

FILED.

SEP 25 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IOWA STATE BANK of Clarksville,)
Iowa,)

Plaintiff-Appellant,)

vs.)

GLEN LEE RIGGINS and ROSIE TENA)
RIGGINS; AREDALE STATE BANK;)
DUANE G. MILLER; FIRST STATE BANK)
OF GREENE; BATHKE OIL CO., INC.;)
FARMERS CO-OPERATIVE COMPANY,)
INC.; FARMERS CO-OPERATIVE)
SOCIETY; S. C. KRAMER and LORAIN)
KRAMER; HOBSON, CADY & DREW; and)
BUTLER COUNTY, IOWA,)

Defendants-Appellees.)

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Filed September 25, 1986

6-209
85-1779

Appeal from the Iowa District Court for Butler County (No. 16752) - Paul W. Riffel, Judge.

Plaintiff bank appeals from the judgment in a foreclosure action, asserting that the evidence was sufficient to establish a relationship of agency and/or surety between defendants Riggins, that notes signed by Rosie Riggins individually therefore were subject to a jointly executed mortgage containing a dragnet clause, and that the mortgage was prior to subsequently executed mortgages covering the same property. **AFFIRMED.**

Susan R. Flander of Shepard & Shepard, Allison, for plaintiff-appellant.

Raymond P. Drew of Hobson, Cady & Drew, Hampton, for defendant-appellee Aredale State Bank.

James F. Smith of Noah & Smith, Charles City, for defendant-appellee Miller.

David M. Nelsen of Nelsen & Folkers, Mason City, for defendants Riggins.

Richard W. Vickers of Vickers Law Office, Greene, for defendant Farmers
Co-Operative Society.

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

DONIELSON, P.J.

Plaintiff bank appeals from the judgment in a foreclosure action, asserting that the evidence was sufficient to establish a relationship of agency and/or surety between defendants Riggins, that notes signed by Rosie Riggins individually therefore were subject to a jointly executed mortgage containing a dragnet clause, and that the mortgage was prior to subsequently executed mortgages covering the same property. We affirm.

Defendants Glen and Rosie Riggins operated a 120-acre farm in Butler County, Iowa. The farm was owned by Glen only. On September 28, 1978, the Riggins jointly executed a note for \$35,000.00 with the plaintiff, Iowa State Bank of Clarksville on their farm property to provide funds for their farming operations. This mortgage contained a "dragnet clause" which secured "all future advances of credit by this bank." The bank and the Riggins engaged in various other financial transactions subsequent to the 1978 mortgage. The bank ultimately sought to foreclose based upon a default in payment upon two notes executed by Rosie alone, one executed on January 20, 1982, and the other on April 16, 1982. Though the loan officers at Iowa State Bank specifically told Rosie that Glen would have to come in and sign the notes, the officers never pursued their request. All other obligations to the Iowa State Bank were either satisfied or paid by renewal.

On March 19, 1979, Glen and Rosie jointly executed a mortgage in favor of the defendant Aredale State Bank, pledging as security the same property stated in plaintiff Iowa State Bank's mortgage. The Riggins' farm property was also pledged as security on August 9, 1979, to defendant Duane Miller, the Riggins jointly executing a note for \$20,710.00 at 11% interest. Both the Aredale State Bank and Miller had knowledge of the Iowa State Bank mortgage.

Iowa State Bank had knowledge of the other two mortgages shortly after their execution through a local publication.

The trial court found that the notes executed by Rosie individually were not covered by the Iowa State Bank's 1978 mortgage and that the evidence failed to establish that Rosie acted as Glen's agent when she signed the notes or that Glen acted as a surety for Rosie. The trial court ruled that Rosie was liable to Iowa State Bank individually, but that the Aredale State Bank and Miller were established as respectively, first and second lienholders with regard to the Riggins' farm property. The Iowa State Bank has appealed from that judgment.

Our scope of review in equity cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

The plaintiff first contends that the trial court erred in finding that Rosie was not the agent of her husband Glen, thereby not allowing the mortgage together with the future advances clause contained therein to cover the two notes signed by Rosie individually. The plaintiff claims that an agency relationship existed between Rosie and Glen by implication, due to the fact that Rosie handled the day-to-day operations financial transactions for the farming operation and that Glen seldom visited the bank to borrow money. Plaintiff also contends that Glen knowingly permitted and accepted the benefits of Rosie's financial transactions and therefore led plaintiff to believe an agency relationship existed. We disagree.

An "agency" is a fiduciary relationship resulting from a manifestation of consent by one person, the "principal," that another, the "agent," shall act on the former's behalf and subject to the former's control and consent from

the latter to so act. Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977). Such agency may be created by express contract or by implication. Walnut Hills Farms v. Farmers Coop Co. of Creston, 244 N.W.2d 778, 780 (Iowa 1976). A fundamental principle of agency law is that whatever an agent does within the scope of his or her actual authority binds the principal. Dellon v. City of Davenport, 366 N.W.2d 918, 924 (Iowa 1985). "Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, allows the agent to believe he has the power to act." Id. Actual authority includes both express and implied authority. Id.; Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977). Express authority is derived from specific instructions set out by the principal. Id. Implied authority includes all such incidental authority as is necessary, usual, and proper to effectuate the main authority expressly conferred. Id. Such implied agency may be established by the surrounding circumstances, such as words and conduct, from which an intention to create an agency may be fairly implied. Walnut Hills Farms, 244 N.W.2d at 781. Additionally, an implied agency may be evidenced from a course of dealings of a similar nature between parties. 3 Am. Jur. 2d § 18 (1986).

In the present case, the plaintiff bank contends that because Glen allowed Rosie to handle the day-to-day financial affairs from the farming operation, it could properly infer from such conduct that an agency relationship existed. The plaintiff bank further contends that an agency existed because Glen and Rosie did not state that Rosie was not representing Glen in the farming transactions, nor did Glen object to Rosie's actions. We find, however, that there is no evidence of an agency relationship between Glen and Rosie in the present case.

The mere fact that Rosie and Glen are husband and wife is not sufficient to establish an agency relationship. 41 C.J.S. §§ 65-68; Krug v. Deering Implement Co., 239 Iowa 157, 162, 30 N.W.2d 729, 731 (1948); Snyder v. Able, 235 Iowa 724, 730, 17 N.W.2d 401, 404 (1945). The record reflects that Rosie was engaged in a number of business enterprises independent of the farming operation, which was known to the plaintiff bank lending officials. None of the bank officials could testify as to how much of the money from the two 1982 loans at issue were used in Rosie's business ventures. Stanley Lubben, who was an assistant vice-president at the plaintiff bank and who drafted the 1982 note, testified that there had never been any representations to the bank that the Riggins were acting for each other when either or both of them executed notes for renewing old notes or obtaining new money. The plaintiff's officers were aware that Glen was the record owner of the farmland encumbered by the 1978 mortgage, and the record reveals that they were eager to have Glen sign the 1982 notes taken out by Rosie. Had the plaintiff bank actually believed Rosie to be an agent of Glen, Glen's signature on the 1982 notes would not have been necessary. In order to show that an agency exists, the party claiming the existence of an agency must present substantial evidence; a scintilla is not enough. Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 789 (Iowa 1985). Though Rosie and Glen had a long history of business transactions with the plaintiff bank, we find no evidence of an agency relationship.

Nor do we find evidence of a principal-surety relationship. In such a relationship, the "principal" is a party who enters into a contract with a "surety" who agrees to answer for the principal's debt in the event the principal fails to pay such debt. Jenswold v. Peterson, 252 Iowa 996, 999, 108 N.W.2d 363, 364 (1961); 74 Am. Jur. 2d § 3. In the present case, there is no evidence that Glen entered into any written agreement whereby he agreed to pay Rosie's

debts in the event Rosie failed to pay on the 1982 notes taken out individually by Rosie.

The plaintiff bank, however, contends that the 1978 mortgage signed by both Rosie and Glen containing the future advance clause was intended to cover all future advances made to either Glen or Rosie individually. We disagree.

The 1978 mortgage signed by both Rosie and Glen is a "dragnet" mortgage. Such mortgages, while valid, are not favored by the law and are to be construed strictly against the mortgagee. Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 285, 289 (Iowa 1981); Frease Leasing, Inc. v. Union Trust and Savings Bank, 253 N.W.2d 921, 925 (Iowa 1977). The 1978 mortgage signed by Rosie and Glen contained the following "dragnet" clause:

Thirty-Five Thousand and no/100 Dollars plus all future advances of credit by this bank

In support of its contention, plaintiff bank relies heavily on First v. Byrne, 238 Iowa 712, 28 N.W.2d 509 (1947). In Byrne, the mortgagors owned their property as tenants in common and jointly signed a mortgage stating that such property "shall stand as security for any other indebtedness . . . that the mortgagee may now hold or in the future . . . acquire against the said mortgagors, or either or any of them." 238 Iowa at 715, 28 N.W.2d at 511. The Iowa Supreme Court went on to hold that the "dragnet" clause meant that the mortgagors had pledged their property to secure all future joint and individual debt, including all future debts consented to or acquiesced in by either party. Id. at 720, 28 N.W.2d at 513. The present case is clearly distinguishable from that presented in Byrne because the mortgage in Byrne pledged the interest of each owner as security for future advances made to the parties jointly or individually. In the instant case, the 1978 mortgage contained no such language.

We find the facts presented in Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 285 (Iowa 1981), to be analogous to the instant case. In Manning, the husband and wife had jointly executed a note for \$69,000.00 and pledged as security 79 acres of land. 311 N.W.2d at 287. The mortgage contained a "dragnet" clause which pledged the mortgaged property as security for additional advances up to \$100,000.00. Id. Following the execution of this note, the husband alone borrowed additional sums. Id. None of the later notes were signed by the wife. Id. The bank later instituted a foreclosure action. Id. The "dragnet" clause contained in the mortgage read as follows:

This mortgage shall stand as security for said note, and for any and all future and additional advances made to the Mortgagors by the holder of said note in such amount or amounts so that the total of such future additional advances outstanding and unpaid at any one time shall not exceed \$100,000.00 and Mortgagee is hereby given authority to make such future and additional advances to Mortgagors herein, upon their signed order or receipt, and secured as the original obligation herein.

Id. at 288. In construing this language, the Iowa Supreme Court held that the loans taken out by the husband alone were not secured by the "dragnet" clause of the mortgage, despite the fact that the husband and wife had been doing business with the bank for twenty years. Id. at 290.

We therefore find that in the present case the "dragnet" clause of the 1978 mortgage did not secure those sums taken out by Rosie in her individual capacity. While the 1978 mortgage would certainly have secured those future advances to Rosie and Glen jointly, the mortgage is silent as to future advances to either of them individually, unlike the "dragnet" clause construed in Byrne.

In the absence of clear evidence of a contrary intention, a "dragnet" mortgage "will not be extended to cover future advances unless the advances are of the same kind or quality or relate to the same transactions or series of transactions as the principal obligation secured or unless the document evidencing

the subsequent advance refers to a mortgage as providing security therefore." Freese Leasing v. Union Trust and Savings Bank, 253 N.W.2d 921, 927 (Iowa 1977). The January 20, 1982, note signed by Rosie did not contain any language referencing the "dragnet" clause when it was executed. The note, when offered into evidence at trial, however, contained a reference to the dragnet clause. The record indicates that such clause was added on to the January 20, 1982, mortgage after its execution, since the carbon copy of the note Rosie signed did not contain such a clause. Bank officer Rohlwing testified that he was not sure when the language was added, but that at the time the note was executed he had requested Glen's signature, but had failed to pursue the matter.

The note of April 16, 1982, executed by Rosie individually did contain a reference to the 1978 "dragnet" mortgage. Though the April 16, 1982, note states that the purpose of the note was to renew the original 1978 mortgage plus another note jointly executed by the Riggins in 1980, Stanley Lubben testified that he had personally prepared the note and that the April 16, 1982, note represented approximately \$2,900.00 of "new money" and the renewal of two notes executed by Glen and Rosie in 1981 which did not contain any reference to the future advance clause. Lubben testified that the 1981 notes pertained largely to prior advancements made to Rosie for investments in outside business ventures which proved to be unsuccessful. Lubben also testified that he requested that Rosie have Glen sign the note, but that he did not pursue the matter, therefore acknowledging that he had "let Glen off the hook." Witness Rohlwing also admitted that he was aware of Rosie's business ventures, which were completely independent of the farm operation, but had no idea as to how much she invested. The trial court therefore found, and we agree, that the plaintiff bank was only entitled to a judgment against Rosie individually.

We also find that the plaintiff bank had actual notice of the subsequent mortgages executed by Glen and Rosie in favor of defendants Aredale State Bank and Duane Miller. Though mere constructive notice of a later encumbrance will not defeat the priority of a lien for advancements made by a first mortgage *after the execution and recording of the subsequent encumbrance*, the prevailing view is that actual notice will defeat the priority of advancements made by the first mortgagee after the execution and recording of the subsequent encumbrance. Freese, 253 N.W.2d at 925. Mr. Rohlwing testified that the bank had received actual notice of the subsequent encumbrances through a local publication. Additionally, Mr. Rohlwing testified that a financial statement prepared by the plaintiff bank on March 12, 1982, indicated that the Aredale State Bank and Duane Miller held mortgages on Glen's farm property. The record therefore seems clear that the plaintiff bank did in fact have actual knowledge at the time it executed the January 20, 1982, and April 16, 1982, mortgages to Rosie that there were preexisting mortgages and that therefore those liens created by the two 1982 advancements to Rosie were subordinate to the mortgage liens held by defendants Aredale State Bank and Duane Miller.

AFFIRMED.