FILED
OCT 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-373 / 89-1689

THE FEDERAL LAND BANK OF OMAHA,

Plaintiff-Appellee,

vs.

153

JERRY K. FRANK and **AGNES M. FRANK**, Husband and Wife, and **RICHARD J. SCHAEFER,**

Defendants-Appellants.

Appeal from the Iowa District Court for Hancock County, Jon Stuart Scoles, Judge.

Defendants appeal a district court decree of foreclosure and judgment notwithstanding the verdict. **AFFIRMED.**

Charles C. Allen and Amanda Potterfield of Joe Johnston Law Firm, P.C., Iowa City, for appellants.

Dale L. Putnam of Putnam and Strand Law Office, Decorah, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendants appeal following a trial court decree foreclosing their interest in eighty acres in Hancock County, Iowa. On July 3, 1979, defendants-appellants Jerry Frank and Agnes Frank borrowed money from plaintiff-appellee Federal Land Bank. To secure the note defendants gave plaintiff a mortgage on eighty acres of land in Hancock County. The eighty acres encumbered by the mortgage included a forty-acre tract that was the defendants' homestead.

In April 1987 the defendants were delinquent in their payments on the note, and plaintiff filed an equity action seeking judgment on the note and foreclosure of the mortgage. The defendants answered plaintiff's petition, raised certain affirmative defenses, and filed a counterclaim alleging they had been induced into signing the promissory note by fraudulent and misleading representations. Ultimately, defendants' counterclaim was submitted to a jury, and the jury found for defendants on their counterclaim and set damages at $36,880. The plaintiff filed a motion for judgment notwithstanding the verdict. The trial court sustained the plaintiff's motion on the basis of a statute of limitations defense which the defendants contend was not timely raised.

The trial court subsequently entered a decree of foreclosure. The defendants have appealed.

The plaintiff filed a motion to dismiss this appeal, which was ordered submitted with the appeal. The plaintiff contended (1) it purchased all of defendants' rights to the counterclaim in the bankruptcy proceeding, (2) it was owner of any rights the defendants had by virtue of the counterclaim, and (3) the plaintiff was dismissing the counterclaim. Attached to the motion were purported copies of the respective orders from the bankruptcy court.

After the motion to dismiss was filed, the defendants filed a motion to strike from plaintiff's designation of the appendix certain items, including the Bill of Sale and Assignment by Trustee of its interest in the counterclaim. The plaintiff did not resist the motion. The supreme court, by a single justice, sustained the defendants' motion. The defendants have argued on appeal that we cannot consider the assignment because it is not a part of the record before us. However, the defendants in resisting the motion to dismiss attached papers from the bankruptcy court, and contended the bankruptcy court held the defendants could not have bought their claim of defense because the trustee could not sell it. The attachments show the bankruptcy court found plaintiff purchased any counterclaim rights to the nonhomestead forty acres. Plaintiff, therefore, had the right to dismiss that part of the claim. The bankruptcy court found the plaintiff did not purchase the counterclaim rights to the homestead forty

acres. Plaintiff, therefore, cannot dismiss that portion of the claim. We agree.

The defendants' first contention is the statute of limitations was not timely pled. The plaintiff does not address the defendants' contention the statute of limitation was not timely pled; rather, plaintiff relied on the contention it has dismissed the action. We, therefore, need not go beyond the ruling of the trial court in searching for a theory under which to affirm. See Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 153 (Iowa 1979).

The defense of the statute of limitations was first raised by the plaintiff in a motion to dismiss the counterclaims filed four days prior to trial on defendants' counterclaim. The trial court did not rule on the issue at that time but used it as a basis for ordering a judgment notwithstanding the verdict. The defendants do not argue the statute had not run. Rather, defendants assert the plaintiff was precluded from raising the issue because it did not do so until three days before trial. The statute of limitations is an affirmative defense which must be raised in an affirmative pleading. See Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987); State ex rel. Krupke v. Witkowski, 256 N.W.2d 216, 218 (Iowa 1977). But where it is obvious from uncontroverted facts appearing unchallenged on the face of the petition, the defense may be raised by a

motion to dismiss. Krupke, 256 N.W.2d at 218. We find no error here, nor did the trial court abuse its discretion in allowing it to be raised late in these proceedings where there were a number of amendments to pleadings before the matter came to trial. We affirm on this issue.

The defendants' second contention on appeal is that their motion for a default on the counterclaims should have been granted, and the trial court erred in denying them the opportunity to litigate the count of their amended counterclaim that alleged a cause of action in contract. Defendants cite no authority in support of these contentions, as required under Iowa R. App. P. 14(a)(3). See also Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985). We find no basis to this contention and affirm on this issue.

The defendants' last contention is the jury verdict precluded the relitigation of the issue of fraudulent misrepresentation. The defendants have not shown where this issue was raised at the trial court level. Issues not presented in the trial court may not ordinarily be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). We affirm.

AFFIRMED.