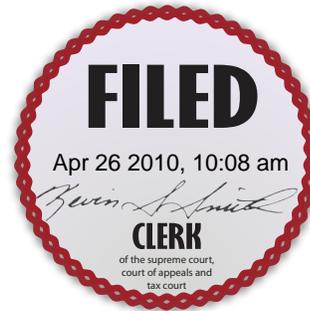


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MELVIN D. FORD and DEBBIE FORD,)

Appellants-Plaintiffs,)

vs.)

No. 39A01-0906-CV-291

LARRY G. JONES and SHARON F. JONES,)

Appellees-Defendants.)

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0809-PL-648

April 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Melvin Dean Ford and Debbie Ford sued Larry Jones and Sharon Jones over an oral land purchase agreement. The trial court entered judgment for the Fords against Larry Jones only, in the amount of \$400,000 plus interest. The Fords appeal the judgment, raising one issue, which we restate as whether the trial court properly denied them equitable relief. Concluding the Fords are entitled to relief in the form of an equitable lien on the Joneses' real property, we reverse and remand that part of the trial court's judgment denying them equitable relief, and affirm the remainder of the judgment.

Facts and Procedural History

The Joneses, as tenants in common, are the owners of two parcels of land in Jefferson County, Indiana. The parties referred to these two parcels as the "Hanover parcel" and the "Chelsea parcel." Each parcel is comprised of approximately 100 acres. A house is situated on the Chelsea parcel and the Joneses were building a home on the Hanover parcel. Farm Credit Services of Mid-America, FLCA ("Farm Credit") held a mortgage on each parcel signed by both Larry and Sharon. The Joneses defaulted on their mortgages and Farm Credit initiated foreclosure proceedings. In March 2008, Farm Credit and the Joneses entered into an agreed summary judgment which granted judgment to Farm Credit on both mortgages in the total amount of \$316,570.35, plus pre-and post-judgment interest and expenses advanced by Farm Credit, foreclosed Farm Credit's mortgage liens as first and prior liens against the parcels, and ordered the parcels sold at sheriff's sale. The parties agreed Farm Credit would forbear execution for thirty days to give the Joneses an opportunity to refinance and pay the

judgment. The Joneses were unable to do so, however, and a sheriff's sale of the Chelsea parcel was scheduled for September 10, 2008, to be followed by a sheriff's sale of the Hanover parcel a week later on September 17, 2008.¹

Larry Jones contacted Dean Ford regarding the possibility of the Fords buying the parcels. No agreement was reached until immediately before the September 10, 2008, sheriff's sale of the Chelsea parcel. At that time, Larry and Dean orally agreed the Fords would buy all of the Chelsea parcel and 95 acres of the Hanover parcel, leaving the Joneses approximately five acres of the Hanover parcel upon which the house they were building was situated. The Fords paid \$400,000 directly to Farm Credit within minutes of the scheduled start of the sheriff's sale and the sheriff's sale was cancelled. An attorney then prepared a written purchase agreement intended to memorialize the oral agreement. Mrs. Jones testified that because of illness, she was not aware until after the fact that the properties were in foreclosure or that Larry had agreed to sell the properties to Dean. Dean acknowledged he never spoke to Mrs. Jones despite knowing Larry owned the properties with his wife. Larry testified that within a few minutes of reaching the agreement with Dean, he received a call from another person he had been negotiating with who offered him a better deal. The Joneses eventually informed Dean they were not going to sign the purchase agreement.

The Fords filed this lawsuit seeking specific performance, imposition of a constructive trust, and imposition of a lien. Subsequent to filing the lawsuit, the Fords paid an additional

¹ The complaint and some testimony at trial indicate the sales were set for September 11 and 18, see appellants' appendix at 5, transcript at 7; but the trial court order and various other documents indicate the sales were set for September 10 and 17, see appellants' app. at 19, plaintiff's exhibit 2 (affidavit of Farm Credit loan officer).

\$22,000 to the county treasurer to prevent the properties from being sold at a tax sale.² The Fords then amended their lawsuit to add an equitable subrogation count seeking to be substituted for Farm Credit in the foreclosure action. The case was tried to the bench on March 20, 2009, on the lien and equitable subrogation counts only. The trial court entered the following relevant findings of fact, conclusions of law, and judgment:

FINDINGS OF FACT

* * *

5. Between the time of the judgment [in favor of Farm Credit] and prior to the time of the first sale, Melvin Dean Ford and Larry G. Jones entered into negotiations regarding the purchase by the Fords of some or all of the land.

6. Sharon F. Jones had no knowledge of these negotiations, nor of the pending sheriff's sales.

7. The Fords had both constructive and actual notice that Sharon Jones had an interest in the real estate.

* * *

11. Within fifteen minutes of the first Sheriff's sale, Mr. Jones agreed to keep only a five acre tract [of the Hanover parcel] and to sell the real estate to the Fords for \$400,000.

12. On September 10, 2008, just prior to when the Sheriff's Sale was scheduled to begin, the Fords paid the sum of Four Hundred Thousand Dollars (\$400,000.00) to Farm Credit. The Sheriff's Sales were cancelled.

13. Farm Credit applied the \$400,000 it received from the Fords to the principal and interest owed to satisfy the two mortgages, pay its attorney fees, taxes, pay the cost of advertising, [and to pay] the sheriff's sale costs. Farm Credit has also reimbursed the Fords for payments the Fords made after September 10, 2008 on the real property taxes on the land.

14. As of March 19, 2009 Farm Credit had a balance of \$43,455.15 held in escrow.

15. Although not a party to this action, Farm Credit, by its Senior Loan Officer Michael Casey, has stated, by affidavit made an exhibit in this case, "upon direction from the Court as to the entitlement to the escrow account fund balance, [Farm Credit] is more than willing to distribute the funds as so ordered."

² The Fords' original \$400,000 payment was in excess of the amount owed by the Joneses to Farm Credit, and Farm Credit held the remainder in an escrow account. Prior to the trial in this case, the Fords were reimbursed for the tax payment from the escrow account.

16. Some time after September 10, 2008 a purchase agreement was written to commemorate the purported understanding between Mr. Jones and Mr. Ford. This agreement was never signed by any party, though the Fords were willing to do so.

* * *

18. Only after the proposal [sic] purchase agreement was drawn up, some days after the Fords had paid \$400,000 to Farm Credit, did Sharon Jones learn of the mortgage foreclosure, of the negotiations between her husband and Mr. Ford, and of the payment by the Fords to Farm Credit.

19. Sharon [Jones] was never a part of and did not agree to any such sale.

* * *

CONCLUSIONS OF LAW

From these facts the Court makes the following conclusions of law:

1. Mr. and Mrs. Jones owned the land in question as tenants in common.

2. Neither Larry Jones [n]or Sharon Jones could convey his or her interest in the real estate in a manner that would adversely affect the right of the other to enjoy the land.

3. Larry Jones had no agency relationship with Sharon Jones that would give him the authority to bind her to an agreement to transfer her interest in the real estate.

4. There was no document in writing that would remove the transaction here in question from the requirements of Indiana Code 32-21-1-1 (The Statute of Frauds).

5. As between Sharon Jones and Mr. and Mrs. Ford, the Fords were mere volunteers when they paid the \$400,000 to Farm Credit.

6. Being mere volunteers, the Fords cannot now assert the doctrine of equitable subrogation as to Sharon Jones.

* * *

10. Since Larry Jones lacked the power to convey his interest in the real estate in a manner that would adversely affect the right of Sharon to enjoy the land, he could not convey the land to the Fords.

* * *

12. At the time the Fords paid the money to the mortgagee they could thereby obtain no interest in the real estate, since Mr. Jones could not convey any such interest. Therefore, the Fords cannot have a lien on the real estate by virtue of that payment.

* * *

14. As to a money judgment against Larry Jones the law is with the [Fords]; as to whether the Fords have obtained an interest in any of the real estate in question, the law is with the [Joneses].

JUDGMENT

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED by the Court that the [Fords] recover from the Defendant Larry G. Jones the sum of Four Hundred Thousand Dollars (\$400,000.00) plus interest thereon at the rate of eight per cent (8%) per annum from September 10, 2008 until paid.

Any funds hereafter received by Mr. and Mrs. Ford from [Farm Credit] as a result of their payment to Farm Credit of the \$400,000 shall be credited against this judgment.

IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED, by the Court that the [Fords] take nothing by way of their complaint against the Defendant Sharon F. Jones.

IT IS FURTHER CONSIDERED, AND DIRECTED, but not ordered, by the Court that [Farm Credit] distribute the amount held by [it] in escrow from the \$400,000 received from the Fords back to the Fords.

Appellants' Appendix at 18-25. The Fords now appeal.

Discussion and Decision

I. Standard of Review

The trial court's judgment contains findings of fact and conclusions thereon entered *sua sponte*. The findings control only as to the issues they cover, and a general judgment standard applies to any issue upon which the trial court has made no findings. Coffman v. Olson & Co., P.C., 906 N.E.2d 201, 206 (Ind. Ct. App. 2009), trans. denied. In reviewing the judgment, we determine whether the evidence supports the findings and whether the findings, in turn, support the conclusions and judgment. Id. We will reverse a judgment only when it is clearly erroneous; that is, when the judgment is unsupported by the findings of fact and the conclusions thereon, id., or when the trial court applies the wrong legal standard to properly found facts, In re Paternity of K.I., 903 N.E.2d 453, 457 (Ind. 2009). A general judgment may be affirmed on any theory supported by the evidence presented at trial. Coffman, 906 N.E.2d at 207.

II. Equitable Remedy

The Fords contend the trial court erred in denying them an equitable remedy and granting them only a money judgment against Larry.

A. Tenancy in Common

We note first an error of law in the trial court's conclusions. The trial court based its judgment at least in part on the legal effect of the purported sale, concluding that "[a]t the time the Fords paid the money to the mortgagee they could thereby obtain no interest in the real estate, since Mr. Jones could not convey any such interest. Therefore, the Fords cannot have a lien on the real estate by virtue of that payment." Appellant's App. at 24. The Joneses owned the parcels as tenants in common pursuant to the specific language of their deed. See Defendant's Exhibit B (copy of Warranty Deed wherein "Larry G. Jones and Sharon F. Jones, husband and wife (Grantors) . . . CONVEY AND WARRANT to Larry G. Jones and Sharon F. Jones, as equal tenants in common" both parcels); Ramer v. Smith, 896 N.E.2d 563, 567 (Ind. Ct. App. 2008) (explaining where deed conveying property to husband and wife contains no qualifying words, the grantees hold the estate as tenants by the entirety; where the intention to hold the estate as joint tenants or tenants in common is clearly expressed in the deed, however, a joint tenancy or tenancy in common is created). "A tenancy in common is property held by two or more persons by several and distinct titles." Windell v. Miller, 687 N.E.2d 585, 587-88 (Ind. Ct. App. 1997). A tenant in common "may sell his undivided interest, but cannot sell or otherwise dispose of the whole property without authority from his co-tenant" Sims v. Dame, 113 Ind. 127, 15 N.E. 217, 219 (1888).

Tenants in common do not act as partners or as principal and agent to each other simply by virtue of their relation as cotenants. Id. Thus, where one of two cotenants purports to sell the interest of both, but the other cotenant has not sanctioned the sale, the purchaser acquires the interest of one only and becomes a tenant in common with the other. Id. Accordingly, the trial court erred as a matter of law in concluding Larry could not convey his own interest in the parcels. However, as the trial court noted, the requirements of the Statute of Frauds were not satisfied with respect to this conveyance, as there was no writing signed by Larry, and therefore Larry's interest was not conveyed to the Fords. See Appellant's App. at 22 (Conclusion of Law 4, citing Ind. Code § 32-21-1-1); see also Brown v. Branch, 758 N.E.2d 48, 51 (Ind. 2001) (promise to convey real estate falls within Statute of Frauds and because the promise was not in writing, it generally would be unenforceable). The legal effect of Larry's promise to convey the parcels to the Fords is immaterial, however, because the case was tried on the Fords' request for equitable relief.

B. Equitable Subrogation

The Fords contend the trial court erred in denying them equitable subrogation. Equitable subrogation arises when a party, not acting as a mere volunteer, discharges the entire debt of another and permits the party paying off a creditor to succeed to the creditor's rights in relation to the debt. Bank of New York v. Nally, 820 N.E.2d 644, 651 (Ind. 2005). The "classic formulation is that the 'purchaser's right of subrogation to the mortgage he or she discharged includes its priority over junior liens'" Id. (quoting 83 C.J.S. Subrogation § 46 at 576 (2000)); see also Muir v. Berkshire, 52 Ind. 149, 1875 WL 5956 at

*1 (1875) (“Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim.”). Equitable subrogation is designed “to avoid an unearned windfall” to a junior lienholder. Nally, 820 N.E.2d at 653. That is, “subrogation should be used to prevent a junior lienholder from being elevated in priority at the expense of another lienholder.” Bank of America, N.A. v. Ping, 879 N.E.2d 665, 671 (Ind. Ct. App. 2008). Also to be taken into consideration is whether subrogation will prejudice the interests of junior lienholders; in most cases, there is no prejudice because the position of junior lienholders is simply unchanged by allowing the payor to step into the shoes of the original lienholder. Nally, 820 N.E.2d at 653. “Subrogation depends upon the equities and attending facts and circumstances of each case.” Ticor Title Ins. Co. of California v. Graham, 576 N.E.2d 1332, 1338 (Ind. Ct. App. 1991), trans. denied.

Contrary to the Fords’ contention, this is not “a classic case for the application of the remedy of equitable subrogation.” Brief of Appellants at 15; cf. Nally, 820 N.E.2d at 653 (“Perhaps the case occurring most frequently is that in which the payor is actually given a mortgage on the real estate, but in the absence of subrogation it would be subordinate to some intervening interest . . .”). As the Fords paid the entire Farm Credit mortgage and satisfied the tax liens against the parcels, and as there is no evidence of other lienholders in this case, equity does not demand the Fords be subrogated to Farm Credit’s rights under its mortgage because the Fords’ position with respect to the real estate is not in jeopardy.

C. Equitable Lien

The Fords also requested imposition of an equitable lien in their complaint. “In certain cases the law makes provisions for implied liens which are based upon the general consideration of justice even without agreements therefor.” Bahar v. Tadros, 123 Ind. App. 570, 582, 112 N.E.2d 754, 759 (1953).

The vital principle is that a party who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. . . . This remedy is always so applied as to promote the ends of justice.

Id. (citing Dickerson v. Colegrove, 100 U.S. 578 (1879)).

Here, the Fords advanced over \$400,000 to satisfy the mortgage and tax liens on the parcels, in anticipation of receiving title to the parcels. A written agreement was drawn up to that effect, but Larry refused to sign because he was offered a better deal, and Sharon refused to sign because she had been unaware of the deal. Had the deal not been struck mere minutes before the Chelsea parcel was to be sold at sheriff’s sale, however, the Chelsea parcel, at least, would have been sold and the “better deal” and Sharon’s objections would have been moot. Instead, because of the Fords’ advancement of funds, the Joneses’ mortgage and tax obligations have been fulfilled, and they have both been enjoying the use and ownership of the parcels free of encumbrances.

Under these circumstances, an equitable lien is certainly appropriate. The Joneses’ were jointly liable for the Farm Credit mortgage, which was secured by the entirety of their jointly-owned property. They were also jointly liable for the tax obligation upon the real

estate. Regardless of what Sharon knew or did not know about the purported sale of the parcels, regardless of whether the purported sale could be legally enforced, the Fords' payment in anticipation of purchasing the property benefitted both Larry and Sharon by saving their joint property from foreclosure and paying off their joint indebtedness. Giving the Fords an equitable lien on the entirety of the Joneses' property does not put the Joneses in any worse position than they were in before the Fords' involvement: the entire property was then subject to the mortgage and to foreclosure for failure to satisfy the mortgage, and it will now be subject to an equitable lien and to execution for failure to satisfy the lien. See Seller v. Lingerman, 24 Ind. 264, 1865 WL 1891 at *2 (1865) (holding, on rehearing, that trial court properly gave purported buyer an equitable lien on land he bought at a sheriff's sale that was later set aside for the amount of money paid at the sale and noting the debtor "cannot complain that the order . . . was inequitable [because the buyer's] money had been applied, upon a sale of the property, to pay a judgment against the [debtor]."). The trial court's resolution unjustly enriches the Joneses – and especially Sharon – by letting them have the parcels free and clear of encumbrances when they would not have the property at all but for the Fords' intervention. The Fords paid \$400,000 to discharge the Joneses' mortgage and tax obligations on the parcels and are entitled to have a lien on the property rather than just a money judgment against Larry only.

Conclusion

We reverse the trial court's judgment to the extent it denies the Fords equitable relief as to both Larry and Sharon Jones, and remand for the trial court to amend its judgment to

grant an equitable lien to the Fords on both parcels. The trial court's judgment is in all other respects affirmed.

Reversed and remanded in part; affirmed in part.

BAKER, C.J., and BAILEY, J., concur.