IN THE COURT OF APPEALS OF IOWA

FILED
JUN 24 1987
CLERK SUPREME COURT

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FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DAVENPORT,	)	
Plaintiff-Appellee,	)	
vs.	)	
VERNON A. PEARSON, a/k/a Vern A. Pearson, **VICKI S. PEARSON,**	)	7-36 86-855
DENNIS M. SMITH, SYLVIA PETERSEN YOUNG, a/k/a Sylvia P. Young, and **KAREN SUE SMITH,**	)	
Defendants.	)	

Appeal from the Iowa District Court for Scott County (No. 69512), Linda K Neuman and Edward B. deSilva, Judges.

Two defendants appeal from the adverse judgment in a foreclosure action, asserting that genuine issues of material fact exist and that summary judgment for plaintiff therefore should not have been entered. **REVERSED.**

H. Reed Doughty of Winstein, Kavensky, Wallace & Doughty, Rock Island, Illinois, for defendants-appellants.

Robert D. Wilson of Carlin, Hellstrom & Bittner, Davenport, for plaintiff-appellee.

Patrick W. Driscoll of Rehling, Lindburg & Gosma, Davenport, for defendant Young.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

The defendants in this action, Vernon and Vicki Pearson, appeal from a decree of foreclosure entered against them after the trial court sustained the plaintiff's motion for summary judgment.[1] The defendants' sole contention on appeal is that the trial court erred in granting the summary judgment motion because genuine issues of material fact exist in the case. We agree, and reverse.

The facts of this case are essentially undisputed. In June of 1980, the defendants assumed a note and mortgage held by the plaintiff, First Federal Savings and Loan Association of Davenport, on a tract of real property. Pursuant to the language of the note, the defendants were required to make monthly payments to First Federal on the first day of each month; beyond these terms, no method or manner of payment was specified. Apparently, however, the defendants ordinarily submitted the payments by mail and First Federal accepted this mode.

Early in 1984, the defendants began falling behind in their payments. When their March 1 payment for that year was not made in a timely manner, the plaintiff sent them a letter which stated that, commencing April, 1984, each monthly payment "must be received" by First Federal by the [first] day of each month, and not merely postmarked." (Emphasis in original.) In addition, the letter advised the defendants as follows:

> If timely monthly payments are not received, First Federal under the terms of the mortgage has the right to elect that all indebtedness secured by the mortgage, shall, without notice of such election, become due and payable and immediately collectible by any lawful means.

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[1]In the trial court's initial ruling, the plaintiff's motion for summary judgment was denied. The court subsequently reversed itself and granted the motion upon reconsideration.

> This association will not accept any future late payments, and this letter will constitute notice to you that time is of the essence. A late payment is a default.
>
> (Emphasis in original.)

When the defendants' payment for the month of September was not received until the fourth day of that month, First Federal commenced the underlying foreclosure action. In response, the defendants asserted that the payment had not been late because it was mailed and postmarked August 31; the plaintiff had not received the payment until September 4 because September 1 was a Saturday and the following Monday was Labor Day. In addition, the defendants raised the affirmative defense that First Federal's prior acceptance of late payments by mail had constituted a waiver of the express terms of the note. The defendants reassert these grounds on appeal in support of their contention that genuine issues of material fact exist. We now turn to the merits of this assertion.

At the outset, we find it necessary to briefly set forth the principles governing our review of a trial court's order granting a motion for summary judgment. Summary judgment is a procedural device available for the prompt and expeditious disposition of a controversy when there exists no dispute concerning either the material facts or the inferences drawn therefrom, or if a question of law alone is implicated. David v. Comito, 204 N.W.2d 607, 608 (Iowa 1973). When reviewing the grant or denial of a summary judgment motion, we view the facts and inferences found in the pleadings in the light most favorable to the party opposing the motion. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979). Although the moving party bears the burden of proving the absence of any genuine issue, Northrup v. Farmland Ins. Inc., 372 N.W.193, 195 (Iowa 1985), the party resisting the motion may not merely rely upon the allegations or denials contained in his pleadings, but must set forth specific facts illustrating

the existence of a genuine issue for trial. Iowa Civil Rights Comm'n v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973); Iowa R. Civ. P. 237(e).

We have reviewed the pleadings and affidavits presented to the trial court in the present case, and are persuaded that the plaintiff has not sustained its burden of establishing that no genuine issue of material fact can be gleaned therefrom. In granting the plaintiff's motion, the trial court noted that although the plaintiff may have waived its right to accelerate the mortgage by establishing a course of conduct whereby late payments were accepted, its March 1984 letter notifying the defendants that late payments would no longer be tolerated withdrew any such waiver. See Dunn v. General Equities of Iowa, Ltd., 319 N.W.2d 515, 516 (Iowa 1982). We fully agree with this conclusion. We also agree, however, with the defendants' assertion that the March 1984 letter did not necessarily withdraw the course of conduct established between the parties authorizing the defendants to submit their payments by mail. In fact, the statement in the letter that each payment must be "received . . . by the [first] day of the month and not merely postmarked" generates an inference that payment by mail was authorized. It is well settled that if payment by mail is authorized, payment is considered made "when a letter containing the remittance, properly addressed and with postage prepaid, is deposited in the mail." 60 Am. Jur. 2d Payment § 11 at 618 (1972); 70 C.J.S. Payment § 7 at 218 (1951); see also McGowan v. Pascol, 605 S.W.2d 728, 731 (Tex. Civ. App. 1980) ("Where payment of an obligation by mail is authorized, the mailing of a letter including remittance which is properly addressed, and with postage prepaid on the last day of payment is a timely payment."). We think that the pleadings and affidavits presented to the trial court in the instant case give rise to a legitimate inference that a course of conduct continued to exist between the parties whereby payment by mail was authorized. As such, we cannot say that the

aintiff was entitled to judgment as a matter of law [2]

REVERSED.

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[2]The plaintiff has requested the recovery for attorney's fees incurred in connection with this action as provided in the contract executed between the parties. Because of our decision in this action, we conclude that this request is not properly before us