

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

FILED

SID J. WHITE

JAN 8 1987

CLERK, SUPREME COURT

By

Deputy Clerk

MARGARET SHARP,
Petitioner,
vs.

CASE NO. 69535
FIFTH DISTRICT COURT OF APPEAL
CASE NOS. 85-1711 and 1741

MAGALI C. HAMILTON,
Respondent,

H. S. MUSSELWHITE,
Petitioner,

CASE NO. 69536
FIFTH DISTRICT COURT OF APPEAL
CASE NOS. 85-1711 and 1741

vs.

MAGALI C. HAMILTON,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF ~~APPELLEE~~

Sharp

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ARGUMENT IN RESPONSE AND REBUTTAL

The facts of the case are well set out in the Appellate's Brief and the Answer Brief filed by the Appellee and are not restated herein.

The authority and cases cited by the Appellee in her Answer Brief do not support the Appellee's theory which would overcome the Hillman holding. Hillman v. McCutchen, 166 So. 2d 611 (Fla 3d DCA). The Hillman case is on all fours with the instant case and the Court in Hillman expressly held "...that the mortgage between the husband and the Plaintiff was effective to secure the after acquired title." Hillman at 613.

The Appellee erroneously cites the case of Bullard v. State at 306 So. 2d 557 (3d DCA 1975), but it is apparent the Appellee intended to cite Litner v. Willaford, 306 So. 2d 555 (3d DCA 1975). The facts in Litner are clearly distinguishable from the instant case and Hillman. In Litner, the court was dealing with several equitable principles and the "mortgagee" in Litner was attempting to enforce her claim against the party who had not signed the mortgage. In the instant case, the claim is against party who executed the mortgage.

None of the cases cited by the Appellee overcomes the holding in Hillman which is clearly distinguishable from the cases cited by the Appellee. The Appellee simply states that "MRS. HAMILTON could

have received title to the property free and clear of the liens of MUSSELWHITE and SHARP if she had survived her husband, if he had by Quit Claim Deed transferred title to her, if she had reached a marital agreement with Mr. Hamilton and he transferred title of the property to her, or if a special equity in the property had been awarded to her by a Final Decree of Dissolution,..."(emphasis added). None of these "if" facts were present in the instant case.

In legal summary, the Appellant, MARGARET SHARP, would submit the following distinguishing factors in the cases cited by the Appellee:

1. Lieberman v. Kelso, 354 So. 2d 137 (Fla. 2d DCA, 1978) incorporated a Property Settlement Agreement voluntarily entered into between the parties.

2. Quick v. Leatherman, 96 So. 2d 136 (Fla. 1957) involved a Stipulation filed by the parties wherein the wife relinquished and waived claims or other rights she might have against her husband.

3. Holt v. Boozel, 394 So. 2d 226 (Fla. 5th DCA 1981) was based upon the court finding a special equity of the wife in the property.

4. State Department of Commerce v. Lowery, 333 So. 2d 495 (1st DCA 1976) concerned a Deed executed by the husband to the wife prior to Dissolution of Marriage but not recorded until after the Final Judgment of Dissolution.

5. Litner v. Willaford, 306 So. 2d 555 (Fla. 3d DCA 1975)

erroneously cited by the Appellee as Bullard v. State, 306 So. 2d 557 (Fla. 3d DCA 1975), had various equitable principles before the Court which are not present in the instant case, and further was attempting to enforce a claim against the party who had not signed the mortgage.

6. Duncan v. Duncan, 379 So. 2d 949 (Fl. 1980) and Blunnie v. Blunnie, 415 So. 2d 156 (4th DCA 1982) both dealt with possessory rights and not fee interest in real property.


In the instant case, we are dealing with an adversarial proceeding where no special equities are claimed or found by the trial court nor was there any voluntary act by the husband to convey his interest in the marital property to his wife. On the contrary, the \$10,000.00 received by the Husband from the Appellant, MARGARET SHARP, was utilized by the entirities during their marriage and the husband's contract to secure this loan by his mortgage and the covenants and warranties set out therein constitutes all of the requisite legal principles necessary to protect the claim of the Appellant, MARGARET SHARP, to a lien upon the undivided one-half interest of the husband prior to his wife's lien for alimony.

CONCLUSION

It is respectfully argued by the Appellant, MARGARET SHARP, that the trial court erred in determining that the lien of her mortgage did not attach to the separate property of the husband and that the Appellant Court below further erred in affirming trial court decision. The Appellant, MARGARET SHARP, further respectfully requests that this Court reverse and remand the prior decisions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 5 day of January, 1987 to Tucker H. Byrd, Esq., P. O. Box 880, Winter Park, Fl 32790, J. Don Friedman, Esq., P. O. Box 881, Longwood, Fl 32750.



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