

850.45 DEEDS - ACTION TO SET ASIDE - DEFENSE OF INNOCENT PURCHASER.¹

The (state number) issue reads:

"Did the [defendant] [defendant's predecessor in title]² acquire (name property) for value and without public record notice of (state transaction rendering title voidable)?" You are to answer this issue only if you have answered the (state number) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant.³ This means that the defendant must prove, by the greater weight of the evidence, two things:

First, that the [defendant] [defendant's predecessor in title] was a purchaser for value. A "purchaser for value" acquires title to property by exchanging something valuable for it.⁴ (A person who acquires property by [gift] [inheritance] is not a purchaser for value.)⁵ (A person who acquires property for only a nominal consideration is not a purchaser for value.)⁶ (A person who lends money and takes back a deed of trust on land is a purchaser for value.)⁷

And Second, that at the time the [defendant] [defendant's predecessor in title] acquired (name property), there was no public record notice of the (state transaction rendering title voidable).⁸ "Public record notice" means that the public records which affect the title to real property are sufficient to put a careful title examiner on notice that the (state transaction rendering title voidable) has occurred.⁹ (Members of the jury, I instruct you that (state type of record, e.g., grantor's index) is a public record affecting title to real property.) It does not matter that the purchaser did not examine the record title. The purchaser will be held responsible for what the purchaser would have learned had the

purchaser carefully examined the public records which affect title.¹⁰

Finally, as to the (state number) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the [defendant] [defendant's predecessor in title] acquired (name property) for value and without public record notice of (state transaction rendering title voidable), then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

1. This defense is not applicable where the deed is void rather than voidable. *Swan Quarter Farms, Inc. v. Spencer*, 133 N.C. App. 106, 112, 514 S.E.2d 735, 739 (1999). In addition, this defense would not apply where the alleged purchaser participated in or had such complicity in the fraud as to raise an estoppel. *Bourne v. Lay & Co.*, 264 N.C. 33, 37, 140 S.E.2d 769, 772 (1965). However, where the deed is merely voidable, a purchaser for value without notice prevails over the party who seeks to set aside the deed on the basis of fraud, duress or the like. *Id.*; *Johnson v. Brown*, 71 N.C. App. 660, 668, 323 S.E.2d 389, 395 (1984); N.C. Gen. Stat. § 47-18.

2. Even if the defendant is not a purchaser for value without notice, if the predecessor-in-title was, the defendant is nonetheless "protected by the former's want of notice and takes free of the equities." *Swan Quarter Farms, Inc.*, 133 N.C. App. at 112, 514 S.E.2d at 739, citing *Morehead v. Harris*, 262 N.C. 330, 342, 137 S.E.2d 174, 185 (1964).

3. *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981); *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974); *Waters v. Pittman*, 254 N.C. 191, 118 S.E.2d 395 (1961).

4. *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915). The Supreme Court defined a purchaser for value as someone who acquires title through "a fair and reasonable price according to the common mode of dealing between buyers and sellers." *Id.* (following *Fullenwider v. Roberts*, 20 N.C. 420 (1839) (internal quotes omitted)).

5. *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979). A bankruptcy trustee, however, is deemed to be a purchaser for value. *Lynch v. Johnson*, 171 N.C. 611, 616, 89 S.E. 61, 63 (1916).

6. *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939). Something more than nominal consideration is "[a] fair and reasonable price according to the common mode of dealing between buyers and sellers." *King v. McRackan*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) (quoting *Fullenwider v. Roberts*, 20 N.C. 420 (1839)). "The party assuming to

N.C.P.I.-Civil. 850.45
DEEDS - ACTION TO SET ASIDE - DEFENSE OF INNOCENT PURCHASER.
GENERAL CIVIL VOLUME
MAY 2020

be a purchaser for a valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise. . . ." *Id.* (quoting *Worthy v. Caddell*, 76 N.C. 82 (1877)).

⁷. *Brem v. Lockhart*, 93 N.C. 191 (1885).

⁸. "Record title" includes a reference in a recorded instrument to an unrecorded instrument which, by its language, unambiguously indicates that the conveyance is subject to the unrecorded instrument. *Hardy v. Fryer*, 194 N.C. 420, 139 S.E. 1927; *Terry v. Brothers Inv. Co.*, 77 N.C. App. 1, 6, 334 S.E.2d 469, 472 (1985). "Record title" also includes such public records as would be appropriate for a competent examination, including the index to *lis pendens*. *Hill v. Pinelawn Memorial Park*, 304 N.C. 159, 282 S.E.2d 779 (1981) (actual notice of pending litigation involving a *lis pendens* is notice for purposes of defeating a party's claim).

⁹. "The law contemplates that a purchaser of land will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose." *Waters v. N.C. Phosphate Corp.*, 310 N.C. 438, 441-42, 312 S.E.2d 428, 432 (1984); *Randle v. Grady*, 224 N.C. 651, 32 S.E.2d 20 (1944); *Mass. Bond & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436 (1942); see also *Stegall v. Robinson*, 81 N.C. App. 617, 344 S.E.2d 803 (1986) (holding that title examiner should read the prior conveyances to determine that they do not contain restrictions on the property).

¹⁰. An equitable exception to the innocent purchaser for value doctrine holds that "[a]s between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior." *Wilmington Savings Fund Society, FSB v. Mortgage Electronic Registration Systems, Inc.*, ___ N.C. App. ___, ___, 829 S.E.2d 235, 238 (2019) (quoting *Union Central Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927)).