Florida Law Review

Volume 8 | Issue 1 Article 9

March 1955

# Summary Judgment: Consideration of Transcript of Testimony from Prior Trial

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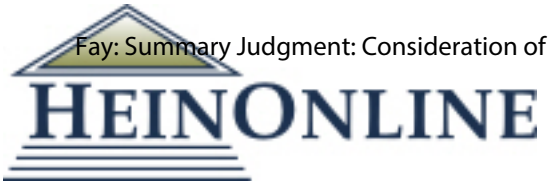

property by the alleged grantee influences the Florida Court in reaching its decision. In this situation possession by the grantor is an indication that the conveyance is a mortgage.[14] When the grantee takes possession the implication is that the transaction is a sale.[15] The Court also considers inadequacy of consideration as a factor tending to show the actual intent of the parties.[16]

The Court's opinion in the instant case, in upholding the right of two individuals to enter into a contract containing a provision allowing the grantor to repurchase property for a specified consideration, is in accord with the prevailing view.[17] The failure of the grantor to show the existence of an indebtedness to the grantee left the Court with little choice but to find the instrument to be a conveyance rather than a mortgage. The principle is basically sound in light of the social desirability of freedom of contract. Courts should interfere only when it appears that the present effect of the written instrument differs from that intended by the parties at the time they entered into the transaction.

EDWARD A. STERN

## SUMMARY JUDGMENT: CONSIDERATION OF TRANSCRIPT OF TESTIMONY FROM PRIOR TRIAL

*Bradley v. Associates Discount Corp., 67 So.2d 913 (Fla. 1953)*

Plaintiff automobile purchaser brought an action on a collision insurance policy. Plaintiff, a conditional vendee, maintained at trial that defendant conditional vendor had operated as both insurer and insured, had received notice of policy cancellation, and had failed to notify purchaser. On retrial, the court, in granting defendant's motion for summary judgment, considered excerpts of testimony introduced at the first trial. On appeal, HELD, *inter alia*, the court, in testing motion for summary judgment, did not commit error in considering

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[14]Hull v. Burr, 58 Fla. 432, 50 So. 754 (1909).

[15]Hollingsworth v. Handcock, 7 Fla. 338 (1856).

[16]Stovall v. Stokes, 94 Fla. 717, 115 So. 828 (1927).

[17]See 4 POMEROY, EQUITY JURISPRUDENCE 573 (5th ed. 1941). See also Annot., 79 A.L.R. 938 (1932).

excerpts of testimony introduced during the first trial. Affirmed in part; reversed in part.[1]

Summary judgment promptly disposes of actions containing no genuine issue as to any material fact.[2] Florida's 1954 Rules of Civil Procedure, in rule 1.36,[3] limit evidence that may be presented with a motion for summary judgment to pleadings, depositions, admissions, and affidavits.[4] The Florida Court has indicated that this rule should be administered so as to provide for speedy resolution and just conclusion of controversies not requiring trial.[5] The instant decision stands alone in Florida in allowing the introduction of a transcript of testimony from a prior trial under rule 1.36.

In certifying the record of a prior trial, the clerk is not verifying the truth of testimony given; he only certifies that such testimony was presented. The administration of the oath to a witness, however, is revealed by the record. Such an oath taken by a witness confronted with the solemnity of a judicial proceeding should be as effective as an affidavit oath. The witness is also subject to the additional prophylactic influence of cross-examination. These factors argue strongly for the admission of recorded testimony on a par with depositions, admissions, and affidavits.

Consideration of the operation of the Florida rule necessitates examination of the operation of federal rule 56, which Florida has adopted as rule 1.36. Federal courts have permitted the introduction of transcripts from prior trials,[6] but these cases are not cited in the instant case; in fact, the Court cites no cases to substantiate this segment of its judgment.

One federal court permitted a defendant, in moving successfully for summary judgment, to introduce both a prior court order disbarring the plaintiff and a prior refusal to cancel the disbarment

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[1]Reversal was predicated upon the Court's determination that there were genuine issues of fact (at 915).

[2]Wilson v. Bachrach, 65 So.2d 546 (Fla. 1953) (dictum); see Comment, 7 U. FLA. L. REV. 335 (1954) (summary judgment for nonmoving party).

[3]Formerly FLA. C.L.R. 43. For a more complete treatment see Arnow and Brown, *Florida's 1954 Rules of Civil Procedure,* 7 U. FLA. L. REV. 125 (1954).

[4]1954 FLA. R. CIV. P. 1.36(c) provides: "The judgment or decree sought shall be rendered forthwith if the pleadings, depositions and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment or decree as a matter of law."

[5]Lomas v. West Palm Beach Water Co., 57 So.2d 881, 882 (Fla. 1952) (dictum).

[6]*E.g.,* Fletcher v. Bryan, 175 F.2d 716 (4th Cir. 1949); Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383 (W.D. Va. 1949).

order.[7] Noting that rule 56 does not specifically include certified transcripts of court documents, this court stated that such a transcript is better evidence of its contents than an affidavit.[8]

In another federal case involving a summary judgment, the court upheld admission of previous trial records submitted as proof that the pleadings were based solely upon negligence.[9] The appellate court said that the fact that the records of the prior trial had been certified by the clerk of the court under the court's seal and had been verified under oath before a notary satisfied even the most technical requirements that affidavits be reduced to writing and sworn to before one authorized to administer an oath.[10]

New York, one of the first states implementing summary judgment procedure,[11] has consistently allowed the use of records of prior trials.[12] The rule there, however, is somewhat different from the federal and Florida rules.[13] Operating under a provision[14] similar to the New York rule, Wisconsin has allowed introduction of undisputed recorded minutes of a corporation directors' meeting.[15] Michigan, with a statute apparently limiting admissible proof to affidavits,[16] allowed the admission of certified copies of a Nevada divorce proceeding.[17]

How far the Florida Court has opened the door to the admission of evidence not enumerated in rule 1.36 is a question that only the Court in future cases can answer. Admission of records of prior judicial proceedings either as (1) affidavits or (2) proof equally as dependable as depositions, admissions, and affidavits appears sound in light of decisions interpreting the federal rules and similar rules of other states. The prevention of duplication of testimony secured

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[7]Fletcher v. Bryan, 175 F.2d 716 (4th Cir. 1949).

[8]*Id.* at 717.

[9]Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383 (W.D. Va. 1949).

[10]*Id.* at 386.

[11]6 MOORE, FEDERAL PRACTICE 2009 (2d ed. 1954).

[12]*E.g.*, Timmerman v. City of New York, 69 N.Y.S.2d 102 (Sup. Ct. 1946), *aff'd*, 272 App. Div. 758, 70 N.Y.S.2d 140 (1st Dep't 1947); Rosenthal v. Rosenthal, 67 N.Y.S.2d 506 (Sup. Ct. 1946); Broderick v. Alexander, 153 Misc. 825, 275 N.Y. Supp. 278 (Sup. Ct. 1934), *aff'd*, 243 App. Div. 752, 278 N.Y. Supp. 521 (1st Dep't 1935), *aff'd*, 268 N.Y. 306, 197 N.E. 291 (1935).

[13]N.Y. R. CIV. P. 113 provides: ". . . on motion upon the affidavit of a party . . . setting forth such evidentiary facts . . . including copies of all documents, as shall fully disclose defendant's contentions . . . ."

[14]WIS. STAT. §270.635 (1953).

[15]Stoiber v. Miller Brewing Co., 257 Wis. 13, 42 N.W.2d 144 (1950).

[16]MICH. STAT. ANN. §27.989 (1938).

[17]Pratt v. Miedema, 311 Mich. 64, 18 N.W.2d 279 (1945).