LAVENDER v. BUHRMAN-PHARR HARDWARE COMPANY.

Opinion delivered June 18, 1928.

1. BILLS AND NOTES—FORGED INDORSEMENT OF BILL.—Where, in a suit in chancery to foreclose a mortgage executed to secure a loan to defendants, witnessed by a draft payable to defendants and an agent of plaintiff, the court found that the draft was paid to such agent on his forgery of defendants' signatures, the draft was not admissible as a receipt nor otherwise binding on defendants.
2. MORTGAGES—BURDEN OF PROOF.—The burden was on a loan company seeking foreclosure of their mortgage given to secure a loan to defendants to show that the money loaned was delivered to defendants, where they denied having received the money.
3. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR AGENT'S FRAUD. —Where a loan company made it possible for its agent to cash a draft and collect the money on his own indorsement and forgery of the signatures of the borrowers by making the draft payable to them and such agent and sending it to him for final disposition, it must bear the loss resulting from his failure to deliver the money in accordance with the loan contract.
4. MORTGAGES—FAILURE OF CONSIDERATION.—Where the consideration for the execution of a note and mortgage was never paid to the makers by delivery of the money agreed to be loaned, the mortgage could not be foreclosed and the property subjected to payment thereof.

5. MORTGAGES—ESTOPPEL.—Neither the vendors' sale and conveyance of the mortgaged property in part consideration of the purchasers' assumption and payment of the note for the amount of the loan mortgage, nor the payment of several installments by the purchasers, will estop the mortgagors from pleading a failure of consideration, where they had no knowledge that the money to be loaned had been forwarded to and embezzled by the mortgagee's agent; the mortgagee not having altered its position or been misled by reason of such conveyance.
6. CANCELLATION OF INSTRUMENTS—FAILURE OF CONSIDERATION.—Upon a failure of consideration of a note and mortgage, they may be canceled.
7. VENDOR AND PURCHASER—ENFORCEMENT OF VENDORS' LIEN.—Where part of the consideration of the sale of land was the assumption by the purchasers of the amount supposed to be due under a prior mortgage, upon the cancellation of such mortgage as executed without consideration, the vendors were entitled to recover such amount from the purchasers as part of the purchase money, and to enforce the vendors' lien therefor.

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

STATEMENT BY THE COURT.

This suit was brought by appellee hardware company to enforce a materialman's lien against property of appellants. Appellants, the owners of the property, were constructing a house thereon, the materials were being bought and contracted for by one Dan Dewberry, who was indebted to appellant in the sum of more than $2,300. When the house was nearing completion, Dewberry, who was the local agent for appellee loan company, suggested that the owner should apply through him to his company and procure a loan on the property for $2,750, which was done. The application was made out, forwarded to the home office of the company in Colorado, where the loan was approved, and the mortgage, note and certificates of stock prepared. These were sent back to Dewberry, along with the check or draft in payment of the loan, for signature of the mortgagors and the delivery of the money loaned. The draft was made payable jointly to J. M. Lavender, Olivia Lavender and Dan Dewberry, agent.

Lavender testified that the mortgage and note were executed and sent on with the application. Other testimony tended to show that the check or draft, payable as already stated, was cashed by Dewberry on the 16th day of December, 1926, at the Texarkana National Bank; that the certificate of acknowledgment to the mortgage bore date December 18, 1926, on which day the draft was paid by the drawee bank in Oklahoma City.

The appellee loan company answered in the suit to enforce the lien, and filed its cross-complaint against appellants to foreclose the mortgage for the amount of the loan. Appellants answered, and also answered the cross-complaint, admitting the application for the loan, the execution of the note therefor and mortgage securing same, but alleged that no money had ever been received by them, that the mortgage and note were procured by fraudulent representation, that the note and bond was without consideration, and answered further, filing a statutory denial of the making of the draft for the loan by the investment company, denying that their signatures as payees thereof were genuine, and alleged that they were forgeries, and that no money had been received by them, and prayed a cancellation of the note and mortgage. Appellants, on.....day of....., after they had applied for the loan, sold the property to Sparks and wife, through Dewberry as agent, for $450 in cash, the express assumption by the vendees, Sparks and wife, of the payment of the indebtedness or mortgage to appellee loan company, and for $600 additional to be paid after the discharge of the said mortgage. It appears also that Sparks paid three or four of the monthly installments due the loan company under the Lavender mortgage before the commencement of the action for foreclosure. Lavender testified that the loan money had never been paid him by Dewberry; that, when a sale of the property to Sparks was suggested, he, Lavender, insisted that the loan papers should be returned, since no loan had been received, and Dewberry assured him that it would be paid shortly, and

that the deed conveying the property to Sparks would be held and not delivered until the loan money was received.

The chancellor found as follows:

"That the loan company made the loan and forwarded its draft for the sum of $2,750, payable jointly to J. M. Lavender, Olivia Lavender and Dan Dewberry, agent, to Dan Dewberry, its agent, for the purpose of delivering said draft to appellants in payment of said loan; that Dan Dewberry forged the names of appellants to said draft, cashed it at the bank, and did not account to appellants or either of them for any part of the proceeds thereof; that thereafter the appellants sold and deeded the lands to Sparks and wife, and made the amount of the loan, $2,750, a part of the consideration in the deed, and that Sparks agreed to assume said mortgage indebtedness, and that by reason thereof the said appellants were estopped to plead said fraud and failure of consideration against said loan company." Judgment was rendered against appellants, foreclosing the mortgage, the property was ordered sold in satisfaction thereof, subject, however, to a prior lien in the sum of $113.83 in favor of the materialman, Buhrman-Pharr Company. Appellant was given judgment against Sparks and wife for the amount of the second lien note of $600, which amount was declared third in priority, and the court decreed that appellants have judgment against D. E. Smith, receiver of Dan Dewberry's insolvent estate, for the amount of the loan, $2,750. The property was sold by the court commissioner, and purchased by the loan company for the sum of $2,000. After deducting the cost and the $113.83 materialman's lien, the balance was credited on the judgment against appellants. From this judgment this appeal is prosecuted.

T. B. Vance, for appellant.

John D. Rogers and *Pratt P. Bacon,* for appellee.

KIRBY, J. The undisputed testimony shows that application was made by appellant for the loan through Dewberry, the local agent of the loan company, that the application was approved, and the loan granted at its

home office in Colorado. The bond for the loan and the mortgage securing it and the agreement to purchase stock, along with a draft in payment of the loan, made payable to the appellants, mortgagors, and Dan Dewberry, agent, were sent to Texarkana for signature of the mortgagors and delivery to them of the money loaned through Dewberry, upon the completion of the transaction. It was further shown and the court found that the names of the mortgagors, payees in the draft or check, were forged by Dewberry, agent of the loan company, and the other payee in the draft to whom it was sent for delivery of the money to the mortgagors upon the execution of the necessary papers. Appellants having denied, in accordance with the statute (§ 4114, C. & M. Digest), their indorsement of the draft, payable to their order and Dan Dewberry, as agent, by whom it was claimed the money loaned was paid to them, and alleged that their signatures were forgeries and not genuine, the draft could not be read in evidence as a receipt of the money, or in anywise binding against them for its payment, and the burden of proof devolved upon the loan company to show the delivery of the money loaned to the mortgagors. *Ohio Gal. Co.* v. *Nichol,* 170 Ark. 16, 279 S. W. 377. See also *Terrill* v. *Fowler,* 175 Ark. 1010, 1 S. W. (2d.) 75.

Lavender testified that the signatures of himself and wife indorsed on the draft were forgeries, and the court found such to be the case He also testified that none of the money which was attempted to be borrowed from the loan company, payment and delivery of which was attempted to be made by said draft, payable to the order of appellants, mortgagors, and Dan Dewberry, agent, and sent and delivered by the loan company to its said agent Dan Dewberry, and cashed by him upon his own and the forged signatures of appellants, had ever been delivered to or received by them. Certainly the loan company could not collect the note given for the loan nor foreclose the mortgage given to secure the payment thereof, when it had never in fact made such loan by delivering the money to the makers of the note and mortgage. The undisputed

testimony shows that Dan Dewberry was the local agent of the loan company, authorized to submit applications, procure the signatures of the applicants to the papers necessary for completion of loans, and deliver the money loaned to the mortgagor or borrower, and also that the draft for the money constituting the loan was made payable to the mortgagors and to Dan Dewberry, agent, and sent to him for final disposition. The loan company made it possible, by this procedure, for its agent to cash the draft and collect the money upon his own indorsement and the forgery of the signatures of the other payees, and, having done so, must bear the loss resulting from the agent's failure to deliver the money loaned to the mortgagor in accordance with the contract made therefor. See *Gate City Building & Loan Ass'n* v. *Crowell, ante,* p. 539. The consideration for the execution of the bond and mortgage never having been paid to the makers of the bond, the mortgagors, failed utterly, and the mortgage could not, of course, be foreclosed and the property subjected to the payment of such note and mortgage.

The court held, however, that, notwithstanding such failure of consideration of the note given for the loan, the mortgagors having sold and conveyed to Sparks and wife the property mortgaged, after the amount of the loan was in fact received by the agent of the loan company, Dewberry, who embezzled the money, requiring, as part of the consideration therefor, the assumption and payment of their bond or obligation to the loan company for the amount of said loan, and the payment of three or four installments thereof by such purchasers, estopped appellants to plead a failure of consideration of their note to the loan company. This, notwithstanding the proof showed that appellants had no knowledge whatever, at the time of said conveyance and of the payment of the installments upon the property, that the money applied for as the loan from the loan company had ever been forwarded or received by its agent at Texarkana, which said agent in fact had denied that it ever had been received by him, according to the testimony in the case.

This holding was erroneous. There was no change of conduct or position by the loan company because of such sale or transfer of the property to Sparks and wife, nor was it misled to its injury in any way thereby, and certainly there could have been no estoppel by this act of appellants to deny that the consideration for the bond and mortgage given by them for the loan, the money for which had never been delivered to them, had failed.

The consideration for the note having failed, the mortgagors were entitled to have the note and mortgage canceled, and the court erred in holding otherwise, and that they were estopped to plead such failure of consideration. Appellants having sold and conveyed the property to Sparks and wife, requiring the payment, as part of the consideration thereof, of the amount that would have been due the loan company under their bond and mortgage, if it had been valid and enforceable, were also entitled to recover the amount as part of the purchase money due from Sparks and wife to them, and to enforce a vendor's lien for the payment thereof in accordance with the terms of the contract of sale.

The decree is reversed as against appellants in favor of the loan company, and, it appearing that the vendees of appellants, Sparks and wife, failed to answer and defend the cause, and that the property has already been sold and purchased by the appellee, the loan company, the cause will be remanded with directions to enter a decree canceling appellant's mortgage and note or bond to the loan company, and decreeing them a vendor's lien for the entire amount of the unpaid purchase price against Sparks and wife, for foreclosure of the lien, and a sale of the property in satisfaction thereof, and payment of the proceeds, after payment of the amount of the lien for materials furnished by appellee, Buhrman-Pharr Co., to appellants, with costs.

It is so ordered.