FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

TREYNOR STATE BANK,

Plaintiff-Appellee,

vs.

GLEN F. DUCHMAN, ZELLA M. DUCHMAN, AGNES O. WOODRUFF, f/k/a AGNES O. SCARVIE, Individually and as Successor in Interest to NORMAN G. SCARVIE; OLIVER SCARVIE, Individually and as Successor in Interest of NORMAN G. SCARVIE; NORMA JEAN BOREN a/k/a NORMA JEAN COLE, Individually and as Successor in Interest to NORMAN G. SCARVIE; And POTTAWATTAMIE COUNTY, IOWA,

Defendants-Appellants.

Filed January 29, 1986

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Appeal from the Iowa District Court for Pottawattamie County - Paul H. Sulhoff, Judge.

Defendant appeals an adverse judgment in a real estate foreclosure action.

AFFIRMED.

James A. Pratt of Heithoff, Pratt & Heithoff, Council Bluffs, Iowa, for defendants-appellants.

Frank W. Pechacek, Jr., of Smith, Peterson, Beckman & Willson, Treynor, Iowa, for plaintiff-appellee.

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

Defendant Zella Duchman appeals an adverse judgment in a real estate foreclosure action. We affirm the judgment.

Glen and Zella Duchman owned, as joint tenants, approximately 1.18 acres of land that they used as their homestead. Zella worked as a bookkeeper and Glen farmed, but only as a tenant.

In order to finance Glen's farming operation, Glen and Zella Duchman executed a promissory note to plaintiff, Treynor State Bank, for the sum of $24,000 on March 23, 1976. For security, the Duchmans assigned the real estate contract on their homestead. The assignment stated that it was "for collateral purpose only," but also specifically stipulated that the Duchmans jointly and severally agreed to sell, assign, and convey to plaintiff their right, title, and interest in and to the real estate contract. It also contained the legal description of their homestead property. The $24,000 note, on its face stated that it was secured by "existing security," referring to the assignment of the real estate contract to the plaintiff bank.

On March 29, 1978, the Duchmans executed and delivered to the plaintiff two additional written promissory notes, one for $14,500 and the other for $33,500. Approximately a year later on May 20, 1980, Glen Duchman individually executed and delivered to plaintiff a promissory note for $77,717.98. This note included a renewal and extension of the two previous notes executed March 29, 1978.

The Duchmans initially made payments on these notes but they eventually fell far behind and finally defaulted. In early October, 1980, plaintiff bank harvested Glen's crops and applied the proceeds from the sale of the grain to the 1980 loan. In addition, the bank held an auction on Glen's rented farm,

sold his machinery and equipment, and applied the proceeds, again, only to the 1980 loan.

On July 30, 1982, plaintiff bank started a foreclosure action against the Duchmans alleging that it was entitled to a lien against their homestead based upon the assignment made in 1976. The trial court found that at the time of the foreclosure hearing, there was still due and owing plaintiff bank, on the 1976 note, the principle sum of $24,000 together with $13,180.16 of interest, for a total of $37,180.16. It further found that under the terms and conditions of the 1980 note, there was still due and owing plaintiff bank $39,634.01 which included principle and interest.

Glen Duchman died on April 17, 1983. This action was continued, however, against Zella Duchman on both the 1980 note and the 1976 note. The trial court found for defendant Zella on the 1980 note and that issue has not been appealed. But judgment was entered against defendant Zella Duchman on the 1976 note which entitled plaintiff to a lien against the homestead property.

On appeal defendant Zella Duchman raises two issues: (1) the trial court erred in finding that the Duchmans waived their homestead exemption; and (2) the proceeds of the sale of grain, machinery, and equipment, as well as other debt payments should have been applied to the 1976 note rather than the 1980 note.

I. **Homestead Exemption.** Defendant Zella asserts that there is no language in the assignment that could be construed as a waiver of their homestead exemption. The homestead right is a right given by statute, and can only be eliminated in the manner provided by the statute. First National Bank of Winterset v. Phillips, 203 Iowa 372, 375, 212 N.W. 678, 680 (1927).

Waiver of a homestead exemption right by conveyance or encumbrance is addressed in Iowa Code section 561.13 (1983). It states:

> A conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, it is not valid, unless and until the spouse of the owner executes the same or a like instrument, or a power of attorney for the execution of the same or a like instrument, and the instrument or power of attorney sets out the legal description of the homestead. However, when a homestead is conveyed or encumbered along with or in addition to other real estate, it is not necessary to particularly describe or set aside the tract of land constituting the homestead, whether the homestead is exclusively the subject of the contract or not, but the contract may be enforced as to real estate other than the homestead at the option of the purchaser or encumbrancer.

Additionally, section 561.21 of the Code provides in part as follows:

> The homestead may be sold to satisfy debts of each of the following classes:
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> * * *
>
> 2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.

The language of Iowa Code section 561.13 has remained substantially the same since 1860, when the supreme court said:

> We conclude that a mortgage is a conveyance within the meaning of § 1247 (now § 561.13), as above cited. And, when the husband and wife concur in and execute a mortgage upon their homestead, they thereby waive their right to hold the same as exempt from judicial sale.
>
> A mortgage thus executed is valid and confers upon the mortgagee the right to foreclose, the same as if it had been given upon any property other than the homestead.

Babcock v. Hoey, 11 Iowa 375, 379 (1860).

It is not disputed that the transaction between the Duchmans, as joint tenants, and plaintiff bank was a mortgage transaction. The Duchmans "assigned and conveyed" their interest in the real estate contract as security for the 1976 note, thus establishing a mortgagor-mortgagee relationship. See Babcock v. Hoey, at 377. The only remaining question then, is whether the language in

the assignment, sufficiently describes defendants' homestead property, thereby establishing an intent to waive the statutory exemption.

By the clear language of section 561.13 a conveyance is sufficient if the instrument "sets out the legal description of the homestead." The rest of the section does not apply to the case before us because the record reveals that the only real estate defendants owned was the 1.18 acres constituting their homestead.

> It is not essential . . . that the homestead should be specially described as such, or that the conveyance should in express terms contain a stipulation that the homestead was conveyed or should be sold. It is sufficient that the piece or parcel of land constituting the homestead is included in the conveyance or mortgage containing the usual provisions.

Waterman v. Baldwin, 68 Iowa 255, 261-2, 26 N.W. 435, 438 (1885).

We hold the assignment executed and delivered by defendant Duchmans, to plaintiff bank, on March 23, 1976, effectively waived their homestead exemption. The assignment contained the legal description of defendant's homestead property. It did not require specific language referring to the land as their homestead.

II. **Application of Proceeds to Notes.** Defendant alleges that plaintiff bank should have applied the proceeds of the machinery, equipment, and crop sales to the notes as they were created in chronological order. Such a procedure would have retired the 1976 note which was secured by defendant's homestead. She cites no authority for her position.

In Lumber Supply, Inc. v. Hull, 158 N.W.2d 667. 669 (Iowa 1968), the supreme court stated, "If a debtor makes a voluntary partial payment to a creditor to whom he is indebted on several accounts, he has a right to select the items to which the payment shall apply. If he does not indicate his wishes, the creditor may ordinarily make such application if he desires."

The record reveals several reasons why plaintiff bank applied the above payments and proceeds to the 1980 loan. First, the collateral sold at the auction specifically stood as security for the 1980 note. Second, the 1980 note had a much higher rate of interest than the 1976 note. Finally, defendant Glen Duchman specifically requested that payments be applied to the 1980 note because of the higher interest rate. We therefore hold the bank properly applied the payments and proceeds to the later notes.

We hold the defendants waived their homestead exemption rights, and that the bank was not required to retire the 1976 note first. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.