IN THE COURT OF APPEALS OF IOWA

No. 1-307 / 90-1600

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FEDERAL SAVINGS & LOAN INSURANCE CORPORATION (FSLIC)
Receiver for Capitol Federal Savings Bank,

Plaintiff-Appellee,

vs.

JOAN GERTRUDE MUNDAY,

Defendant,

and

LEO MUNDAY,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Leo Munday appeals from the mortgage foreclosure decree which entered a deficiency judgment against him. **AFFIRMED.**

William L. Meardon of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellant.

Joseph C. Holland of Hayek, Hayek, Holland & Brown, Iowa City, for appellee.

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

DONIELSON, P.J.

On November 30, 1981, Leo Munday and Joan Gertrude Munday, who were then husband and wife, purchased the Lakewood Hills Apartment Complex located in Coralville, Iowa. They assumed the existing note and mortgage, which were held by Capitol Savings and Loan Association. The Mundays also borrowed $570,000 from Capitol, and a second mortgage was placed on the property. During the remainder of their marriage they managed the apartments.

The Mundays' marriage failed. On January 13, 1987, the district court dissolved their marriage and awarded the apartment complex and its accompanying financial obligations to Joan. Within two hours after she learned of the terms of the decree, she took over management of the apartment units from Leo.

Soon after obtaining ownership of the apartments, Joan asked Capitol to relent on the amount due under the mortgage so that she could refinance. Capitol deferred as Joan had requested. By May 1987 Capitol was experiencing financial difficulties and was placed under the protection of the Federal Savings and Loan Insurance Corporation (FSLIC), and later the Federal Deposit Insurance Corporation (FDIC), as the manager of the FSLIC Resolution Fund.

On March 24, 1988, both of the Mundays received notice that the loans were in default. The Mundays were given a deadline of May 1, 1988, to cure the defaults. These defaults were never cured.

On June 21, 1988, the FSLIC filed its petition seeking foreclosure of the notes and mortgages executed by the Mundays. As of that date the total due on the two mortgages was $1,961,075.81. The district court appointed a representative of the FSLIC as receiver on September 20, 1988.

Joan filed for bankruptcy on July 26, 1988. She was granted a discharge in bankruptcy on October 25, 1988. The FSLIC received a default judgment, in rem, against Joan on November 18, 1988.

In his answer, filed October 12, 1988, Leo filed a cross-claim against Joan based on the hold-harmless clause in the dissolution decree. Leo also filed a counterclaim against the FSLIC seeking damages based on the FSLIC's alleged failure to enforce its rights and diligently attend to the condition of the property.

On July 3, 1990, the district court dismissed Leo's cross-claim because it found Joan's debt had been discharged in the bankruptcy proceedings. The court also found Leo did not present sufficient evidence on his counterclaim. The court entered a personal judgment against Leo for the amount of the notes, plus interest and attorney fees. The mortgage was foreclosed, and the property was ordered to be sold at a sheriff's sale. The court noted that the FSLIC could seek a deficiency judgment against Leo if the property did not sell for an amount sufficient to satisfy the mortgages. Leo appeals.

Mortgage foreclosure proceedings are equitable. Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 389 (Iowa 1988). It follows our review is de novo. Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 523 (Iowa 1974). Although we are not bound by the trial court's fact findings, they are accorded weight, especially when considering the credibility of witnesses. Id.

Leo stipulates that the loans were in default and a judgment was entered against him. He also stipulates the sale of the apartments will not generate sufficient funds to pay the entire amount of the judgment. He appeals the portion of the judgment resulting in a deficiency judgment against him.

Leo believes Capitol and the FSLIC should have acted sooner to protect their security interest instead of relenting for a period of time to allow Joan to seek refinancing. Leo claims the FSLIC, as a mortgagee in possession, had an obligation to prevent a decrease in the value of the mortgaged property. Leo points out he lost control of the property on January 13, 1987.

A mortgagee who is not a mortgagee in possession is not responsible to protect the rents and profits of the mortgaged property. See Gaumer v. Hartford-Carlisle Savings Bank, 451 N.W.2d 497, 500 (Iowa 1990). Here, the FSLIC did not became a mortgagee in possession until September 20, 1988, when a receiver for the property was appointed. Capitol and the FSLIC did not have a duty prior to that time to prevent a decrease in the value of the mortgaged property. Leo does not claim the property decreased in value after the FSLIC took over management.

We affirm the action of the district court.

AFFIRMED.