IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

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HARLAN CHAPMAN and MARIAN CHAPMAN,

Plaintiffs-Appellants,

vs.

RACCOON VALLEY STATE BANK,

Defendant-Appellee.

8-588
88-711

Appeal from the Iowa District Court for Dallas County (27710), Harry Perkins, Judge.

Plaintiffs appeal from a district court judgment rejecting plaintiffs' petition to set aside the sheriff's sale in a foreclosure action. **AFFIRMED.**

John R. Roehrick, Des Moines, for plaintiffs-appellants.

Bryan R. Jennings, Adel, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

PER CURIAM

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Plaintiffs appeal from a district court judgment rejecting plaintiffs' petition to set aside the sheriff's sale in a foreclosure action. We affirm.

The plaintiffs, Harlan and Marian Chapman, purchased the farm from Harlan's parents in 1968. Marian has not lived on the farm, but Harlan did. Plaintiffs also own another farm that includes a residence.

In 1983, Harlan mortgaged his land to the bank as additional collateral for operating loans. The mortgage contained a waiver of homestead exemption. The plaintiffs defaulted and a foreclosure action was instituted by the bank in 1985. Plaintiffs did not claim a homestead nor did they raise the issue of homestead as a defense. A judgment was entered and a sheriff's sale was conducted in December 1986. The sheriff requested bids on the entire farm or any portion thereof. The bank's bid of $72,000 on the entire tract was the only bid. Plaintiffs did not submit a bid nor did the sheriff specifically plat a homestead.

In January 1987, the plaintiffs filed a bankruptcy petition. In January 1988, a sheriff's deed on the farm was issued to the bank.

On December 1, 1987, plaintiffs filed a petition to set aside the sheriff's sale. The district court rejected plaintiffs' request ruling that: (1) the plaintiffs had waived their redemption rights by filing bankruptcy;

(2) the plaintiffs waived their right to claim a homestead by not raising a claim during foreclosure; (3) the plaintiffs failed to establish that the farm contained a homestead; and (4) the plaintiffs were not harmed since the entire farm had to be sold given the large indebtedness covered.

As grounds for appeal the Chapmans assert the sheriff's sale was improper since the homestead was not separately platted and sold; their failure to assert a homestead claim in the foreclosure action did not waive their right to claim it now; and their voluntary filing of a bankruptcy petition did not waive their right of redemption.

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

I.

The Chapmans argue the trial court was incorrect when it found the Chapmans were not harmed by the sheriff's failure to strictly comply with the language of Iowa Code section 561.5 (1987), which 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 costs in the case.

5.1

Compliance with section 561.5 is relevant. See, Welsh v. Citizens Nat. Bank, 420 N.W.2d 473, 475 (Iowa 1988). In Prudential Insurance Co. v. Westfall, 219 Iowa 1119, 260 N.W. 344 (1935), the Supreme Court outlines sale procedure for circumstances where both homestead and nonhomestead property are to be sold. 219 Iowa at 1132-1136, 260 N.W. at 349. Using the proposition that the homestead should be preserved if its value is not needed to satisfy the underlying judgment, the court held the nonhomestead property should be offered before the homestead property in a foreclosure sale. Id., 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 disputed in this case the sheriff failed to give notice to the Chapmans or plat the homestead himself as directed by section 561.5. In addition, it is clear the sheriff did not offer the nonhomestead and homestead property separately at the time of sale, instead offering and selling the entire partial 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 and set it aside. Westfall, 219 Iowa at 1123, 260 N.W. at 349. Failure to comply merely makes the sale voidable. Id., 260 N.W. at 349.

We choose not to set aside the sale for two reasons.

First, the Chapmans argue they were damaged because the sheriff's failure to plat the land eliminated an opportunity to redeem the homestead pursuant to Iowa Code section 654.16 (1987), which provides for separate redemption of homestead during foreclosure proceedings. The Chapmans presented evidence at trial if they had been allowed to redeem the homestead, Harlan Chapman's brother, Don, could have provided sufficient funds.

We note this claim is without merit. The Supreme Court in First Nat. Bank in Fairfield v. Diers, 430 N.W.2d 412 (Iowa 1988), determined section 654.16 became effective May 31, 1986, and would apply only to actions filed on or after this date. In this case as in Diers, the foreclosure action was filed in October of 1985, prior to the effective date of section 654.16. It should be noted the legislature attempted to make section 654.16 retroactive in 1986, but the retroactive application was struck down as an unconstitutional interference with private contractual relations. See Federal Land Bank v. Arnold, 426 N.W.2d 153, 161 (Iowa 1988).

Second, the Chapmans' entire indebtedness was $207,000. The real estate was sold at sale for $72,000--as the district court found, and we agree, a fair market price. It cannot be seriously argued had the sheriff strictly followed sales procedure, the sale of the

homestead would not be needed to solve the indebtedness. The Chapmans argue, however, under the redemption laws, specifically Iowa Code section 628.3, a judgment debtor who redeems, does so free from any deficiency remaining on the judgment.

In Arnold v. Murphy, 199 Iowa 934, 203 N.W. 387 (1925). The Supreme Court stated:

> The very purpose of these requirements is within line of the intent of the legislature to protect the homestead, as far as possible, so that it will not be sold unless necessary to the payment of debts for which it is pledged, or is made liable under the statute. . . . It is fundamental that anyone seeking relief in court must show, before he has any standing, that some of his rights have been infringed, to the end that he has suffered damage or injury in some way.

Id. at 940, 203 N.W. at 390.

Even if the sheriff here had meticulously followed each guideline, we cannot see how the outcome could have been changed. The Chapmans themselves admit they only had access to funds sufficient to redeem the homestead, not the remaining real estate. Because, as we have already pointed out, separate redemption of the homestead is not an available option, we are unable to see how the Chapmans' rights were infringed. From this record, we cannot say the Chapmans were harmed or injured in a legal sense from the foreclosure proceedings. We therefore determine the sheriff's sale should not be set aside.

II. 57

The Chapmans also complain the trial court erred in determining the filing of their voluntary petition in bankruptcy waives their right of redemption pursuant to section 628.4. However, because of our determination regarding the legality of the sheriff's sale, we need not address this issue or appellants' other argument regarding waiver of homestead protection during the original foreclosure proceeding.

AFFIRMED.