FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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THE SECURITY TRUST & SAVINGS BANK OF SHENANDOAH, IOWA,

Plaintiff-Appellee,

vs.

ROBAN DEVELOPMENT CORPORATION, et al.,

Defendants-Appellants.

Filed March 23, 1982

2-44
2-65954

Appeal from Page District Court - Glen McGee, Judge.

Defendants appeal from the judgment entered upon a decision for plaintiff on the claim against them and a summary judgment for plaintiff on defendants' counterclaims. AFFIRMED.

Richard G. Davidson, Davidson Law Office, Clarinda, Iowa, for defendants-appellants.

Robert A. Hutchinson and John V. Donnelly of Brown, Winick, Graves, Donnelly & Baskerville, Des Moines, Iowa, for plaintiff-appellee.

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

Defendants Reas and Roban Corporation (hereinafter "defendants") appeal from the judgment entered upon a decision for plaintiff on the claim against them and a summary judgment for plaintiff on defendants' counterclaims.

Defendants borrowed $75,000 from the plaintiff bank to purchase land to subdivide for houses. The loan had a one-year term. One year later, on March 1, 1975, defendants paid the interest due on the note. On March 1, 1976, when no further payment of either interest or principal had been received, the bank began foreclosure proceedings.

The defendants contend that they had an oral agreement with the bank that the note would be extended year to year, apparently to be paid back as lots were sold. There also was a written agreement, dated October 17, 1974, which defendants contend is a modification and extension of the original note. These positions were asserted as affirmative defenses, and as counterclaims for damages arising from plaintiff's alleged breach of the oral or written extensions and plaintiff's action to enforce the note, which action allegedly was contrary to the modifications. A jury demand on the counterclaims was filed by plaintiff.

As a result of a series of motions for summary judgment, the court entered judgment for plaintiff and dismissed the counterclaims, essentially on the theory that defendants could not prove their oral agreement because of the statute of frauds. This decree was appealed and in a decision filed in December of 1979, this court reversed on the ground that defendants' claim of equitable estoppel could defeat the statute of frauds claim.

On remand, the plaintiff's claim for foreclosure and defendants' affirmative defenses were tried to the court in equity. A jury trial on defendants' counterclaims was severed for trial at a later date. The court found defendants' contentions regarding the oral agreement and their interpretation of the October 17, 1974, written agreement were not reasonable interpretations of the transaction. It also found that defendants had failed to establish that the plaintiff

actively interfered with the completion of defendants' subdivision development so as to preclude the sale of lots from which the note was to be repaid. Judgment for plaintiff and decree of foreclosure was entered.

Following the trial and decree on plaintiff's claims, plaintiff moved for summary judgment on defendants' counterclaims, asserting that the factual basis of the counterclaims had been determined against defendants in the trial of plaintiff's claims. The trial court sustained this motion, agreeing with plaintiff's contention that defendants' counterclaim was based on the same theories as their affirmative defenses and therefore the judgment and decree of foreclosure precluded any relief to defendants on their counterclaim.

On appeal, defendants assert that they are entitled to a reversal of both the judgment against them on the note and the decree foreclosing the mortgage on the subdivision property owned by defendant Roban Development Corporation. They separately urge that, in any event, the trial court erred in granting summary judgment for plaintiff on defendants' counterclaim. The action in the court below having been tried in equity, our review is **de novo.** Iowa R. App. P. 4. We consider the arguments presented and affirm the trial court.

I. Right of Recovery on Plaintiff's Claim. Defendants' first contention on appeal is that the trial court applied an improper burden of proof in sustaining plaintiff's claims on the note and mortgage. In this regard, it is urged that proof by clear, satisfactory, and convincing evidence should have been required. We find no merit in this contention. The standard of proof in a civil action in equity seeking judgment and decree of foreclosure based on a promissory note and real estate mortgage is by a preponderance of the evidence. See Iowa R. Civ. P. 14(f)(6). We disagree with defendants' assertion that plaintiff's claims are in any way dependent upon the reformation of a written instrument affecting title to real estate so as to exact a requirement of proof by clear, satisfactory, and convincing evidence.

In applying the proper burden of proof, the trial court correctly found, as do we on our de novo review, that defendants borrowed the sum of $75,000 from plaintiff, evidenced by a promissory note executed by defendants on March 11, 1974, and payable by its terms on March 1, 1975. The record also supports the trial court's findings that this note was secured by a real estate mortgage on the property of the defendant Roban Development Corporation and that, after payment of the interest due on the note on March 1, 1975, defendants made no further payment of either interest or principal on the note. Except as a result might be otherwise eaffected by defendants' affirmative defenses, these findings fully sustain the judgment and decree of foreclosure entered in the court below.

II. Defendants' Affirmative Defenses. Defendants, in their answer as amended, assert three affirmative defenses to the plaintiff's action on the note and mortgage. The first affirmative defense alleges that the term of the note and mortgage was extended by an oral agreement between the parties. The second affirmative defense asserts that under a correct interpretation of a written agreement between the parties, dated October 17, 1974, the basis of payment of the promissory note was modified and extended. The third affirmative defense is based upon the theory that plantiff actively interfered with the completion of defendants' subdivision development so as to preclude the sale of lots from which the note was to be repaid.

The trial court, after hearing the evidence, found that defendants had failed to establish by a preponderance of the evidence, the factual basis asserted in these affirmative defenses. In our de novo review of the evidence, we agree with the trial court's findings and conclusions in this regard.

Defendants' first and third affirmative defenses are entirely dependent on issues of credibility—a matter which the trial court could better assess than can this court. The second affirmative defense involves the interpretation and construction of a written instrument. We share the trial court's view that that

instrument in no way limits the plaintiff's rights to judgment and decree of foreclosure as a result of defendants' default under the note and mortgage.

III. Truth-in-Lending Violation. We next consider defendants' claim that the trial court erred in not finding that the loan transaction was in violation of Regulation Z promulgated under 15 U.S.C. § 1601. We reject this claim for two reasons. First, a violation of the disclosure requirements of Regulation Z would not, on the present facts, constitute a defense to plaintiff's foreclosure action. No right of rescission exists as to this non-homestead property under this federal law, nor was any effort attempted by defendants to achieve rescission. Defendants have not offered to return the loan proceeds. Secondly, we believe that under 15 U.S.C. § 1603(1), the present transaction was for a business or commercial purpose and thus not subject to Regulation Z.

IV. Summary Judgment on Defendants' Counterclaim. Next, defendants contend that regardless of the determination arrived at with respect to plaintiff's claims, the trial court erred in granting summary judgment on defendants' counterclaim as to which a jury trial had been demanded. As previously noted, the trial of defendants' legal counterclaim for damages had been severed from plaintiff's equitable action for foreclosure and the equitable claims were tried first. The plaintiff thereafter contended in its motion for summary judgment that identical issues control the result of both defendants' affirmative defenses to plaintiff's claim and defendants' counterclaim. As a result of this situation plaintiff claimed, and the trial court found, that the judgment in the foreclosure action necessarily rejected these affirmative defenses and therefore precluded relitigation of the same issues on the counterclaim.

Defendants on this appeal assert that some of the issues relating to their counterclaim are different from the affirmative defenses to plaintiff's claim. While this may be true to the extent that additional issues may be involved with respect to the counterclaim, we nonetheless conclude that the summary judgment

was properly granted. This is because our examination of the record convinces us that there is a sufficient identity of controlling issues between the counterclaim and the affirmative defenses so that a subsequent judgment in favor of defendants on the counterclaim would be entirely inconsistent with the previous adjudication of those issues necessary to the determination of plaintiff's equitable claims. This is a sufficient basis for application of the doctrine of issue preclusion. See Brigdon v. Covington, 298 N.W.2d 279, 281 (Iowa 1980).

Defendants attempt to argue on appeal that the result should be otherwise because by trying the equitable issues first, the court denied defendants their right to a jury trial. The limitations on denial of jury trial by trying equitable issues before legal issues is thoroughly examined in Morningstar v. Myers, 255 N.W.2d 159, 161-62 (Iowa 1977). We need not consider the effects of that decision on the procedure employed in the present case had defendants objected to the trying of the equitable claims before the legal claims. It is abundantly clear that they did not object to the procedure employed by the trial court and, in fact, they joined in a stipulation that the equitable claims be tried first. Contrary to defendants' assertions on this appeal, we find nothing in that stipulation which protects defendants against the application of the doctrine of issue preclusion which otherwise flows from the trial of the equitable issues.

Finally, on the matter of summary judgment, we reject defendants' contention that a motion for summary judgment is an improper procedural remedy for asserting a claim of issue preclusion. Compare, Harrington v. Polk County Federal Savings & Loan Ass'n., 196 N.W.2d 543, 548 (Iowa 1972).

V. Ex Parte Order Amending Legal Description. Finally, we consider defendants' contention that the trial court erred in amending, by ex parte order, the legal description of the property to be sold upon foreclosure of the mortgage. Our examination of the record reveals that the order complained of relates to the legal description in the original decree of foreclosure in this action which was

subsequently reversed by this court. No claim of error has been asserted involving the legal description contained in the decree which is the subject of this appeal. We have considered all issues presented and find no reason to disturb the judgments and decree of the trial court.

AFFIRMED.