

MIDLAND SAVINGS & LOAN COMPANY *v.* BROOKS.

Opinion delivered June 4, 1928.

1. MORTGAGES—POSSESSION AS NOTICE OF EQUITIES.—Possession by a purchaser of a lot from its equitable owner at the time when a mortgage was executed by a party holding the legal title for the equitable owner was equivalent to actual notice to the mortgagee of the purchaser's equitable title and rights.
2. MORTGAGES—POSSESSION AS NOTICE OF EQUITIES.—One purchasing a lot, signing a purchase-money note and making payments in good faith, in reliance on the vendor's assertion that the title was in himself, though the legal title was in another for the purchaser's benefit, had an equitable interest of which his possession was notice to a subsequent mortgagee.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; affirmed.

STATEMENT OF FACTS.

Paul R. Brooks and Christine Brooks, his wife, brought this suit in equity against the Midland Savings & Loan Company to have a contract of sale, executed to plaintiffs to lot 3, block 3, Strange's Addition to the city of Texarkana, Arkansas, declared to be a prior lien to a mortgage given to the defendant, and that a mortgage executed to the defendant by B. V. Long be declared a cloud upon the title of the plaintiffs. The defendant filed an answer, denying the allegations of the complaint, and sought to foreclose a mortgage executed by B. V. Long and wife to said defendant. B. V. Long and Lela Long, his wife, and Agnes McCall are all made parties defendant to the cross-complaint.

The facts necessary to determine the issues raised by the plaintiffs may be stated in brief form as follows: On April 29, 1926, Dan Dewberry purchased from Mrs. Agnes McCall the lot involved in this controversy, and took the title thereto in the name of B. V. Long. On May 1, 1926, Dan Dewberry, as agent of the Midland Savings & Loan Company, filed an application with that company in the name of B. V. Long for a loan of \$2,000 upon said property. On May 18, 1926, the Midland Savings & Loan Company granted the loan, and a mortgage was executed to it on that date on said property by B. V. Long and wife, which was duly filed for record. On May 29, 1926, the deed to said property from Agnes McCall to B. V. Long was duly filed for record; and on the same day the mortgage from B. V. Long and wife to the Midland Savings & Loan Company was also filed for record. No part of the mortgage indebtedness to the Midland Savings & Loan Company has been paid. Dan Dewberry and B. V. Long are both insolvent. On May 5, 1926, Dan Dewberry and his wife entered into a written contract with Paul R. Brooks and Christine Brooks, his wife, whereby they agreed to sell them said lot for \$2,750. Thirty-five dollars of this amount was cash in hand paid, and the balance of \$2,715 was evidenced by a promissory note, bearing interest from date until paid at the rate of ten per cent. per annum, and was payable in monthly installments of \$35 each. The note for \$2,715 for the balance of the purchase money was payable to the order of Dan Dewberry, and was signed by Paul R. Brooks. On the 5th day of May, 1926, as soon as the contract was executed, Paul R. Brooks and wife entered into possession of said lot, and have resided in the dwelling-house thereon continuously since that time. Brooks continued to make the monthly payments of \$35 as specified in said contract and note until the 5th day of April, 1927. The total amount so paid is \$420. At the time Brooks made the contract with Dewberry for the purchase of the property, he did not know that there was any mortgage on the property.

The chancellor was of the opinion that the interest of the plaintiffs in said lot was paramount to the mortgage of the defendant, the Midland Savings & Loan Company, and that the latter company should be subrogated to the rights of Dan Dewberry to receive the balance of the purchase money for said lot from the plaintiffs after the payment out of said purchase money of two prior mortgage liens against said property. A decree was entered in accordance with the findings of the chancellor, and to reverse that decree the defendant, the Midland Savings & Loan Company, has duly prosecuted an appeal to this court.

Jno. D. Rogers and *P. P. Bacon*, for appellant.

Frank S. Quinn, for appellee.

HART, C. J., (after stating the facts): As will be seen from our statement of facts, on the 5th day of May, 1926, Dan Dewberry entered into a written contract with Paul R. Brooks for the sale of the lot in controversy. After making a small cash payment, Brooks executed a note to Dewberry for the balance of the purchase money, and was placed in possession of the property. He has actually resided on the property since the date of his purchase, and was residing there at the time a mortgage was executed by B. V. Long and wife to the Midland Savings & Loan Company, on the 18th day of May, 1926. The possession of the property by Brooks and wife at the time the mortgage to the Midland Savings & Loan Company was executed was equivalent to actual notice to that company of the title, rights and equities of the occupants. *Thalheimer v. Lockert*, 76 Ark. 25, 88 S. W. 591; *Naill v. Kirby*, 162 Ark. 140, 257 S. W. 735; *First National Bank of Paris v. Gray*, 168 Ark. 12, 268 S. W. 616; *Reed v. Ziff Lodge 119 Order of Masons*, 175 Ark. 980, 1 S. W. (2d.) 1000; *Crawley v. Neal*, 152 Ark. 232, 238 S. W. 1054; *American Building & Loan Association v. Warren*, 101 Ark. 163, 141 S. W. 765. In the case last cited the law applicable to cases of this sort is clearly stated as follows:

“Ordinarily, possession by a person under a contract of purchase, although unrecorded, is notice of his equitable rights and interests in the property. Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally, actual, visible and exclusive possession is notice to the world of the title and interest of the possession in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor, and, if he does not do so, notice thereof will be imputed to him.”

In the case at bar Brooks went into possession of the lot as soon as he purchased it, and made payments of the purchase money under the terms of his contract to the amount of \$420. He testified that he did this in good faith, and his testimony is not contradicted. The other evidence in the case shows that Dan Dewberry purchased the property from Mrs. Agnes McCall and had the title put in the name of B. V. Long for his benefit. Brooks did not have any notice of this, and, relying upon the assertions of Dan Dewberry, believed that the title was in Dewberry at the time he purchased the lot, and entered into possession of it. There is nothing whatever in the record to impeach the good faith of Brooks in the purchase of the property. Dewberry represented that the title was in him when he made the contract with Brooks, and Brooks signed the note for the purchase money and entered into possession of the property, believing that he was acquiring a good title thereto. B. V. Long admitted that the property was purchased by Dan Dewberry from Mrs. Agnes McCall and that the title was taken in the name of B. V. Long for the benefit of Dan Dewberry, and that he (Long) had no interest whatever in the property. Under these circumstances Brooks had an equitable interest in the property, and his possession of it was notice to the

defendant, the Midland Savings & Loan Company, of his rights.

It follows that the decree of the chancery court will be affirmed.
