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Richmond, Virginia

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Record No. 6800

In the Supreme Court of Appeals of Virginia at Richmond

HENRY A. FLORANCE,
TRUSTEE, ET AL.

v.

HARRY P. FRIEDLANDER,
TRUSTEE, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6800

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

HENRY A. FLORENCE, TRUSTEE, AND RALPH B. CORRON, TRUSTEE, Appellants,

against

HARRY P. FRIEDLANDER, TRUSTEE, MARK P. FRIEDLANDER, TRUSTEE, AND WISCONSIN DEVELOPMENT CO., INC., Appellees.

From the Circuit Court of Fairfax County
James Keith, Judge

Upon the petition of Henry A. Florence, Trustee, and Ralph B. Corron, Trustee, an appeal is awarded them from a decree entered by the Circuit Court of Fairfax County on the 6th day of February, 1967, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Harry P. Friedlander, Trustee, and others were defendants.

And it appearing that a suspending and *supersedeas* bond in the penalty of $15,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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BILL OF COMPLAINT FOR REFORMATION OF INSTRUMENTS AND FOR INJUNCTION

COMES NOW THE complainants, by counsel, and file this, their bill for reformation and for injunction, temporary and permanent, restraining the defendants as hereinafter prayed and for grounds therefore say as follows:

1. The complainants are the owners of that certain parcel of land situated in Providence Magisterial District, Fairfax County, Virginia, more particularly described as follows:

BEGINNING at B, a point in the middle of the road leading from Merrifield to West End; (said point of beginning being the same point as shown as "B" on Plat attached to and made a part of a Deed recorded in Deed Book P5 at page 263 of said land records) thence S. 86° 20′ W. 711.4 feet to C, a stake; thence S. 3° 32′ E. 184.6 feet to (C′) a stake; thence N. 86° 20′ E. 705.3 feet to (B′), a point in the middle of the road leading from Merrifield to West End; thence with said road, N. 2° 10′ W. 184.6 feet to the beginning, and containing three acres of land, be the same more or less.

2. The defendant, Wisconsin Development Co., Inc., is the beneficiary and holder of a certain deed of trust note dated May 6, 1966, made by the complainants in the connection with their purchase of the said real property from the said Wisconsin Development Co., Inc.

page 2 } 3. The defendants, Harry P. Friedlander and Mark P. Friedlander, are the trustees named in that certain deed of trust dated May 6, 1966, securing the said deed of trust note against the said real property.

4. Under date of January 13, 1966, the complainants, as purchasers, and the defendant, Wisconsin Development Co., Inc., as seller, entered into a contract for the purchase and sale of the aforesaid real property, being approximately three acres of ground near Merrifield, Fairfax County, Virginia. A copy of the said contract is attached hereto as Exhibit A and made a part hereof as though set forth in full herein.

5. Under the terms of the said contract, the purchaser was to pay the purchase price of One Hundred Ten Thousand Dollars ($110,000.00), as follows: Twenty-two Thousand Dollars ($22,000.00) cash, and Eighty-eight Thousand Dollars ($88,000.00) in a deed of trust note secured by a deed of trust on subject property.

6. Under the terms of the aforesaid contract the purchaser was to convey the property free and clear of any and all liens and encumbrances except the purchase money deed of trust aforesaid.

7. The settlement of the aforesaid contract was set to be held at the law offices of Garnett, Hunter & Dimond, Arlington, Virginia, on May 6, 1966.

8. On May 6, 1966, the settlement of the aforesaid contract was commenced at the law offices of Garnett, Hunter & Dimond, Arlington, Virginia, at which time and place the purchasers, pursuant to said contract, tendered a deed of trust note dated May 6, 1966, in the amount of $88,000.00 and also tendered a deed of trust securing the said note on the subject property dated May 6, 1966, and naming the defendants Harry P. Friedlander and Mark P. Friedlander, as trustees in said deed of trust, together with sufficient funds to complete the settlement of the said contract on their part. Your complainants further allege that at the time and place aforesaid the defendant, Wisconsin Development Co., Inc., executed and tendered a deed to the subject property to the complainants but did not at that time and place complete the settlement of the said contract on its part because there was of record a deed of trust on the subject property securing a note in the amount of $88,000.00, and the release of this deed of trust was neither recorded nor delivered to the settling attorney on the day set for settlement.

page 3 } 9. That the settling attorneys made numerous attempts to procure a release of the aforesaid outstanding deed of trust from the defendant, Wisconsin Development Co., Inc., or to procure the note secured by the aforesaid deed of trust in order to complete the settlement of the aforesaid contract, but the same was not obtained until May 23, 1966, when the defendant, Wisconsin Development Co., Inc., by and through its agents delivered the outstanding deed of trust note aforesaid to the offices of the settling attorney.

10. Your complainants allege that they were not possessed of the subject property and did not have any use thereof nor could they have possession or make any use thereof until after the defendant, Wisconsin Development Co., Inc., com-

pleted the settlement of the aforesaid contract on their part on the 23rd day of May 1966.

11. Your complainants allege that in view of the above circumstances considered, the said deed of trust note given under date of May 6, 1966, and the deed of trust securing the same, should be reformed so that the same be dated as of the 23rd day of May 1966.

12. Your complainants allege that on November 7, 1966, a payment on account of interest on the said purchase money deed of trust note in the amount of Two Thousand Six Hundred Forty Dollars ($2,640.00) was mailed by Henry A. Florance to the defendant, Wisconsin Development Co., Inc., in a Florance Realty Co., Inc., envelope addressed to Wisconsin Development Co., Inc. A copy of said envelope which was used in said mailing is attached hereto as Exhibit B. Your complainants further allege that said payment of interest was made by check drawn on the account of Matson Agency, Inc., a corporation owned and controlled by Henry A. Florance, one of the trustees and owners of the real property involved herein, signed by Henry A. Florance and made to the order of Wisconsin Development Co., Inc., in the amount of $2,640.00.

13. On November 9, 1966, your complainants received a letter from Arthur L. Willcher, attorney at law, purporting to demand payment in full of the said note. A copy of the said letter is attached hereto and marked Exhibit C.

page 4 14. On November 9, 1966, your complainants received another letter from Arthur L. Willcher, attorney at law, returning the check previously received in payment of the said interest. A copy of the said letter of November 9, 1966, is attached hereto as Exhibit D.

15. Promptly thereafter, on the 10th of November 1966, Henry A. Florance returned the said check to Wisconsin Development Co., Inc., together with a copy of his letter to Griffin T. Garnett, Jr., dated November 10, 1966. The said letter and check to Wisconsin Development Co., Inc., were forwarded to Wisconsin Development Co., Inc., by certified mail, and Henry A. Florance holds in his file the return receipt for said certified mail.

16. The said check drawn November 7, 1966, to the order of Wisconsin Development Co., Inc., and forwarded to it the last time on November 10, 1966, has never been cashed and is still apparently being held by the payee.

17. Your complainants allege that they made prompt and timely payment of the interest due in the customary manner and form provided for such transactions; that they were not delinquent in the payment of interest; that there were and

are ample funds in the account upon which the check was drawn to cover said check and that your complainants stand ready, willing and able to pay said interest, either by having the said check cashed or by paying into Court in cash or certified check any interest payment due upon the return of the outstanding check to the complainants.

18. Your complainants allege that there has not been any default on their part under the terms of the aforesaid note or the deed of trust securing the same as will authorize the holder of the note to declare the entire balance of said note due and payable.

19. Your complainants allege that notwithstanding that the payment of interest has been proffered to the note holder, the said Harry P. Friedlander and Mark P. Friedlander, trustees, have advertised the subject real property for sale under the said deed of trust in the Fairfax City Times, which said sale is advertised to take place on the 3rd day of February 1967, at 12:00 o'clock Noon, all of which more fully appears in a copy of said notice of sale filed herewith, marked Exhibit E and made a part of this Bill of Complaint.

page 5 } 20. Your complainants allege that under the terms of the aforesaid deed of trust the trustees are required to advertise "the time, terms and place of sale for at least once a week for two successive weeks in some newspaper published or having a general circulation" in Fairfax County, Virginia.

21. Your complainants allege that the Fairfax City Times is not a newspaper published in or having a general circulation in Fairfax County, Virginia.

22. Your complainants allege that the aforesaid advertisement of sale is contrary to the requirements of the said deed of trust and in violation of the rights of your complainants in that the first notice of sale was published on January 26, 1967, with the sale to be made on February 3, 1967, and, accordingly, two weeks will not have elapsed from the time of first publication until the date of sale, all to the detriment and prejudice of the rights of your complainants, and that any sale thereunder would be void.

23. Your complainants, owners of the real property subject to the deed of trust aforesaid, will be irreparably damaged by said sale going to foreclosure.

24. Your complainants have no adequate remedy at law and are remediless save in a court of equity.

WHEREFORE your complainants pray that Harry P. Friedlander, Mark P. Friedlander and Wisconsin Development Co., Inc., be made parties defendant to this bill and be required to answer the same but not under oath, answer

under oath being waived; that proper process issue; that the deed of trust note and deed of trust heretofore given by your complainants in connection with the purchase of the property involved herein be reformed, changing the date of each respective instrument to May 23, 1966; that the defendants be enjoined and restrained pending this litigation from foreclosing upon the said deed of trust dated May 6, 1966; that the sale advertised to take place on the 3rd day of February 1967 and the notice published in said newspaper as aforesaid be temporarily enjoined and permanently enjoined and restrained; that the trustee defendants and/or noteholder defendant be restrained from charging any part of the cost in the foreclosing proceeding, including counsel fees, against

page 6 } the makers of the note and the deed of trust and that said sale under any other notice of sale by the said trustees in inhibited, as well as any other attempts at such sale and that your complainants be awarded reasonable counsel fees and court costs, and for such other further and general relief as to equity may seem meet.

HENRY A. FLORANCE,
TRUSTEE

By PETER J. KOSTIK
Counsel

RALPH B. CORRON,
TRUSTEE

By PETER J. KOSTIK
Counsel

* * * * *

Service accepted this 30th day of January 1967.

HARRY P. FRIEDLANDER

Filed in Circuit Court Clerk's Office Jan. 30, 1967.

THOMAS P. CHAPMAN, JR
Clerk, Fairfax County, Va.

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ANSWER TO BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF THE ABOVE-STYLED COURT:

Comes now the defendants herein and for Answer to the Bill of Complaint state as follows:

1. They admit the allegation contained in paragraphs numbered 1, 2, 3, 12, 13, 14, 15, 16, 19, 20, and 22 of the Bill of Complaint.
2. They deny the allegations contained in paragraphs numbered 4, 5, 6, 7, 8, 9, 10, 11, 17, 18, 21, 23 and 24 of the Bill of Complaint and demand strict proof thereof.
3. The Bill of Complaint is not under oath and ought not be heard by this Court.
4. Defendants rely upon the defense of *res adjudicata.*
5. Defendants rely upon the defense of *estoppel.*
6. Defendants rely upon the defense of waiver.
7. Defendants rely upon the defense of election.

WHEREFORE, having fully answered, defendants pray that the Bill of Complaint may be hence dismissed with their costs and that the prayers therein contained, and each of them, may be denied.

HARRY P. FRIEDLANDER,
TRUSTEE

MARK P. FRIEDLANDER,
TRUSTEE

WISCONSIN DEVELOPMENT
CO., INC.

by: HARRY P. FRIEDLANDER

Filed in open court Feb. 1st, 1967.

E. YOUNG, Deputy Clerk

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FINAL DECREE

THIS CAUSE came on to be heard on February 1, 1967, upon the Bill of Complaint for Reformation of Instruments and for Injunction; on the application of the complainants to restrain the defendants from proceeding to foreclosure under a certain advertisement of trustees' sale of real estate; upon the answer of the defendants; upon testimony presented in open court by the complainants and defendants; the exhibits filed herein; and upon argument of counsel; and

THE COURT BEING OF THE OPINION and so finds and rules that:

1. A payment of interest was due on or before November 7, 1966;
2. The maker was bound to pay the creditor in person on or before November 7, 1966;
3. That the depositing of a letter in the post office on November 7, 1966, containing a check for the payment of interest did not constitute payment thereof.
4. That the noteholder's direction to "forward the remittance" did not constitute authority to use the mails;
5. That the payment of interest was not timely made.
6. That the noteholder acted promptly and there has been no waiver;
7. That the term "the indebtedness" in the deed of trust includes the interest payments;
8. That the deed of trust note and the deed of trust ought not be to reformed;
9. That the Fairfax City Times is a newspaper published in Fairfax County, Virginia,

doth deny the petition for reformation and the prayers thereof on the above grounds, and

page 18 } THE COURT BEING FURTHER OF THE OPINION that

1. The provision of the deed of trust concerning the advertisement of the notice of the trustees' sale requires fourteen (14) days to elapse from the time of the first publication until the date of sale;
2. That two weeks will not have elapsed from the publication of the said notice of sale until the date of sale; it is, therefore

ADJUDGED, ORDERED and DECREED that the sale of the real estate involved herein scheduled to be held on Feb-

ruary 3, 1967, be, and the same hereby is, enjoined on the ground that the advertisement of the notice of sale is void, but this injunction shall not prohibit re-advertisement and later sale by the trustees under the deed of trust, provided the said advertisement and sale are in conformity with the terms of the deed of trust, and, it is

FURTHER ADJUDGED, ORDERED and DECREED that the Petition for Reformation of Instruments and for Permanent Injunction, and the prayers of the same, be and the same hereby are, denied and this cause dismissed, and

IT FURTHER APPEARING TO THE COURT that the complainants intend to present a petition for an appeal and *supersedeas* to the Supreme Court of Appeals of Virginia from the judgment of this Court and are desirous of giving a *supersedeas* bond at this time in lieu of a suspending bond, and

IT FURTHER APPEARING TO THE COURT that the complainants request that this decree and the execution thereof be suspended for a reasonable time, and thereafter until such petition for an appeal and *supersedeas* is acted upon by the Supreme Court of Appeals of Virginia, it is, therefore,

ORDERED and DECREED that this decree, and the execution thereof, be and the same hereby is, suspended for a period of sixty-one (61) days from the date of this Order, and thereafter until the Supreme Court of Appeals of Virginia has acted upon a petition for an appeal and *supersedeas* presented to the said Court, if such petition is actually filed within the time prescribed by law, or until the time for presenting such a petition shall have expired, upon the condition that the complainants, or someone for them, enter into a *supersedeas* bond before the Clerk of this Court in the penalty of $15000.00, with surety to be approved by the said Clerk and

page 19 } conditioned to perform and satisfy this decree, proceedings on which are stayed, in case such decree be affirmed or the appeal dismissed or refused or not petitioned for within the time prescribed by law, and also to pay all damages, costs and fees which may be awarded against or incurred by the complainants in the Court of Appeals and all actual damages incurred in connection with a *supersedeas* that may be granted by the Appellate Court, said bond to be given on or before 12:00 o'clock Noon, February 15th, 1967, and it is

FURTHER ORDERED and DECREED that the foreclosure proceedings herein shall be, and the same hereby are, stayed and continued until the further order of this Court, provided said bond be given as herein required.

To the rulings of the Court and the entry of this decree, except the ruling of the Court that the deed of trust requires fourteen (14) days to elapse from the time of the first publication until the date of sale, the complainants, by counsel, duly note their objection and exception and give notice of their intention to appeal this decree.

ENTERED this 6th day of February, 1967.

JAMES KEITH, Judge

SEEN:
GARNETT, HUNTER & DIMOND
Counsel for Complainants
2000 N. 16th Street
Arlington, Virginia

By GRIFFIN T. GARNETT, JR.

SEEN, OBJECTED TO AND EXCEPTED TO:
FRIEDLANDER & FRIEDLANDER
Counsel for Defendants
2009 N. 14th Street
Arlington, Virginia

By HARRY P. FRIEDLANDER

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NOTICE OF APPEAL

Notice is hereby given that the Complainants, Henry A. Florance, Trustee, and Ralph B. Corron, Trustee, hereby appeal to the Supreme Court of Appeals of Virginia from the final decree entered herein on February 6, 1967, adjudicating the principles of this cause in favor of the Defendants.

The denial of the petition for reformation of instruments and the denial of a permanent injunction and the adjudication of the principles of this cause in favor of the defendants is identified as a separable controversy from the adjudication concerning the provision of the deed of trust regarding the

period of time of publication of the notice of trustees sale of foreclosure.

DATED this 28th day of February, 1967.

HENRY A. FLORANCE,
TRUSTEE

RALPH B. CORRON,
TRUSTEE

By PETER J. KOSTIK
of Counsel
2000 N. 16th Street
Arlington, Virginia

Filed in Circuit Court Clerk's Office Feb. 28, 1967.

THOMAS P. CHAPMAN, JR.
Clerk, Fairfax County, Va.

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ASSIGNMENTS OF ERROR

COMES NOW the Complainants, Henry A. Florance, Trustee, and Ralph B. Corron, Trustee, by counsel, and for their assignments of error to the judgment of the trial court in this cause set forth the following errors:

1. The Court erred in ruling that a payment of interest was due on or before November 7, 1966.
2. The Court erred in ruling that the makers of the note were bound to pay the creditor in person on or before November 7, 1966.
3. The Court erred in ruling that the depositing of a letter in the post office on November 7, 1966, containing a check for the payment of interest did not constitute payment thereof.
4. The Court erred in ruling that the note holders direction to "forward the remittance" did not constitute authority to use the mails.
5. The Court erred in ruling that the payment of interest was not timely made.

6. The Court erred in ruling that the noteholder acted promptly and that there had been no waiver.

7. The Court erred in ruling that the term "the indebtedness" in the deed of trust included the interest payments.

8. The Court erred in ruling that the deed of trust note and the deed of trust ought not to be reformed.

9. The Court erred in ruling that the Fairfax City Times is a newspaper published in Fairfax County, Virginia.

page 29 } 10. The Court erred in denying the Complainants petition for reformation and for permanent injunction, said denial being contrary to the law and the evidence in this cause.

HENRY A. FLORANCE,
TRUSTEE

RALPH B. CORRON,
TRUSTEE

By: PETER J. KOSTIK,
of Counsel
2000 N. 16th Street
Arlington, Virginia

Filed in Circuit Court Clerk's Office Feb. 28, 1967.

THOMAS P. CHAPMAN, JR.
Clerk, Fairfax County, Va.

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ASSIGNMENTS OF CROSS-ERROR

COMES NOW the Complainants, Henry A. Florance, Trustee, and Ralph B. Corron, Trustee, by counsel, and file this, their assignments of cross-error to the decree of the trial court heretofore *netered* in this cause on February 6, 1967, and for assignments of cross-error say as follows:

1. The Court erred in ruling that a payment of interest was due on or before November 7, 1966.

2. The Court erred in ruling that the makers of the note were bound to pay the creditor in person on or before November 7, 1966.

3. The Court erred in ruling that the depositing of a letter in the post office on November 7, 1966, containing a check for the payment of interest did not constitute payment thereof.

4. The Court erred in ruling that the noteholders direction to "forward the remittance" did not constitute authority to use the mails.

5. The Court erred in ruling that the payment of interest was not timely made.

6. The Court erred in ruling that the noteholder acted promptly and that there had been no waiver.

7. The Court erred in ruling that the term "the indebtedness" in the deed of trust included the interest payments.

8. The Court erred in ruling that the deed of trust note and the deed of trust ought not to be reformed.

9. The Court erred in ruling that the Fairfax City Times is a newspaper published in Fairfax County, Virginia.

page 32 } 10. The Court erred in denying the Complainants petition for reformation and for permanent injunction, said denial being contrary to the law and the evidence in this cause.

HENRY A. FLORANCE,
TRUSTEE

RALPH B. CORRON,
TRUSTEE

By: PETER J. KOSTIK,
of Counsel
2000 N. 16th Street
Arlington, Virginia

Filed in Circuit Court Clerk's Office Feb. 28, 1967.

THOMAS P. CHAPMAN, JR.

* * * * *

Alan R. MacDonald

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* * * * *

Whereupon

ALAN R. MacDONALD a witness, called for examination by counsel for the defendants, and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:

Q. What is your name and address, please?

A. My name is Alan R. MacDonald; I live at 216 Locust Court in Vienna.

Q. What is your occupation?

A. I am assistant to the publisher of Globe Publications.

Q. Does Globe Publications publish the Fairfax City Times?

page 8 } A. Yes, sir; that is one of our newspapers.

Q. Pursuant to instructions from me, did you publish the Notice of Trustees Sale in the Fairfax City Times?

The Court: That has been marked Exhibit 1. That has been marked Exhibit 1 in this case.

The Witness: Yes, we did.

By Mr. Friedlander:

Q. Where is the Fairfax City Times published?

A. It is published in Vienna.

Q. Where is it entered as second class mail with a United States Post Office?

Mr. Garnett: I am sorry. I couldn't hear you.

By Mr. Friedlander:

Q. Where is it entered as second class mail with a United States Post Office?

A. At the Fairfax City Post Office.

Q. Does Globe Publications publish any other publications, any newspapers?

A. Yes. We publish five other newspapers in Fairfax County.

Q. Did the sale also appear in those other newspapers?
A. Yes, it did.
Q. What newspapers are they?
A. In addition to the Fairfax City Times, the
page 9 } Fairfax County Globe, the Falls Church Globe, The Virginian of Vienna, the Dulles, Herndon, Virginia and the Annandale Globe.
Q. Are all these papers published in Fairfax County?
A. Yes, they are.

Mr. Garnett: What is that? I am sorry.
Mr. Friedlander: Are all of these papers published in Fairfax County.

By Mr. Friedlander:
Q. Your answer is "yes"?
A. Yes, they are.
Q. Where are they published?
A. They are all published from our Vienna office.
Q. What do you mean by published?
A. Those are our central business offices.
Q. Where do the other papers have their circulation?
A. Other than the Fairfax City Times, the Fairfax County Globe is circulated in the Springfield, Baileys Cross Roads and McLean areas. The Falls Church Globe is circulated in the City of Falls Church and Sleepy Hollow, Seven Corners, Lake Barcroft area.
The Virginian is circulated in Vienna, Oakton, Dunn Loring, Pimmit Hills. The Dulles, Herndon, Virginia is circulated in Chantilly, Floris, Herndon, Reston, Great Falls,
page 10 } Sterling, Sterling Park and in the lower end of the Oakton area. And the Annandale Globe is circulated in Annandale, Burke, Kings Park and the Backlick area.

Mr. Friedlander: I would like to offer these as our Exhibits, Your Honor. They are the other papers in which the ad ran.
Mr. Garnett: I object, if it please the Court, I don't think those are relevant so far as the Fairfax City Times are concerned. I don't think what any other papers have run is relevant. It must be published in a paper of general circulation—
The Court: I haven't seen those advertisements. Why do you say it is not relevant?

Alan R. MacDonald

Mr. Garnett: They are entirely distinct papers, separate and apart from the Fairfax City Times, may it please, the Court.

The Court: Does the deed of trust require publication in the Fairfax City Times?

Mr. Garnett: No. The deed of trust requires the publication of general circulation in Fairfax County and presumably the Fairfax City Times—

The Court: He says they are also published in these other papers. Do you claim it is not?

page 11 } Mr. Garnett: I claim it is not by his own testimony. It is not relevant by his own testimony. Each one has some specific area. They are not papers of general circulation by his own testimony.

Mr. Friedlander: I would offer these as our exhibits, one through six, Your Honor.

The Court: I am going to admit them over your objection for what they purport to be.

Mr. Garnett: All right, sir.

The Court: And the Annandale Globe publication will be Exhibit 3.

(The newspaper referred to above was marked as Defendant's Exhibit 3 for identification and was received in evidence.)

Mr. Friedlander: The Dulles, Herndon, Virginia.

The Court: Exhibit 4.

(The newspaper referred to above was marked as Defendant's Exhibit 4 for identification and was received in evidence.)

Mr. Friedlander: The Virginian.

The Court: What is that?

Mr. Friedlander: No. 5.

The Court: Exhibit 5.

(The newspaper referred to above was marked as Defendant's Exhibit 5 for identification and was received in evidence.)

page 12 } Mr. Friedlander: This is the Fairfax County Globe, Your Honor.

The Court: That is No. 6.

(The newspaper referred to above was marked Defendant's Exhibit No. 6 for identification and was received in evidence.)

Mr. Friedlander: And this is the Falls Church Globe.
The Court: No. 7.

(The newspaper referred to above was marked Defendant's Exhibit No. 7 for identification and was received in evidence.)

By Mr. Friedlander:
Q. Have you prepared for me a list of the circulation of each of these papers on January 26 and again on February 2?
A. This list which I prepared myself tells one, the number of papers which are actually distributed according to our records for January 26 and also lists those which will be distributed today.
Q. Have they already been printed?
A. They were in the process of being printed today, February 2nd issue, broken down by newspaper.

Mr. Friedlander: I offer this as the next exhibit.
The Court: All right, Mr. Garnett, any objection?
Mr. Garnett: None to its formal offer except as page 13 } to its relevancy and materiality.
The Court: Well, I don't understand. This shows the number of papers issued or the paid up subscriptions?
The Witness: That is the number of papers distributed.
The Court: This will be No. 8.

(The document referred to above was marked Defendant's Exhibit No. 8 for identification and was received in evidence.)

Mr. Friedlander: No further questions.

CROSS EXAMINATION

By Mr. Garnett:
Q. Now you tell me, sir, these various papers, are they published under separate corporate entities?
A. No, they are not.
Q. They are published under one corporate entity?

Alan R. MacDonald

A. That is correct.

Q. And did you not state that each one of them was restricted to given areas?

A. Well, in the strict sense, yes, each paper is for a given area.

Q. The Fairfax County Globe which you have press runs for January 26 3,000, that just means the number of papers that have been run off the press; is that correct?

page 14 } A. This is the number of copies which were distributed. Our press runs would be in excess of that.

Q. When you say distributed, how many subscribers do you have for instance to the Fairfax County Globe?

A. We have no subscribers to the Fairfax County Globe.

Q. You have no subscribers to the Fairfax County Globe?

A. That is a free distribution.

Q. Free distribution.

How many subscribers do you have to the Fairfax City Times?

A. I would say roughly about 4800.

Q. 4800. Where? In the town or city of Fairfax?

A. In the City of Fairfax and in the surrounding county area; Centreville, Clifton, Fairfax Station, Merrifield—

Q. But the primary service of the Fairfax City Times is in the City of Fairfax?

A. No, I would not say that that is true.

Q. You would not?

A. No.

Q. But didn't you state on direct examination that these were distributed in local areas?

A. Local areas, that is true.

Q. All right.

page 15 } Now what area did you originally state that the Fairfax City Times was distributed in?

A. That was circulated in Fairfax City and surrounding county areas.

Q. How many times has the ad in question appeared in the Fairfax City Times?

A. It has appeared once and because I don't know the situation of our printing today, the Fairfax City Times may already be off the press, it may have been printed twice.

Q. And how many times was the ad set up to be printed in your Fairfax City Times?

A. It was ordered to be run in two consecutive issues, the issues of January 26 and February 2.

Q. The ads in the other named papers, are they set up to run the same way?

A. Yes, they were.

Mr. Garnett: No further questions.

Mr. Friedlander: No further questions.

The Court: The Fairfax City Times has about 4,000 paid subscribers?

The Witness: About 4,800 paid by mail subscribers and I would say an additional 200 paid newsstands sales.

The Court: That is not a subscriber.

page 16 } The Court: The Virginian, where does it circulate?

The Witness: Vienna, Oakton, Dunn Loring, Tysons Corner, Pimmit Hills.

The Court: How many paid subscribers does it have?

The Witness: It has about the same number, perhaps 200 more.

The Court: Falls Church Globe?

The Witness: This might better explain that.

The Court: No. 9?

Mr. Friedlander: Sir?

The Court: This shows the areas covered by each paper.

The Witness: There is a map on the inside.

The Court: How about the Falls Church Globe; how many paid subscribers?

The Witness: I would say about 4,000.

The Court: Dulles, Herndon?

The Witness: 2,000.

The Court: And Fairfax County?

The Witness: That has none. That is a new publication. It is distributed free.

The Court: Now what are these? Year's subscriptions?

page 17 } The Witness: Yes, they are yearly, by mail and paid in advance.

The Court: But none of these papers that you have named have a general circulation in Fairfax County. It is only their combined circulation?

The Witness: What do you mean general circulation?

The Court: You don't have a paper that is sold all over the county?

The Witness: Well, you know, in the case of the Court House, for example, we sell all our papers here. The Fairfax County Globe—

Alan R. MacDonald

The Court: Maybe I should have said subscribed generally throughout the county?

The Witness: No, there is no one newspaper which does that but in combination, I suppose one could say they do.

The Court: All right. You may step down.

Mr. Friedlander: One further question.

The Court: Excuse me.

RE-DIRECT EXAMINATION

By Mr. Friedlander:

Q. The non-subscribed circulation, is that throughout the county for the Fairfax City Times?

page 18 } A. Well, that like our paid subscribers, some of it would be in Fairfax City and some would be in the Fairfax County areas last week.

The Court: Would you read the question back?

(The court reporter then read from her notes as requested.)

The Court: I don't know that non-subscribers is relevant and I would strike that question. I don't think it is relevant.

By Mr. Friedlander:

Q. Do each and every one of these papers publish in Fairfax County?

A. Yes.

RE-CROSS EXAMINATION

By Mr. Garnett:

Q. Is this a brochure put out by your publishing company?

A. It is.

Mr. Garnett: I would like to introduce it, may it please the Court.

The Court: Do you have any objections, Mr. Friedlander?

Mr. Friedlander: No objection.

The Court: That will be Complainant's Exhibit H.

page 19 } (The document referred to above was marked Complainant's Exhibit H for identification and was received in evidence.)

The Court: Are you all through with this witness?
Mr. Friedlander: Yes, Your Honor.
Mr. Garnett: Yes.
The Court: All right. You are excused, Mr. MacDonald. Thank you, sir.

(witness excused.)

Mr. Garnett: Mr. Henry Florance.

Whereupon

HENRY A. FLORANCE a complainant, was called for examination by counsel on behalf of the complainants, and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Garnett:
Q. Would you please state your name?
A. Henry A. Florance.
Q. What is your occupation?
A. Realtor-builder.
Q. How long have you been in the business as a realtor and a builder?
A. At least 21 years.
page 20 } Q. Did there come a time, Mr. Florance, when you made an offer to purchase, a written offer to purchase certain land in Fairfax County, Virginia owned by the Wisconsin Development Company?
A. Yes.
Q. I hand you herewith a document dated January 13, 1966 and ask if this is a copy of the contract which was entered into between you and Wisconsin Development company?
A. Yes, it is.

Mr. Friedlander: I object to this unless the absence of the original is explained.
The Court: What?
Mr. Friedlander: I'll object until the absence of the original document is explained, Your Honor.
Mr. Garnett: We have the original here if necessary, if it please the Court.

The Court: What is that? A photostat?
Mr. Garnett: This is a photostat.
The Court: Is this a photostat of the original?
The Witness: Yes, sir.
The Court: Where is the original?
The Witness: I think Mr. Hunter has it or the title company.
page 21 } Mr. Garnett: We have the original, may it please the Court.
The Court: I'll admit this over your objection. It's got Exhibit A marked on it.
Mr. Garnett: That was just filed with the Court.
The Court: Let this come in as your exhibit.

(The document referred to was marked Complainant's Exhibit I for identification and was received in evidence.)

Mr. Kostik: What is the number that you put on that?
The Court: I.
Mr. Friedlander: May I compare that with the original?
The Court: Yes, sir.
Mr. Friedlander: Your Honor, I wish to continue my objection. We can't read that.
The Court: I have said that about all of Mr. Garnett's exhibits and I have asked him to get a new machine.

By Mr. Garnett:
Q. Is this the original, Mr. Florance?
A. Yes, it is.

Mr. Garnett: I'll offer the original.
The Court: All right. The copy is withdrawn
page 22 } and the exhibit is Exhibit I without objection.

By Mr. Garnett:
Q. Mr. Florance, do you know the date that was originally set for settlement of this contract?

Mr. Friedlander: Objection. It is irrelevant.
Mr. Garnett: It is not, Your Honor.
The Court: Overruled.
I would like to look at the contract if I may.

By Mr. Garnett:
Q. Was it the 22nd?

Mr. Garnett: It was originally set, if it please the Court, for April and then it was set for May and it was actually settled May 6.

The Court: Do you know when it was originally set?

The Witness: It was originally set supposedly within a 90-day period of this agreement.

The Court: And when was that?

The Witness: The date of the agreement is January 13, 1966.

The Court: Go ahead.

By Mr. Garnett:

Q. Did the case go to settlement—when did the case go to settlement, Mr. Florance, if you know?

A. It went to settlement on the 6th and I need
page 23 } a file or something to refresh my memory or maybe I can do it by calculation.

The 13th.

The Court: Was it the date the note was signed?

The Witness: Yes, sir.

The Court: All right. That was May 6th.

The Witness: That was settled on that date.

By Mr. Garnett:

Q. May the 6th, the date the note was signed.

Now do you know whether or not the papers were recorded on May 6?

A. I know they were—

The Court: They speak for themselves; don't they? They are in evidence.

The Witness: I know that they were not recorded on the 6th.

By Mr. Garnett:

Q. Do you know when they were recorded, Mr. Florance?

The Court: If you don't know, say so.

The Witness: I don't know the exact date.

The Court: All right.

By Mr. Garnett:

Q. After purchase, did you execute a deed of trust?

A. Yes.

Henry A. Florance

page 24 } Q. I hand you herewith a deed of trust dated the 6th day of May and ask if that is a copy of the deed of trust?

A. It is.

The Court: That is all in evidence.

Mr. Garnett: I would like to offer this in evidence.

The Court: It is in evidence.

Mr. Garnett: All right. It is in evidence.

By Mr. Garnett:

Q. Do you know whether or not there was a delay in the recording of that deed from May 6th?

A. Yes, there was.

Q. Do you know what the delay in the recording of that deed of trust was?

A. I know that there was some obligation on the property that had to be paid off before the new deed of trust and deed could be recorded and that I couldn't go on the property and do any work until it was recorded.

Q. Did you complain about this to anybody?

A. Yes, sir, I did.

Q. To whom?

A. To Mr. Willcher and to Mr. Hunter and to Mr. Berman.

page 25 } Q. And what, if anything, was the nature of your complaint?

A. That I needed the papers recorded so that I could start work.

Q. Do you know when the papers were recorded?

A. Some two to three weeks after settlement.

Q. Did there come a time when you submitted your payment on the deed of trust for interest?

A. Yes.

Q. Do you know the date on which you sent the check over to Mr. Willcher?

A. It was the 7th day of November.

Q. And this is the envelope addressed to Wisconsin Development Company, Suite 268?

A. Yes, sir.

Q. Dated, November 7th. Is that the envelope in which you sent it?

A. Yes, sir.

Mr. Garnett: This is already in evidence, may it please the Court.

The Court: Let the record show that it is in evidence as Exhibit No. 2.

page 26 } By Mr. Garnett:

Q. And I hand you herewith, Mr. Florance, a check drawn on Matson Agency, Inc., No. 625, in the amount of $2,640 and I ask you if that was the check that was in the envelope?

A. Yes, sir.

Q. And that note shows on it what it is for—I mean the check?

A. Yes, sir. Interest on note Hartland Road.

Mr. Garnett: I think this is already in evidence too, Your Honor.

The Court: The check is in evidence as Exhibit No. 1-A.

By Mr. Garnett:

Q. In October had you received notice as to where to forward the payments?

A. Yes, sir, and this is the notice.

Q. And that is the notice from Mr. Willcher?

A. Right.

Mr. Garnett: And this is already in evidence.

The Court: Now this letter back from Mr. Willcher is not in evidence. It was attached to the deed of trust. Shall I put this in now?

page 27 } Mr. Friedlander: I have no objection and I would move its admission.

The Court: This will be Complainant's Exhibit B, from Willcher to Florance, dated November 9, 1966.

(The document referred to above was marked Complainant's Exhibit D for identification and was received in evidence.)

Mr. Garnett: There was another letter, may it please the Court.

Mr. Friedlander: No objection.

The Court: And another letter of November 8, 1966 from Arthur L. Willcher to Mr. Florance. That will be Complainant's Exhibit No. C.

Henry A. Florance

(The document referred to above was marked Complainant's Exhibit C for identification and was received in evidence.)

By Mr. Garnett:

Q. Mr. Florance, I hand you herewith a letter from Mr. Arthur L. Willcher, dated November 8, 1966, a copy of the letter, and ask you if you received this letter?

A. Yes, sir, I did.

Q. Do you know the date you received the letter?

A. I received this letter on November 9, sir.

page 28 } Q. Mr. Florance, I hand you herewith a letter from Arthur L. Willcher, dated November 9 and ask you whether you received that letter?

A. Yes, I did.

Q. Do you know the date?

A. November 10th.

Q. Now on November 10th when you received the letter from Mr. Willcher, what did you do?

A. I contacted you by telephone and I sent you a letter with a copy of the letter to Mr. Willcher, along with the original check.

Q. So you returned the check?

A. (Nodding head.)

Q. Have you received that check back?

A. I have not.

Q. Now Mr. Florance, did you enter on the property between November 7 and the date when the papers became of record?

A. No, sir, I did not.

The Court: I believe you used the wrong date. You mean May 6?

Mr. Garnett: May 6, excuse me.

By Mr. Garnett:

Q. May 6 and the date papers became of record.

page 29 } A. Did I enter on the property?

Q. Yes, to commence any project.

A. No, sir, I did not. I didn't have title to the property, and there were a lot of questions that came up about it. I was not given the full information on the property either by the seller or by the agent that I bought it from that showed up in the title search.

Q. Had it been your intention, Mr. Florance, that that

note obligation which is dated May 6 would run from the date that you signed it or from the date which you took title to the property?

Mr. Friedlander: Objection. He is trying to vary a written instrument.
The Court: Sustained.

By Mr. Garnett:
Q. Mr. Florance, what were your intentions so far as the settlement was concerned?
A. What were the extensions?
Q. Intentions. What were your intentions so far as settlement was concerned when it was made on May 6.

Mr. Friedlander: Objection. It calls for—
The Court: Sustained.

page 30 } By Mr. Garnett:
Q. Mr. Florance, you said that you have been in the real estate business some 21 years?
A. Yes, sir.
Q. During that time have you supervised the handling of mortgage payments for one real estate company or the other?
A. For some 20 years.
Q. For what companies?
A. Arlington Realty Company.
Q. In what capacity?
A. Salesman, sales manager and executive vice president.
Q. And how many mortgages in dollar amount did Arlington Realty Company service?
A. At the time I left, approximately $38 million.
Q. Do you hold first and second trust notes?
A. Yes, I do.
Q. Over the years, approximately how many have you held?
A. Several million.
Q. Have you and are you paying on first and second trust notes?
A. More than several million.
page 31 } Q. Now Mr. Florance, where those noteholders live outside the county of Arlington, what was their customary method of payment? To you or to Arlington Realty Company, by mail or by hand?

Henry A. Florance

Mr. Friedlander: Objection.

The Court: Will you state your grounds for objection and will you state why you think it is a proper question and let's get it in the record.

Mr. Friedlander: There is no showing that Wisconsin Development is at all aware of any custom that they may testify exists and without showing that it becomes irrelevant whether there is a custom or not.

The Court: All right, Mr. Garnett.

Mr. Garnett: I think that we have a perfect right not only to show the transactions between the party, the primary parties, but the customs and usages in the trade insofar as the method of payment of trust notes is concerned.

The Court: I'll permit you to ask the question but I will tell you now I don't think these noteholders or these people are bound by it.

Mr. Garnett: I didn't say they were bound by it at the present time, may it please the Court.

The Court: All right, go ahead. Objection overruled.

page 32 } The Witness: What was the question?

The Court: He asked you what was the custom in your business of receiving second trust payments or first trust payments when the maker lived outside of Arlington County. That is substantially correct?

Mr. Garnett: That is correct.

The Witness: We receive payments on the due date or shortly thereafter. We do not even send out late notices unless they were at least 10 days delinquent.

By Mr. Garnett:

Q. Did you receive them by mail?

A. Even the ones in Arlington, mostly by mail.

Q. And how do you make your payments to a noteholder outside the County of Arlington?

A. The same way.

Q. And is that, to your knowledge, the usual custom in the trade?

A. To my knowledge, it is the usual custom in the trade.

Mr. Garnett: I have no further questions, may it please the Court.

Henry A. Florance

CROSS EXAMINATION

By Mr. Friedlander:

Q. Mr. Florance, where was the settlement held?

page 33 } A. It was held in the office of Garnett, Hunter & Dimond.

Q. Is Mr. Hunter your personal attorney?

A. Yes.

Q. Has Mr. Hunter done work for you?

A. Yes.

Q. Would you suggest to the Court the number of cases they have handled for you in the past year, both title and litigation?

A. I would say practically no litigation, two at the most on litigations and titles, I am merely guessing, maybe a hundred.

Mr. Garnett: When? The last year?

By Mr. Friedlander:

Q. In the last year you said?

A. Yes. Maybe that is high. Maybe only 50. I am guessing.

Q. For how many years has Mr. Garnett been doing your work?

A. Ever since I came here in business, 18, 20, 21 years.

Q. And the settlement was held in his office?

A. Yes.

page 34 } Q. And Mr. Garnett personally handled it, didn't he?

A. No, sir. Mr. Hunter personally handled it.

Q. Pardon?

A. Mr. Hunter.

Q. Personally handled it, and they prepared the deed of trust that you executed?

A. Yes, sir.

Q. And they prepared the note that is being foreclosed?

A. To the best of my knowledge; yes, sir.

Q. And they recommended that you sign it in the form that it was?

A. They didn't recommend anything.

Q. They presented it to you to be signed?

A. Yes, sir.

Q. Were they also representing Wisconsin Development Corporation at that settlement?

Henry A. Florance

A. To the best of my knowledge, Wisconsin Development Corporation was looking to them for a check and there was $5,000 held in escrow that was the result of some disputes over settlement.

Q. That is over real estate commission?

A. That's right.

page 34 } Q. But you don't know that they received their check before the 23rd of May; do you, or the 24th?

A. That who received their check?

Q. Wisconsin Development.

A. I don't know when. I didn't give them a check, sir.

Q. When did you instruct Garnett and Hunter, attorneys, to not go through with the settlement?

A. When did I instruct them?

Q. Uh-huh.

A. I don't think that I ever instructed them not to go through with the settlement. Some two or three weeks later as I have said earlier, I asked them to send me my check back if the property couldn't be recorded.

Q. Do you have a letter to that effect?

A. I sent a letter to Mr. Hunter.

Q. Do you have a copy of it with you?

A. I am not sure but I think I do, either I have it or Mr. Hunter or Mr. Garnett has it, somebody has it.

I don't have it, sir.

Q. Tell me when the first time you went on the property was?

A. When was the first time I went on the property?

Q. Yes.

page 35 } A. Sometime in either January or December of 1965 or January of 1966.

Q. When was the first time you went on the property after you purchased it?

A. I don't know when you're saying "after purchase" whether you mean the date the deed was recorded or the date the contract was signed or the date of settlement. I don't know to which date you are referring, sir.

Q. Okay. Let's go step by step.

When was the first time you went on the property after you signed the contract?

A. After I signed the contract, I have not to this date been on the property?

Q. You have not to this date?

A. Not to this date.

Q. So that your testimony that you didn't have title to the property so you did not go on it—

A. I have not to this date been on it.

Q. So that statement, though true, did you intend to mislead us by that statement?

A. I have, as the records will show,—Mr. Corron and I bought the property as trustees. He does the building and I tell him to go out after the deed was signed.

page 36 } Q. You said under direct examination that you didn't have title to the property so you didn't go on the property. Did you not?

A. Yes.

Q. The fact is you haven't been on the property to this date?

A. This is right.

Mr. Friedlander: No further questions.

RE-DIRECT EXAMINATION

By Mr. Garnett:

Q. Mr. Florance, when he says go on the property, when did you start your project on the property?

A. Just as soon as I could get a building permit. I started —I told Mr. Corron to start tearing the house down after the deed was recorded.

Mr. Friedlander: Objection and I ask that that be struck.

Mr. Garnett: Well, let me rephrase it.

By Mr. Garnett:

Q. When did you start any work on the property?

A. After the deed was recorded.

The Court: I don't think it is material but you can go ahead and ask him all you want to.

page 37 } By Mr. Garnett:

Q. You did nothing on the property until the deed was recorded?

A. No, sir.

Mr. Garnett: I have no further questions.

The Court: Step down.

(Witness excused.)

William James D. Hunter

Call your next witness.

Whereupon

WILLIAM JAMES D. HUNTER a witness, called for examination by counsel for the complainants, and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Garnett:

Q. Will you state your name, please?

A. William James D. Hunter.

Q. What is your occupation and profession?

A. I am an attorney.

Q. How long have you been an attorney?

A. Since 1940.

Q. And you are a member of the law firm of Garnett, Hunter and Dimond?

A. I am.

page 38 } Q. And in your capacity as attorney, do you handle title examinations, titles to real property?

A. I do.

Q. Did there come a time when you were requested to examine title to the subject real property which you have heard discussed here this morning?

A. I did.

Q. And did you so examine title?

A. I did. I had the title examined through one of my associates.

Q. Did there come a time when settlement was set on this property?

A. There did.

Q. Will you tell the Court what the date of settlement was?

A. May I refer to my notes?

Q. Yes, sir.

A. Settlement was had on this property on May 6, 1966.

Q. And that meant settlement was held in your office?

A. That is true.

Q. The deed was signed, the deed of trust was signed; correct, sir, as required under the contract?

A. The deed was signed by Wisconsin Develop-

page 39 } ment Corporation by the proper officers, the trust and note were signed by Mr. Florance and Mr. Corron. The trust and note were not signed in my office.

The trust and note were mailed out and returned and were in my hands at date of settlement.

Q. All right, sir.

Now in your title examination, did the property at time of settlement have any encumbrances on same?

A. Yes. We, in fact, found two deeds of trust on the property, one which I learned through some various telephone conversations—

Mr. Friedlander: Objection if it is not something in his file.

The Court: He can tell you he had conversations and not tell you what was said to him.

The Witness: I'll go back and refer to those specifically.

The first trust that we found on record was recorded in 1964. It was secured by a note made by Richard S. Hammett and it was in the amount of $30,000, it was secured to Metropolitan Mortgage Fund.

In trying to get the pay-off figures on that trust, I found out that in the prior settlement, the trust note had in fact been paid off but a Maryland settling attorney had
page 40 } not had it released. I obtained from them a deed of release which we recorded.

That then left only one trust on the property?

Q. And what was that trust?

A. That was a trust which was recorded in February of 1965. It was from Wisconsin Development Company, Inc. to a Kathleen—K-e-y-e-s-k-i (spelling), and a George F-e-r-r-a-i-u-o-l-o, Trustees. That secured to Norfolk Investment Company, Inc., a Maryland Corporation, and Lomar, Inc., a D. C. corporation, a note in the amount of $88,000.

Q. All right.

At the time of settlement and when the deed was presented to you, was that note presented marked "paid in full", so release could be effected of that particular trust?

A. No.

Q. What did you do with respect to that note?

A. Well, the question with reference to this note necessarily came up before I arranged for settlement because in preparing the settlement statements, I had to know how we were going to pay this trust off and where the funds were coming from.

I called personally Mr. Willcher. He told me that a deed of release releasing this trust would be in our
page 41 } hands no later than the date of settlement.

William James D. Hunter

Q. Was that deed of release there at the day of settlement?

A. It was not.

Q. What transpired with respect to that note afterwards?

A. Well, I'll have to testify from my files on that, Mr. Garnett, because at one point in this Mr. Malecki, my partner, came in and handled a part of this settlement because I was out of the office.

Q. All right.

The Court: Did you get the deed of release?

The Witness: The deed of release was eventually brought into our office—I'll have to check my file to see just when we received it, yes, but it was some several days after—I have some memorandum notes here in the file that say that on May 5 at the request of Mr. Willcher by telephone, a deed of release was prepared and forwarded to Mr. Billowitz, an attorney in Alexandria, Virginia.

Again we have another notation on May 10, Mr. Billowitz called saying he had the release but that it was not signed because the holders of the note had not authorized him to substitute as trustee to sign that deed of release.

page 42 } Another memorandum dated May 24, sometime after eleven o'clock, Mr. Willcher and Mr. Cohen—I think that is the name—came into the office and the deed of release was delivered to us and was recorded by our office on June 1.

We had the deed of release in hand, so we had control of the situation and could go ahead and we recorded the deed.

By Mr. Garnett:

Q. And this was on what date?

A. Let me read the note in full that I have here on May 24th. This is made by Mr. Malecki, my partner.

"May 24, '66. After eleven o'clock a.m., Mr. Willcher and Mr. Cohen,"—yes, I believe that was his name—"who was the other holder of the note, came to the office. After much discussion between Mr. Willcher and Mr. Cohen, the note was surrendered to me for release.

"I then sent the papers to Fairfax to be recorded by Mr. Pomeroy,"—who is also working in our office—"I also sent the new note and proceeds check to be delivered to Mr. Willcher and the papers were recorded."

We, having control of the note, the paid note being delivered to us, we were then in position to record

page 43 } the deed, the new trust, and that was on May 24.

William James D. Hunter

Q. And then you got the deed of release?

A. Later on a release came from Mr. Billowitz who necessarily had to have the paid note in his presence before he could execute the release and that deed of release was recorded according to our records on June 1.

Q. Will you please tell the Court from your settlement sheet what the payment was, the payment to be made at the time of settlement by Mr. Florance so the Court may know?

A. Mr. Garnett, the contract was $110,000 with a cash payment of—

Mr. Friedlander: $22,000.

The Witness: The contract was $110,000 purchase price, $22,000 cash at date of conveyance.

By Mr. Garnett:

Q. And the purchaser was to take back—I mean, the seller was to take back what kind of a trust?

A. He took back the purchase money trust in the amount of $88,000.

Mr. Garnett: No further questions.

CROSS EXAMINATION

By Mr. Friedlander:

Q. Do you still have the contract in front of you?

page 44 } A. Yes, sir.

Q. When did Mr. Florance or someone for him, for Mr. Florance, deliver to you the funds to purchase the property?

A. I would definitely say on or prior to final date that we have here of settlement on May 6. I will, of course, have to look at our trustee records to see when those funds were deposited in that account. They would have gone in that same day.

Q. Your testimony is they were held by you from May 6 until you disbursed them on the 24th?

A. That is correct, sir; yes.

Q. When Mr. Willcher came in with the deed of release, was he anxious to get his money? Is that what all the conversation was about?

A. Well, Mr. Willcher did not come in with the deed of release, sir. Mr. Willcher came in with a paid note.

Q. When he came in with the paid note?

A. Yes, sir.

William James D. Hunter

Q. Is it not a fact that he was anxious to get his money?

A. He was; yes. He was very anxious to get his money.

Q. Isn't it further a fact that your difficulty and the delay was with Mr. Billowitz?

page 45 } A. I do not say that the delay and difficulty was Mr. Billowitz's fault because Mr. Billowitz, although trustee, had never any authority from the holders of the note, who were Mr. Willcher and Mr. Cohen, or whoever it might be, so he could execute this deed of release.

Q. You just told us that a lady with a long name—

A. Well, there was a substitution of trustees in the chain of title, sir. The trustees were not the trustees that acted. I would have to go back and see when the substitution of trustees took place.

Q. Do you have that in your file?

A. Yes, I have the abstract of that trust. There are two names which I won't attempt to pronounce, a Kathleen K-e-y-e-s-k-i (spelling) and George F-e-r-r-a-i-u-o-l-o (spelling).

The reason we communicated with Mr. Billowitz at all was because someone in Mr. Willcher's office told us that the release would be coming from there.

Q. Are you testifying here that the delay was occasioned by Mr. Willcher?

A. I am testifying that the delay was occasioned by the reason that we could not get a deed of trust note marked "paid", or a deed of release marking it paid which

page 46 } Mr. Willcher had assured me I would have on May 6. Until we had that, we were not in position to record the deed or to make a disbursement.

Q. Have you had some conversation with Mr. Billowitz about that?

A. Mr. Billowitz's office—our office was in communication with Mr. Billowitz's office; yes.

Q. You held the proceeds in your possession and those proceeds were not used to pay off the other note, were they?

A. They were not. Had they been so used, I would have been in a better position.

Q. But you didn't have the cash?

A. I didn't even have enough to pay the note off. I could not complete the settlement until I was in position to record the deed and give clear title to the purchaser and pay off the remainder of the proceeds to the seller.

Q. Do you have any correspondence in your file or notes indicating why the settlement was not held within 90 days of the contract date?

A. No, sir, I do not. I have gone through the file for that reason.

Q. Do you have any correspondence from Mr. Florance or notes stating that time was essential to him and page 47 } demanding that the settlement be held forthwith or promptly?

A. I have a letter from Mr. Florance which is written several days after settlement—

Q. Answer my question first. Do you have any letters before settlement from him?

A. No, sir.

Q. So your testimony would have to be then the delay in holding the settlement was occasioned by agreement between the parties?

A. I cannot answer that question.

Mr. Friedlander: No further questions.

The Court: Do you have any further questions, Mr. Garnett?

RE-DIRECT EXAMINATION

By Mr. Garnett:

Q. Mr. Hunter, you did not have enough cash to pay off that existing obligation?

A. No, I did not.

Q. Mr. Hunter, I hand you herewith a form, it is another one of these reproductions, documents of Garnett, Hunter and Dimond, and ask you if that is a copy of the note that was prepared and executed by Mr. Florance in this case?

A. I can say I recognize Mr. Florance's and Mr. page 48 } Corron's signature. I can't say that is the copy of the note?

The Court: I can't hear you.

The Witness: I cannot testify that this is a copy of the note because I do not have the original note. It should be available somewhere here and I can testify from that. I can only check this note against the terms of the trust and say it complies with the terms of the trust as recorded.

Mr. Friedlander: We will stipulate that.

The Court: Does it comply with the copy in your file?

The Witness: I can't answer that question.

The Court: All right, it has been stipulated that this is the one.

William James D. Hunter

Mr. Garnett: I have no further questions.

The Court: Did you represent the sellers at the settlement and charge them a settlement fee?

The Witness: Your Honor, I think a settlement fee was charged to them; yes. Let me check my file. I am sure that it was.

Yes, sir, a settlement fee was charged to the seller.

The Court: All right. Step down.

(Witness excused.)

page 49 } Mr. Garnett: That is our case, may it please the Court.

The Court: Do you have anything further?

Mr. Friedlander: No, Your Honor.

The Court: So that you will have your record, Mr. Garnett, on the points raised about the notice, the custom, the requirement that it be paid on time, would you like me to read the letter into the record now?

Mr. Garnett: I have no objection to your reading the letter into the record, may it please the Court, but I would like to be heard on it before.

The Court: Do you have anything new to offer?

Mr. Garnett: Yes, I do and this is why I asked the question to begin with.

The Court: Now I don't mean on the other points raised. I am just talking about the points raised in the original—

Mr. Garnett: Yes, sir, if it please the Court, at that time which was relatively a short notice with respect to this matter, we were looking for the law which we knew and I felt would bear out in respect to this and I would like to present it to the Court very briefly.

(Mr. Garnett then presented a closing argument.)

page 50 } The Court: I feel now as I felt the first time, this is a suit in equity and this was a very harsh thing that the noteholder was doing and as a chancellor, it would be my duty to do anything I could to enjoin the sale and I still feel that way but I still have found no way under what has been presented so far to enjoin the sale.

I feel that the letter of November 8th accelerated the payment of the note. I think the letter of the 9th of November reiterated that and I feel that they exercised their right properly under this instrument.

There are other things that we considered then. I still feel that the note called for payment on the 7th, that was not changed in any way by the custom of the community. Mr. Willcher had already put Mr. Florance on notice that it was due on this due date and I think he did say the 7th in his letter, May 7th because the 6th fell on Sunday and I don't think there was any authority in that letter to authorize the mailing it on the 7th or putting in what Mr. Florance claims was the custom of the community.

So that on those points that you raised before and as you have argued again today, I feel that I will deny your prayer for injunction.

On the two new points you raised, I certainly
page 51 } would like to hear you as to whether or not this
is proper advertisement, the two points that you raised, whether the paper was in general circulation and whether or not there are two weeks required.

I would like to hear you on those points.

(Mr. Kostik then presented argument.)

The Court: Let's hear what Mr. Friedlander has to say. Do you have anything more than that statute to rely on? Do you have any cases?

Mr. Friedlander: I don't think there are any cases since the amendment and I suggest to the Court that the cases counsel relies upon have been overruled and their interpretation is no longer in force because of the obvious legislative change of the rules set forth by the Supreme Court of Appeals.

The Court: I am sorry, I can't agree with you. I think two weeks means two weeks of seven days each. I realize we are not moving this case along very fast but they have got another two weeks. I would hold this is a paper of general circulation in accordance with the terms of the deed of trust but I do not think that eight days is in compliance with the terms of the deed of trust and therefore I would enjoin the sale.

Mr. Garnett: To which I respectfully note my
page 52 } exception.

The Court: Right. That will be a final decree.

Mr. Garnett: There is nothing on the record regarding the question of—

The Court: Everything, put it all in there, everything that was in that other order.

Mr. Garnett: But we've got a new question which was not argued at the present time and that was the question of the reformation of this—

The Court: I would deny that too.

This agreement means what it says, that it was dated on the 6th and that there was no ground for reformation.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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