216

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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| In re | |
| BOSWELL LAND & LIVESTOCK INC., | Bankruptcy Case No. 82C-01990 |
| Debtor. | |
| WILLIAM G. BOSWELL and MARY LEE BOSWELL, | Bankruptcy Case No. 82C-01991 |
| Debtors. | |
| ELTON, INC., a Utah corporation, | Civil Proceeding No. 85PC-0777 |
| Plaintiff. | |
| v. | |
| UNITED STATES OF AMERICA, FARMERS HOME ADMINISTRATION, et al., | |
| Defendants. | MEMORANDUM OPINION |

Appearances: Stephen B. Mitchell, Burbidge & Mitchell, Salt Lake City, Utah, for plaintiff Elton, Inc.; Kathleen B. Barrett, Assistant United States Attorney, Salt Lake City, Utah, for defendant United States of America, Farmers Home Administration.

## PROCEDURAL AND FACTUAL BACKGROUND

On July 17, 1985, Elton, Inc. (hereinafter "Elton") filed this civil proceeding against Farmers Home Administration (hereinafter "FHA") to determine the order of sale of five parcels of real property and the validity of a trust deed held by FHA against a parcel of real property owned by Elton. This matter came before the Court on a Motion for Summary Judgment by Elton. The undisputed facts giving rise to this controversy are as follows.

On March 23, 1976, Boswell Land & Livestock, Inc. (hereinafter "Boswell Land") executed a trust deed in favor of Zions First National Bank (hereinafter "Zions") encumbering five parcels of real property located in Utah County, Utah (hereinafter referred to as Parcels 1, 2, 3, 4, and 5) as security for a loan in the amount of $120,000.00.

On June 1, 1977, Boswell Land sold Parcel 1 together with other properties not involved in this case for $389,000.00 to Elton under a Uniform Real Estate Contract. In addition, a warranty deed was prepared at the time the contract was signed.

On June 7, 1977, Elton recorded a Notice of Interest with the office of the Utah County Recorder in Parcel 1 by virtue of a Uniform Real Estate Contract.

On March 27, 1979, Boswell Land and William and Mary Lee Boswell executed a second trust deed in favor of the FHA

encumbering Parcels 1, 2, 3, 4, and 5 as security for a loan in the amount of $100,000.00.

On July 10, 1980, Elton recorded a Warranty Deed from Boswell Land in the office of the Utah County Recorder describing all of the property covered by the June 1, 1977 Uniform Real Estate Contract.

FHA subsequently obtained an assignment of the trust deed held by Zions and now seeks to foreclose the trust deed against Parcel 1.

## DISCUSSION

The first argument made by the plaintiff on its Motion for Summary Judgment is that Parcels 2, 3, 4, and 5 should be sold before Parcel 1 is sought under the doctrine of inverse order of alienation to satisfy the first trust deed now held by FHA.

The doctrine of inverse order of alienation applies when an owner gives a blanket mortgage on a tract or on several tracts of land and later conveys or encumbers portions of the property subject to the paramount lien. See Annotation, 131 A.L.R. 5 (1941). Under this doctrine, if the grantor has conveyed or encumbered only a portion of the property covered by the blanket lien, a subsequent grantee or mortgagee can require that the portion of the property retained by the grantor be sold first to satisfy the paramount mortgage. Id. Also, if all of the

property subject to a blanket mortgage is subsequently conveyed or encumbered by the original mortgagor in parcels, the parcels are liable for the blanket mortgage in the inverse order of their alienation. Id. The underlying reason for the rule is that a grantor who sells his property and receives full value, particularly where he sells with covenants of warranty, will not be presumed to have intended to derogate from his grant by charging the payment of his debt secured by the paramount encumbrance upon the parcel conveyed. Id. In this case, Boswell Land conveyed only a portion of the property that was subject to the blanket lien of Zions. Consequently, the plaintiff wants the FHA to look first to the property retained by Boswell Land for satisfaction of the Zions' lien. However, the inverse order of alienation does not apply when there is evidence of an intent that the doctrine should not be invoked. Id. at 62. The doctrine is inapplicable where the parcel is conveyed subject to that encumbrance, or under a conveyance in which the grantee assumes its payment, and the amount, or the proportionate amount, of the paramount encumbrance is credited on or deducted from the consideration for the conveyance of the parcel. Id.; New England Loan & Trust Co. v. Stephens, 16 Utah 385, 52 P. 624 (1898); In re Dan Hixson Chevrolet Co., 20 B.R. 108, 111 (Bkrtcy. N.D. Tex. 1982). In such a case, the underlying reason for the rule is lacking, and therefore the rule is inapplicable.

In this case, the Uniform Real Estate Contract for the purchase of Parcel 1 and other properties not involved in this case provided:

> 6. It is understood that there presently exists an obligation against said property in favor of Zions First National Bank-Spanish Fork Branch with an unpaid balance of $120,000.00, as of June 1st, 1977.
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> * * *
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> 19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

In addition, at the time the contract was signed, Boswell Land prepared a warranty deed which was recorded on July 10, 1980. Apparently, the deed made no reference or mention of the existence of any liens against the property purchased by Elton. A deed made in full execution of a contract of sale of land merges the provisions of the contract into the deed. This rule includes all prior negotiations and agreements leading up to the execution of the deed. The rule as to merger of previous agreements, however, is subject to several exceptions. One such exception

exists where the statement for the conveyance of real property with respect to consideration is incomplete. See Annotation 143 A.L.R. 548, 552 (1943). To establish the true consideration for a conveyance, parol evidence is admissible. Id.; Dieckman v. Walser , 114 N.J.Eq. 382, 168 A. 582 (1933); Clott v. Jordan, 10 N.J.Misc. 733, 160 A. 684 (1929); Woods v. Roberts, 586 P.2d 405, 407 (Utah 1978). In Clott v. Jordan, the consideration in the deed was expressed as "One dollar and other good and valuable consideration." The court stated:

> The deed in question here cannot be said to be either complete or unambiguous, for, instead of naming the actual consideration which the parties had agreed upon, it states that the grant was made in consideration of the 'sum of One ($1.00) Dollar and other good and valuable consideration'; manifestly that expression is too general to disclose the details of the consideration, and in an action which is essentially to recover a part of the consideration, recourse must be had to some source other than the deed to ascertain what it was, and since the deed was executed in attempted compliance with an antecedent contract in which these parties had presumably agreed upon the consideration, we would naturally look to it for the information. To do that would not be to contradict the deed or anything contained in it, but to make certain and definite that which it leaves uncertain and indefinite.

Id. at 686. Furthermore, the court in Woods vs Roberts found that the trial court did not err in admitting the prior agreements of the parties to show the actual consideration "since the normal recital of consideration in a deed is merely a

receipt." Id. at 407. The consideration in the warranty deed executed by Boswell Land was expressed as "Ten dollars and other good and valuable consideration." Therefore, the prior agreements between the plaintiff and Boswell Land are admissible to show what that consideration was for the conveyance of Parcel 1. The real estate contract provided that Elton would receive a warranty deed conveying title to Parcel 1 and additional property "free and clear of encumbrances except as herein mentioned." The encumbrance mentioned in the contract is the lien held by Zions. After examining the language of the contract, and in particular paragraphs 6 and 19, the Court is of the opinion that part of the consideration given by the plaintiff was to take Parcel 1 and other property not involved in this case subject to the Zions' lien. Consequently, the doctrine of the inverse order of alienation is inapplicable.

The second argument made by the plaintiff is that the FHA does not hold a valid second trust deed against Parcel 1. The basis of this argument is that the defendant's lien was extinguished when the real estate contract payments were completed. The defendant's argument is that the contract provided for the creation of a lien against the property and its validity is not dependant upon whether the contract payments have been completed.

Under a real estate contract, the purchaser acquires equitable title to the property and the seller retains mere legal

title. See Jelco, Inc. v. Third Judicial District Ct., 29 Utah 2d 472, 511 P.2d 739 (1973). Under the doctrine of equitable conversion, the vendor's rights to the real estate is deemed to be "personalty" because he is entitled to receive only the consideration mentioned in the contract. His interest is a security interest similar to that of a mortgage. The extent of the security interest is dependant upon the outstanding contract balance and is discharged when the purchase price is paid. The vendee's rights to the property are deemed to be "realty" because he is entitled to the property upon completion of the terms of the contract. This doctrine appears to have been adopted by the Utah Supreme Court and applied in matters of tax, probate, and condemnation. Id. See In re Estate of Wilson, 78 Utah 2d 197, 499 P.2d 1298, 1300 (1972); Allred v. Allred, 15 Utah 396, 393 P.2d 791, 792 (1964); see also, Franklin Financial v. Fillmore (In re Peterson), slip op., nos. B-75-386 & B-75-387 (Bkrtcy. D. Utah Dec. 3, 1976).

In this case, paragraph 8 of the Uniform Real Estate Contract provided:

> 8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed Nine percent (9%) per annum and payable in regular monthly installments; provided that the agrregate [sic] monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer

> under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

The idea behind paragraph 8 is for the vendor to use the contract payments, to the extent necessary, to satisfy these loans. A problem, however, arises when the payments have been completed but the loans remain unsatisfied.

As previously discussed, a vendor's interest in a real estate contract is considered to be "personalty"; a vendee's interest is considered to be "realty." Furthermore, perfection of a security interest in the vendor's interest is governed by the Uniform Commercial Code. National Acceptance Company of America v. Salina Truck & Auto Parts, Inc., et al. (In re Salina Truck & Auto Parts, Inc.), No. 84PC-1082, unpublished memorandum opinion (Bkrtcy. D. Utah Sept. 1986). In this case, paragraph 8 appears to authorize the creation of a lien against the vendee's interest under the contract. In addition, no dispute exists as to whether the FHA followed the appropriate method of perfecting its interest. Nevertheless, in the opinion of the Court, the FHA was provided with nothing more than that held by the vendor. The purpose of the lien provided for by paragraph 8 was to secure the payment of the outstanding contract balance. Once the payments were made, the lien was to be discharged. Therefore, payment of the contract obligation, not whether the vendor properly remits

the payments to the third party lender, triggers the extinguishment of the lien. To find otherwise would work a great injustice upon the vendee.

In this case, Boswell Land exercised its option as provided for in paragraph 8 and borrowed money from the FHA. However, at the time Elton completed the contract payments, money was still owed to the FHA. Despite this fact, the security interest of the FHA has been discharged. The FHA had constructive notice of Elton's interest in Parcel 1 and should have notified Elton that the contract payments should be made to it.

**CONCLUSION**

Plaintiff's Motion for Summary Judgment as to the application of the doctrine of inverse order of alienation is denied. As to the validity of FHA's lien, plaintiff's motion will be granted.

DATED this 9 day of December, 1986.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE