

BOGERT v. WADE.

Opinion delivered December 2, 1929.

1. EVIDENCE—PAROL EVIDENCE RULE.—The rule excluding parol evidence of a contemporaneous parol agreement contradicting or varying a written agreement is inapplicable where the parties are not the same.
2. EVIDENCE—PAROL EVIDENCE RULE.—An oral agreement by the holder of a mortgage to release the indorsers of the mortgage note from a deficiency judgment if they procured an assignment of certain notes to him by the purchaser of the mortgaged property *held* not part of a contemporaneous written contract for repurchase of the property by the latter from the holder of the mortgage; such indorsers not being interested in the written contract.
3. MORTGAGES—RELEASE FROM DEFICIENCY JUDGMENT—EVIDENCE.—In a suit to enjoin an execution sale of mortgaged lands to satisfy a deficiency judgment, preponderance of evidence *held* to show that defendant agreed to release plaintiff's grantors from whom he purchased the mortgage from a deficiency judgment if they would procure assignment of certain notes to him as collateral security for their part of such deficiency judgment.

Appeal from Washington Chancery Court; *Lee Seamster*, Chancellor; reversed.

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to enjoin them from proceeding further in the levy and sale of the lands described in the complaint, under an execution issued in favor of H. K. Wade, one of the appellees, against the grantors of appellant. The suit was defended on the ground that the lands belonged to the grantors of appellant, and that the levy upon them was legal.

The record shows that C. A. Fallin, W. C. Fallin and J. C. Martin held a mortgage on certain real estate located in Washington County, Arkansas, known as the

"Elkins Mill Property," for \$3,500. They sold the note and mortgage to H. K. Wade at a discount of \$500. F. M. Wood bought the mortgaged property, and assumed and agreed to pay the mortgage, but failed to do so. H. K. Wade then brought suit against all these parties to foreclose the mortgage. He obtained a judgment against all of the defendants for the amount of the mortgaged property, and the mortgaged property was sold under the decree of foreclosure on June 18, 1926. H. K. Wade purchased the property for less than the amount of his judgment, thus leaving a deficiency judgment of \$824.74.

According to the testimony of C. A. Fallin, W. C. Fallin and J. C. Martin, H. K. Wade made an oral agreement with them whereby he would release them from the deficiency judgment if they would get F. M. Wood to assign to him a note for \$1,000, given to him by R. T. McClinton. The Fallins and Martin agreed to this, and on the same day got F. M. Wood to indorse to Wade the McClinton note. Wade then said that he would have the deficiency judgment against the Fallins and Martin satisfied. The agreement was made after the bank closed. Wade thereafter did not carry out his part of the agreement, and never had the judgment released of record.

F. M. Wood corroborated the testimony of the two Fallins and Martin. He said that, after the sale of the Elkins mortgaged property, he settled the balance of the judgment by turning over the two notes of \$500 each to Wade, as agreed upon. He and Wade at the same time executed the following agreement:

"Fayetteville, Arkansas, 6/18/26.

"Whereas H. K. Wade has this day bought at commissioner's sale the property known as the Elkins Mill property, at Elkins, Arkansas, foreclosed in chancery court v. F. M. Wood and others, in consideration of one dollar paid to H. K. Wade, the said Wade agrees to sell, and the said Wood agrees to purchase, said property back from said Wade for the sum of said debt and all costs, on or before the August term of Washington County Chancery Court, and the said Wood has deposited with the

said Wade as additional security two (2) notes executed by R. T. McClinton to the said Wood for the sum of \$500 each, due November 15, 1926, and August 15, 1927. Upon the payment of said amount as agreed upon the said Wade is to return the collateral to F. M. Wood.

“Witness our hands and seal this 17th day of June, 1927.

“H. K. Wade,

“F. M. Wood.”

According to the testimony of Wade, he did not make the agreement testified to by the Fallins and Martin. He never at any time agreed to release them from payment of the deficiency judgment. He admitted the execution of the written contract with Wood, and stated that that was the only contract with regard to the matter that he entered into. Subsequently he caused an execution to be levied on the property involved in this action to satisfy the deficiency judgment.

In the meantime the Fallins and Martin had executed a deed to the property on which the execution was sought to be levied to Harry K. Bogert and James H. Bogert, on the 30th day of August, 1926. On the 22d day of July, 1927, J. H. Bogert conveyed the property by deed to Harry K. Bogert.

The chancellor found the issues in favor of appellees, and the complaint was dismissed for want of equity. The case is here on appeal.

C. D. Atkinson, for appellant.

W. N. Ivie and *John Mayes*, for appellees.

HART, C. J., (after stating the facts). It is first sought to uphold the decree upon the theory of *Dierks Special School District v. Van Dyke*, 152 Ark. 27, 237 S. W. 428, where the court held that, while parties to a written contract may prove that, after its execution, they substituted a new agreement for it, they cannot prove that, at the time the contract was entered into, they had an understanding not expressed in the written contract nor reduced to writing.

Again counsel seek to uphold the decree upon the theory of *Barfield Mercantile Co. v. Connery*, 150 Ark. 428, 234 S. W. 481, where the court held that the rule that parol evidence is inadmissible to contradict or vary a written instrument is confined to the parties to the instrument or to those claiming some right or interest under it.

Counsel insist that the first case is applicable, because the oral agreement testified to by the Fallins and Martin was entered into at the time the written contract was executed between Wade and Wood, and for that reason they cannot vary the terms of the written contract, because the oral contract was necessarily a part of the written one executed on the same date. We do not agree with counsel in this contention. The written contract was entered into between Wade and Wood for the purpose of enabling Wood to purchase back the property which had been foreclosed under the mortgage, within a certain and fixed time. It is true that it recites, as additional security for the performance of the contract, the assignment of the two notes executed by R. T. McClinton to Wood, but the Fallins and Martin were not interested in this contract at all. It was not made for their benefit, and it did not concern them whether Wood purchased the mortgaged property back or not. They were only concerned in being released from the deficiency judgment. They performed their part of the contract to secure their release from the deficiency judgment by procuring Wood to transfer the two McClinton notes to Wade. The two contracts, while executed at the same time, were between different parties and were for different purposes. In any event it cannot be said that the oral contract testified to by the Fallins and Martin in any wise tended to contradict or to vary the written contract between Wade and Wood.

In the second place, it is claimed that the Fallins and Martin claimed some right or interest under the written contract executed between Wade and Wood. We cannot perceive how the Fallins and Martin were in any wise interested in the contract between Wade and Wood.

They did not claim any rights under it, and it did not concern them in the least whether or not that contract was carried out. Their rights became vested under the oral contract which they made with Wade for a release from the deficiency judgment against them upon procuring Wood to assign to Wade the two McClinton notes for \$500 each. They carried out their part of the contract by procuring Wood to indorse the notes to Wade, and it did not make any difference to them that Wood did this in order to secure the right to purchase back the property within a limited time.

This brings us to a consideration of the case upon the merits. On the one hand, the two Fallins and Martin and Wood all testified that Wade agreed to release the Fallins and Martin from the deficiency judgment if they would procure Wood to assign to Wade the two McClinton notes for \$500 each as collateral security for his part of the deficiency judgment. All four of these parties testified in positive terms that this was the agreement. It is true that Wade in equally positive terms testified that this was not the agreement, but, so far as the record discloses, the parties were all credible persons, so that there is no reason why the testimony of one of them should equal or outweigh the testimony of the other four. We are of the opinion that the chancellor erred in finding the facts on this branch of the case in favor of appellees, and that a preponderance of the evidence was in favor of appellant upon this branch of the case.

The case seems to have been fully developed upon this point. It follows that the decree will be reversed, and the cause will be remanded, with directions to grant the prayer of the complaint for a permanent injunction restraining appellees from proceeding further in the levy and sale of the property under the execution against the grantors of appellant, and for further proceedings in accordance with the principles of equity. It is so ordered.