New Mexico Law Review

13 N.M. L. Rev. 177 (Winter 1983 1983)

Winter 1983

Real Estate Contracts - When Recording of a Lien Instrument Is Not Notice to the Whole World - Actual Notice Required to Protect Second Lien on a Real Estate Contract: Shindledecker v. Savage

William M. Casey

REAL ESTATE CONTRACTS—When Recording of a Lien Instrument is Not Notice to the Whole World—Actual Notice Required to Protect Second Lien on a Real Estate Contract: *Shindledecker v. Savage*

INTRODUCTION

Shindledecker v. Savage[1] is one of the most recent in a line of cases concerning the rights of a second lienholder[2] under an installment, real estate, or executory land sales contract. In *Shindledecker*, the New Mexico Supreme Court held that under a real estate contract the buyer has a mortgageable interest in his equity.[3] The court also held that a second lienholder on a real estate contract does not protect his interest by recording the second instrument. A second lienholder instead must use a contractual device[4] to give the original seller actual notice of the second lien. This is intended to insure that the second lienholder receives both notice of a breach by the buyer and the opportunity to protect his interest.[5]

STATEMENT OF THE CASE

In 1975, Bob and Barbara Savage purchased a home from Russel Taylor under a real estate contract.[6] The Savages agreed to pay $1,500 down and to make monthly payments on the unpaid balance. Later, the Savages mortgaged their interest in the property to secure several loans received from John Shindledecker. At that time the Savages were current in all their obligations on the contract. Some time after mortgaging their interest with Shindledecker, the Savages decided to move from the state. Although they were not in default on the real estate contract with Taylor, at the time of their move they executed a document that instructed the escrow agent on that contract to release to Taylor a special warranty deed held

1. 96 N.M. 42, 627 P.2d 1241 (1981).

2. A second lienholder in *Shindledecker* and other cases cited in this Note is one who has lent the buyer money and taken an encumbrance on the property junior to the real estate contract to secure the debt. *Id.* at 43–44, 627 P.2d at 1242–43. Though sometimes called a second mortgage holder, even by the *Shindledecker* court, a second lienholder is different from a second mortgage holder. See *infra* text accompanying notes 22–33 for a discussion on the difference between a second mortgage and a lien on a real estate contract.

3. 96 N.M. at 43, 627 P.2d at 1242.

4. The *Shindledecker* court said, "Instead, the mortgagee must use one of several available contractual devices to insure that he receives both notice of a breach by the vendee and the opportunity to protect his interests." *Id.* at 44, 627 P.2d at 1243. The court did not say what contractual devices should be used.

5. *Id.*

6. *Id.* at 43, 627 P.2d at 1242. For a discussion of how a real estate contract differs from a mortgage, see *infra* text accompanying notes 42–49.

in escrow.[7] That deed conveyed the Savages' interest back to Taylor. Taylor then sold the property to a party who later sold it to the Jacquezes. From the time Taylor received the special warranty deed until he resold the property, no one made any payments on the contract.[8]

Shindledecker sued the Savages, the Jacquezes, and the holder of the Jacquezes' mortgage.[9] He asked for and received a judgment on the debts owed him by the Savages. He also requested, but was denied, a foreclosure against the Jacquezes on the second mortgage he held. He appealed the trial court's refusal to foreclose his mortgage.[10]

The New Mexico Supreme Court held that Shindledecker did have an enforceable lien[11] on the amount of equity held by the Savages. According to the court, this lien was subject to the prior interest of Taylor and was also subject to continued performance under the contract. The court also held that Shindledecker's rights had to yield to the rights of the subsequent purchasers, the Jacquezes.[12]

DISCUSSION

A. The Buyer's Mortgageable Interest

The *Shindledecker* court said the first issue in the case was whether the buyer under an executory land sales contract has a mortgageable interest. Shindledecker argued that he had an interest that was enforceable against the Savages' equitable interest in the property.[13] The *Shindledecker* court said that the Savages did have a mortgageable interest, and that Shindledecker did have an enforceable lien on that interest, but that it was not the same as a second mortgage.[14]

In considering the Savages' interest, the *Shindledecker* court first noted that the majority of courts which have addressed the question have held that both the legal and equitable owners have mortgageable interests in

7. 96 N.M. at 43, 627 P.2d at 1242.

8. *Id.*

9. Taylor, the original vendor, was not a party to the action. This fact may, in later cases, limit the application of the *Shindledecker* court's holding that the rights of the second lienholder must yield to the rights of the subsequent purchasers. In fact, all cases cited in the *Shindledecker* opinion and all cases cited in this Casenote concerning real estate contracts involved the original seller or his representative as a party.

10. 96 N.M. at 42, 627 P.2d at 1241.

11. For a discussion of the enforceability of Shindledecker's interest, see *infra* text accompanying notes 30–33.

12. 96 N.M. at 44, 627 P.2d at 1243.

13. *Id.* at 42, 627 P.2d at 1241.

14. *Id.* at 43–44, 627 P.2d at 1242–43.

the realty.[15] The court cited both specific[16] and general[17] authority in support of its position.

The first case the *Shindledecker* court relied upon was *Gavin v. Johnson.*[18] In *Gavin,* the Connecticut Supreme Court held that a party in possession of land under an agreement to purchase may subject his interest in the land to an enforceable lien on the property.[19] The facts of *Gavin* were that Johnson sold two lots to Gifford, one outright and one by a land sales contract. Gifford built on the lot that was under contract. In the mortgage he secured for building money, however, Gifford described instead the lot he had paid for. After a foreclosure, Gavin bought what he thought was the lot with the building on it. In fact, however, title to the lot had never vested in Gifford because of his failure to meet the terms of the contract. Gavin sued to secure titles. Although Johnson argued that the agreement with Gifford gave no permission to encumber the lot thus it could not be the one mortgaged and foreclosed, the *Gavin* court held that even without such authority a party in possession of land under an agreement to purchase may subject his interest in it to a lien that may be enforced.[20]

The *Shindledecker* court also relied upon the position taken by the Washington Supreme Court in *Sigman v. Stevens-Norton, Inc.*[21] The *Sigman* court stated that a purchaser under a real estate contract had a mortgageable interest, then went on to hold that a lien on that interest is different from an actual second mortgage.[22] In *Sigman,* the plaintiff claimed he was fraudulently induced to make a loan by representations that the loan was a safe one secured by a second mortgage on five parcels of real property. The defendant argued that because a purchaser under a real estate contract has a mortgageable interest, there is no substantial difference between such a lien and a second mortgage. Although the Washington

15. *Id.* at 43, 627 P.2d at 1242. Under a real estate contract the seller retains legal title but the buyer has equitable title. *See* G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law § 3.25 at 79 (1979) [hereinafter cited as Osborne].

16. Gavin v. Johnson, 131 Conn. 489, 41 A.2d 113 (1945); Sigman v. Stevens-Norton, Inc., 70 Wash. 2d 915, 425 P.2d 891 (1967).

17. 55 Am. Jur. 2d *Mortgages* § 111 (1971). This section states that courts recognize the interests of both the vendor and the vendee under a contract to purchase as mortgageable interests. The court also cited Annot., 85 A.L.R. 927 (1933) as general authority for its position. The cited annotation deals with the interest of a vendee under an executory contract as subject to the conditions of a levy of execution, assessment of a lien adjudged against the property, or attachment.

18. 131 Conn. 489, 41 A.2d 113 (1945).

19. *Id.* at ___, 41 A.2d at 115.

20. *Id.*

21. 70 Wash. 2d 915, 425 P.2d 891 (1967).

22. *Id.* at ___, 425 P.2d at 894.

Supreme Court agreed that the purchaser has a mortgageable interest, it found that there is a crucial difference between a lien taken under a real estate contract and an actual second mortgage. The difference is that there is no lien on the fee under a mortgage on a buyer's interest, but only a lien on the buyer's equitable interest.[23] Therefore, relying on *Gavin* and *Sigman,* the *Shindledecker* court held that the Savages' interest under the real estate contract was a mortgageable interest, and that Shindledecker had a valid lien on that interest.[24]

The *Shindledecker* court also held that Shindledecker's lien was not the same as an actual second mortgage, even though it was called a second mortgage.[25] The *Shindledecker* court, relying on and quoting from *Sigman,* said that an actual second mortgage is a lien on the fee, but that what Shindledecker had was a lien not on a fee interest but on the buyer's (the Savages') equitable interest. The *Shindledecker* court added that Shindledecker's interest was limited by the buyer's interest because the buyer cannot create an interest in the realty greater than his own.[26]

The *Shindledecker* court cited *Campos v. Warner,*[27] in which the New Mexico Supreme Court held that a tenant did not have a right to damages against a seller who cancelled the lease when the buyer rental company defaulted on its real estate contract.[28] In *Campos,* the plaintiff leased real estate from a rental company that had bought the property from Warner, the defendant, under a contract for deed. When the company defaulted on the contract, Warner took back the property and refused to honor Campos' lease. In reversing the trial court's award of damages, the *Campos* court reasoned that the rental company, which had bought the property under a real estate contract and leased it to the plaintiff, Campos, could not create greater interest in Campos by virtue of the lease than it had originally possessed under the contract.[29]

The *Shindledecker* court also found that because the lien was subject to the prior interest of the seller under the contract, it was enforceable only if the contract were kept in force by continued performance of its terms.[30] The Oregon Supreme Court provided the authority for this position in *Sheehan v. McKinstry.*[31] In *Sheehan,* the court allowed a seller to foreclose his interest in the property when the buyer defaulted on a land sales contract. The *Sheehan* court allowed this foreclosure despite

23. *Id.*
24. 96 N.M. at 44, 627 P.2d at 1243.
25. *Id.* at 43, 627 P.2d at 1242.
26. *Id.*
27. 90 N.M. 63, 559 P.2d 1190 (1977).
28. *Id.* at 64, 559 P.2d at 1191.
29. *Id.*
30. 96 N.M. at 43, 627 P.2d at 1242.
31. 105 Or. 473, 210 P. 167 (1922).

a second lien on the buyer's interest because the second lienholder had four months within which to meet the terms of the contract but failed to do so. The *Sheehan* court said the enforceability of the buyer's second mortgage was subject to performance of the terms of the contract.[32] Therefore, the *Shindledecker* court said, Shindledecker had a valid lien on the Savages' interest, limited to the extent of their interest, but subject to Taylor's interest, and subject to continued performance of the contract.[33]

This first holding by the *Shindledecker* court is welcome. It states unequivocally for New Mexico a position long held by most other jurisdictions, as shown by the range of authority cited by the *Shindledecker* court.

B. Actual Notice Requirement

Having laid the foundation regarding the extent of Shindledecker's rights, the court then addressed the issue of whether Shindledecker had an enforceable claim in the nature of a foreclosable mortgage against the subsequent purchasers. Shindledecker argued that his lien should be declared superior to the claims of the other defendants and that it should be foreclosed.[34] The New Mexico Supreme Court said Shindledecker's claim was not enforceable against the subsequent purchasers because he did not protect his lien by giving actual notice to the seller, Taylor.[35] In addition, Shindledecker argued that the court should use its powers of equity to enforce his mortgage. The court, however, said the equities in the case favored the Jacquezes, the innocent purchasers.[36]

Before denying Shindledecker's claim, the court again recognized that his interest was legitimate. It emphasized this legitimacy by noting that although generally a seller under a real estate contract has the right to retake the property when a buyer defaults, this right to retake is limited where, as here, the buyer has mortgaged his equitable interest. The right to retake is limited in that the holder of the lien has the right to assume the position of the buyer.[37]

---

32. *Id.* at ___, 210 P. at 171.

33. 96 N.M. at 43–44, 627 P.2d at 1242–43.

34. *Id.* at 42, 627 P.2d at 1241.

35. *Id.* at 44, 627 P.2d at 1243. Ironically, the record suggests that Taylor did have actual notice. Transcript of Proceedings at 33. *Shindledecker v. Savage*, 96 N.M. 42, 627 P.2d 1241 (1981) [hereinafter cited as Transcript] (on file at the University of New Mexico law library). The *Shindledecker* court, however, noted that Taylor was not a party to the action, and therefore the court could not grant any relief which might be due to Shindledeckeer from Taylor, 96 N.M. at 43, 627 P.2d at 1242.

36. 96 N.M. at 44, 627 P.2d at 1243.

37. *Id.*

1. Enforceability of the claim

The court began its analysis of the conflict by citing *Bishop v. Beecher*[38] for the proposition that the vendor under a property sales contract can, on default by the purchaser, retake the property and retain all payments made under the contract.[39] In *Bishop,* the plaintiff, Bishop, purchased a house under a real estate contract. When he defaulted, the defendant Beecher tried to take back the property under the terms of the contract. Bishop sued to have the contract declared an equitable mortgage so that he would be allowed a right of redemption for a reasonable period of time. Although Bishop had paid about one-third of the total of the contract, the court affirmed the trial court's ruling that there was no equitable right of redemption.[40] The *Bishop* court said that it would not rewrite a contract into which the parties freely entered, and with which Bishop failed to comply. The court noted that the amount Bishop had paid, less than $60 a month over six years, was a reasonable amount for rent. It also stated that such real estate contracts benefit thousands of persons who would otherwise be unable to buy homes.[41]

The *Bishop* case makes clear the difference between a real estate contract and a mortgage or second mortgage. An explanation of this difference will facilitate an understanding of both the *Bishop* and *Shindledecker* cases.

The real estate contract has been referred to as "the most commonly used substitute for the mortgage or deed of trust."[42] In New Mexico, a mortgage of real estate is used as security for payment of a debt, giving both legal title and the right of possession to the person paying the mortgage.[43] Under a real estate contract, legal title remains with the seller, but the buyer has the right of possession.[44]

The main difference between the two, as demonstrated in *Bishop,* is that a defaulting mortgagor has a right to redeem his interest in the

38. 67 N.M. 339, 355 P.2d 277 (1960).

39. 96 N.M. at 44, 627 P.2d at 1243.

40. Under New Mexico law an equitable right of redemption is the right of a person who has had his mortgaged property sold in a foreclosure sale to redeem, or buy back, the property within nine months of the sale. He can do it by paying the foreclosure buyers directly or by petitioning the court. *See* N.M. Stat. Ann. § 39-5-18 (1978).

41. 67 N.M. at 342–43, 355 P.2d at 279–80.

42. Osborne, *supra* note 15, § 3.25 at 79. The authors state:

> [t]he installment land contract and the purchase money mortgage fulfill the identical economic function—the financing by the seller of the unpaid portion of the real estate purchase price. Under an installment land contract, the vendee normally takes possession and makes monthly installment payments of principal and interest until the principal balance is paid off. The vendor retains legal title until the final payment is made, at which time full title is conveyed to the vendee.

Id.

43. *See* N.M. Stat. Ann. § 48-7-1 (1978).

44. Osborne, *supra* note 15, § 3.25 at 79.

property. The mortgagee can eliminate this equitable right of redemption only by a foreclosure proceeding, should the mortgagor prove to be uncooperative. Even then, the mortgagor still has a right to redeem within a certain period after the sale, which is nine months in New Mexico.[45] The real estate or land installment contract, on the other hand, normally has a forfeiture clause that typically provides that "time is of the essence."[46] When a vendee fails to comply with the terms of the contract, the vendor may terminate the contract, retake possession of the premises without legal process, and keep all prior payments as liquidated damages. The clause gives the vendor a remedy similar to foreclosure without any need for judicial action.[47]

Under New Mexico practice, the vendor executes a warranty deed at closing that conveys the property to the buyer. The buyer simultaneously executes a special warranty deed conveying his interest in the property back to the seller. Both these deeds are held by an escrow agent who collects the payments. In the case of default, or if authorized by the buyer, the escrow agent releases the special warranty deed to the seller after he has complied with the contract forfeiture requirement.[48] If the buyer pays the contract in full, the escrow agent releases the warranty deed to him.[49]

The *Shindledecker* court stated that the seller's rights under the contract were somewhat limited in this case. Where the buyer has mortgaged his

45. N.M. Stat. Ann. § 39-5-18 (1978).

46. 67 N.M. at 340, 355 P.2d at 278.

47. Nelson and Whitman, *The Installment Contract—A National Viewpoint*, 1977 B.Y.U. L. Rev. 541.

The contract involved in this case is not in the court record, but the *Bishop* court noted that the contract in question in that case was the "usual type." The *Bishop* contract stated that time was of the essence and, upon default of payment by the vendees continuing for 30 days after written demand, the vendor may:

> at his option, either declare the whole amount remaining unpaid to be then due and proceed to enforce the payment of the same; or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises, and all rights of the purchaser in the premises herein described shall thereupon cease and terminate and they shall thereafter be deemed a tenant holding over after the expiration of their term without permission.

67 N.M. at 340, 355 P.2d at 278.

48. In *Shindledecker*, the Savages, who were the original purchasers of the property under the real estate contract, authorized the release of the warranty deed from escrow. 96 N.M. at 43, 627 P.2d at 1242.

49. In a standard real estate contract, the pertinent paragraph reads:

> 13. It is understood and agreed that, coincident herewith, the Owner has executed a good and sufficient warranty deed conveying the above-described premises to the Purchaser, which said deed, together with a copy hereof, shall be placed in escrow with ___, who is hereby designated and appointed escrow agent, to be delivered by the Escrow Agent to the Purchaser upon full compliance on his part with all the conditions of this contract. In consideration of that fact the said Purchaser executes, coincident herewith, a special warranty deed reconveying the above described premises to the Owner, which said special warranty deed shall also be placed in escrow herewith to be delivered by the Escrow Agent to the

equitable interest to a third party, as the Savages did here, the seller and buyer cannot get together and agree to rescind the outsider's lien or mortgage.[50] Instead, the mortgagee acquires the original purchaser's right to buy the property under the terms set out in the contract, thus assuming the rights of the buyer under the contract.[51]

The *Shindledecker* court adopted and quoted the reasoning in *First Mortgage Corp. of Stuart v. deGive*[52] as authority for its position. In *deGive* the seller, deGive, had sold real property to O'Connor under a land sales contract. O'Connor then mortgaged his interest as security for two loans received from a mortgage company. Later, he conveyed his interest back to deGive. A successor to the mortgage company sued deGive to try to foreclose on the mortgage. The district court of appeals reversed the trial court's summary decree for deGive. In doing so, it stated that O'Connor's conveyance of his interest back to deGive could not cut off the mortgage company's interest. It also defined the mortgage company's rights in a paragraph, quoted by the *Shindledecker* court, in which it said that the mortgagee had the right to complete the purchase if the mortgagor refused to do so, and that enforceability of the mortgage depended on keeping the contract in force by performing its terms.[53]

In applying the *deGive* reasoning to this case, the *Shindledecker* court recognized Shindledecker's right to assume the Savages' position under the contract. The court then held that Shindledecker's rights must yield to those of the subsequent purchasers of the property. The court reasoned that the mortgagee must protect his interest by providing adequate notice to the original seller and found that Shindledecker's recording of the mortgage was not adequate notice.[54] The court further reasoned that the equities favored the Jacquezes, as subsequent purchasers of the property.[55]

The *Shindledecker* court found that the mortgagee of an equitable interest must protect his lien by giving actual notice to the sellers. This

---

Owner in the event that the said Purchaser defaults as hereinabove set forth, and remains in default for a period of ___ days after written demand for payment as provided for in paragraph 8.

Real Estate Contract—Form 103 (Revised 7-76). This contract, obtained from a stationery store, is merely representative of a standard real estate contract. Similar form contracts are available from the Realtors Association of New Mexico.

50. 96 N.M. at 44, 627 P.2d at 1243.

51. *Id.*

52. 177 So. 2d 741 (Fla. Dist. Ct. App. 1965).

53. *Id.* at 746; 96 N.M. at 44, 627 P.2d at 1243.

54. See *infra* text accompanying notes 56–71, regarding the court's requirement of actual notice. Although the court never explicitly said that Shindledecker failed to give adequate notice, such a conclusion is implied in the rationale.

55. 96 N.M. at 44, 627 P.2d at 1243.

enables the seller to arrange for an assumption of the contract by a third party, if the original buyer defaults or refuses to continue performance under its terms. The court expressly rejected the argument that recording serves as notice[56] when it stated that, "[r]ecording the mortgage does not give the vendor constructive notice such as to require the vendor to notify the mortgagee of his intent to retake the property."[57]

2. Rights must yield

a. failure to give adequate notice

The *Shindledecker* court did not give its reasoning behind requiring actual notice rather than constructive notice. However, the New Mexico Supreme Court's rationale in *Romero v. Sanchez*,[58] a case not cited in *Shindledecker*, may provide an answer. The *Romero* court held that the recording of an instrument is constructive notice to subsequent purchasers and encumbrancers only and does not affect prior parties. In *Romero*, the Romeros executed a deed to the Sanchezes, who agreed to buy the land in question. Fifteen years later, after the Sanchezes had paid only $400 of the total agreed price of $10,000, the Romeros sued to set aside the deed on the basis of fraud. The Romeros alleged that the Sanchezes defrauded them by assuring them that they had to execute the deed for tax purposes, but that the deed could not and would not be recorded, but by then going ahead and recording the deed. At trial, the Sanchezes successfully moved for summary judgment on the basis that the statute of limitations had run since the date of recording, which is notice to all the world. The Romeros argued that the fraud limitation should be based on actual discovery. The New Mexico Supreme Court agreed and said the purpose of the recording statutes was to inform those persons who are bound to check the records, and not to be a haven for those who would commit fraud against those who, because they were earlier in the chain of title, had no reason to check the records.[59]

The *Romero* reasoning that recording of an instrument is constructive notice to subsequent purchasers and encumbrancers only and does not affect prior parties was similar to the reasoning underlying *Kendrick v. Davis*,[60] the Washington case the *Shindledecker* court cited for its re-

56. The trial court record showed that the second mortgage was recorded in this case. Record of Proceedings at 47, *Shindledecker v. Savage*, 96 N.M. 42, 627 P.2d 1241 (1981) [hereinafter cited as Record] (on file at the University of New Mexico law library).

57. 96 N.M. at 44, 627 P.2d at 1243.

58. 83 N.M. 358, 492 P.2d 140 (1971).

59. *Id.* at 359–62, 492 P.2d at 141–44.

60. 75 Wash. 2d 456, 452 P.2d 222 (1969).

quirement of actual notice. The *Kendrick* court reasoned that "[t]he recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument. The recording of an instrument does not constitute notice to antecedents in the chain of title."[61] In *Kendrick,* plaintiff Kendrick, the personal representative of the deceased seller under a real estate contract, sought to quiet title and regain possession of the property involved after default by defendant Davis. Davis had mortgaged his interest to a finance company. When the finance company was named defendant, it tendered to the court the amount due on the contract, showing it was not only willing but also able to complete the contract on which Davis had defaulted. The finance company had recorded the instrument with which Davis transferred his interest. The trial court removed Davis from the contract because of the default and inserted the finance company, which held his interest, to take his place, thus denying possession to Kendrick. In reversing that judgment and giving Kendrick the property, the *Kendrick* court held that the finance company, holder of a recorded second lien on a real estate contract, was not entitled to possession after the buyer's default because it had failed to give the seller actual notice of its interest.[62]

The reasoning underlying *Kendrick* was nominally the same as that underlying *Romero:* that recording is good as constructive notice only to subsequent parties. Despite the similarity, the *Shindledecker* court neither cited nor relied upon the *Romero* case. The reason the court failed to cite *Romero* is unclear. The omission may be because the *Kendrick* decision dealt directly with second liens on real estate contracts, while the *Romero* case dealt with fraud.

It is also possible that the *Shindledecker* court considered notice to be a minor issue because Taylor, the original vendor, was not a party to the suit. At trial, Shindledecker argued that the Savages and Taylor had agreed that Shindledecker could assume the real estate contract for satisfaction of the debt and the second mortgage. Proof of such an agreement would go far toward proving Shindledecker's interest. The court noted that because Taylor was not a party to the lawsuit, it could not grant the relief Shindledecker might otherwise be due from Taylor.[63] Thus, the special facts of the case, that the original seller was not a party and innocent purchasers were involved, seem to have greatly influenced the court's decision.

Whatever the *Shindledecker* court's reasons for citing *Kendrick,* the use of that decision seems surprising because several commentators have criticized the *Kendrick* case and its holding. One commentator suggested

61. *Id.* at ___, 452 P.2d at 228.

62. *Id.* at ___, 452 P.2d at 224–27.

63. 96 N.M. at 43, 627 P.2d at 1242. Taylor had moved to Missouri and resisted several requests to return for the suit. Transcript at 19–22.

that the decision could open the door to fraudulent schemes, such as a seller's setting up a strawman buyer who would mortgage his interest, default, allow the seller to exercise the forfeiture clause, and leave the second lienholder with nothing, even if he had recorded his lien instrument.[64] This criticism is not well taken, however, because both the *Kendrick* and *Shindledecker* decisions protect against such a scheme as long as actual notice is given. If the mortgagee gives actual notice to the seller, the seller is protected by having an opportunity to take over the contract if the buyer defaults. In addition, the *Shindledecker* court would require the mortgagee to use one of several available contractual devices to insure that he receives both notice of a breach by the buyer and the opportunity to protect his interests.[65] The court did not specify what devices it had in mind, but the most logical one would be for the mortgagee to have the seller sign any lien instruments executed on the property. This would protect a mortgagee's interest against any strawman scheme because his lien would be upheld in court under the *Shindledecker* and *Kendrick* decisions.

Another commentator argued that actual notice should not be the rule because when a seller seeks forfeiture he usually hires a lawyer. Thus, he should be held to the knowledge a lawyer would ordinarily provide, that of constructive notice and a search of the records.[66] The commentator failed to note, however, that while mortgages are historically based on property law, real estate contracts are primarily based on contract law. Contracting parties can, and usually do, operate without lawyers as long as the contracts are clear and easy to follow. While the language of the typical real estate contract may be hard to understand at first, once the provisions are explained they are clear and easily followed. Courts almost always encourage freedom of contract and so the parties in a real estate contract should be free to follow their instrument without the necessity of a lawyer.[67]

The same point blunts the criticism set forth by the dissenting judge in *Kendrick,* who criticized the majority opinion because it "ignores the practicalities of our time and the importance of a title search in all real-estate transactions."[68] The dissent in *Kendrick* ignores the situation under a real estate contract, where forfeiture has no effect on the seller, who always retains legal title in himself. Therefore, a title search by the seller

64. Note, *Recorded Interests in Real Estate—Notice to the "Whole World" Except. . . . ,* 5 Gonz. L. Rev. 289, 300 (1970).

65. 96 N.M. at 44, 627 P.2d at 1243.

66. Note, *Mortgages—Mortgage of a Vendee's Interest in an Installment Land Contract—Mortgagee's Rights Upon Default,* 43 Mo. L. Rev. 371, 374 (1978).

67. The *Bishop* court, as noted earlier, recognized this aspect when it stated that it would not rewrite a contract into which the parties had freely entered. *See supra* text accompanying notes 38–41.

68. 75 Wash. 2d at ___, 452 P.2d at 229.

would not be necessary in ordinary real estate contract transactions unless a second mortgage is taken under such a contract.

The *Shindledecker* court's reliance on *Kendrick* is not so troubling for the above-mentioned criticisms as it is for the reasoning underlying the *Kendrick* holding. The *Shindledecker* court did not give its reasons for holding that actual notice is required, but the *Kendrick* rationale is that constructive notice should apply not to antecedents in the chain of title, but only to subsequent purchasers. In the *Shindledecker* case, however, the defendants, the Jacquezes, were subsequent purchasers,[69] and were not antecedents in the chain of title. It is not clear why actual notice should be required in such a case. The *Shindledecker* court also stated that a title search would not have revealed the second mortgage to the Jacquezes. This statement is inconsistent with the district court's findings that the second mortgage was recorded.[70] If the lower court's finding is correct, a proper title search should have revealed the existence of a second mortgage, and the Jacquezes should have been charged with the knowledge a proper title search would have provided. In addition, the *Shindledecker* court went against the prevailing position that a seller must notify a buyer's mortgagee before declaring a forfeiture.[71]

It may be that the *Shindledecker* court was swayed by the equities in the case, although the *Shindledecker* court failed to give its reasoning for requiring actual notice. The *Kendrick* reasoning appears to be inapplicable to the *Shindledecker* facts. These shortcomings, along with the court's reliance on the heavily criticized *Kendrick* holding, and its failure to require proper title searches by the subsequent purchasers or the original seller all seem to imply that the *Shindledecker* decision probably depended more on the equities than on the law of actual or constructive notice.

b. equities

In the last substantive paragraph of the *Shindledecker* opinion, the court considered whether the equities in the case favored Shindledecker over the subsequent purchasers. Shindledecker argued that they favored enforcement of his lien. The court, however, said the equities favored the Jacquezes, the innocent purchasers. The court said Shindledecker

69. 96 N.M. at 43, 627 P.2d at 1242.

70. Record at 47.

71. *See, e.g.*, Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924). In *Stannard*, defendant Marboe had sold some property to a third party under a land sales contract. That buyer mortgaged his interest to Stannard, who recorded his instrument. Later the buyer defaulted, and Marboe took back the property without notifying Stannard. Stannard then sued, and the Minnesota Supreme Court found that the seller was required to notify Stannard before foreclosure so that Stannard could exercise his rights to take up the contract.

could have taken the necessary steps to put Taylor on notice to protect against a default, but that the Jacquezes did not know of any agreements among the other three principals and a title search would have revealed nothing to indicate possible defects in their title.[72] Thus, the decision clearly favors a *bona fide* purchaser over the holder of a second lien. The *Shindledecker* court did not cite to any cases for protection of such purchasers, possibly because *Shindledecker* is the first New Mexico case concerning protection of *bona fide* purchasers against previous liens. Other New Mexico cases dealing with *bona fide* purchasers concern mainly the validity and recording of deeds rather than lien instruments, and the most typical and extensive is *Mosley v. Magnolia Petroleum Co.*[73] In *Mosley,* plaintiff Mosley and others sought to quiet title to an interest in the minerals under a tract of land and to cancel deeds purporting to transfer those mineral interests. Mosley claimed that when he originally conveyed part of his mineral interest, the purchaser somehow got the deed from the escrow agent and changed it to convey the entire mineral interest. The petroleum company said that Mosley later learned of the altered deed, which was recorded, and should have corrected the problem so that in any later conveyances purchasers knew that not all the mineral rights were being conveyed.[74] The company claimed that it was a *bona fide* purchaser. The *Mosley* court, however, held that the company was not a purchaser and had no semblance of title because the deed was void. It added that the application of the doctrine of *bona fide* purchasers for value without notice is limited to parties who purchase legal title to property without notice of outstanding equities, or knowledge of facts that charge them with such notice.[75] Otherwise, the court said, the doctrine of "buyer beware" applies and the burden of securing good title is on the purchaser.[76] Therefore, the authority in New Mexico puts the burden on the purchaser, but the doctrine of *bona fide* purchaser acts as a shield by which the purchaser of a legal title may protect himself against the holder of an equity interest.[77]

Apparently this reasoning can apply to the *Shindledecker* case. Although Shindledecker's lien instrument was recorded and was not fraudulent, as was the deed in *Mosley,* the Jacquezes were later innocent purchasers who bought legal title which could be enforced against Shin-

72. 96 N.M. at 44, 627 P.2d at 1243.
73. 45 N.M. 230, 114 P.2d 740 (1941).
74. *Id.* at 236–40, 114 P.2d at 746–50.
75. *Id.* at 250, 114 P.2d at 760.
76. *Id.* at 245, 114 P.2d at 755.
77. *Id.* at 251, 114 P.2d at 761.

dledecker's equitable claim. In addition, the *Shindledecker* court said a title search would have revealed nothing to indicate possible defects in the Jacquezes' title.[78]

Other aspects also seem to make the equities favor the Jacquezes. For example, Shindledecker had a valid judgment against the Savages for the debts owned him.[79] He won the judgment in district court, and that part of the decision was not appealed. The Savages were parties to the suit and apparently were available to Shindledecker for execution on the judgment. The court seemed to see no difficulty in Shindledecker's collecting on the judgment. Perhaps the New Mexico Supreme Court thought it would be more fair to leave Shindledecker with his judgment and the Jacquezes with their home than to give Shindledecker both the judgment, which was not appealed, and the property.

In addition, the court noted that no one made any payments on the contract from the time the Savages gave up their rights to the time Taylor sold the property,[80] a period of more than two months.[81] Therefore, Shindledecker made no payments on the contract, although, as the court noted earlier, he was required to keep the contract in force by the subsequent performance of its terms to maintain the enforceability of his lien.[82]

Furthermore, the record indicates that certain considerations not expressed in the opinion may have been essential to the court's decision, especially considering the equities. For instance, the court may have decided and left unsaid that Shindledecker's real complaint was with Taylor, the original seller. The record suggests that Taylor had actual knowledge of Shindledecker's interest and that the two had talked about it both before and after the Savages' release of the special warranty deed.[83] Taylor's failure to appear in court, however, made the matter impossible to litigate in this case.[84]

Therefore, although the *Shindledecker* court dealt with the equities in only one paragraph, other aspects of the opinion and suggestions in the record show that the decision probably hinged on the equities of the case. Assuming that it did, then the holding of the case that the holder of a lien on a buyer's equitable interest in a real estate contract must protect his interest by giving actual notice to the seller would be limited. It may

78. 96 N.M. at 44, 627 P.2d at 1243.
79. *Id.* at 42, 627 P.2d at 1241.
80. *Id.* at 43, 627 P.2d at 1242.
81. Transcript at 33.
82. 96 N.M. at 44, 627 P.2d at 1243 (citing First Mortgage Corporation of Stuart v. deGive, 177 So. 2d at 746).
83. Transcript at 23–33.
84. 96 N.M. at 43, 627 P.2d at 1242. Taylor had moved to Missouri and resisted several requests to return for the suit. Transcript at 19–22.

possibly apply only in the case of subsequent, *bona fide* purchasers, and it may be that it will only apply when the original seller is not a party.

CONCLUSION

The *Shindledecker* court held that the buyer under a real estate contract has a mortgageable interest in his equity. It also held that a holder of a lien on that equitable interest does not protect his interest by recording the lien instrument, commonly called a "second mortgage," but instead must use a contractual device to give the original seller actual notice of the second lien. The holding that a buyer under a real estate contract has a mortgageable interest followed the majority position and served merely to make it clear in New Mexico that such an interest would be recognized as mortgageable, as it is recognized in most other jurisdictions. The *Shindledecker* court also followed the majority when it said that the mortgageable interest is limited by the buyer's interest, and that rather than a lien on a fee the second lienholder has a lien on an equitable interest, and the enforceability of his interest depends on keeping the contract in force by continued performance of its terms. The requirement for actual notice seems to go against the idea of recording as "notice to all the world," and contradicts the majority position that the seller in a real estate contract is required to search the record and notify any interest holders before foreclosing. The *Shindledecker* holding may be limited, however, in that the court did not give its reason for requiring actual notice and by the special facts of the case.

WILLIAM M. CASEY