

NO. A06-851

State of Minnesota
In Court of Appeals

Dale M. Stone,

Respondent,

vs.

Selwin Ortega,

Appellant,

and

Jetmar Properties LLC,
Keith H. Hammond,

Defendants.

APPELLANT'S REPLY BRIEF

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I. FACTS

In this case the relevant facts are clear and undisputed, and are fully in Selwin Ortega's favor despite the lengthy discussion in Respondent's brief.

Dale Stone knowingly signed a deed which said he was giving away his real property, and since it was a quit claim deed was his promise (which he knew would be recorded) saying he was "quitting" and thus releasing any claim to the property. Trial 40-42. Dale Stone fully knew and intended it would appear to others that "Jetmar LLC" (the named grantee) would have clear title to the real property (Stone even helped clear up liens to create this appearance). Trial 40, 92-94. Why was this done? Dale Stone was willing to sign this deed and deliver it for recording for a 15.00% interest in a large condominium complex, which Appellant's brief was estimated worth Three Quarters of a Million Dollars (\$750,000) which amount Respondent did not dispute. Trial 39-41, 76. So it was not that people thought the transfer was minor , and Dale Stone appears to have been paid well and would have insisted this agreement be enforced had it turned out to succeed. Then Dale Stone failed to record, and knew it was not being recorded (since he knew it was not in writing), an additional agreement he said he had with Keith Hammond that the property (after lenders were misled) would be returned in 60 days without any liens. Trial 92.

Although the Court found Hammond fraudulently did not intend to follow this additional agreement, this fraud would just make the transfer "voidable" so this transfer (it is thought) became binding when anyone relied and under Minnesota law normally this case would not even be debatable. It is the technical defect that LLC papers were not filed until after the deed was given, and not the fraud, that are the grounds by which Stone can

even argue this case (that people should be able to avoid the situation and risks they voluntarily took and hurt others who relied on the actions people took).

But on the issue about LLC papers not being filed, there is truly 0 (zero) facts people had or even hints that LLC papers had not been filed. For example, no one saw any letter from the Secretary of State warning people filing hadn't occur, no one saw a letter from an attorney warning this had not been done, and no one before they relied saw an unsigned and unfiled original copy of Articles of Incorporation. Contrary to Respondent's brief, no attorney or other person ever even suggested to Selwin Ortega he should check since there might not be an LLC (contrary to the deed Dale Stone himself signed saying the party getting the land was Jetmar LLC). Everyone, including both Dale Stone and Selwin Ortega thought and were relying that Jetmar LLC was formed and was the right name to use. Nor was "limited liability" or some benefit of working with an LLC an issue, so that people would really have cared about this. All the facts cited in Respondent's brief are not about actual facts providing notice LLC papers weren't filed, but are about 1) legally separate issues about whether Hammond appeared less creditworthy or honest than most borrowers (which is something Stone who worked with Hammond is more blameworthy for not spotting anyway), and 2) how one could check on LLC papers being filed and how recommended is this check in non-statutes.

This case is even more egregious than the normal case, since combined with the conduct of Dale Stone of doing a deed he knew would create the appearance of ownership (which led to Selwin Ortega relying and keeping extended a \$200,000 loan) is Dale Stone's conduct in actually keeping his claims secret even when someone was claiming his

property and not acting reasonably promptly during the foreclosure (which lasted for 10 months after the May 2003 time Dale Stone gave away his property despite him 2 months after the deed knowing his property was not going to be returned), not acting or talking before or at the foreclosure sale on March 2, 2004, where relying on the appearance of title Selwin Ortega bid his \$200,000 mortgage debt (which Dale Stone had notice of since December 2003 from letters from Selwin Ortega's attorney tenants gave him), and for the 6 month redemption period doing nothing despite Dale Stone knowing he (and Keith Hammond who he choose to keep working with) could redeem but that after 6 months it would be too late. See Footnote 1 of Appellant's Brief citing Trial Transcript where Dale Stone admitted knowledge.

Finally, Dale Stone "was" involved with Keith Hammond in his real estate business before Hammond got into criminal trouble for his conduct, as shown by Stone admitting at trial know to providing some help on numerous projects, so much so the salary he agreed to for such help was \$6,000 a month (which is \$72,000 a year). Trial Transcript ("Trial") 59-68, 82-84. Dale Stone has a masters degree and is even is licensed to teach high school, and at trial appeared to understand English better than others and it certainly it is not a second language for him (unlike maybe others) so that he should be excused from understanding what he signed and not being bound by Minnesota law. Trial 29-32, 64-66.

II. RECORDING ACT AND BONA FIDE PURCHASER

To say a deed is technically “void” is a truism, and not helpful, and the real question is whether any of several legal theories call for this result not to be reached, and in most cases with defective deeds this usually is what is done.

Respondent’s brief does not deny that Dale Stone by his actions made the land records indicate he had no claims in the property, and lead people to think Jetmar LLC was the owner. To avoid the common sense result that under statutes or general principles of the Recording Act that Selwin Ortega should be allowed to have relied, and Dale Stone should not be allowed to create such a misleading situation, Respondent first argues that Selwin Ortega gave no “consideration”. This is despite Selwin Ortega loaning \$200,000, keeping this loaned in exchange for collateral of the property at issue, and despite him even bidding this amount to purchase at the foreclosure sale. Respectfully, consideration and certainly reliance has been shown. *Westbrook State Bank v. Anderson Land and Cattle Co.*, 364 N.W.2d 416 (Minn. 1961)(past debt for consideration for mortgage); *Carnel v. Travelers Ins. Co.*, 402 N.W.2d 190 (Minn.App. 1987)(bid at foreclosure uses old debt [so value of consideration would be full debt claim thus lost]).

Then Respondent tries to argue that the Recording Act’s protection of “Bona Fide Purchasers” does not apply since Selwin Ortega can not have relied on the appearance of title without (it is claimed) doing every type of search and investigation possible. This simply is not Minnesota law, which instead requires people have actual knowledge of actual facts on an issue which then, and only then, triggers a duty to reasonably investigate the thing facts create an issue about. As Respondent’s brief admits, even “implied notice”

means that one has “actual knowledge of facts which would put one on further inquiry.” *Miller v. Hennen*, 438 N.W.2d 368 (Minn. 1966). In this case Selwin Ortega had zero “actual knowledge of facts” about LLC papers not being filed, at all. Furthermore, although this is not the issue, Selwin Ortega also had no information that Hammond had fraud in his mind when he obtained what appeared to be a normal quitclaim deed from Dale Stone (by fraudulent not having in his mind a future intention to follow the informal unwritten, unrecorded agreement to return the property unencumbered in 60 days).

Nor is there any “sliding scale” of investigation, where without actual facts of a problem a farmer or housewife can rely on land records (which is what statutes and cases say), but a business person must investigate somewhat, while a bank must do every search possible. Although cases mention the words “reasonable” and investigate, the requirement is not overcome that people have actual facts before investigation is mandatory. *Miller v. Hennen*, 438 N.W.2d 366 (Minn.1989), is helpful since it lists types of notice, and it says:

A purchaser in good faith is one who gives valuable consideration without actual, implied or constructive notice of inconsistent outstanding rights of others.... .
“Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record.” Anderson, 263 N.W.2d at 384.... Implied notice has been found where one has “actual knowledge of facts which would put one on further inquiry.” Anderson, 263 N.W.2d at 384-85. For example, if a subsequent purchaser was aware that someone other than the vendor was living on the land... This court adopted the following rule for implied notice cases: One is not a bona fide purchaser and entitled to the protection of the recording act, though he paid a valuable consideration and did not have actual notice of a prior unrecorded conveyance from the same grantor, if he had knowledge of facts which ought to have put him on an inquiry that would have led to a knowledge of such conveyance. *Henschke v. Christian et al.*, 228 Minn. 142, 146-47, 36 N.W.2d 547, 550 (1949).

(emphasis added).

Even the best cases Respondent could find to support his position show actual knowledge of facts is what triggers further investigation. In *Clafin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242 (Minn.App.1992) (“The fact that Margaret was a grantor-in-possession [which possession by a previous grantor is suspicious] gave rise to a duty that the Bank inquire of her as to her rights... [emphasis added]”). In another of Respondent’s cases, *West Concord Conservation Club, Inc. v. Chilson*, 306 N.W.2d 892 (Minn. 1981), there were plenty of actual facts people knew that then triggered a duty to investigate including strangers known to be paying bills on the property, a utility box of another on the property, and actual possession of records showing the grant was not authorized. Cf. *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382 (Minn. 1978) (refusing to increase test for bona fide purchasers, at all, saying “constructive notice cannot be expanded to supply the absence of actual knowledge of facts necessary to support proof by inference of implied notice. Where we have found implied notice, it has been based upon actual knowledge of facts which would put one on further inquiry, not upon imputed record notice of such facts.”)

The Miller case concerning Title Standards cited by Respondent deals with when people know about other claims can they not be investigated because they appear to be older than 15 years or are outside the “tract index” so are wild deeds. See Miller, 438 N.W.2d at 371. The court ruled that if you “know” about a claim then investigate, and it was not a ruling saying there is always a duty to investigate including all the many, many types of investigation found in non-statutes like the Title Standards, or the White Pages

(which no one including any expert intruded at trial and said was reasonable to follow always despite them being a “guide” for attorneys). Minnesota Standards for Title Representations, Preface to the White Pages. Respectfully, no one even attorneys and especially lay people do all the searches and investigations possible or recommended (like seeing certified copies of all corporate records, etc.), yet Minnesota law says people can rely on the appearance of title unless a fact about an issue triggers a duty to investigate.

Minnesota law thus finds it reasonable that people rely on the appearance of title, and not investigate every possible problem (again, by doing dozens of searches and waiting months for certified copies of every document, etc.) so long as they do not have facts showing a problem with an issue. Absent knowing actual facts about LLC papers not being filed Selwin Ortega acted reasonably for Bona Fide Purchaser status and all other issues where whether a buyer acted normally is an issue.

III. CORPORATION BY ESTOPPEL AND OTHER EQUITABLE ISSUES

Respondent does not deny that “corporation by estoppel” is available to support Selwin Ortega. Respondent also does not show wrong the many cases including Minnesota cases which almost automatically apply corporation by estoppel whenever anyone thought they were dealing with a company in making a deal they later want to avoid. The Minnesota Supreme Court in *Froslee v. Sonju*, 209 Minn. 522, 524, 526-27, 297 N.W. 1, 3, 4 (1941), said it is only required that:

To be estopped from asserting title, one must have led another by words or conduct to believe that the former had no interest in the property, and the other must have relied upon the misleading words or conduct in such a manner as to change [its] position for the worse.

....

[The party seeking relief] must show that [it] acted as an innocent purchaser and that [it] relied upon [the adverse party's] words or conduct to [its] detriment.

Accord Brekke, 683 N.W.2d 777-78 (holding that, to establish equitable estoppel, party seeking relief must demonstrate that adverse party made a knowing misrepresentation with intent to induce reliance and that party seeking estoppel subsequently relied on misrepresentation to its prejudice). See Proulx v. Hirsch Bros., Inc. 155 N.W.2d 907 (Minn. 1868).¹

Concerning “corporation by estoppel” Respondent again argues what investigation Minnesota law says should be expected even without notice of facts showing any problem.

This claim of Respondent that even without notice of a problem complete searching in

¹ See also Perine v. Grand Lodge A. O. U. W., 50 N.W. 1022 (Minn.1892) (One contracting with an alleged corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped to deny its corporate existence, in an action by the corporation to enforce the contract); Minnesota Gas-Light Economizer Co. v. Denslow, 48 N.W. 771 Minn.,1891 (“The defendant recognized and contracted with the plaintiff as a corporation. Held, that he is estopped to deny its corporate character so far as may be necessary to enforce his contracts, made with it under its corporate name.”); Johnston Harvester Co. v. Clark, 15 N.W. 252 (Minn.1883) (same); Kingsley v. English, 278 N.W. 154 (Minn. 1938) Northern Bldg. & Loan v. Withered, 286 N.W. 397 (Minn. 1939) (in Minnesota land transaction said people were “estopped in a suit to foreclosure a mortgage from setting up that it was not a corporation because the law not was not fully complied with in its organization”); State v. Rivers, 206 Minn. 85, 287 N.W. 790, 125 A.L.R. 475 (Minn. 1939)(“One who has entered into a contract with another acting as a corporation and has thereby obtained an advantage under the contract cannot question the corporate character of the ‘corporation’ . Continental Insurance Co. v. Richardson, 69 Minn. 433, 72 N.W. 458; 2 Dunnell, Minn. Dig., 2 Ed. & 1932 Supp., § 1983, and cases cited; Northern Bldg. & Loan Ass'n v. Witherow, 205 Minn. 413, 286 N.W. 397. The note and mortgage here involved specifically provided that the money was payable to the ‘Thorpe Finance Corporation’ . If it or its assigns sought to foreclose, the mortgagor would be estopped to deny the validity of the mortgagee's incorporation. Thus it appears immaterial whether or not the mortgagee was properly incorporated or authorized to do business. ”); Macomber v. Kinney, 114 Minn. 146, 155-56, 128 N.W. 1001, 1004 (1910); Holcomb v. Indep. Sch. Dist., 67 Minn. 321, 324-25, 69 N.W. 1067, 1068 (1897).

every issue is mandatory was shown wrong in this Reply Brief above. Again, there was no facts showing LLC papers weren't filed, and even if this were the issue no facts showing the completely normal appearing deed Dale Stone signed was fraudulent.

Respondent therefore says because the LLC papers not being filed could have been discovered through investigation then corporation by estoppel is unavailable.

Respectfully, in most or all cases of defective incorporation if people had searched everything recommended by the most thorough people (reviewing papers, checking with secretary of state, talking to people) of course defective incorporation problems would all be discovered, so to say this is to eliminate corporation by estoppel in Minnesota. This would take from the Courts the power to make people follow their agreements and not try to use later-found problems (e.g., a missed annual fee, lack of proper minutes supporting a sale or authorizing an officer, lack of consideration) to avoid their deals just because they turned out bad and someone wants land back.

Despite Appellant's brief raising the issues, Respondent in his brief does not explain whether if any defect about formation of any previous owner means an old transfer didn't occur how the formation of all previous owners can be investigated. Nor did Respondent explain how the true date a deed was delivered (for a present transfer and all previous transfers) can be determined so the time to check things can be known. Making equitable estoppel a minor and less powerful thing really should not be done.

IV. COLLATERAL ESTOPPEL AND LACHES

Laches, waiver, and clearly estoppel in general were raised in the Answer, the Summary Judgment motion before the same Court, and generally at trial. See Answer clearly declaring broadly “27. Plaintiff’s claims are barred by estoppel, release, res judicata, waiver[.] ... 24. Plaintiff’s claims are barred by the applicable statute of limitations.” It was also clearly claimed “28. Any recovery by plaintiff is barred by his failure to mitigate...” A-31. Additionally, given the conclusory nature of the Complaint (which did not ask for overturning the Foreclosure Sale at all) it was made clear Selwin Ortega was reserving the right to assert “additional affirmative defenses[.]” A-32. Even the statutory framework concerning land and land titles was cited, citing to M.S. s 507.34, making clear that the procedures concerning lands should apply.

Respondent’s Brief admits that the Minnesota Supreme Court has applied collateral estoppel to actions occurring after a foreclosure sale and after the redemption period. See *Prior Lake State Bank v. Mahoney*, 2216 N.W.2d 681 (Minn. 1974). The Minnesota Supreme Court clearly felt waiting so long is not reasonable even with foreclosures by advertisement, and Minnesota does not want people to treat casually a foreclosure by advertisement they know is occurring. That is exactly what happened here.

Even if collateral estoppel is not used, the result intended by the Supreme Court can be reached by waiver and laches. The basic question in applying the doctrine of laches is “whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant” the requested relief. *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996) (quotation omitted). Laches was

recently used to show even if not a party and not fully aware of things, one still cannot do nothing and let people rely and then have them bear the costs. In *Bateman v. City Count of the City of La Crescent*, 2000 WL 979105 Minn.App.) (unpublished) (emphasis added), the Court of Appeals said:

The basic question is “whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Fetsch v. Holm*, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952). The purpose of the doctrine is “to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.” *Aronovitch v. Levy*, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953). [“he who seeks equity must do equity, and he who comes into equity must come with clean hands.” *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 715 (Minn.1985) (citing *Johnson v. Freberg*, 178 Minn. 594, 597-98, 228 N.W. 159, 160 (1929)).]” Appellant argues that the mere fact that he was aware of a potential setback violation does not mean he knew of his rights because he relied on the zoning administrator's recommendation that the project complied with zoning requirements. However, the record clearly shows that appellant knew on September 9, if not earlier, that the Strubs' office building might violate the setback requirement.... Appellant also contends laches is inapplicable because he never relinquished or abandoned his rights. *Ryan v. Minneapolis Police Relief Ass'n*, 251 Minn. 250, 255, 88 N.W.2d 17, 21 (1958) (stating laches applies when delay and circumstances establish an abandonment or relinquishment of rights). Despite appellant's reliance on Ryan, there is no formal requirement that the plaintiff's rights be abandoned or relinquished. The doctrine of laches prevents a non-diligent plaintiff from recovering at the expense of a person who will be prejudiced by the delay in asserting a known right.

In this case Dale Stone on May 13, 2003, appeared to quit claim any interest in the property to Jetmar LLC. Dale Stone said there was an additional agreement to return the property for 2 months but at this time, and for over 1.5 years, Dale Stone did not tell anyone of this agreement and certainly never recorded it. In July 2003 Dale Stone knew his property contrary to agreement was being kept and was continuing to appear to be owned by someone else. Selwin Ortega kept loaned \$200,000 which otherwise was due

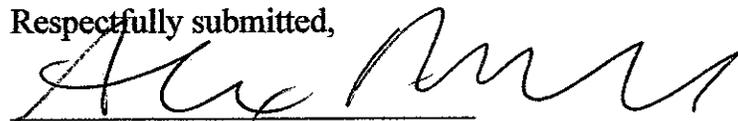
after getting a mortgage on the property. In December 2003 Dale Stone was informed that Selwin Ortega had a mortgage he was taking action on, but despite this Dale Stone kept secret his claims from Selwin Ortega. The Foreclosure Sale happened in March 2003, where Selwin Ortega bid away his mortgage claim (without knowing anything about Dale Stone's claim to the property). This lawsuit did not happen until October 7, 2004.

CONCLUSION

Respectfully the conduct of Respondent and the version of Minnesota law Respondent wants to have this Court support, legally and especially equitably is incorrect, and relief for Appellant Selwin Ortega who did rely on land records should be granted.

Dated: October 9, 2006

Respectfully submitted,



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