FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FARMERS SAVINGS BANK, JOICE, IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1985
vs.	)	5-49 84-823
CHARLES F. GERHART, PENELOPE J. GERHART, and CHASPEN CORPORATION,	)	
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Winnebago County - B. C. Sullivan, Judge.

Defendants appeal from order of trial court (1) refusing to set aside a nunc pro tunc order discharging the receiver and (2) setting aside a sheriff's sale. MODIFIED, REVERSED AND REMANDED.

Mark S. Soldat, Algona, for defendants-appellants.

Craig G. Ensign of Ensign & Ensign, Norwood, for plaintiff-appellee.

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

Defendants appeal from order of trial court (1) refusing to set aside a nunc pro tunc order discharging the receiver and (2) setting aside a sheriff's sale.

Facts

In 1981 defendants Charles F. Gerhart, Penelope J. Gerhart and Chaspen Corporation made, executed and delivered one certain promissory note to plaintiff Farmers Savings Bank. The note was secured by a mortgage on certain real estate in Winnebago County.

The bank on March 8, 1983, filed a petition in equity against the defendants claiming personal judgment against the defendants for the balance due on the note and foreclosure of the mortgage against the Winnebago County property. The petition further requested the property be sold subject to a six month right of redemption on the part of the defendants and that a receiver be appointed to take charge of the premises and collect rents, profits and insurance and apply the proceeds on the indebtedness herein. A receiver, Elwood Norstrud, was appointed by the court. Norstrud filed an oath and bond and he was issued letters of receivership by the county clerk of court.

On May 26, 1983[1], an order was entered sustaining the bank's motion for summary judgment entering personal judgment against the defendants and foreclosing the mortgage against the real estate. The property was ordered to be sold and, if no redemption was made, the court would issue the sheriff a writ of possession commanding him to put the grantee's name in the sheriff's deed and to remove defendants in possession.

The bank did, at the sheriff's sale on August 8, 1983, bid the total amount of its judgment and costs. The sheriff then issued a sheriff's certificate of purchase to the bank. The certificate provided unless redemption was made within six months of the sale date a sheriff's deed would issue to the bank.

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[1] On June 28, 1983, an order nunc pro tunc issued increasing the amount of the judgment in the May 26 order. Neither party challenges the nunc pro tunc order on appeal.

On November 9, 1983, the receiver filed a report indicating he took charge of the real estate but collected no income and made no disbursements. On the same day the court entered an order nunc pro tunc finding the receiver should have been discharged on May 25, 1983, (the day before the order sustaining the summary judgement was filed) and discharged the receiver and his bondsman from further duty as of May 25, 1983. Defendants immediately filed a motion requesting the receiver make an accounting and that the court order the receiver to turn any overplus property to them. The bank resisted the motion. Defendants also filed a motion to set aside the nunc pro tunc order. The bank also resisted that motion. The bank filed a motion to vacate the sheriff's sale which was resisted by the defendants. A hearing was held on the motions.

The facts indicated that, prior to the filing of the foreclosure petition, a structure on the mortgaged premises had been destroyed by fire. The defendants carried fire insurance on the structure and the bank was named as a payee under the policy terms. At the time of the filing of the petition no insurance recovery had been received. On June 8, 1983, the insurer sent the bank a draft for $33,000. The bank received the draft after the May 26, 1983, decree on summary judgment but before the bank obtained their June 28, nunc pro tunc order increasing the original judgment from $52,928.53 to $55,838.70. The $33,000 was also received prior to the sheriff's levy and sale. When the bank received the $33,000, they claim they credited the account of Defendant Charles Gerhart at the bank.[2] The defendants were never notified by the bank that the $33,000 had been received. It was not until November of 1983, some two months into the redemption period and then only after inquiry by defendants' attorney and a motion by defendants requiring the receiver to account for the $33,000, that the bank, in a resistence to the motion to require the receiver to file an accounting, related to the court the fact that they had received the $33,000.

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[2] The account, however, had been reduced to judgment.

After the hearing the trial court determined that the defendants should have credit for certain insurance proceeds received by the bank and sustained defendants' motion for accounting on that ground only. The court granted the bank's request to set aside the sheriff's sale and held that the bank made an excusable good faith mistake of fact and would be injured if the sale is not set aside. The court further affirmed the nunc pro tunc order discharging the receiver. The court ordered the insurance proceeds paid to the clerk of court to apply to the judgment.

I. Nunc Pro Tunc Order

The defendants claim the trial court incorrectly affirmed the nunc pro tunc order discharging the receiver and exonerating his bond. The nunc pro tunc order was entered at the bank's request and without notice to the defendants. It served to back date the court's action to the date of the foreclosure judgment. The bank argues that this was proper because it was intended to be done in the summary judgment order and after the decree of foreclosure there remained nothing for the receiver to do. We disagree with both of the bank's contentions.

The appointment of the receiver was at the bank's request. The order was entered ex parte and without notice. That issue of the ex parte entry of the order is not raised and is not considered. The bank obviously sought the receiver for their protection. However, the appointment of the receiver took from the defendants certain incidents of ownership in the property which the defendants would have retained during the pendency of the action absent the receiver's appointment.

The general rule is that a receiver has only such powers, rights, duties, and functions as are conferred upon him by statutes, rules, orders, or decrees of the court appointing him. 66 Am. Jur.2d 184. The receiver's authorization was set out in the order appointing him. He was authorized to collect rents, profits and insurance and apply them pursuant to §654.14 the Code. §654.14 provides in part:

. . . The rents, profits, avails and/or income derived from said real estate shall be applied as follows:

1. To the cost of receivership.
2. To the payment of taxes due or becoming due during said receivership.
3. To pay the insurance on buildings on the premises and/or such other benefits to the real estate as may be ordered by the court.
4. The balance shall be paid and distributed as determined by the court.

While the receiver was appointed by and at the insistence of the bank, as an officer of the court he cannot serve only the bank as a master but owes a duty of fairness to the property owner who still retains rights to the property and will retain rights until the sheriff's deed finally issues. Should the property owner elect to redeem or to pay the mortgage before judgment or to pay the judgment before sheriff's sale, the amount he owes to discharge his obligation is affected by the collection of monies and the application thereof by the receiver. There is no basis for the bank's argument that the receiver has no further obligation once the decree of foreclosure has been entered.

We also disagree with the bank that the order discharging the receiver could be entered without notice. In 1915 the Iowa court held parties to a suit are required to receive notice on a receiver's report and the court set aside a discharge where no notice was served on interested creditors. In Re Receivership of W. A. Magner, 173 Iowa 299, 306, 155 N.W. 317, 319 (1915). In Miller v. Everest, 212 N.W.2d 522, 525 (Iowa 1973) the court held the discharge of a receiver in a foreclosure proceeding and termination of receivership was void as to the executor of the estate of a person injured on the premises during the receivership. For want of notice, the court held the order void as to the executor and determined that the receiver remained undischarged and the receivership remained open as to the executor.

The broad general rule is that the dismissal of the action in which a receiver was appointed does not of itself terminate the receivership or discharge the receiver. Once the main action is dismissed or terminated, the receiver must

have an opportunity to prepare and present his accounts and adjust the details which are essential to the closing of the receivership. 66 Am. Jur.2d §196. The Iowa court has said " . . . No person could lawfully deprive him as receiver of its possession as long as he remained undischarged. Young v. Miller, 228 Iowa 741, 746, 292 N.W. 845 (1940). The order granting summary judgment did not end the receiver's duties.

We modify the trial court's order with reference to the receiver and sustain defendant's motion to set aside in its entirety the nunc pro tunc order discharging the receiver. We remand to the district court with instructions to order the receiver to collect the insurance proceeds, rents and profits, file an accounting thereon, pay those charges authorized by §654.14, the Code, and distribute the balance as determined by the court on final hearing, after notice to all interested parties.

II. Sheriff's Sale

The defendants contend the trial court should not have set aside the sheriff's sale. The decree of foreclosure entered personal judgment against the defendants for $52,928.63[3] with interest at 20% from date of judgment plus other costs. The bank, by two of its officers, appeared at the sheriff's sale and bid $55,838.70 for the parcels. The bank had legal counsel at the time but did not take their counsel to the sale. They contend that in bidding in the full judgment they made a mistake and they were misinstructed by the sheriff.

The sheriff was asked:

> Q. And what is the fact, Sheriff Vold, that you told them [referring to the bank officers] that ordinarily the judgment creditor should — that the judgment creditor bid the amount of its judgment plus costs? A. The question was asked as a normal procedure and my answer was in regard to the normal procedure occurred at the sheriff's sale.
> Q. And what was your answer then to them? A. Ordinarily they bid the judgment plus all costs.

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[3] The $52,928.63 was entered in the May 26, 1983 judgment and it was increased to $55,838.70 by the nunc pro tunc order of June 28, 1983.

We disagree with the trial court that the sale should be set aside. That a party is not entitled to have a sheriff's sale set aside because of the mere fact that he has made a mistake in the amount of his bid and suffered injury thereby is a familiar rule, and one which has heretofore been recognized by this court. Aronson v. Hoskins, 201 Iowa 389, 398 (1926). Where plaintiff sought to have a sheriff's sale set aside due to the forgetfulness of plaintiff and of his attorney as to their bidding plan, the court held: "The rule of caveat emptor applies to sheriff's sales and they will not be disturbed if there be nothing more than a mistake of law or forgetfulness on the part of the bidder. Crawford v. Foreman, 127 Iowa 661, 665 (1905).

The case at bar is distinguishable from Bay v. Harnett, 58 Iowa 344, 347, 12 N.W. 336, 337 (1882) where the sheriff told a bidder he would apply the excess to a mortgage lien. In Bay, the court considered this to be a representation as to facts, not as to what the law would do but as to what the sheriff was doing and would do. The court said: "As the sheriff will not and cannot apply the proceeds in the manner represented, the plaintiff had been misled as to material facts, and, upon that ground is entitled to relief." There is no evidence here that the sheriff represented he would do something other than what he in fact did.

We also distinguish Equitable Life Ins. v. Carpenter, 202 Iowa 1334, 1337, 212 N.W. 145, 146 (1929), where the court held a sheriff's sale had upon an execution that was clearly erroneous in stating the amount of the judgment should have been set aside and the sheriff's certificate cancelled. There is no evidence here of any mistaken amounts being included in an execution. If there was a mistake it was the bank's mistake based on an erroneous application of facts known only to them.

The bank claims the sale should be set aside because to do otherwise would unjustly enrich the defendants. The bank received the insurance proceeds; and after receipt of the proceeds, they obtained a nunc pro tunc order increasing the

judgment. They alone were aware of the insurance proceeds and made no effort to turn them over to the receiver or to satisfy the judgment rendered in an amount equal to the proceeds. They had knowledge of the receipt of the insurance proceeds and yet made a determination at a public sheriff's sale to bid the amount of their judgment for the real estate. The bank claims the court should determine they paid too much for the property despite the fact that they made a determination to bid and were the highest bidder at the public sale. They determined at a public sale the price to bid and bid it. That was the sale price. They have their property for the price they bid at a public sale conducted at their direction. We cannot determine the setting aside of the sale will not be injurious to defendants. At a public sale we cannot discount the fact that other bidders may have bid had the bank bid less and we cannot determine the market conditions would be the same as existed at the time of the first sale. The facts do not support a finding that the defendant would be unjustly enriched if the sale is not set aside.

We reverse the trial court's order setting aside the sheriff's sale.

MODIFIED, REVERSED AND REMANDED.