Estate of Olkeriil v. Ulechong v. Akiwo, 4 ROP Intrm. 32 (1993)

ESTATE OF JONAS OLKERIIL,
Plaintiff/Appellee,

v.

LAURENTINO ULECHONG,
Defendant/Third PartyPlaintiff/Appellee,

v.

RAYMOND AKIWO,
Third Party Defendant/Appellant.

CIVIL APPEAL NO. 25-91
Civil Action No. 232-89 & 428-90

Supreme Court, Appellate Division
Republic of Palau

Opinion and order
Decided: November 30, 1993

Counsel for Appellant: Douglas F. Cushnie

Counsel for Defendant/Appellee: Mariano W. Carlos

Counsel for Plantiff/Appellee: Johnson Toribiong

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; JANET H. WEEKS, Part-Time Associate Justice

PER CURIAM:

The present lawsuit is a dispute over the title to a parcel of land in Koror State involving three parties: the estate of Jonas W. Olkeriil, Laurentino Ulechong, and Raymond Akiwo. All three ⊥44 parties filed motions or cross-motions for summary judgment. The Trial Division granted summary judgment, holding that (1) title to the property lies with Ulechong, and that (2) Olkeriil's estate is liable to Akiwo in the amount of $1,500 plus interest for partial payments Akiwo had made for the land. For the reasons set forth in the Discussion below, we reverse the first holding in part and the second holding in its entirety, and remand this case to the Trial Division for further proceedings consistent with this opinion.

Estate of Olkeriil v. Ulechong v. Akiwo, 4 ROP Intrm. 32 (1993)

BACKGROUND

The issues in this appeal cannot be resolved without a detailed understanding of the somewhat complicated history of the tract of land at issue, a history which includes a previous lawsuit and two separate conveyances of the same property.

The land is a portion of Tochi Daicho Lot No. 1000 in the Delui area of Meketii hamlet of Koror State. The property originally belonged to Rubasch Dungan, who transferred it to Jonas Olkeriil's father sometime before the Japanese Land Survey of 1939-41. Olkeriil Senior held the title of Rechucher Ra Techekii of the Techekii Clan at the time, and the Tochi Daicho erroneously listed the clan as the owner, with Olkeriil Senior as administrator. When Olkeriil Senior died, Jonas Olkeriil inherited the land. The erroneous Tochi Daicho listing and adverse possession by another party led to a lawsuit regarding this and an adjacent tract. The lawsuit, which was separate from the instant case, was filed on ⊥45 June 10, 1981, to quiet title to Lot 1000 and the contiguous Lot 999. *See Techekii Clan v. Paulus v. Salii* , Civ. Action No. 69/70-81 (hereinafter "*Techekii*"). The *Techekii* court issued its final judgment in 1987, confirming Jonas Olkeriil as the owner of the portion of Lot 1000 at issue in the present case. An appeal of the *Techekii* decision was filed but ultimately dropped.

On December 29, 1981, during the early stages of the *Techekii* litigation, Jonas Olkeriil conveyed the land to Akiwo. The Deed of Transfer recites that the $4,800 consideration had been paid, and contains an acknowledgment, signed by the Clerk of Courts on the same date, that the transaction had been recorded and filed in Book Number 18 at page 44. Despite the acknowledgment, the trial court took judicial notice of the fact that the Clerk's Office never actually entered the transfer into the recording book because page 44 of the book remains blank.

On May 27, 1988, after the *Techekii* court had issued its judgment and while an appeal was still pending, Olkeriil made a second transfer of the same property, this time to Ulechong by a warranty deed that was duly recorded. The $9,000 consideration was paid into a joint bank account and was to be released to Olkeriil when the *Techekii* decision confirming Olkeriil's title was upheld on appeal.

At the time Ulechong recorded his deed, he had no actual knowledge of the prior deed to Akiwo. He did become aware of the deed, however, while the *Techekii* appeal was still pending and the $9,000 was in the joint account. After the *Techekii* appeal was ⊥46 dropped, Ulechong refused to release the $9,000 from the account because of the cloud on the title posed by the Akiwo deed. Olkeriil filed the present lawsuit to set aside his deed to Ulechong, and Akiwo was brought in as a third party.

DISCUSSION

I. Who holds title to the property?

Our review of the summary judgment on the issue of title will address two fundamental issues: First, did the trial court err in concluding that Akiwo's deed had not been recorded on the

basis of the judicially noticed fact that the recordation does not appear on the page of the recording book indicated in the acknowledgment of the deed? Second, if Akiwo's deed was never recorded, did the court err in concluding that Ulechong was a bona fide purchaser? The two issues are interrelated. Ulechong cannot qualify as a bona fide purchaser unless his purchase was without notice of Akiwo's deed. If he was a bona fide purchaser and duly recorded his deed before Akiwo recorded, Ulechong's deed prevails over Akiwo's, as the following provision in 39 PNC § 402 makes clear:

> Effect of failure to record.
>
> No transfer of or encumbrance upon title to real estate or any interest therein, other than a lease for a term not exceeding one year, shall be valid against any subsequent purchaser or mortgagee of the same real estate or interest, or any part thereof, in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the transfer to the subsequent purchaser or mortgagee is first duly recorded. (emphasis added)

The term "duly recorded" is not defined by the statute, but we interpret it to require some form of entry into the recording ⊥47 books. *See* 66 Am. Jur. 2d *Records and Recording Laws* § 81 (1973). Akiwo's deed bears a notation from the Clerk of Courts indicating that it was recorded on December 29, 1981, in Book 18, Page 44. Although that notation is some evidence that the deed was presented for recording, it is not conclusive evidence that the deed was actually recorded. The notation on an instrument by the Clerk of Courts does not itself constitute recordation of the instrument. An instrument is not "duly recorded" unless an entry is made in the recording books.

As to the issue of judicial notice, we agree with the trial court that the recording books in the Clerk of Courts' office are a proper subject of such a procedure. Rule 201, subsections (b) and (c), of the ROP Rules of Evidence permit a court to take judicial notice on its own initiative of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Official recording books fall well within the ambit of this rule.

Akiwo argues that the court should have at least provided him with an opportunity to respond to the judicial notice. Subsection (e) of the same rule provides:

> A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Akiwo complains that the trial court in the instant case took judicial notice without any notice to the parties. Rule 201(e) does not require, however, prior notification to the parties. It ⊥48 does entitle a party to an opportunity to be heard upon timely request. Akiwo could have made such a request in a post-judgment motion.

We agree with Akiwo, however, that the trial court failed to establish that the deed was not duly recorded merely by establishing by judicial notice that Akiwo's deed was not recorded at Book 18, Page 44. It may be duly recorded in some other book or on some other page in the Clerk's records. Therefore, there remains an issue of material fact as to whether Akiwo's deed was recorded before Ulechong's.

We therefore reverse the trial court on this limited aspect of the summary judgment and remand the case to the trial court to afford Akiwo the opportunity to show that he recorded his deed before Ulechong. If such recordation is not established, however, the trial court shall enter judgment in favor of Ulechong because we agree with the conclusion of the trial court that Ulechong qualifies as a bona fide purchaser.

A bona fide purchaser is by definition one who purchases for value in good faith and without notice. *See* 77 Am. Jur. 2d *Vendor and Purchaser* § 633, § 644 (1975); Black's Law Dictionary 177 (6th ed. 1990). While there is no question that Ulechong purchased the property for value and in good faith, the issue of whether he acquired title without notice of Akiwo's deed is somewhat trickier. Ulechong clearly did not have notice of Akiwo's deed until after he had recorded his own deed. Nevertheless, the purchase money was placed in a joint bank account and was not to be delivered to ⊥49 Olkeriil until the *Techekii* case had become final.

Akiwo contends that the trial court erred in considering the transaction with Ulechong to be a transfer of title subject to a condition subsequent. He claims that it was an escrow transaction which had not closed at the time Ulechong became aware of the Akiwo deed. The problem with this contention is that the transaction was lacking in the essential elements of an escrow agreement. Most importantly, the deed was not delivered to a third party to hold until the satisfaction of a condition. Instead, the deed was immediately delivered to Ulechong for recordation. Similarly, the purchase price was not delivered to a third party to hold pending satisfaction of a condition. It was placed directly into a joint bank account. There was no third party to the transaction. Although the parties referred to an escrow account in the deed, an escrow was never established. "Merely labeling a specific delivery of property as an escrow does not make it such." 28 Am. Jur. 2d *Escrow* § 3 (1966).

We agree with the trial court's conclusion that there was transfer of title subject to a condition subsequent. The plain language of the deed shows that title was conveyed subject to the possibility that the deed would at some time in the future be rendered null and void if the *Techekii* appeal were decided adversely to Olkeriil:

> In the event the appeal in Civil Action Nos. 69/70-81 [*Techekii* case] shall be dismissed or the Grantor [Olkeriil] here shall prevail on the said appeal, he shall be entitled immediately to the money in escrow account together with any interest which shall have accrued up to that time; in the event the Grantor shall ⊥50 not prevail in the appeal of the said civil actions, the Grantee [Ulechong] shall be entitled to the money in escrow or TCD account together with any accrued interest and this Warranty Deed shall be rendered null and void and of no force and effect.

It seems clear that the only reason Ulechong did not pay the money directly to Olkeriil was to protect himself against a possible though not anticipated reversal of the *Techekii* case on appeal, in which case he could retrieve his money and the warranty deed would "be rendered null and void and of no force and effect." Notably, the only circumstance in which Ulechong could recover the $9,000 was a reversal of the *Techekii* judgment. In that event, however, neither Ulechong nor Akiwo would have any right to the land. By contrast, as long as the *Techekii* judgment was not reversed, the $9,000 payment was irretrievable. Since the appeal in *Techekii* was eventually dropped, Olkeriil was entitled to the money and Ulechong was entitled to the land.[1]

II. The propriety of summary judgment as to Akiwo's payments.

In addition to granting title to Ulechong, the trial court awarded damages to Akiwo for the partial payments he had made for Lot 1000. The question is whether it erred in so doing. The issue is not whether the trial court's decision was correct as to ⊥51 damages, but rather whether the issue should have been resolved upon summary judgment.

The granting of summary judgment is subject to the following principles: A motion for summary judgment should only be granted when the pleadings, affidavits, and other papers show that there is no genuine issue of a material fact, and the moving party is entitled to judgment as a matter of law. ROP Rules of Civ. Pro. 56(c). All doubts are to be resolved against the moving party. *Cantor v. Detroit Edison Co.* , 96 S.Ct. 3110, 3113 (1976). The opponent to summary judgment need only show that there is sufficient evidence supporting the claimed factual dispute to require a judge or jury to resolve the parties' differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). The affidavits of the moving party are to be strictly construed, and those of the opposing party liberally construed; where the affidavits of the parties are diametrically opposed, and it is apparent that one of them is not telling the truth, the credibility of the parties is a question for the trier of fact, and the motion should be denied. 73 Am. Jur. 2d *Summary Judgment* § 36 (1974). The opponent's version of any disputed issue of fact is presumed to be correct. *Eastman Kodak Co. v. Image Technical Services, Inc.* , 112 S.Ct. 2072, 2077 (1992). An appellate court will look at the record in the light most favorable to the party opposing the motion. *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486, 491 (1962).

In light of the foregoing considerations, we hold that summary ⊥52 judgment was not appropriate as to the issue of damages in this case. Akiwo states in his affidavit that he paid the entire $4,800 purchase price. On the other hand, Olkeriil's affidavit states that only $1,300 has been paid. A third affidavit, by Katosang Rimirch, a relative of both Akiwo and Olkeriil, states that Rimirch and Olkeriil visited Akiwo in 1988, that Olkeriil offered to return $1,500 to Akiwo to rescind the deed, and that Akiwo promised to pay the outstanding balance.

---

[1] While we agree with the trial court that Ulechong qualifies as a bona fide purchaser (if Akiwo's title was not first recorded), we do not concur with its analysis of this case as one of after-acquired title. In our view, Jonas Olkeriil acquired his title to the property upon his father's death, and the *Techekii* case merely confirmed it. If Akiwo had duly recorded his deed, his title would have been good against all subsequent purchasers.

The affidavits showed that there was a genuine issue of material fact. Nevertheless, the trial court granted summary judgment to Akiwo for $1,500 plus interest. It is clear that the court weighed the evidence and found Olkerii's version more persuasive. As the authorities cited above make clear, however, the trial court was not authorized to do so. It is exactly this type of factual dispute that should be decided by a trier of fact at trial, not upon a battle of affidavits in a motion for summary judgment. Akiwo should not be denied the opportunity to present his evidence at trial and to impeach the testimony of Olkeriil and Rimirch.

We therefore reverse the summary judgment as to damages and remand the case to the trial court for further proceedings on this issue.

III. Third Party Procedure.

We will now turn our attention briefly to another argument Akiwo raises on appeal. He argues that Ulechong was not entitled ⊥53 to the relief prayed for under a third party complaint. He bases his contention on ROP Civ. Pro. 14(a), which allows a defendant to bring in a third party "who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff." Akiwo points out that he had no potential liability to Ulechong and therefore Rule 14(a) was an inappropriate procedure.

While Akiwo's position is a correct reading of the rule, he clearly has waived any objection to process by not raising it in his pleadings or motion in the trial. ROP Civ. Pro. 12(h). Had he raised such a defense or made such a motion, he could have been brought into the action by Rule 13(h), "Joinder of Additional Parties," and Rule 19, "Joinder of Persons Needed for Just Adjudication." Akiwo not only failed to file a timely objection, he went on to avail himself of the court's jurisdiction by filing a cross-motion for summary judgment. He clearly assumed the role of being a proper party, and he may not afterward object that he was not such. *See* 59 Am. Jur. 2d *Parties* § 237 (1987).

CONCLUSION AND ORDER

The Trial Division erred in granting summary judgment to Ulechong on the issue of title. The court also erred in granting summary judgment on the issue of how much Akiwo had paid for the land. We hereby REVERSE the judgment and REMAND this case to the Trial Division with the following instructions: Akiwo is hereby given sixty days from the date this opinion is entered to show by ⊥54 written submission the specific book and page of the recording books where his deed was recorded. If such a submission is not made, the court is instructed to enter judgment for Ulechong on the issue of title. As to the other issue of how much Akiwo has paid for his deed, the case is REMANDED for trial in accordance with this opinion.