

IN THE CIRCUIT COURT FOR CALVERT COUNTY, MARYLAND

HARRY BORDEN

Plaintiff

v.

Civil Action No. C 06-1357

WILBUR HURLEY, Jr., et. ux

Defendant

OPINION

This matter came before the court on August 7, 2007 for a civil non-jury trial. At issue in this case is the non-payment of rent. Harry Borden, Plaintiff in this case gained title to 860 Chippingwood Drive, Port Republic, MD 20676 on August 22, 2005. On the same day Plaintiff entered into a lease agreement with Defendants for rental of 860 Chippingwood Drive, Port Republic, MD 20676. Plaintiff also entered into a lease agreement with Defendant Wilbur Hurley, Jr.'s father, Wilbur Hurley, Sr. and mother Philis Hurley for rental of an efficiency located on the property, for \$1590.00 a month. Plaintiff brought suit against Wilbur Hurley, Jr. and Doris Hurley on October 27th 2006. Subsequently, on November 9, 2006, Wilbur Hurley, Jr. and Doris Hurley brought a declaratory judgment action against Harry Borden and numerous other parties in case number C-06-1332, disputing *inter alia*, the validity of the deed and lease agreement referenced above.

BACKGROUND

A. History of 860 Chippingwood Drive

On June 16, 2000, Madeline Chase, Doris Hurley's mother and Wilbur Hurley, Jr.'s mother-in-law, conveyed title to the unimproved property now known as 860 Chippingwood Drive, Port Republic, MD 20676, to the Defendants. Defendants subsequently took out several loans to construct a home and an efficiency for Wilbur Hurley, Jr.'s parents.

A complaint for foreclosure was docketed against the Hurleys on October 21, 2003 in case C-03-1133 in the Circuit Court for Calvert County. This foreclosure was dismissed February 15, 2005, without prejudice, for lack of prosecution. While the

foreclosure in C-03-1133 was dismissed in February 2005, as late as July 15th 2005, the substitute trustees for the Hurleys' mortgage company had issued a notice that a foreclosure "may be or has been docketed" against the Hurleys. The substitute trustees also issued a pre-sale notice for publication, with the foreclosure sale noted as August 16, 2005. There was also an Amended Affidavit of Deed of Trust Debt signed by the substitute trustee on July 15th 2005. The pre-sale publication and the Amended Affidavit of Deed of Trust Debt were received by Circuit Court for Calvert in August 2005, as indicated by a file stamp. But because the foreclosure case had been dismissed in February 2005 for lack of prosecution, and no motion for deferral had been filed to re-open the case, they were not docketed in the case, and the proposed sale for August 16, 2005 was canceled. There were no other foreclosures subsequently filed.

B. Hurley - Borden Transactions

On June 11, 2005 the parties entered a residential contract of sale in which Plaintiff agreed to purchase the Defendants' home for \$600,000. Ultimately both parties agreed to sell the house for \$594,000. On August 22, 2005, the parties proceeded to settlement, at which time the Defendants executed a Deed granting and conveying 860 Chippingwood Drive property to the Plaintiff. At or near the time of settlement, the parties also entered into an option contract to purchase the property, allowing the Defendants to repurchase the property. The parties also entered into a residential lease agreement, allowing the Defendants to reside on the property.

The Option to Purchase Property contract was signed by the Hurleys on August 15th 2005 and signed by Harry Borden on August 21st 2005. In consideration of \$52,996.00, Plaintiff granted the Defendants the option to purchase the property back within 3 years, for a total of \$742,996.00. The lease agreement provided for a 36 month lease with the monthly rent being 2,500. The Hurley to Borden deed was recorded on September 28, 2005. Plaintiff's mortgage on the property is \$3,819.00, with a \$146 monthly fee for a property management. Plaintiff's anticipated payment of rent from the property at issue in this case was \$4,090.00 (\$2500 from Wilbur Hurley, Jr. and Doris Hurley and \$1590 from Wilbur Hurley, Sr. and Philis Hurley).

The Defendants failed to pay rent beginning in approximately August 2006. Plaintiff filed suit for rent on October 27th 2006 in Calvert County District Court for unpaid rent from August 1, 2006 until October 1, 2006. On October 26, 2006, nearly a year after the conveyance, attorney for the Defendants, wrote a letter to Plaintiff as

formal notice that his clients, the Defendants were rescinding any and all oral contracts, pursuant to the Protection of Maryland Homeowners in Foreclosure Act including the Residential Contract of Sale, the Option to Purchase Real Estate contracts, the lease agreements, and the recorded deed. On November 15, 2006, Defendants prayed a jury trial in the Circuit Court for Calvert County. On January 1, 2007, attorney for the Defendants again wrote a letter to Plaintiff and his attorney regarding the Defendants' rescission of the sale of the real property.

On March 14th 2007, this court ordered Defendants to pay into the registry of the court the sum of \$2,500.00 per month during the pendency of this action. Defendants made one payment of \$2500 into the court registry on March 30, 2007. Defendants have been occupying 860 Chippingwood Dr., Port Republic, MD 20676, without paying rent or a mortgage for a year and a half. Plaintiff has had to maintain the \$3,819.00 mortgage payment with no reimbursement from the Defendants, nor rent from any other tenants.

DISCUSSION

The Defendants argue several theories under which they do not owe Plaintiff rent. One of Defendants' theories is that the Defendants intended to create a mortgage, not an outright sale of property. Thus, they argue, they retain title to the property and, thus, cannot be sued for rent. They also argue that since Plaintiff filed suit for rent and did not bring a foreclosure suit, that Plaintiff is denied all recovery. Alternatively, they argue that they rescinded the sale, pursuant to the provisions of the Homeowners in Foreclosure Protection Act, Md. Real Property Article, Title 7, Subsection 3 and, thus, they maintain title and, therefore, do not owe Plaintiff any rent. Defendants also argue that the Plaintiff violated a slew of federal and state laws in the sale / leaseback transactions which took place in August of 2005.

I. Sale or Mortgage

A. Deed of Sale

Under Maryland law deeds are to be construed under the basic principles of contract interpretation. *White v. Pines Community Improvement Ass'n, Inc.*, 403 Md. 13, 31, 939 A.2d 165, 176 (2008). The presumption regarding a deed is that the instrument is what on its face it purports to be, an absolute conveyance of the land. *Foard v. Snider*, 205 Md. 435, 442, 109 A.2d 101, 104. To overcome this presumption and to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. If the court finds that the actual intention of the parties was that the papers were executed as

security, the court will allow the debtor to redeem the property upon payment of the debt.
Id.

There has been no proffer that at the time the deed was executed it was both parties' intention to create a mortgage rather than an outright conveyance of land. Other than Defendants' unsupported claims, this court finds no evidence in the record that the deed was anything other than a outright sale. The documents surrounding the sale of the property do not indicate that the deed of sale was executed as security for a loan. As noted above, the evidence indicating the parties' intention to create a mortgage must be "clear, unequivocal and convincing." This court finds that the Defendants have failed to meet their burden to overcome the presumption that a deed of sale is an absolute conveyance.

B. Equitable Mortgages

While there is such a concept as equitable mortgage in Maryland, it is not applicable to the case at bar. In *Pence v. Northwest Bank Minnesota*, 363 Md. 267, 768 A.2d 639, (2001), the Maryland Court of Appeals had the opportunity to discuss the law of mortgages in Maryland. In discussing formal mortgages the *Pence* court quoted *Bank v. Lanahan*, 45 Md. 396 (1876):

By the legal, formal mortgage a property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute legal conveyance, but subject to a proviso or condition by which the conveyance is to become void, or the estate is to be reconveyed, upon payment to the mortgagee of the principal sum secured, with interest on a day certain; and upon nonperformance of this condition, the mortgagee's conditional estate becomes absolute by law, and he may take possession thereof, but it remains redeemable in equity during the certain period.

Equitable mortgages on the other hand are instruments which on their face appeared to be mortgages but which were defective in some manner. *Id.* at 280-281. In discussing equitable mortgages the *Pence* court quoted *LeBrun v. Prosie*, 197 Md. 466, 477, 79 A.2d 543 (1951) in which the court stated

The principle is now well settled, that it would seem to be beyond all question and controversy, that if a party makes a mortgage, or affects to make one, but it proves to be defective,

by reason of some informality or omission, such as failure to record in due time, defective acknowledgment, or the like, though even by the omission of the mortgagee himself, as the instrument is a least evidence of an agreement to convey, the conscience of the mortgagor is bound, it will be enforced by a court of equity.

As to Defendants' claim that an equitable mortgage was created, this court finds that no equitable mortgage was created under the laws of Maryland. In arguing that an equitable mortgage was created Defendants cite to Md. Code Ann. Real Property 7-101, discussed *infra*, and a 4th Circuit case, a Minnesota case, and a District of Columbia case. Defendants cite to no Maryland case law in support of their argument. The reason for this, this court surmises is because, as discussed above, in Maryland equitable mortgages apply to mortgages, which are such on their face, but fail for some procedural flaw. This is clearly not a case of an equitable mortgage under Maryland law. This case involves an outright sale which Defendants now claim was a mortgage. This is not the scenario to which the "equitable mortgage" doctrine applies.

C. Md. Code Ann. Real Property § 7-101

Defendant also cites to Md. Code Ann. Real Property § 7-101 as support for the proposition that a sale with a sale / leaseback or repurchase option is in fact a loan and the deed at issue is construed as an equitable mortgage. This court finds that a sale with a sale / leaseback or repurchase option does not create an equitable mortgage per se. Md. Code Ann. Real Property Article §7-101 (a) reads: "Every deed which by any other writing appears to have been intended only as a security for payment of an indebtedness or performance of an obligation, though expressed as an absolute grant is considered a mortgage." The statute goes on to require that before a person can benefit from such a mortgage they must record any writing acting as a defeasance of it. Defeasance has been defined by the Maryland Court of Appeals as an "instrument executed at the same time with some other deed, and intended to defeat the force of the latter upon the performance of certain conditions expressed therein." *Hoffman v. Gosnell*, 75 Md. 577, 24 A. 28, 30 (1892). The only writings which were executed at the time the deed was executed were the lease agreement and the option to purchase, neither of which condition or even allude to a condition upon the execution of the deed. Since this court has found no writings evidencing that the sale of deed was intended as a security for a debt or some other

obligation, Md. Code Article Real Estate 7-701 does not support Defendants' argument that an equitable mortgage was created between the parties.

II. Maryland Protection of Homeowners in Foreclosure Act

Defendants argue that Plaintiff violated Md. Code Ann., Real Property Article, Title 7, Subtitle 3, Protection of Homeowners in Foreclosure Act; and, therefore, they should regain title to their real property and are entitled to damages. This court declines to make a finding as to whether the Md. Code Ann. Real Property Article, § 7-301 – §7-321 applies to the facts in this case. There are individuals and entities that have legal or equitable interests in the subject property who are not parties in this case. They are however, parties in the pending declaratory judgment action noted above.

Assuming arguendo that the statute did apply to this case, this court finds that Defendants had the right to rescind the sale of their home. As this court has previously found, Defendants did not take the required steps to rescind the sale. Judge Northrop ruled on the 6th day of April, 2007 that since no monies were paid, nor any accounting provided, the rescission was ineffective and a suit for rent could go forward. To date there has still been no accounting. Therefore, the Plaintiff is entitled to the payment of all accrued rent, late fees, and any other amounts due under the terms of the lease. Failure to pay rent will entitle the Plaintiff to take whatever actions Maryland law allows.

CONCLUSION

This court finds that the deed from the Defendant to the Plaintiff was not a mortgage, for the reasons set forth above, and there is a lease between the parties which require the Defendants to pay rent to the Plaintiff. Therefore, the Defendants must pay the Plaintiff all rent owed and any late fees.

This court notes there is a pending declaratory judgment action in C-06-1332 to determine the validity of various documents referred to above. Therefore, the holding made in this case regarding the lease may be changed or modified pursuant to the ruling in that case.

Warren J. Krug

WARREN J. KRUG, JUDGE

3/28/08

DATE

CONCLUSION

IN THE CIRCUIT COURT FOR CALVERT COUNTY, MARYLAND

HARRY BORDEN

Plaintiff

v.

WILBUR HURLEY, Sr., et. ux

Defendant

Civil Action No. C 07-455

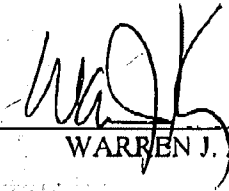
ORDER

In accordance with the Opinion filed this day in Case C-06-1357, it is this 28th day of March 2008, by the Circuit Court for Calvert County, hereby

FOUND, that Defendants' son and daughter-in-law do not hold an equitable mortgage on 858 Chippingwood Dr., Port Republic, MD 20607; and it is further

ORDERED, that there is a lease requiring the defendants to pay rent and any late fees, under the terms of the lease agreement; subject however, to modification if the decision in C-06-1332 finds that the deed and / or lease were ineffective or invalid.

ORDER



WARREN J. KRUG, JUDGE

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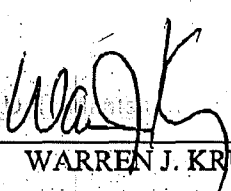
Defendant

ORDER

In accordance with the Opinion filed simultaneously herewith, it is this 28th day of March 2008, by the Circuit Court for Calvert County, hereby

FOUND and ORDERED; that the deed from the Defendants to the Plaintiff is not a mortgage, legal or equitable; and it is

ORDERED, that a lease exists between the parties requiring payment of rent and any late fees, under the terms of the lease by the Defendants; subject, however, to modification if the decision in C-06-1332 finds that the deed and / or lease were ineffective or invalid.



WARREN J. KRUG, JUDGE