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Summary of Huntington v. Mila, Incorporated

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Huntington v. Mila, Incorporated, 75 P.3d 354 (Nev. 2003).[1]

Property – Agency

Summary

Appeal from an Eighth Judicial District Court, Las Vegas Nevada order certified as final under NRCP 54(b) granting Respondent Mila's motion for partial summary judgment to dismiss Appellant Huntington's third party complaint.

Disposition/Outcome

Affirmed. A title insurance company is not a lender's agent as a matter of law. Therefore, a title insurance company's constructive knowledge cannot be imputed to the lender.

Facts and Procedural History

On May 18, 1998, the Donald J. Adams Trust conveyed real property to Tanner Song, who, on that same day conveyed the real property to Appellant David Huntington. Song and Huntington executed an unrecorded Real Estate Holding Agreement (Agreement). The Agreement stated that Song shall hold legal title to the real property and that Song was not to convey or encumber the real property except pursuant to the written instructions of Huntington. Song also signed a Memorandum of Real Estate Holding Agreement (Memorandum), which stated that he held the property pursuant to the unrecorded Agreement. The Memorandum was recorded on August 5, 1998 and rerecorded on April 21, 1999.

In July of 1999, Song applied for a home equity loan from Respondent Mila, Inc. Song executed a deed of trust against the real property for $100,000 as security for the loan. Stewart Title conducted a title search on the property, and uncovered the recording and rerecording of the Memorandum. The home equity loan was executed on July 27, 1999.

Huntington filed an action to quiet title against Mila. Mila filed an answer and third party complaint against Song, who filed an answer and complaint against Huntington. Mila filed a motion for summary judgment to dismiss Huntington's claims. The district court granted Mila's motion for summary judgment, finding that Mila was a bona fide lender without notice of Huntington's prior encumbrance. The order was certified as final under NRCP 54(b), and Huntington appealed.

Justices Shearing, Leavitt, and Becker, *per curiam*, found that as a matter of law, a title insurance company is not a lender's agent. Therefore, the title insurance company's constructive notice of encumbrances cannot be imputed to a lender. On that basis, the Nevada Supreme Court held the decision of the district court affirmed.

[1] By Amy A. Johnson

Discussion

Under NRS 111.325[2], conveyances of real property that are not recorded will be void as against any subsequent purchaser in good faith and for valuable consideration, if that purchaser records his conveyance first. A subsequent purchaser with actual or constructive notice of an interest in property superior to his own is not considered in good faith and is not entitled to protection of the recording act.[3] A subsequent purchaser has a duty of inquiry when the circumstances of the transaction would lead a reasonable purchaser in his position to make an investigation of the existence of prior unrecorded rights.[4] A subsequent purchaser will be charged with constructive notice whether or not he actually undertakes the investigation.[5]

Stewart Title's search uncovered the recording and rerecording of the Memorandum executed by Song. The Memorandum stated that it was pursuant to the unrecorded Agreement, and acting as a reasonable title company, Stewart should have reviewed the Agreement. Stewart Title thereby had constructive notice of Huntington's interest. Huntington argues that a title insurance company conducting a title search on behalf of a lender is the lender's agent. On that theory, any constructive knowledge imparted on the title insurance company must be imputed to the lender.[6]

In order to determine whether a title insurance company's constructive knowledge is imputed to the lender, it is necessary to analyze the distinction between an abstract of title and title insurance.[7] Under NRS 692A.015, an abstract of title does not include a "binder, commitment to insure or preliminary report of title." Under NRS 692A.023 a commitment to insure or preliminary report of title is a "report furnished in connection with an application for title insurance" and does not contain an abstract of title.[8]

The California Supreme Court considered this issue in *Rice v. Taylor*.[9] In *Rice*, a property owner applying for a loan to pay off two prior encumbrances on real property failed to disclose the first encumbrance to the lender.[10] A preliminary title report revealed the first encumbrance, but the lender had no actual knowledge of the encumbrance and executed the loan.[11] The court found that title insurance is different

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[2] This statute is Nevada's recording act.
[3] Allison Steel Mfg. Co. v. Bentonite, Inc., 471 P.2d 666, 669 (Nev. 1970).
[4] *Id.* at 668.
[5] *Id.*
[6] The court states that the issue of whether Mila itself had constructive notice of the Memorandum and a duty to investigate is not an issue in this case. Mila asserted in its motion for summary judgment that the document was not properly recorded and therefore could give no constructive notice. Huntington did not provide evidence to the contrary.
[7] Jurisdictions are split as to whether there is a difference between an abstract of title and title insurance. *See* 1 Am. Jur. 2d.: Abstracts of Title § 2 (1994).
[8] California and Washington also have similar statutes distinguishing an abstract of title from a commitment to insure or a preliminary title report. Cal. Ins. Code § 12340.10 (West 1988); Wash. Rev. Code Ann. § 48.29.010(3)(b) (West 1999).
[9] 32 P.2d 381, 383 (Cal. 1934).
[10] *Id.*
[11] *Id.*

from an abstract of title, because title insurance is an indemnity agreement on the part of an independent contractor and contains no element of agency.[12]

NRS 692A.015, similar to California statutes,[13] defines an abstract of title as imparting constructive notice as to the chain of title on the property at issue. Title insurance, on the other hand, is a guarantee or indemnification against loss or damage suffered as a result of liens and encumbrances.[14] Title insurance specifically does not impart constructive notice of encumbrances and a title insurance company is thereby only required to disclose those encumbrances it is not willing to insure or indemnify against in a title policy. The reasoning in *Rice* is correct and a title insurance company conducting a title search on behalf of a lender is not the lender's agent. Thus, Stewart Title was not Mila's agent, and Stewart Title's constructive notice may not be imputed to Mila. The judgment of the district court is affirmed.

Conclusion

In order for holders of a prior encumbrance on real property to be protected under the recording acts, they must be sure to properly record their interest so as to be considered within the chain of title. A lender may be charged with constructive notice, but as this case indicates, such will be difficult for a prior lien holder to prove. Prior encumbrances not properly recorded will not appear on an abstract of title, and although they may appear on a title insurance report, such offers no constructive notice to the lender. A lender is thereby considered a bona fide purchaser for value and the prior lien holder loses its interest in the real property. This decision makes proving constructive notice on the part of a lender a difficult task at best for the prior encumbrance holder.

[12] *Id.*
[13] Cal. Ins. Code § 12340.10 (West 1988).
[14] Nev. Rev. Stat. 681A.080.