

FILED

APR 25 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DONALD J. DAHLOF and)
MARILYN F. DAHLOF, Husband)
and Wife,)

Plaintiffs-Appellants,)

vs.)

THE FEDERAL LAND BANK OF)
OMAHA, a Corporation,)

Defendant-Appellee,)

LeDIOYT LAND COMPANY,)
Receiver, and LeDIOYT LAND)
COMPANY, A Corporation,)

Defendants.)

8-704
88-661

43

Appeal from the Iowa District Court for Shelby County
(16099), Paul H. Sulhoff, Judge.

Plaintiffs appeal from a district court decision
granting the Federal Land Bank's motion for summary
judgment by refusing to set aside the sheriff's sale of
plaintiffs' farm. **AFFIRMED.**

Edward W. Bjornstad, Harlan, for plaintiffs-appellants.

Rodney P. Kubat of Whitfield, Musgrave & Eddy, Des
Moines, for defendant-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

PER CURIAM

Donald and Marilyn Dahlof appeal from a district court decision granting the Federal Land Bank's motion for summary judgment. After refusing to set aside the sheriff's sale of Dahlofs' farm. We affirm.

In January of 1985, the Federal Land Bank (FLB) commenced a mortgage foreclosure action against the Dahlofs. On June 18, 1985, a decree of foreclosure was entered. Prior to this, on June 3rd, the Dahlofs filed a declaration of homestead rights. The Dahlofs' mortgage with the FLB specifically waived their homestead exemption.

On August of 1985, a sheriff's sale was conducted and the Dahlofs were the high bidders. The Dahlofs were unable to acquire the necessary funds and another sheriff's sale was held in October of 1985. This time the FLB was the high bidder. A \$30,000 deficiency remained after this sale. The sheriff sold the property en masse at each of the sales, failing to separately plat the Dahlofs' homestead pursuant to Iowa Code section 561.5.

On October 22, 1986, the sheriff issued a deed conveying the farm sold at the sale to FLB. On December 22, 1986, an order terminating receivership of the property was filed and the final report of the receiver was approved. In May 1987, the Dahlofs filed this action claiming, among other things, the sheriff's sale should be set aside. The district court granted FLB's motion to

partial summary judgment, finding noncompliance with Iowa Code section 561.5 did not render the sheriff's sale void, merely voidable. Since a deficiency remained after the sale, the district court determined Dahlofs were not prejudiced. In addition, the district court found the Dahlofs guilty of laches by failing to make a more timely objection to the sale.

As basis for appeal, the Dahlofs argue the sheriff's failure to separately plat the homestead as required by Iowa Code section 561.5 rendered the sheriff's sale void and thus, the trial court erred in sustaining FLB's motion for partial summary judgment.

Our scope of review in equity matters is de novo. Iowa R. App. P. 4.

Rule 237 of the Iowa Rules of Civil Procedure establishes two components which must be satisfied before summary judgment may be granted. First, there must be no genuine issue as to any material fact. Second, the moving party must be entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); Iowa Department of Transportation v. Read, 262 N.W.2d 533, 536 (Iowa 1978). We consider the motion in the light most favorable to the nonmoving party, reviewing the entire record, including pleadings, affidavits, and depositions on file. Id. at 536. The burden is upon the movant to show an absence of any genuine issue of material fact. In determining whether or not

summary judgment is appropriate, we must determine whether the Dahlofs' assertion that the sheriff's sale is void or instead, merely voidable, as determined by the district court. Further, in the event we determine the sale is merely voidable, we must decide whether there is any indication in the record the Dahlofs have been prejudiced by the sale.

Iowa Code section 561.5 states:

Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included, the officer having the execution shall give notice in writing to said owner, and the spouse of such owner, if found within the county, to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the cost in the case.

The purpose behind platting the homestead prior to sheriff's sale is to help assure the homestead is protected from sale unless the sale of the remainder of the land fails to satisfy the mortgage debt. See Iowa Code § 561.21; Prudential Insurance Company v. Westfall, 219 Iowa 1119, 260 N.W. 344 (1935). With this purpose in mind, the Westfall court held nonhomestead property should be offered before the homestead property in a foreclosure sale. Id., 219 Iowa at 1132-1136, 260 N.W. at 349. If the bid for the nonhomestead property is not sufficient to cover the judgment, then the homestead property may be offered separately. If the aggregate of the bids is

insufficient to satisfy the judgment, all the property may be sold en masse. Id., 260 N.W. at 349. It is not in dispute in this case the sheriff failed to plat the homestead himself as directed by section 561.5. In addition, it is clear the sheriff did not offer the nonhomestead and homestead properties separately at the time of sale, instead offering and selling the entire parcel en masse.

The failure of the sheriff to follow the procedures set out in 561.5 and to follow the procedure for sale derived from Westfall, does not force us to void the sale. Westfall, 219 Iowa at 1123, 260 N.W. at 349. Failure to comply merely makes the sale voidable. Id., 260 N.W. at 349.

Finding, then, the trial court applied the law correctly, we must determine whether or not the Dahlofs were prejudiced in any way by the sheriff's sale.

We choose not to set aside the sheriff's sale because the Dahlofs have not shown they have been prejudiced. Two sheriff's sales were held, and the Dahlofs were present at both sales, and participated in them. In fact, they were the highest bidder at the first sheriff's sale, although their bid was worthless and forced a second sale. After the second sheriff's sale, a deficiency of more than \$30,000 remained on FLB's judgment. There is no indication the Dahlofs had sufficient funds with which to attempt to

buy their homestead at the second sheriff's sale, even if it had been sold separately.

Clearly, the record here demonstrates a lack of harm to the Dahlofs and the platting and resale of Dahlofs' homestead would be useless. Therefore, we determine the trial court correctly ruled the absence of prejudice to the Dahlofs entitled FLB to summary judgment. Thus, we hold the sheriff's sale held on October 14, 1985, and subsequent sheriff's deed should not be set aside and, therefore, affirm the trial court on all matters.

AFFIRMED.