definite formula for establishing delivery of a real estate deed, "it must be the *concurrent* act of two parties" (emphasis supplied). Nonetheless, a gap of time may occur between the making of a grant and the acceptance thereof, without preventing an effective delivery. See *Butrick v. Tilton, 141 Mass. 93, 94-95, 6 N.E. 563 (1886)*. See also *Graves v. Hutchinson, 39 Mass. App. Ct. 634, 639-640, 659 N.E.2d 1212 (1996)*. The question, thus, becomes whether delivery to Edward was effective in 2011, even though Dorothy had executed and recorded the deed many years prior in 2004.

The judge found that when Dorothy executed and recorded the deed to Edward she "intended a present transfer of the Property in order to put it beyond the reach of a potential nursing home creditor should she, in the future, be forced to reside in such a home." We see no basis in the record for disturbing this factual finding. The judge also found that Edward's immediate refusal to reconvey the property when he learned of the existence of the deed in 2011 "was an immediate acceptance of the deed because he conducted a sufficient act of dominion to accept the transfer." Again, we see no reason to disturb

the judge's factual finding.

Additionally, no evidence appears in the record that would suggest that Dorothy changed her mind about conveying the property to Edward at any time between when she signed and recorded the deed in 2004 and the date Edward learned of its existence in 2011. Accordingly, we conclude that Dorothy's intent to pass title to Edward was sufficiently concurrent with Edward's acceptance of that title so as to satisfy the elements of an effective delivery. For these reasons, we agree with the judge's ruling that the deed from Dorothy to Edward was effectively delivered in 2011.[7]

7 In so ruling, the judge relied in part on *Ward v. Ward, 70 Mass. App. Ct. 366, 874 N.E.2d 433 (2007)*. Financial claims that the holding in *Ward* is inapposite. The central issue in *Ward* was whether the grantor could rescind a deed due to his own misunderstanding about its legal effect; we held that the deed could not be rescinded based on a unilateral mistake of law in the absence of fraud or coercion. *Id. at 368-371*. In so doing, we observed "[i]t [made] no difference that [the grantee] was unaware of the existence of the deed for sixteen months after its recording." *Id. at 371*. While we agree that our decision in *Ward* is not controlling, the judge's reliance on it does not render his analysis infirm.

2. *The effect of the mortgage on Edward's interest.*

Financial next argues that, even if Edward accepted the deed from Dorothy, his acceptance was subject to the reverse mortgage. We disagree. Reported cases are clear that a deed becomes effective as between the grantor and grantee at the time of delivery -- and not upon the execution or recording date if that date is not the same as the delivery date. See *Harrison v. Trustees of Phillips Academy, 12 Mass. at 461* ("The date of the deed is immaterial, its effect commencing from the delivery only"). See also *Samson v. Thornton, 44 Mass. 275, 281, 3 Metc. 275 (1841)*.

The question then becomes whether Financial's mortgage had any effect on the title conveyed to Edward where the mortgage was executed prior to delivery of the deed to Edward, but was never recorded. The judge found it dispositive that Edward had only inquiry notice and not actual notice of Financial's mortgage at the time when he learned of and accepted Dorothy's deed to him.[8] Again, we see no reason to disturb the judge's factual finding. Here, the evidence demonstrated that Financial had *actual* knowledge of Dorothy's prior deed to Edward before closing on the loan, and it went forward with the transaction anyway. More fundamentally, there was *no* evidence to suggest that Financial accepted Dorothy's mortgage with the understanding (or assumption) that the prior grant to Edward was void. Instead, the information available to Financial from the record title showed -- unequivocally -- that Dorothy held only a life estate at the time of the loan closing. In short, the recording system served its precise purpose by warning Financial prior to the transaction of the prior grant to Edward. See *G. L. c. 183, § 4*. See also *Allen v. Allen, 86 Mass. App. Ct. at 301*, quoting from *Moore v. Gerrity Co., 62 Mass. App. Ct. 522, 526, 818 N.E.2d 213 (2004)* ("The purpose of the recording statute is 'to allow persons without actual knowledge to the contrary to rely upon registry records'").

8 *General Laws c. 183, § 4*, provides: "A conveyance of an estate in fee simple, fee tail or for life . . . shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual knowledge of it, unless it, or an office copy as provided . . . is recorded in the registry of deeds for the county or district in which the land to which it relates lies." This language has been held to encompass mortgages. See *Tramontozzi v. D'Amicis, 344 Mass. 514, 517, 183 N.E.2d 295 (1962)*; *Bank of Am., N.A. v. Casey, 474 Mass. 556, 560-561, 52 N.E.3d 1030 (2016)*. Financial does not challenge whether this language protects grantees such as Edward, who are not "heirs [or] devisees," but also are not purchasers for value. See *Selectmen of Hanson v. Lindsay, 444 Mass. 502, 507, 829 N.E.2d 1105 (2005)*, quoting from 14 *Powell, Real Property § 82.01[3]*, at 82-13 (M. Wolf ed. 2000) (describing recording acts as "designed to protect purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests"). See also Eno & Hovey, Real Estate Law § 4.60, at 117 (4th ed. 2004) ("The statute applies when the question is one of priority between two conflicting, successive conveyances to bona fide purchasers, or persons claiming under them, of the same legal interest in land"). Accordingly, we do not reach that question.

That an error likely occurred when Financial closed the loan and disbursed funds does not change the fact that Financial willingly took Dorothy's mortgage with actual knowledge of Dorothy's prior grant.[9] Accordingly, the judge was correct in ruling that the mortgage to Financial pertains only to Dorothy's life estate,[10] and not to the fee simple interest she had already granted to Edward,[11] notwithstanding that the deed to Edward was not effective as between Dorothy and Edward until 2011.[12]

9 Contrary to Financial's assertion, we do not view the judge's decision as holding that Financial intentionally accepted a mortgage in a life estate, as opposed to intentionally accepting a mortgage with actual knowledge that the grantor possessed only a life estate.

10 A life estate is alienable by the life tenant, and can be conveyed by deed. See *Hershman-Tcherepnin v. Tcherepnin, 452 Mass. 77, 88 & 90 nn. 20, 21, 891 N.E.2d 194 (2008)*. Moreover, the fact that Financial never recorded the mortgage has no impact on the title interest as between Dorothy and Financial. See *Jacobs v. Jacobs, 321 Mass. 350, 351, 73 N.E.2d 477 (1947)*.

11 We note that it appears that the judge made two contradictory rulings. On the one hand, he held that the mortgage was invalid because it did not comply with regulations on reverse mortgages promulgated by HUD. On the other hand he stated that the mortgage "is only valid against [Dorothy's] interest in the [p]roperty" and, thus, Financial's collateral "is limited to [Dorothy's] life estate" -- meaning that if Dorothy's note becomes payable, "Financial can seek to enforce the debt by foreclosing on [Dorothy's] life estate." Either the mortgage was entirely void by statute and conveyed nothing, or it was a valid grant that conveyed an interest in the real estate (the extent of which is the subject of this memorandum and order). We need not resolve that contradiction because we conclude that the mortgage operated to grant Financial a security interest in Dorothy's life estate. Similarly, we need not decide whether the mortgage complied with HUD regulations, or any failure by Financial to comply with HUD regulations impacted the state of the title.

12 Our decision is consistent with the following observation: "*Except* as to a purchaser for value *without notice*, the recording of a deed without the knowledge or consent of the grantee is not effective until the date of its acceptance" (emphasis supplied). Eno & Hovey, Real Estate Law § 4.61, at 119. Essentially, we apply a corollary to that rule -- that a recorded deed *is* effective as to a purchaser for value *with notice*, notwithstanding whether acceptance has occurred. Additionally, affirmance of the judgment for the defendants on all counts is appropriate even though it is our view that Financial holds a security interest in the life estate because no count in Financial's amended complaint seeks a declaration of the same.

3. *Equitable subrogation*. The trial judge held that Financial was not entitled to equitable subrogation of its interest in the property to Edward, because it proceeded "with full knowledge of all the facts, [and] finds itself in the position it chose to put itself into." See *Childs v. Stoddard, 130 Mass. 110, 112 (1881)*. We agree.

Equitable subrogation is a doctrine that is typically applied to determine the order of priority as among various mortgagees. See *East Boston Sav. Bank v. Ogan, 428 Mass. 327, 329-331, 701 N.E.2d 331 (1998)*; *Wells Fargo Bank, Natl. Assn. v. National Lumber Co., 76 Mass. App. Ct. 1, 5-6, 918 N.E.2d 835 (2009)*. Assuming without deciding that some aspect of an equitable subrogation claim is available to Financial in the circumstances presented, Financial fares no better on this theory because it was fully aware of the deed to Edward in the record. See *East Boston Sav. Bank v. Ogan, supra at 331* ("[T]he degree of knowledge attributable to a subrogee concerning the existence of the intervening mortgage may nullify equitable subrogation").

4. *Unjust enrichment*. Financial's final argument that the trial court erred in entering judgment for Dorothy and Edward on Financial's unjust enrichment claim is also unavailing. The terms "unjust enrichment" and "quantum meruit" are generally construed as synonymous. See *Glynn v. Hy-Brasil Restaurants, Inc., 75 Mass. App. Ct. 322, 326, 914 N.E.2d 103 (2009)*. In seeking to recover under a quantum meruit theory the plaintiff must prove: "(1) that it conferred a measurable benefit upon the defendants; (2) that [it] reasonably expected compensation from the defendants; (3) and that the defendants accepted the benefit with the knowledge, actual or chargeable, of the [plaintiff's] reasonable expectation." *Finard & Co., LLC v. SITT Asset Mgmt., 79*

Mass. App. Ct. 226, 229, 945 N.E.2d 404 (2011). "A plaintiff is not entitled to recovery on a theory of quantum meruit where there is a valid contract that defines the obligations of the parties." *Boston Med. Center Corp. v. Secretary of the Executive Office of Health & Human Servs., 463 Mass. 447, 467, 974 N.E.2d 1114 (2012).*

The judge correctly ordered judgment for the defendants on Financial's unjust enrichment claim. The note and mortgage between Dorothy and Financial amount to written contracts that control the rights and obligations of those parties. See *ibid.* Moreover, Financial has not asserted any basis for suggesting that it had a reasonable expectation of reimbursement from Edward when it advanced funds to Dorothy.

Judgment affirmed.

By the Court (Vuono, Meade & Carhart, JJ.[13]),

13 The panelists are listed in order of seniority.

Entered: August 30, 3016.