FILED
JAN 24 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PEOPLES TRUST & SAVINGS BANK, Riverside, Iowa,

Plaintiff,

vs.

DONALD BAIRD and WANDA BAIRD, et al.,

Defendants-Appellants.

Filed January 24, 1984

3-379
83-88

Appeal from the Iowa District Court for Johnson County--Ansel J. Chapman, Judge.

Defendants Baird appeal from separate orders arising out of foreclosure proceedings. AFFIRMED.

Philip B. Mears of Mears, Zimmerman & Mears , Iowa City, for defendants-appellants Baird.

David Meloy of Stanley, Lande, Coulter & Pearce, Muscatine, for defendants-appellants Latta.

Dennis S. Clark of Kamath & Clark, P.C., Iowa City, for plaintiff.

Considered by Oxberger, C.J., and Donielson, and Sackett, JJ.

Defendants Baird appeal from separate orders arising out of foreclosure proceedings, asserting: (1) that retroactive application of amendment of Iowa Code section 625.22, enlarging the amount of attorney fees to which defendants Latta were entitled, constitutes an unconstitutional impairment of contract; and (2) that defendants Lattas' waiver of right to a deficiency judgment in separate foreclosure proceedings relating to a separate property securing the note upon which their claim is based waived any right to surplus proceeds following sale of the property upon which plaintiff bank, a senior creditor, foreclosed in the present proceeding. We affirm.

I. Attorneys Fees

Appellants contend that retroactive application of the reasonable attorney fee provision of Iowa Code section 625.22, amounts to an impairment of contract and as such is unconstitutional. We disagree. In Bankers Trust Co. v. Woltz, 326 N.W.2d 274 (Iowa 1982), the court stated:

> We note that the right to attorney fees and costs is statutory, and depends upon the statute in force at the termination of the proceedings. Since no party is entitled to costs until a judgment is recovered, Iowa Code § 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrues at the termination of the proceedings and this right exists solely by virtue of the statute. The extent of the right can be governed only by the statute in existence at the time the right vests. Therefore, Iowa Code section 625.22 (1981), controls attorney fees to be taxed as part of the costs in the present case.

Id. at 278. Therefore, if there is no vested right to computation of attorneys fees until judgment, it would follow that absent such a right there could be no unconstitutional impairment.

Furthermore, "*the change in the statute pertains to a mere question of* costs.... The change, we think, does not impair the obligation of the contract,

but merely affects the remedy. Statutes may constitutionally be enacted changing the remedy existing when the contract was made, if they preserve the existing remedies in substance, and with integrity, and do not destroy or embarrass the remedies existing when the contract was made." County of Kossuth v. Wallace, 60 Iowa 508, 509-10, 15 N.W. 305 (Iowa 1883). See also 20 C.J.S. Costs § 3(b). We find such to be the case here and accordingly affirm the trial court's decision.

II. Deficiency Judgment

Bairds claim that the Lattas have waived their right to any deficiency judgment against the proceeds which might arise upon foreclosure sale of the Highway 218 property. We disagree. Iowa Code section 628.26 states in part:

> The mortgagor and the mortgagee of real property consisting of less than ten acres in size may agree and provide in the mortgage instrument that the period of redemption after sale on foreclosure of said mortgage as set forth in section 628.3 be reduced to six months, provided the mortgagee waives in the foreclosure action any rights to a deficiency judgment against the mortgagor which might arise out of the foreclosure proceedings.

Iowa Code § 628.26 (emphasis added). The plain import of the emphasized language is that the mortgagee waives any personal deficiency judgment against the mortgagor. The Lattas do not make any claim against the Bairds personally; instead, they seek to enforce the deficiency against the proceeds of the sale of the Highway 218 property. It is not uncommon for a lender to secure a single loan by mortgages on several different pieces of real estate. We do not believe it was the intent of the legislature to allow a reduced redemption period only upon waiver of deficiency of all of the parcels of real estate securing the note.

Nor was there any express or implied waiver by the Lattas. Waiver is a voluntary or intentional relinquishment of a known right. In the Matter of

Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). There is nothing in this record that would suggest that the Lattas intended to give up their right to assert a claim for a deficiency in the Highway 218 property foreclsoure proceeding.

AFFIRMED.