preliminary objection:

In the nature of a motion to strike No. 1 is denied and No. 2 is granted.

For a more specific pleading is granted.

The plaintiff is granted leave to amend its complaint within twenty (20) days of the date hereof.

Exceptions are granted the parties.

KRAMER v. SPRINGHOUSE LTD, et al. C. P. Franklin County Branch, A.D. 1980 - 107

Mortgage Foreclosure - Fraud - Secret Equity

1. Merely alleging fraud as a legal conclusion adds nothing if it is not based upon facts clearly and explicitly set forth as constituting such fraud.

2. Where defendants' deeds were not recorded but held by the Grantor-Mortgagor, when the plaintiff mortgagee accepted a mortgage on the land, the defendants' deeds were a secret equity.

3. A mortgage who lends money upon the security of the title of the mortgagor, and who has neither actual or constructive knowledge of any claims of third parties, holds the lien free of any secret equities.

Gerald E. Ruth, Esq., Attorney for Plaintiff

John McD. Sharpe, Jr., Esq., Attorney for Defendants, McLaughlins

Robert E. Graham, Jr., Esq., Attorney for Defendants, Eckards

OPINION AND ORDER

KELLER, J., October 13, 1980:

This action in mortgage foreclosure was commenced by the filing of a complaint on March 26, 1980. The complaint alleges the granting of a mortgage by defendant, Springhouse, Ltd. to Remarkable Enterprises of York, Inc. on November 28, 1977, and binding upon a certain 109.16 acre tract of real estate located in Fannett Township, Franklin County, Pennsylvania. The mortgage was recorded on December 13, 1977 in Franklin County Mortgage Book Vol. 367, Page 560, and accepted for recordation by the Recorder of Deeds as Day Book Document No. 15073. Remarkable Enterprises of York, Inc. assigned its interest in the said mortgage to John W. Kramer, Sr., plaintiff herein. The complaint alleges the defendants other than Springhouse, Ltd. purchased tracts of real estate from Springhouse, Ltd. which were recorded subsequent to the recordation of the plaintiff's mortgage, and that no payments of principal or interest were made on account of the mortgage as required therein. The defendants, John J. McLaughlin and Marilyn McLaughlin filed their answer containing new matter on May 2, 1980, and an amendment to new matter on May 30, 1980. The defendants, Norman G. Eckard and Kathleen C. Eckard, filed their answer containing new matter on May 12, 1980, and their amendment to new matter on June 6, 1980. The new matter pleaded by the defendants McLaughlin and Eckard alleges that the plaintiff's mortgage did not create a lien on their real estate by reason of the fraud perpetrated upon them and others by Springhouse, Ltd. The essence of the defendants' allegation under new matter is that Springhouse, Ltd. conveyed to them and others various tracts of real estate for a fair and adequate consideration, receiving cash and a purchase money mortgage as security for the balance; thereafter Springhouse, Ltd. borrowed money from Remarkable Enterprises and gave as security the mortgage pleaded in the complaint; Springhouse, Ltd. held the deeds to the defendants until December 13, 1977, when Cindy J. Smith, an agent or employee of Springhouse, Ltd., entered all of the documents for recordation and recorded as the first document the mortgage due Remarkable Enterprises. The defendants aver Remarkable Enterprises was not a bona fide mortgagee and had notice of the prior conveyances either by actual knowledge or knowledge imputed from its relationship with and knowledge of Springhouse, Ltd. and Cindy J. Smith; whereas the defendants had no knowledge of the existence or recording of the mortgage of Remarkable Enterprises until March 1980. The amendments to new matter filed by both sets of defendants allege two other prior conveyances of Springhouse, Ltd. by deeds pre-dating the mortgage which were recorded prior to the recordation of the other documents.

The plaintiff filed preliminary objections to the new matter pleaded by the McLaughlins on May 27, 1980, and to the new matter pleaded by the Eckards on June 3, 1980. Both preliminary objections are in the nature of a demurrer, a motion to dismiss the new matter, and for a more specific pleading. Briefs were submitted and arguments heard on August 7, 1980. The matter is now ripe for disposition.

The defendants contend that plaintiff's mortgage, though recorded prior to their deeds, does not create a lien on their land nor any right superior to theirs because of the fraud perpetrated upon them by Springhouse, Ltd.; because the same person, i.e., Cindy Smith, recorded the mortgage and the defendants' deeds and her knowledge is imputed to all of the parties. Since the plaintiff stands in the shoes of Remarkable Enterprises as to the knowledge of the fraud he is, therefore, not a bona fide purchaser. In essence, the defendants urge that Remarkable Enterprises had knowledge or imputed knowledge of a fraudulent scheme perpetrated by Springhouse, Ltd., and plaintiff as assignee of Remarkable Enterprises is charged with the effect of that knowledge. The effect being that the protection afforded by the recording statutues to bona fide purchasers is not available to the mortgagee herein or its assignee.

The theory of the defendants' case would, therefore, seem to rest upon the capacity in which Cindy Smith acted in recording the instruments at issue, and the nature and extent of any agency relationship which may have existed between Cindy Smith and the parties.

There are serious problems with the defendants defense to the foreclosure action as presented in their answers. The defendants allege the affirmative defense of fraud. Pa. R.C.P. 1019(b) requires that averments of fraud be set forth with particularity. "Particularity" requires the pleader to aver the particular facts on which the claim of fraud is based.

> "Averments of fraud are meaningless epithets unless sufficient facts are set forth which would permit an inference that the claim is not without foundation...While it is impossible to establish precise standards as to the degree of particularity required in a given situation, two conditions must always be met. The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge." *Bata v. Central Pa. National Bank*, 423 Pa. 373, 379, 380, 224 A. 2d 174, 179 (1966).

The Pennsylvania Supreme Court in *Bailey v. Bailey*, 338 Pa. 221, 222, 12 A. 2d 577, 578 (1940) refers to the term "fraud" as an "alluring generality" and cautions against the "temptation to employ it indiscriminately, whereby it tends to degenerate into merely a trite epithet."

> "Merely alleging fraud as a legal conclusion adds nothing if it is not based upon facts clearly and explicitly set forth as constituting such fraud." *Hornsby v. Lohmeyer*, 364 Pa. 271, 276, 72 A. 2d 294, 298 (1950).

The defendants averments of fraud seem to be based upon plaintiff (or his assignor) having actual or imputed knowledge of a fraudulent scheme perpetrated by Springhouse, Ltd., the grantor-mortgagor. The defendants do not, however, aver facts sufficient to explain to the plaintiff the nature of the requisite knowledge. The defendants rely upon conclusory statements regarding Remarkable Enterprises actual knowledge, or knowledge imputed from a relationship with Springhouse, Ltd. and its agents. Without a statement of the facts constituting fraud by Remarkable Enterprises, or facts of some collusion between Springhouse, Ltd. and Remarkable Enterprises, or among any of the parties, or facts defining the circumstances under shich plaintiff or his assignor had knowledge of the prior deeds, the Court is not convinced of the legal viability of the defense pleaded by the defendants in their new matter. No facts have been stated which define circumstances of actual or constructive knowledge of prior deeds, of imputed knowledge from a valid, existing agency relationship, *Corn Exchange National Band v. Burkhart*, 401 Pa. 535, 165 A. 2d 612 (1960), *First National Bank of Hooverville v. Sagerson*, et al., 283 Pa. 406, 129 A. 333 (1925); or of circumstances where failure to make inquiry would be gross and culpable negligence. *Appeal of Morgan*, 126 Pa. 500, 17 A. 666 (1889).

Central to the issues of this case is the undisputed fact that the defendants' deeds were not recorded by the defendants after they purchased the land. For some reason, unexplained in the pleadings to date, Springhouse, Ltd., the grantor-mortgagor, was given control of the deeds by the grantees, including those of the McLaughlins and the Eckards. Without a more specific pleading of the relevant facts, it appears that when Remarkable Enterprises accepted a mortgage on the land the defendants' deeds were a "secret equity." The Pennsylvania Supreme Court in *Haggerty v. Moyerman*, 321 Pa. 555, 559, 184 A. 654, 656 (1936) stated:

> "A purchaser of land who pays value for it, or a mortgagee who lends money upon the security of the title of the mortgagor, and who has neither actual or constructive knowledge of any claims of third parties holds the title or lien so acquired free of any such secret equities: *Stonecipher v. Keane*, 268 Pa. 540, 546 (1920); *Salvation Army v. Lawson*, 293 Pa. 459 (1928); *Purharic v. Novy*, 317 Pa. 199 (1934). This is but an application of the fundamental principle that where one of two innocent persons must suffer, he whose neglect made the injury possible should bear the loss. *Spragg v. Shriver*, 25 Pa. 282, 185 (1855), *Puharic*, supra."

Defendants have alleged facts of their own negligence in utilizing the protections of the recording statutes; their failure to promptly record their deeds created the opportunity for fraud by the grantor. Further, defendants have not averred facts which would justify their negligence, nor do they aver facts which would establish the mortgagee as the perpetrator of the fraud.

The defendants have, therefore, failed to aver sufficient facts to adequately explain the nature of their claim to plaintiff. The Court must sustain the plaintiff's demurrers.

In the light of our determination that the demurrers must be sustained, we do not find it necessary to give further consideration to the plaintiff's other preliminary objection. The defendants will be given the opportunity to amend their new matter and we would expect that any such amendments to pleadings will strictly comply with the Rules of Civil Procedure and in accordance with this Opinion.

ORDER OF COURT

NOW, this 13th day of October, 1980, the Plaintiff's Preliminary Objections in the Nature of Demurrers to the New Matter contained in the Answers of the defendants, Norman G. Eckard and Kathleen C. Eckard, and John J. McLaughlin and Marilyn McLaughlin, are sustained. The Defendants are granted twenty (20) days from date hereof to file amended pleadings.

Exceptions are granted the Defendants.

CRAWFORD v. CHAMBERSBURG HOSPITAL AND ALFRED FRANTZ, M.D., C.P. Franklin County Branch, 180 August Term, 1975

Trespass - Discovery - Response to Interrogatories - Sanctions

1. Where plaintiffs interrogatories requested the identity of the expert witness defendant would call at trial, defendants response that it had not arrived at an ultimate determination as to identity of expert witness is not a satisfactory response.

2. A party responding to interrogatories has a duty to disclose those prospective expert witnesses he is likely to call and to supply any other

information concerning those witnesses requested in the interrogatories.

3. A party filing interrogatories has a right to be reimbursed for any expenses insurred in preparing a motion to compel discovery and impose sanctions, where the court finds such a motion is justified.

Richard C. Angino, Esq., Counsel for Plaintiffs

James K. Thomas, Esq., Counsel for Defendants

Frank B. Boyle, Esq., Counsel for Defendants

OPINION AND ORDER

KELLER, J., April 28, 1980:

This matter is before the Court on the motion of plaintiffs to compel discovery and impose sanctions, and specifically requesting the Court to direct judgment in favor of the plaintiffs against both defendants and limit the scheduled trial to one of damages. The plaintiffs' motion was filed on March 3, 1980.

To put this proceeding in its proper context, we will hereafter set forth the various pleadings that have been filed, discovery efforts and proceedings, and incidents involving the Court.

PLEADINGS

August 14, 1975 —	Writ in trespass issued on praecipe of plaintiffs and served on both defendants on August 18, 1975.
August 27, 1975 —	Appearance entered by counsel for the Chambersburg Hospital.
August 27, 1975 —	On praecipe by counsel for Hospital a rule issued upon plaintiffs to file a complaint.
May 16, 1977 —	Appearance entered by new counsel for Hospital.
Dec. 27, 1979 —	Plaintiffs' complaint filed.
Dec. 27, 1979 —	Plaintiffs' praecipe to list case for trial at the March 1980 Term.
Feb. 21, 1980 —	Defendant—Hospital's answer with new matter filed.