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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RENTAR INDUSTRIES, INC., Plaintiff/Defendant to Cross-Petition/Appellee, vs. **TRI-LAND, LTD.**, an Iowa corporation; **TRUCK SERVICE COMPANY**, an Iowa corporation; **FOUR STAR TRANSPORTATION, INC.**, an Iowa corporation, Defendants/Defendants to Cross-Petition/Appellants, **PRAWL ENGINEERING CORPORATION**, a Nebraska corporation, Defendant, and **AMERICAN SAVINGS COMPANY**, a Nebraska corporation, Defendant/Cross-Petitioner.	Filed September 29, 1981 1-83 2-65435

Appeal from Pottawattamie District Court - Glen M. McGee, Judge.

Defendants Tri-Land, Ltd., Truck Service Company, and Four Star Transportation, Inc., appeal from a judgment for plaintiff Rentar Industries, Inc. foreclosing a mortgage on Tri-Land's trucking facilities. AFFIRMED.

Robert J. Laubenthal of Smith, Peterson, Beckman & Willson, Council Bluffs, for defendants-appellants.

John M. Peters of Peters Law Firm, Council Bluffs, and John F. Thomas, Omaha, Nebraska, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendants Tri-Land, Ltd., Truck Service Company, and Four Star Transportation, Inc., appeal from a judgment for plaintiff Rentar Industries, Inc. foreclosing a mortgage on Tri-Land's Trucking facilities. Defendants contend that: (1) plaintiff was not the real party in interest, (2) the admission of oral testimony as to the amount due on the note violated the best evidence rule, (3) evidence of an oral contemporaneous agreement was admissible under exceptions to the parol evidence rule, and (4) plaintiff was estopped to foreclose by its delay in instituting this action. Our review of this equitable action is de novo. Iowa R. App. P. 4. We affirm.

I.

On December 23, 1975, defendant secured a $245,000.00 loan from plaintiff to finance construction of a truck service terminal. The loan was evidenced by defendants' promissory note and guaranty. Defendant gave security by executing and delivering to plaintiff a mortgage for certain real property located in Pottawattamie County, Iowa. The first monthly installment of $2,364.32 was due February 2, 1976, and defendant paid this amount on February 20, 1976. From that point on defendant was at all times at least a month late with every payment. By January 1, 1977, defendant was six months behind in payments, on that date two payments were made but no other payments were made until September 28, 1977. On August 18, 1977, plaintiff and defendants entered a written agreement to defer until the end of the loan period, the delinquent payments that were due from September 1, 1976, to August 1, 1977. Subsequent payments were to be made as they came due. Defendants' last payment was dated March 28, 1978.

On March 22, 1979, defendants' note and mortgage were assigned to Louis Viverito. Viverito sent a letter to defendants demanding payment of the sums due. When no payments were made, suit was filed on May 24, 1979, in the District Court of Pottawattamie County, Iowa. Defendants answered claiming Viverito was not the real party in interest and that the mortgage and note were still owned by Rentar, Inc. Thus on October 10, 1979, Viverito transferred his interest in defendants' mortgage back to Rentar, Inc. by quit claim deed and on October 15, 1979, Rentar filed an Amended and Substituted Petition substituting Rentar, Inc. as plaintiff in place of Viverito. In defendants' answer to the amended and substituted petition they alleged that Rentar was not the real party in interest due to the assignment made to Viverito.

The case was tried to the court on March 20, 1980. The court entered judgment on

April 17, 1980, finding as facts that the plaintiff/Kentar, Inc. was the present owner and holder of the defendants' note and mortgage; that defendants had not produced competent, relevant, or satisfactory evidence to establish any oral agreements amending, modifying, or otherwise changing the written terms of said note and mortgage; that defendants were in default; and that the total amount due plaintiff was $310,230.00 plus attorney's fees. The trial court held the mortgage should be foreclosed. Defendants then instituted this appeal.

II.

Defendants contend that the trial court erred in holding that plaintiff was the real party in interest and present owner of the note and mortgage executed on December 23, 1975, by the defendants. We affirm the trial court's finding that plaintiff was the real party in interest for the following reasons.

First, we cannot agree with defendants' contention that the quit claim deed from Viverito to plaintiff was improperly acknowledged and thus constituted incompetent evidence which should not have been admitted at trial. Whether or not the quit claim deed was properly acknowledged is not determinative of this case. The purpose of having a properly acknowledged and recorded deed is to provide constructive notice to subsequent bonafide purchasers for value. There are no bonafide purchasers for value in this case who would be misled or otherwise harmed by a defective acknowledgement. Even if the deed was not properly acknowledged it would still be valid between the parties to the deed. Slattery v. Slattery, 120 Iowa 717, 95 N.W. 201 (1903), Shanda v. Clutier State Bank, 220 Iowa 290, 260 N.W. 841 (1935). Assuming that the deed was improperly acknowledged, Gould v. Woodward, 4 Greene 82 (Iowa 1853) held that a deed which is not acknowledged may be accepted as evidence and is good between the parties.

Second, we disagree with defendants' contention that the quit claim deed from Viverito to plaintiff was not effective as an assignment of Viverito's interest in defendants' mortgage, note and guaranty. The instant case is in some respects similar to Lackender v. Morrison, 231 Iowa 899, 2 N.W.2d 286 (1942). In that case the grantee of a deed, which was subsequently determined to be for security only, filed suit claiming to be the absolute owner of the property in question. After filing suit the grantee deeded the property to a third party (i.e. transferee) who was substituted as plaintiff for the grantee. The defendant in Lackender argued that the deed from the grantee to the

transferee was not effective as an assignment of the mortgage. The court did not decide whether a deed from a mortgagee ordinarily amounts to an assignment of the mortgage but did say that it had "found no case holding that the grantee of a deed subsequently adjudged to be for security only could not, by a deed to a third party, transfer at least such interest as he had." Id. at 904, 2 N.W.2d at 289. Thus whatever interest Viverito had in the mortgage could be transferred by deed and did not require a formal assignment.

Even if only the mortgage was effectively transferred by the quit claim deed, plaintiff would still be allowed to maintain this action. In Swan v. Yaple, 35 Iowa 248, 250 (1872), it was held that if the owner and holder of a note assigned the mortgage to another party he would remain the real party in interest, but the assignee would be a trustee and also able to maintain an action to foreclose the mortgage. The court went on to say:

> It is no defense to an action, by a party holding the legal title to the cause of action, to show that another is the party beneficially interested. Cottle v. Cole & Cole, 20 Iowa, on page 486. Nor will the fact that another person is the holder of the legal title constitute a defense in an action by the party holding the beneficial interest. Id.

Even if the quit claim deed was only sufficient to make plaintiff a trustee, plaintiff would still be able to maintain an action.

Third, we disagree with defendants' contention that the cause of action was improperly split in this case. Reviewing the record de novo we find that Viverito and Rentar intended the quit claim deed to transfer all of Viverito's interest in the mortgage, note, and guaranty to Rentar. This finding is further buttressed by Viverito's acquiescence to Rentar's amended and substituted petition which substituted Rentar as plaintiff.

III.

Defendants' next contention is that the trial court erred in holding plaintiff had introduced sufficient competent evidence to prove the amount of unpaid balance due and owing from defendants to plaintiff. Defendant argues that the best evidence rule was violated when a summary sheet was introduced as evidence to prove the unpaid balance owed to plaintiff. We disagree. The best evidence rule has no application to this case because the summary sheet was never offered into evidence, it was only marked as an exhibit. The best evidence rule only applies when a party is attempting to

prove the terms of a writing, and where the terms are material. In such cases the original writing must be produced, unless it is shown to be unavailable for some reason other than a serious fault by the proponent. McCormick on Evidence § 230 at 560 (2d ed. E. Cleary 1972). The evidence introduced on the amount owed was the oral testimony of Mr. Dratt, an officer of the plaintiff corporation. The summary sheet was used only to refresh Dratt's memory. There was no existing written record that would have shown the correct amounts owed without further analysis and calculation. In order to testify as to the amount owed it was necessary for him to examine plaintiff's records of defendants' payments to ascertain on what date payments were made and calculate interest on the overdue amounts. This type of testimony was found acceptable in Gregg v. Middlestates Utilities Co., 228 Iowa 933, 944-5, 293 N.W. 66, 71-2 (1940) where the court said:

> We are not holding that it is necessary to bring into court all the slips or memoranda pertinent to any entry . . . Neither do we hold that a competent person who has examined voluminous books of accounts or records may not testify as to a tabulation or a summarized statement or a finding of some particular matter . . . But we do hold that before such testimony is offered, the books and records from which such statement is prepared or on which such testimony is based should be in evidence, or at least in court or available to the party against whom it is offered.

We conclude that Dratt's oral testimony was acceptable as evidence and not a violation of the best evidence rule. It should be noted that defendants neither introduced any evidence to prove the amount owed was different from the amount Dratt's testimony indicated was due; nor did they ever request to examine plaintiff's records.

Defendants' assertion that the summary sheet was inadmissible as hearsay is also without merit. Again we note that the summary sheet was never offered or accepted as evidence, and it was merely used to refresh the memory of the witness. While the testimony is technically hearsay, it falls under the books of account exception. The trial court has the sound legal discretion to allow an expert to testify as to a summary of what appears in the books. Berg v. Ridgway, 258 Iowa 640, 647, 140 N.W.2d 95, 100 (1966).

IV.

Defendants also claim that the trial court erred in holding that no competent evidence was produced to establish an oral agreement between defendants and plaintiff modifying or amending the written terms of the mortgage and note. Defendants allege

that there was an oral agreement between defendants and plaintiff not to foreclose the mortgage for ten years from December 23, 1975, the date of the execution of the mortgage and note. Defendants argue that evidence with regard to the alleged oral agreement is admissible under two exceptions to the parole evidence rule.

First, defendants claim evidence of the oral agreement is admissible as an aid to interpretation of the written terms of the mortgage and note. We cannot agree that this exception applies. Parol evidence is admissible under this exception only when the terms of the written agreement are ambiguous or incomplete. 30 Am. Jur. 2d Evidence, 1066 (1967). The mortgage and note clearly state that failure to make monthly payments would result in default, which would entitle plaintiff to foreclose the mortgage. Defendant is actually trying to introduce evidence to alter the express terms of the mortgage and note, thus the evidence is not admissible absent allegations of fraud, accident or mistake. Stebens v. Wilkinson, 249 Iowa 365, 372, 87 N.W.2d 16, 20 (1957). The fact that defendants entered a written agreement with plaintiff on August 18, 1977, to defer the overdue payments for the time period of September 1, 1976, to August 1, 1977, until the end of the loan period indicates that defendants were concerned about being in default and the possibility of foreclosure by plaintiff. Breach of this agreement also clearly allowed for foreclosure.

Second, defendants argue the alleged oral agreement was competent to show that delivery of the note and mortgage by defendants was conditional. While it is true that parol evidence is competent to show that a written instrument was delivered upon certain conditions, Walker v. Todd, 225 Iowa 276, 280 N.W. 512 (1938), this exception does not apply here. The condition must precede delivery and will have the effect of suspending the contract as a whole for the time being. It cannot qualify or modify the terms of the written contract. Farmers' Savings Bank v. Weeks, 209 Iowa 26, 28, 227 N.W. 508, 509 (1929). In this case the condition urged by defendants would have the effect of qualifying or modifying the unambiguous terms of the mortgage and note which specifically allow foreclosure upon default.

V.

Finally, defendants contend that the trial court erred in failing to find that plaintiff had waived, or should be estopped from exercising, its right to accelerate the entire debt and foreclose the mortgage. We disagree. While it is true that defendants were technically in default in 1976 and plaintiff did not commence its foreclosure action

until 1979, we do not find a waiver or estoppel. As previously stated, on August 18, 1977, plaintiff and defendants entered a written agreement to defer the payments which were delinquent at that date until the end of the loan period. This agreement clearly stated that plaintiff retained the right to foreclose for defaults occurring subsequent to the agreement. When the defendants again defaulted, soon after the execution of the deferral agreement, the record shows that plaintiff did demand payment and did give notice to defendants before filing the foreclosure action in district court.

> It has generally been held that a mortgagee will be deemed to have waived his right to exercise an option to accelerate the debt where he has not made an election to do so within reasonable time after the mortgagor's default . . . On the other hand, the fact that a mortgagee does not exercise his right to exercise an option to accelerate the maturity of a mortgage because of one default in regard thereto does not preclude him from exercising such option because of a subsequent default. 55 Am. Jur. 2d, Mortgages, § 338 (1971).

We find that even if plaintiff is assumed to have waived its rights to foreclose or accelerate prior defaults, this would not preclude such an action on subsequent defaults. This is especially true where, as in this case, a written demand for payment is made before the foreclosure action is instituted.

AFFIRMED.