93 Md. 696, 50 A. 152

Court of Appeals of Maryland.
MAYOR, ETC., OF **BALTIMORE**
v.
PEAT.
Oct. 18, 1901.

Appeal from Baltimore city court; George M. Sharp, Judge.

Action by the mayor and city council of Baltimore against Mary V. Peat. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Page, J., dissenting.

West Headnotes

Judicial Sales 229 ⚿61
229k61 Most Cited Cases
Where a lease containing a covenant on the part of the lessee to pay the rent was assigned by the lessee, and the interest of the assignee was subsequently sold under a judicial decree, and some time thereafter a deed was given pursuant to such decree, the deed operated by relation to terminate the privity between the assignor and assignee at the date of the sale, and the assignor could not recover from the assignee for rents paid subsequent to the sale owing to the failure of the assignee to pay such rent.

Landlord and Tenant 233 ⚿231(2)
233k231(2) Most Cited Cases
A lease containing a covenant on the part of the lessee to pay rent as it matured was assigned, and the interest of the assignee was sold under a judicial decree, and thereafter the assignor paid rents on the assignee's failure to do so, and after the commencement of suit by the assignor against the assignee to recover the rent paid by the assignor subsequent to the sale and because of the assignee's failure to pay a deed was executed pursuant to the decree. *Held*, that the fact that the deed was executed after the commencement of suit did not render it inadmissible to show the termination of the privity between the assignor and assignee by relation from the time of the sale.

Argued before McSHERRY, C.J., and BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

Wm. Pinkney Whyte and Chas. W. Field, for appellant.
Fredk. C. Cook, for appellee.

SCHMUCKER, J.
The appellant was the original lessee of a lot of ground in Baltimore city under a 99-year lease containing the usual covenant on the part of the lessee to pay the rent as it matured. The term created by this lease came to be vested in the appellee by assignment. The appellant, by reason of its liability under the covenant, was compelled to pay certain installments of rent which matured after the assignment, and it brought the present action***153** to recover from the assignee the amount so paid. The declaration was in assumpsit for money paid by the appellant for the use of the appellee. The appellee pleaded nil debet, non assumpsit, and limitations, and also filed four special pleas by way of defense on equitable grounds. The appellant joined issue on the first and second pleas, and replied to the third plea that the action had accrued within three years. It demurred to the four special pleas. The court overruled the demurrers, and the appellant permitted final judgment to be entered against it in the case, and took the present appeal.

The declaration alleged the demise of the lot to the appellant in 1868 for the term of 99 years at an annual rent of $300, and that the lease contained a covenant on the part of the lessee to pay the rent as it matured. It also alleged the acquisition of the term by the appellee through mesne assignments on December 12, 1895, subject to the implied covenant and liability on her part to pay the rent; but that she failed to pay so much of it as fell due

in the years from 1896 to 1900, inclusive, amounting in all to $1,500. It further alleged that the appellant paid this rent to the lessor, as it was bound to do under the covenants of the lease, and that the appellee, though often requested to do so, did not repay the rent to the appellant. The pleas demurred to averred that the appellee's estate in the lot was terminated on April 20, 1897, by a sale of it and other property, made under a decree of the circuit court of Baltimore city passed in a cause in which that court had jurisdiction by Wm. R. Barnes, trustee, to Emora Brannan and John C. Peat, and that the sale had been finally ratified in due course on May 27, 1897, and that the purchasers thereupon entered into possession of the lot, and had ever since retained and used it. The pleas further alleged that, after the purchase money had been fully paid, a deed was made by the trustee to the purchasers of the property so sold, but by inadvertence and mistake the lot now in question was omitted from the deed. In two of the pleas it was further alleged that such omission was not discovered until after the institution of the present suit, when the omitted lot was conveyed by the trustee to the purchasers, Brannan and Peat, by a deed duly executed, acknowledged, and recorded before the filing of the pleas. Upon this state of facts the appellant contended that, as the first deed from the trustee to the purchasers did not include the lot in question, the legal estate therein remained in the appellee, and maintained the privity of estate between her and the lessor during the period when the rent which forms the basis of the present action accrued, and that she would have been liable therefor to the lessor in an action upon the covenants of the lease; that the payment of the rent by the appellant had inured to her benefit and relief by the discharge of her liability for it, and that she was under an obligation to repay it, which could be enforced in this suit. The appellee contended that limitations was a bar to the recovery of so much of the rent as matured and was paid by the appellant prior to the sale of the lot to Brannan and Peat in April, 1897, and that she would not have been liable to the lessor for the rent thereafter accruing because that sale devested the title to the term out of her, and vested it in the purchasers, and thus destroyed the privity of estate between her and the lessor, even though the deed from the trustee to the purchaser was not made until after the institution of the present suit. We think that, inasmuch as the appellant offered no evidence in support of its replication to the plea of the statute of limitations, but suffered final judgment to be entered against it on the demurrer, its claim to be reimbursed for so much of the rent as fell due and was paid by the appellant more than three years prior to the institution of the suit must be held to be barred by limitations. This disposes of the rent which matured prior to the sale of the lot by the trustee to Brannan and Peat on April 20, 1897.

We will now consider the appellant's right to be reimbursed for the payment of so much of the rent as matured after the trustee's sale. There is no doubt that the covenant to pay rent in a lease like the one now under consideration not only binds the lessee personally throughout the entire term, but also runs with the land, and each successive assignee of the leasehold term becomes liable upon the covenant to the lessor for such rent as matures while the title to the leasehold remains in him, provided the action against him for the rent be instituted before he parts with the legal title to the term. It is equally clear that, as the assignee's liability for the rent springs entirely from his relation to the land, that liability extends only to such rent as matures while the title to the term remains vested in him. Hintze v. Thomas, 7 Md. 346; Donelson v. Polk, 64 Md. 504, 2 Atl. 824; Ice Co. v. Bixler, 84 Md. 446, 35 Atl. 1086. The assignee of a term has in different cases been also held liable to indemnify the original lessee against breaches of covenants in the lease committed during the continuance of his own tenancy, and this court has in so far recognized that liability as to refer to it for purposes of illustration in

Brinkley v. Hambleton, 67 Md. 177, 8 Atl. 904; but the liability to so indemnify the original lessee if it exist is founded upon the primary liability of the assignee to the lessor to perform the covenants during his own tenancy. The vital question, therefore, in the case before us is, at what time, under the facts presented by the record, must the legal title to the leasehold estate in the lot ***154** on which the $300 rent was reserved be regarded as having been devested out of the appellee? The mere assignment of the equitable title of the assignee to the leasehold, whether accomplished by his own act or through the agency of a judicial proceeding, if not consummated by the transfer of the legal estate, will be insufficient to discharge him from liability under the covenants of the lease. Peter v. Schley's Lessee, 3 Har. & J. 211; Lester v. Hardesty, 29 Md. 50; Sanders v. McDonald, 63 Md. 508; Nickel v. Brown, 75 Md. 184, 23 Atl. 736. In the case at bar it is admitted that there was not only a devasting of the equitable title of the appellee to the leasehold by the trustee's sale to Brannan and Peat, but there was ultimately a conveyance of the legal estate from the trustee to the purchaser. The contention of the appellant is that, notwithstanding the fact of the conveyance of the legal title out of the appellee by the trustee's deed, during the interval between the trustee's sale and his deed the legal title remained in her in such sense that it maintained the privity of estate between her and the lessor, and made her liable for the rent maturing during that time; but we cannot admit the soundness of this contention. There would be great force in the appellant's position if the appellee had transferred to Brannan and Peat an equitable title to the lot in question by a contract of sale or bond of conveyance made by her, and had then for a long time neglected to complete the transaction by a transfer of the legal estate; but the trustee's sale was a transaction between the court and the purchaser, the consummation of which depended upon no further action upon her part. Upon the final ratification of the sale the equitable and substantial title to the lot was devested out of her, and into the purchasers; and when the trustee's deed conveying the lot to the purchaser was duly executed, acknowledged, and recorded the same transmutation of the legal title occurred. The order of ratification and the trustee's deed did not, however, operate to pass the equitable and legal title, respectively, merely from their several dates, but, being made under a judicial sale, they, upon the principle of relation, operated retrospectively, and devested the equitable and legal estates out of the appellee and vested them in the purchasers from the date of the trustee's sale. Wagner v. Cohen, 6 Gill. 102, 45 Am.Dec. 660; Lannay's Lessee v. Wilson, 30 Md. 550; Hunter v. Hatton, 4 Gill, 126, 127, 45 Am.Dec. 117; Dalrymple v. Taneyhill, 4 Md.Ch. 175.

Nor do we think the fact that the deed from the trustee to Brannan and Peat was not executed until after the institution of the present suit renders it inadmissible in evidence to prove a destruction of the privity of estate between the appellee and the lessor as of the date of the trustee sale of the lot. There is some conflict of authority upon this proposition outside of our own state, but since the case of Hunter v. Hatton, supra, there is no room for doubt as to the view of this court upon the question of the operation of the deed, or its admissibility in evidence. In that case the plaintiff had purchased a parcel of land at a trustee's sale, which was finally ratified, but no deed for the land had been made to him by the trustee. In that condition of his title, when he held the equitable, but not the legal, estate, he brought an action of trespass q.c.f. for a forcible entry into the land. The defendant pleaded liberum tenementum, and the plaintiff traversed the plea, thus putting in issue the defendant's freehold title to the land. At the trial of the case the plaintiff, to prove that the freehold title was in him, and not in the defendant, offered in evidence the record of the chancery proceedings under which the sale to him had been made, accompanied by a deed from the trustee to

him, which had been executed after the institution of the trespass suit. The lower court refused to admit the evidence, and judgment was rendered for the defendant. This court reversed the judgment upon the ground that the deed from the trustee to the plaintiff, although made after the institution of the suit, passed the title not merely from the time of its execution, but, being a conveyance under a judicial sale, upon the principles of relation it operated retrospectively, and vested the freehold estate to the premises in the grantee from the date of the sale, and therefore disproved and defeated the plea of liberum tenementum, and that by operation of law the freehold was in the plaintiff at the time the trespass was committed. It is true that the courts, especially in later cases, have shown a just disposition to so limit the application of the doctrine under consideration as not to destroy intervening rights of innocent parties created bona fide and for valuable consideration, which have duly attached to the estate between the events which it is proposed to unite by relation; but it is obvious that the present case is not a proper one in which to apply the limitation, for here there are no such intervening rights. The appellant did not pay the rent sued for at the request of the appellee, nor upon the faith of its supposed responsibility to her. No such request or reliance is alleged in the pleadings. On the contrary, the declaration alleges that the appellant paid the rent because it was bound by its own covenant to do so. In our opinion, the deed from Barnes, trustee, to Brannan and Peat, although made after the rent sued for fell due, and even after the institution of this suit, operated by relation to devest out of the appellee the legal title to the leasehold estate as of the date of the trustee's sale on April 10, 1897, and thus terminated the privity of estate between her and the lessor as of that date, and that she is not liable to either***155** the appellant or the lessor for the rent which matured thereafter.

It follows from what we have said that the judgment appealed from was affirmed by the order per curiam heretofore passed by us.

PAGE, J., dissents.
Md. 1901.
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