STATE OF MICHIGAN

COURT OF APPEALS

HOWARD L. WARSON,

Plaintiff-Appellee,

v

HOWARD D. WARSON, DANIEL L. WARSON, MORTGAGEIT, INC., ARGENT MORTGAGE CO., L.L.C., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., REX FERGUSON and PENNY FERGUSON,

Defendants,

and

WASHINGTON MUTUAL BANK,

Defendant-Appellant.

UNPUBLISHED
June 2, 2009

No. 283401
Genesee Circuit Court
LC No. 06-083704-CK

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant, Washington Mutual Bank ("Defendant")[1], appeals as of right a judgment for plaintiff, voiding a deed conveying real property to it. We affirm.

Plaintiff and his wife, Lillian Warson, owned a home and a cabin. In 2001, they signed two quit claim deeds that apparently conveyed these properties jointly to their sons, Daniel L. Warson and Howard D. Warson. Daniel and Howard[2] subsequently executed deeds conveying full ownership in the cabin to Daniel and full ownership in the home to Howard. Thereafter, Daniel conveyed the cabin to Rex Ferguson and Penny Ferguson as collateral for a loan. Moreover, in 2005, Howard obtained a mortgage against the home from Argent Mortgage Co.,

[1] None of the other defendants in this matter filed claims of appeal.

[2] We use "Howard" to denote Howard D. Warson, and "plaintiff" to denote Howard L. Warson.

L.L.C., for $80,500. That mortgage was discharged and Howard obtained a mortgage against the home from MortgageIt, Inc. for $88,000. Howard failed to make payments on that mortgage and MortgageIt, Inc., foreclosed Howard's interest in the home. MortgageIt, Inc., subsequently sold the home to defendant.

When he found out his home was subject to a mortgage in default, plaintiff investigated the title records and found out about the interests Daniel and Howard had recorded. Plaintiff filed a suit alleging that Daniel and Howard fraudulently induced his signature on the 2001 deeds. Consequently, he urged the trial court find the deeds and conveyances arising therefrom void. He also urged the trial court to declare him the owner of the home and cabin, free of all claims. At the bench trial, plaintiff testified that he signed the deed to his home with the intent that it be put into his safe as long as he was alive; he signed it so that the home would not be part of probate proceedings after his death.[3] As for the cabin, plaintiff testified that he did not intend to sign the deed at all, but Howard asked him to sign what appeared to be a blank piece of paper, telling him it was for insurance. This, he later came to believe, turned out to be a quit claim deed for the cabin. After trial, the trial court adopted plaintiff's testimony as its own findings of fact. It further found that plaintiff "did not intend to convey his residence. He intended that deed to go into the safe for safekeeping." The court held that the deeds were "invalid and illegal" and that the subsequent conveyances of interest in those properties were also invalid. Thus, the Fergusons' and defendant's remedies were to pursue Howard and Daniel for damages resulting from their "fraudulent transactions." The court entered a judgment accordingly.

Only defendant appealed to this Court; therefore, we need not consider whether the trial court reached the correct conclusion concerning the quit claim deed to the cabin. Only the deed to plaintiff's home is at issue.

We review a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.* at 99. Questions of law we review de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

Because there was no delivery of the deed by plaintiff, we agree with the trial court that there was no valid conveyance of the home. A deed conveying a present interest in land must be delivered and accepted. *Gibson v Dymon*, 281 Mich 137, 141; 274 NW 739 (1937). "The significance of delivery is its manifestation of the grantor's intent that the instrument be 'a completed legal act.'" *McMahon v Dorsey*, 353 Mich 623, 626; 91 NW2d 893 (1958). Physical delivery to the grantee, or physical possession by the grantee, raises a presumption of intent to pass title. *Resh v Fox*, 365 Mich 288, 291-292; 112 NW2d 486 (1961). Recording of the deed also raises a presumption of valid delivery. *Gibson v Dymon*, 281 Mich 137, 140; 274 NW 739 (1937). "[Y]et a presumption is but a rule of procedure used to supply the want of facts. Its only effect is to cast the burden on the opposite party of going forward with the proof." *Id*.

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[3] Lillian died in August 2005, before the suit was filed.

In this case, plaintiff testified that Daniel and Howard devised a plan to avoid probate. Specifically, Daniel provided a quit claim deed for the home and encouraged plaintiff to convey it to him and Howard. There was evidence at trial that plaintiff had experienced a troublesome probate proceeding as a personal representative and he admitted that he wanted to avoid probate for his family. However, plaintiff objected to Daniel and Howard's plan to achieve this goal because he recognized the quit claim deed would terminate his ownership. He therefore insisted it be put back in his safe and to remain there until his death. Plaintiff testified that he would not have signed the deed otherwise.

The question was one of fact for the trial court to decide. *Resh, supra,* at 291. As the Court in *McMahon* noted, here "we are not forced to the determination of intent from ambiguous circumstances. We have the unequivocal statement of the grantor himself as to his intention." *McMahon, supra,* at 627. Defendant argues that plaintiff was confused and that his statements are insufficient to sustain his burden of proof because they are contrary to his actual actions: he made no effort to get the deeds back from his sons. Plaintiff, however, made it clear that he thought the deeds were safe and that Howard only gained possession of the deed to the home through his misleading and surreptitious actions. He also testified that at the time he found out about the defaulted mortgage he was angry but took no action because his wife was ill. Defendant's evidence is not enough to show delivery was intended at the time the sons possessed the deeds, even if plaintiff did intend that the sons gain title to the property at some future time. See, *Major v Todd*, 84 Mich 85, 95-96; 47 NW 841 (1890). The trial court was in a superior position to observe and evaluate the witnesses' credibility. *Hofman v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). Weighing plaintiff's testimony against Daniel's conflicting testimony, the trial court stated that it found plaintiff credible. We cannot say this was clear error, and defer to the trial court's evaluation.

Defendant also alleges that plaintiff did not rely on Daniel's representation that the 2001 deed to the home would be secured in the safe. Rather, defendant claims that plaintiff was only concerned that the original 1973 deed to the home be returned to the safe after it was used to copy the land description for the new deed. Defendant correctly notes plaintiff's concern with respect to the 1973 deed. However, at trial, plaintiff repeatedly testified that he believed the deed he signed in 2001 would be secured in the safe. The trial court did not clearly err in finding this testimony credible.

In addition, defendant alleges that plaintiff did not rely on Daniel's representation that the deed would be secured in the safe, but rather, relied on Lillian's statement of that promise. Defendant correctly notes that Lillian recounted Daniel's representation to plaintiff. Even if plaintiff relied on her statement when he signed the deed, that statement necessarily relied on Daniel's representation. Therefore, the trial court did not clearly err by failing to parse plaintiff's reliance on Lillian's statement from his reliance on Daniel's representation.

Finally, defendant claims that plaintiff "clearly" testified that he intended to convey his "property" to his sons. This testimony was made regarding the cabin, not the home. Thus, this testimony is not indicative of plaintiff's intent or reliance on Daniel's representations with respect to the home.

Defendant's second argument on appeal is that it is a bona fide purchaser and its interest in the home arising out of the 2001 deed was not voidable. Consequently, defendant argues that

the trial court erred when it found the conveyances arising from that deed void. However, defendant can only rely on its conclusion that the trial court found the deed was invalid because plaintiff was fraudulently induced to sign it, and that made the conveyance *voidable,* rather than *void*. We find it unnecessary to analyze whether a fraudulently induced conveyance is void or voidable because we find, as did the trial court, that plaintiff had no intent to deliver the deed to the home. A deed that is not delivered is void and conveys no title. *Power v Palmer*, 214 Mich 551, 560-561; 183 NW 199 (1921); Weber v Schafer, 236 Mich 345,349-350; 210 NW 248 (1926). "[A] mortgage will give the mortgagee no greater rights or interests than the mortgagor's. Whatever defeats a mortgagor's title also defeats the lien of the mortgagee." *State Bar Grievance Administrator v Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973); 16 Michigan Law & Practice, Mortgages, § 56, p 348, citing *Sloan v Holcomb,* 29 Mich 153 (1874), *Joy v Jackson & M Plank Road Co*, 11 Mich 155 (1863). Because Howard had no property interest to convey, the trial court did not err in finding defendant likewise had no interest.

Defendant's last claim on appeal is that the trial court erred by denying its motion for reconsideration. We disagree. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. [See *Churchman, supra*, p 233.]

It is not an abuse of discretion to deny a reconsideration motion premised "on testimony that could have been presented the first time the issue was argued." *Id.* Plaintiff testified that he believed he would own the home until he died because the 2001 deed would be stored in his safe and would not be recorded. When the trial court considered the validity of the deed for the first time in its original judgment, defendant could have requested the trial court to treat the deed as a valid testamentary conveyance. However, defendant waited to make this request until the motion for reconsideration. Therefore, the trial court did not abuse its discretion when it denied the motion for reconsideration. *Id.*

Affirmed.

/s/ Donald S. Owens
/s/ Pat M. Donofrio

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BANDSTRA, J. (*concurring*).

I concur in the conclusion of the lead opinion that the trial court's decision that the deed plaintiff signed, purportedly conveying an interest in the home to his son, was fraudulently induced. As to defendant's second argument, that nonetheless its interest in the home should not have been voided by the trial court because it was a bona fide purchaser, I concur in the result but for a different reason.

To qualify as a bona fide purchaser, defendant must have acted in good faith in taking its interest in the home, meaning that defendant had no reason to believe that some fraud or other irregularity was present requiring further inquiry. *American Cedar & Lumbar Co v Gustin*, 236 Mich 351; 210 NW 300 (1926); 1 Cameron, Michigan Real Property Law (3d ed.), § 11.21, p 396. A party claiming to be a bona fide purchaser cannot have "notice" of such an irregularity, which has been defined as "whatever is sufficient to direct the attention of a purchaser of realty to prior rights or equities of third persons and to enable the purchaser to ascertain their nature by inquiry." Cameron, *supra* at § 11.22, p 396; *Kastle v Clemons*, 330 Mich 28; 46 NW2d 450 (1951). Further, possession by another may also disqualify a person from being a bona fide purchaser for value because, "(i)f someone is in possession, the purchaser should determine that

person's rights, since the purchaser takes subject to them." *Cameron*, *supra* at § 11.25; *Smelsey v Guarantee Financial Corp*, 310 Mich 674; 17 NW2d 863 (1945).

The uncontested record in this case shows that defendant was on notice of plaintiff's continuing claim to an interest in the home under these principles. Defendant acquired its interest in the home from MortgageIt long after this litigation, where MortgageIt was a defendant and plaintiff was prosecuting his claim, was commenced. Defendant does not argue that it failed to receive notice of the litigation from MortgageIt and, in fact, defendant was added as a party to the litigation shortly after it took its interest in the home. Plaintiff was living at the home at the time defendant acquired its interest and the mortgage that was foreclosed, resulting in defendant's acquisition of an interest in the home, was an "owner-occupied" mortgage. Again, defendant does not claim to have not been so informed. And, even apart from that language in the mortgage, plaintiff's residence in the home gave rise to an obligation on defendant to determine plaintiff's rights in the home.

Considering these facts, I conclude that defendant's claim to be a bona fide purchaser without notice is without merit and, accordingly, that the trial court properly rejected defendant's claim to an interest in the property arising out of the fraudulently induced deed.

/s/ Richard A. Bandstra