

QUESTION 2

Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Blackacre is located in a jurisdiction with a race-notice recording statute.

Without Bob's knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Amy and Bob then sold all of their interest in Blackacre by a quitclaim deed to David, who recorded the deed. Shortly thereafter, Cathy recorded her deed.

David entered into a valid 15-year lease of Blackacre with Ellen. The lease included a promise by Ellen, on behalf of herself, her assigns, and successors in interest, to (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Ellen recorded the lease.

Five years later, Ellen transferred all of her remaining interest in Blackacre to Fred. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike.

David has sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre.

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred? Discuss.
2. Is David likely to prevail in his suit against Ellen and Fred? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

At common law, there were no recording statutes and the rule was that the first in time prevailed. Under this jurisdiction, there is a race-notice statute that will govern the facts of this case. If the statute does not apply, then the common law does. A race-notice statute provides that any subsequent purchaser of property will take if they are a bona fide purchaser (BFP) and recorded first. To be a BFP, a party must pay value and take without notice of any prior recordings that may affect their title to the property. Notice can be by: (1) actual notice; (2) constructive notice; or (3) inquiry notice. Actual notice is that the party knew there was another party with a claim on the property. Constructive notice is when a recording in the grantor-grantee index gives notice to a party that there are other parties claiming interest to the land. Lastly, inquiry notice is when the party is given facts that there may be other possessors to the property and that party has a duty to inquire further (i.e., if they see a house built on the land with occupants, that party has a duty to inquire why they are on the land).

A. Cathy

A joint tenancy is created with a right of survivorship when the four unities are met: time, title, instrument and possession. In other words, the parties must acquire their joint tenancy at the same time, with the same amount of title, in the same instrument and each have the right to possess the entire land. The right of survivorship allows that when one of the joint tenants die, the entire estate goes to the surviving joint party. However, if the joint tenancy is severed, the parties become tenants in common and the right of survivorship no longer exists. The joint tenancy can be severed by a unilateral conveyance of one of the joint tenants to another party.

Here, Amy and Bob owned the land in fee simple as joint tenants with the right of survivorship. The facts do not give details as to if the four unities of time, title, instrument and possession were met. However, the facts assume that these elements

were met. As such, Amy and Bob owned Blackacre as joint tenants with the right of survivorship to begin with. Amy thereafter gifted her interest to Cathy. This bequest severed the joint tenancy between Amy and Bob. At this point in time, Bob and Cathy were then owners to Blackacre as tenants in common. However, as will be discussed in the following section, because Cathy failed to record her deed, David will take Blackacre under the recording statute and Cathy has no interest in Blackacre.

B. David

As mentioned, under the recording statute in this jurisdiction, a subsequent purchaser will take if they are a BFP and record their interest first. Amy and Bob sold all of Blackacre to David. Although Amy no longer had any interest in Blackacre because she had conveyed her interest to Cathy, David was unaware of that fact. David was a BFP as required under the statute. First, he paid value for the property. And secondly, based on the facts, he did not have knowledge about Cathy's conveyance. There are no facts to indicate that he had actual knowledge of the conveyance to Cathy. Additionally, David did not have constructive notice of the conveyance to Cathy. A BFP only has a duty to check the grantor-grantee index when the conveyance is made to him. He does not have to subsequently check the index for good title. Therefore, when he checked the index before accepting the property, there was no notice of Cathy's deed. Lastly, David did not have inquiry notice. It doesn't appear that Cathy lived on the land or made any assertions of title over the land. As such, David qualified as BFP because he took without notice and paid value for the land. Also, to prevail under a race-notice statute, the subsequent purchaser must record. Here, David recorded his deed promptly. As a result, David's interest in the land is superior to Cathy's.

C. Ellen

David had good title to the property as discussed above and therefore, was free to do what he wanted with the land. He subsequently leased the property to Ellen. Ellen is a BFP under the recording statutes as well. She is paying value for the lease through rent payments and took without notice of Cathy's interest. Similar to David, there is no actual or inquiry notice for the same reasons as stated above. Additionally, she just not

have constructive notice. Although Cathy has now recorded the deed, it is not within the chain of title that Ellen would have to search. Even if Ellen did have notice of Cathy's interest, she would be protected by the Shelter Doctrine, which allows subsequent parties to assume BFP status from the prior conveyance, even if that purchaser did not have BFP status. Here, David was a BFP and recorded his deed; thus, Ellen is a BFP under David anyway.

However, David's conveyance to Ellen was not a fee simple, but rather, a lease for a term of 15 years. Thus, by the terms of the lease, Ellen has a possessory interest in the property for the next 15 years. At the time of the lease, she was in privity of contract with David (through the lease) and privity of estate with David (by occupying the land).

D. Fred

Parties are generally free to assign their interests under a contract or lease to another party. An assignment is where a party gives the remaining interest under the lease to a subsequent party. Alternatively, a sublease is where a party gives less than the full interest left on the lease. Thus, the courts are to look at the actual interest conveyed and not what the parties might have labeled it.

The lease between David and Ellen did not contain an anti-assignment clause. Rather, the lease applied to Ellen, her assigns, and successors in land. Thus, an assignment of Ellen's interest was valid under the lease. (Even if it wasn't, David would have likely waived the anti-assignment provision because he continued to accept rent from Fred). Additionally, the facts state that Ellen transferred "all her remaining interest in Blackacre to Fred." Therefore, it was an assignment, since all her interest, the remaining 10 years on the lease, was transferred to Fred. As such, Fred assumed Ellen's interest in the land. As such, Fred is lawful tenant with possessory interest in Blackacre for the next ten years.

E. Conclusion

Because this is a race-notice jurisdiction and the statute applies under the facts of this case, David has superior title to the land. Cathy does not have any interest in the land because she failed to record her interest. David conveyed his possessory interest

to Ellen, who assigned her interest to Fred. As such, David holds title in fee simple to Blackacre and Fred has possessory interest in Blackacre for the next ten years under the terms of the lease between David and Ellen.

2. David v. Ellen & Fred

As mentioned above, there was a valid assignment of Ellen's interest to Fred under the lease. Ellen, as the assignor, remains in privity of contract with David. Fred, as the assignee, remains in privity of estate with David. The terms of the lease between David and Ellen contained two covenants: Ellen, on behalf of herself, assigns, and successors was to: (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. Unfortunately, lightning struck the property and destroyed a building on the property. Thus, the issue is whether David can prevail on a damages claim based on these covenants against Ellen and Fred?

A. Ellen

As mentioned, Ellen remains in privity of contract with David under the terms of the lease. A novation occurs when two parties agree that one party will no longer be held liable under the terms of the contract.

Under the facts, Ellen and David entered into a 15-year lease agreement. Five years into the lease, Ellen assigned her interest to Fred. There does not appear to be any agreement between David and Fred relieving Ellen of her liability under the lease. As such, no novation has occurred. Because David and Ellen are still in privity of contract, David can bring claims against Ellen for damages for breach of the covenant regarding hazard insurance for Blackacre.

B. Fred

For a covenant to run with the land and bind successors in interests, certain requirements must be met depending on whether the interest in the burdened (servient) or benefited (dominant) estate is being transferred. The servient estate is the estate that incurs the burden of the covenant, while the dominant estate is the one that

benefits from the covenant. If the covenant is on the servient estate, the covenant will run with the land if: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; (3) the servient estate has notice of the covenant; (4) there exists horizontal privity; and (5) vertical privity.

Here, the covenant burdens the lessee estate, since Ellen and her successors/assigns are required to maintain hazard insurance and use that insurance to repair the damages. Thus, David will have to show the above five elements in order to be able to collect damages from Fred.

i. Intent

The parties to the original agreement must have intended that the covenant be perpetual and continue to bind successors in interest of the land. Here, the parties specifically included in the written lease agreement that "Ellen, on behalf of herself, assigns, and successors in interest" will maintain hazard insurance and use the proceeds of such insurance to fix any damage caused by any hazards. Therefore, the express language of the parties in the lease provide that they intended the covenant to bind all successors in interest.

ii. Touch and Concern the Land

To bind successors in interest, the covenants must also touch and concern the land. Courts have held that a covenant touches and concerns the land if it conveys a benefit onto the land. For example, the payment of rent is a sufficient covenant that touches and concerns the land. Here, the covenant is to provide insurance to protect the land in case of damage and to repair the land in the event that such hazardous damage does occur. This is for the benefit of the land to maintain the premises and therefore, it touches and concerns the land.

iii. Notice

The successor in interest must have notice of the covenant in order to be bound by the terms of it. As mentioned above, there are three types of notice. Here, Fred had constructive notice because Ellen recorded the deed in the grantor-grantee index.

Therefore, Fred would be able to know the terms of the lease because it was within the chain of title and will be deemed to have constructive notice of the covenants.

iv. Horizontal Privity

Horizontal privity must exist between the original parties to the covenant, such as grantor-grantee or lessor-lessee. A covenant agreement alone is insufficient to establish horizontal privity. Here, David and Ellen have horizontal privity as their relationship was that of lessor-lessee. Thus, horizontal privity exists.

v. Vertical Privity

Lastly, vertical privity must exist between the successor in interest and the previous owner of the servient estate. Here, Ellen conveyed the remainder of her interest on the lease to Fred. Therefore, there is a vertical privity between Ellen and Fred.

Thus, all five elements are met for a covenant to run with the land and David may hold Fred liable for damages for the breach of the covenants.

C. Conclusion

David may hold Ellen liable for damages for breach of the two covenants because she is in privity of estate with David. Additionally, David will be able to hold Fred liable for damages because the two covenants run with the land and Fred had notice of such covenants.

QUESTION 2: SELECTED ANSWER B

- 1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and Fred.**

Classify the Interest: Joint Tenants with a Right of Survivorship

A joint tenancy is a concurrent interest in land in which case at least two individuals own an undivided interest in the whole of the property. A joint tenancy is created with express language that the tenancy carry with it the right of survivorship. The right of survivorship means that when one joint tenant dies the other co-tenants take the deceased tenant's interest in the property. A joint tenancy is created when four unities are present at the time of creation. These unities are the unities of time, title, interest, and possession.

Here, facts indicate that Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Thus, the original property relationship was that of a joint tenancy because the right of survivorship was expressly provided for.

Severance of the Joint Tenancy

A joint tenancy is severed whenever any one of the four unities of time, title, interest, and possession is disturbed. When one of the four unities of a joint tenancy is disturbed a tenancy in common results and the right of survivorship is extinguished. In this event the tenants in common own a undivided interest in the whole of the property which is then freely alienable.

Here, the facts indicate that Amy gifted her interest in Blackacre to Cathy by deed. By gifting her interest in the joint tenancy, Amy disturbed the four unities, particularly the unity of title. As indicated above, when a joint tenancy is severed a tenancy in common is created. Thus, since the joint tenancy was severed, at this particular point in the facts

Amy held no interest, and Cathy and Bob held the property as tenants in common. The right of survivorship was extinguished and both Cathy and Bob had an undivided interest in the whole of the property.

Amy's Conveyance to David / Recording the Interest / Recording Statute

The facts indicate that after Amy gifted her interest in Blackacre to Cathy by deed she and Bob sold all of their interest in Blackacre to David. These facts implicate the rules for the relevant recording statute.

In a race-notice jurisdiction, a subsequent bona fide purchaser (BFP) is protected by the recording statute provided that he takes without notice and is the first to record his interest in the deed. There are three different kinds of notice. There is actual notice, record notice, and inquiry notice. Actual notice refers to the extent to which a BFP actually knows that someone else claims an interest in the land. Record notice refers to the extent to which the BFP is notified by researching the record of title. And inquiry notice refers to the extent to which a BFP inspects the property and discovers someone else asserting a claim to the property. Additionally, it should be noted that the recording statutes are designed to protect subsequent BFP's and not gratuitous grantees of real property.

Here, the facts indicate that Amy and Bob sold all of their interest in Blackacre to David after Amy gifted her interest to Cathy by deed. The facts also indicate that David recorded his deed before Cathy recorded her deed. Thus, for the recording statute to apply and for David to take title to the property he must be a subsequent BFP who took without notice and who recorded first. The facts indicate that David did in fact record before Cathy recorded. Thus, the "recorded first" element is satisfied. The next question that must be determined is whether David had notice of Amy's interest. There is nothing in the facts which says that David had actual notice of Cathy's interest. Additionally, although the facts do not indicate that David inspected the property, the facts also do not indicate that Cathy occupied the property so as to put David on notice

had he inspected the property. The real question is whether David had record notice. Determining record notice is a two-step process. First, the BFP must go to county recorder's office, locate the particular property and construct the chain of title. The chain of title can be constructed by looking first at the grantee index and then building the chain of title back in time. Next, the BFP must adverse each link of the chain. This is done by looking at the Grantor index and following the chain of title until the BFP reaches his interest. Here, David will not discover Cathy's interest in Blackacre. Cathy recorded her deed too late. By recording her deed after David recorded his deed David would not be put on notice as to Cathy's interest in Blackacre. Also, although not directly relevant, it should be noted that Cathy, as a gratuitous grantee, is not likely to receive any protection under the recording statute.

On balance, David obtained lawful title to Blackacre as a subsequent BFP who took without notice and was the first to record his interest.

2. Is David Likely to Prevail in his Suit Against Ellen and Fred

The Lease with Ellen

A tenancy for years is a specific type of tenancy that has a specific start date and a specific end date. A tenancy for years need not be for a terms of actual years but rather only needs a specific starting and ending date. A tenancy for years is terminated upon the end of the specified date.

Here, the facts indicate that David entered into a valid 15-year lease of Blackacre with Ellen. Since the lease has a specific start date, and a specific end date, it is likely considered a tenancy for years.

Ellen's Transfer to Fred

A sublease is a legal relationship in a leased property that arises when the tenant conveys out less than his entire interest under the lease. In this circumstance, sublessor has privity of estate with the lessor. An assignment occurs when the lessor conveys out all of his durational interest under the lease. In the case of an assignment the original lessee is no longer in privity of estate with the lessor but depending on the circumstances may still remain in privity of contract with the lessor. Privity of estate means that two individuals share an interest through their relationship to a leased property and privity of contract is a contract obligation between two contracting parties.

Here, the facts indicate that five years into the lease, Ellen transferred all of her remaining interest in Blackacre to Fred. Thus, because all of the remaining interest was transferred as opposed to only some or part of the interest Ellen executed a valid assignment. The results of this assignment is Fred is not in privity of estate with David. However, because Ellen was the original contracting party with David, she remains in privity of contract with David.

Breach of the Covenant: Ellen

A restrictive covenant is a written promise with respect to land either to take an affirmative action or to refrain from taking action. Liability for the restrictive covenant may attach to parties that are either in privity of contract with the lessor or privity of estate. In the event of privity of contract, the contracting party remains liable under a contract theory of recovery. If an express contract between the lessor and the lessee is breached by failing to satisfy the written covenant then the landlord may sue to evict the tenant and/ or assert a claim of money damages.

Here, as noted above, Ellen is in privity of contract with David. She is the original party under the lease, who signed the lease and who had knowledge of the covenants in the lease. The fact that she assigned her interest to Fred means only that she is not under privity of estate with David, but she is still liable under privity of contract. The lease included a promise by Ellen to obtain hazard insurance and to use any payments for

damage to the property to repair such damage. Ellen breached the lease covenant because she never obtained hazard insurance covering Blackacre and because a building on the property was destroyed by fire.

Thus, because Ellen is in privity of contract with David, David can elect to sue Ellen for breach of the express contractual covenant.

Breach of the Covenant: Fred

Restrictive Covenant

A restrictive covenant is a written promise with respect to a particular piece of property to do or to refrain from doing something on that particular property. Restrictive covenants run with the land to successive assignees if the covenant makes the land more beneficial or useful. In order for the burden of a restrictive covenant to apply there must be intent and notice, the covenant must touch and concern the land, there must be vertical privity and horizontal privity. In order for the benefit of a restrictive covenant to apply there need only be the elements of intent, touch and concern and vertical privity. Vertical privity is present when the successor in interest has the entire interest in the property. Horizontal privity refers to the fact that the original parties to the agreement had a mutual interest in the property outside of the covenant agreement.

Here, the facts indicate that the lease expressly stated that the covenant to obtain hazard insurance and to use its proceeds would apply to "Ellen, on behalf of herself, her assigns, and successors' interest." Thus, because there was intent that the covenant apply to subsequent parties, the intent element is met. The facts also indicate that Ellen recorded the lease and that the covenants were expressly written in the lease. Thus, it appears that Fred had notice of the lease provisions. The next element that must be satisfied is the touch and concern element. As discussed above, in order for the covenant to touch and concern the property it must make it more beneficial or more useful. Here, the covenant was that Ellen and her assigns obtain hazard insurance which would cover any damage to the property. If a particular piece of property is

covered by insurance, then it is more likely than not to be benefitted and thus, as a result will be more valuable. As noted above, vertical privity must also be satisfied. Here, Ellen conveyed out all of her remaining interest on Blackacre. Additionally, there is nothing in the facts to suggest that anyone else other than Fred not presently occupies the property. Thus, vertical privity is satisfied. Finally, there must be horizontal privity. David owns the property outright. Additionally, David and Ellen had no interest in the property outside of the lease. Thus, horizontal privity is satisfied.

Based on the foregoing analysis, it appears that the burden of the restrictive covenant to obtain hazard insurance does run to Fred, a party in privity of estate with David. Thus, because Fred failed to obtain insurance and because the property was destroyed implicating the need for the insurance, David is likely to prevail in his suit against Fred.