FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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OTOE COUNTY NATIONAL BANK,

Plaintiff-Appellant,

vs.

LEE E. NIKOLAS INVESTMENTS, INC.; LEE E. NIKOLAS; TERESA S. NIKOLAS; INGERSOLL COURT APARTMENT PARTNERS; PHILLIP J. SCHNEIDER; STEVEN B. BASSMAN; JEROME T. BASSMAN; GENE MADDOX; JAMES W. CHRISTIANSEN; MARVIN M. LEIBOW; JOEL FRIEDSON; HARRY PRINGNITZ; GEORGE BLOODGOOD, JR., G. W. HART and JESSE F. WESTFALL,

Defendants-Appellees.

Filed August 29, 1985

5-225
84-1241

Appeal from the Iowa District Court for Polk County - John N. Hughes, Senior Judge.

Plaintiff appeals an adverse judgment on its claim for a deficiency judgment against defendant Partnership due to an alleged assumption of a mortgage. **AFFIRMED.**

Jonathan C. Wilson and Brian L. Wirt of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, Iowa, for plaintiff-appellant.

Joseph L. Marks of Marks, Marks & Marks, Des Moines, Iowa, for defendant-appellee Bassman.

Luis Herrera, Des Moines, Iowa, for defendants-appellees Nikolas.

Paul A. Zoss and David L. Davitt of Adams, Howe & Zoss, Des Moines, Iowa, for all other defendants-appellees.

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

SCHLEGEL, J.

Plaintiff appeals an adverse judgment on its claim for a deficiency judgment against defendant Partnership due to an alleged assumption of a mortgage. The facts of this case involve a series of informal real estate transactions between one Lee E. Nikolas and Steven B. Bassman and Philip J. Schneider, on one hand, and Nikolas and Ingersoll Court Apartment Partners (hereinafter "Partnership"), on the other.

Nikolas is a real estate broker with considerable real estate experience and expertise. Bassman is a realtor and also administrator-treasurer of Partnership. Schneider is a realtor and attorney and is also a member of Partnership.

Defendant Partnership purchased the Ingersoll Court Apartments in 1977 and, after certain remodeling and maintenance expenses, were still indebted to the original seller and a local bank in 1979 when Nikolas began negotiations with Bassman to buy the apartments. Nikolas did not know of Bassman's status as being anything other than a normal realtor in this transaction.

Originally Nikolas felt the purchase would be a profitable one and that he could sell the apartments if he had to for approximately a $20,000 gain. In fact, Nikolas was in financial trouble from the very beginning. Both Bassman and Schneider, as individuals, lent money to Nikolas to help pay a portion of the downpayment. By the end of the first year of ownership Nikolas was seeking to sell the property and be relieved of any liability on the contract.

Thus, in the fall of 1980, both Nikolas, who owed Partnership on the contract, and in turn Partnership, who still owed the original seller and a local bank, were looking for a buyer who might relieve them both of their respective financial burdens.

In November 1980, Bassman and another realtor, Vern McDonough, found Carl G. Goldsberry as a willing buyer. Goldsberry owned, free and clear, six

small parcels of land that he offered to trade for Nikolas's interest in the apartments. In addition to the real estate transfer, Goldsberry offered to assume the contract between Partnership and the original seller of the apartments. He originally communicated this offer to Nikolas, believing Nikolas to be the owner. After receiving a rejection on this offer, however, Goldsberry then discovered that Nikolas's purchase of the Apartments was never recorded and that Partnership was still the owner of record. He then made a second offer, based essentially on the same terms, to the "Owner and Owners of Record." He listed McDonough as the agent for the seller and Bassman as the listing salesman.

Partnership accepted this proposal but added a document to the offer which stated in effect that they would accept only on the condition that a mortgage or mortgages be obtained on the smaller properties so that enough money would be available to liquidate its debts to its creditors. Nikolas and ten of the partners signed the document. The record shows that Partnership carefully drafted the document so as to make clear that it would not become personally liable on the mortgage.

Nikolas then signed a letter, typed on Bassman Realty stationery, addressed "To Whom it May Concern" stating that he would "assume" a mortgage on the properties presently owned by Goldsberry.

McDonough then contacted a former business partner, Dale Swanson, at a bank in Bellevue, Nebraska, where Swanson was a vice president, to arrange for Nikolas to apply for a mortgage loan at the Bellevue Bank. The application was referred, however, by Swanson to plaintiff, the Otoe County National Bank in Nebraska City, Nebraska, with which the Bellevue Bank was affiliated. In December 1980, plaintiff bank issued a "commitment letter" to purchase the loan in the amount of $140,000, which, in turn, was accepted by Nikolas as presi-

dent of his realty corporation, Lee E. Nikolas Investments, Inc. ("Investments, Inc."). Investments, Inc., then executed a note in January of 1981 in the amount of $140,000 payable to the Bellevue Bank. The note was also signed by Nikolas and his wife as individuals. The Bellevue Bank then endorsed the note to the order of plaintiff bank. On the same day, Investments, Inc., also executed a mortgage to the Bellevue Bank as mortgagee covering the six properties owned by Goldsberry. The mortgage contained a provision stating that the sale of any or all of the mortgaged properties without the mortgagee's prior written consent would give the mortgagee an option to declare all sums secured by said mortgage to be immediately due and payable. This mortgage then was assigned by the Bellevue Bank to plaintiff bank.

Shortly after the assignment of the mortgage, Goldsberry conveyed the six properties to Investments, Inc. Subsequently, Partnership quit claimed to Goldsberry all of Partnership interest in the Ingersoll Court Apartments. (The record does not show any conveyance or assignment by the Nikolases to Goldsberry of the interest of the Nikolases in said apartments.) On January 12, 1981, after Partnership conveyed its interest in the apartments to Goldsberry, Investments Inc. conveyed the six properties to Partnership by deeds which contained no reference to a mortgage to the Bellevue Bank. These deeds were not recorded until July 7, 1981.

Goldsberry asumed all the debts that Partnership still owed on its purchase contract, and Nikolas, by conveying the six properties to Partnership, subject to the mortgage, satisfied his debt to Partnership.

As far back as November 1980, when the initial phases of the mortgages were being transacted, Bassman Real Estate received written authorization from Investments, Inc. to "handle and disburse all funds" received from the Bellevue Bank loan. This authorization in turn was forwarded to a Des Moines

attorney who, without any knowledge of Partnership interest, disbursed the loan funds according to Bassman's directions. For that matter, the record shows that at the time of the closing of the loan in January of 1981, the Bellevue Bank, its employee and officer, Swanson, and the plaintiff bank had no knowledge of any interest that Partnership might have in the transaction either as a recipient of a portion of the borrowed funds or as the ultimate grantee of the six properties Goldsberry was conveying to Nikolas's corporation. Plaintiff bank does not claim it relied upon any parties other than the Nikolases and Investments, Inc., to pay and satisfy the note and the mortgage when the contracts were signed. Nikolas fully understood that he was personally liable for the mortgage and the note.

As stated previously, the proceeds of the loan were dispersed per Bassman's directions. Of the $140,000, $132,000 went to Bassman Realty's trust account. From these proceeds, payments included: $65,519.52 to Valley National Bank to pay Partnership's debt for remodeling the Apartments; $29,420.00 to West Bank to pay a debt incurred by Bassman and Schneider in order to help Nikolas make his original downpayment on the apartments; $28,000.00 commission to McDonough and Bassman for the sale of the apartments to Goldsberry; and $1,000.00 to Swanson at the Bellevue Bank.

Nikolas nor his corporation received any proceeds from this loan. A "reserve" of $4,850.76 was set up by Bassman because a negative cash flow was anticipated from the six properties. This reserve account bore the name "Ingersoll Properties" of which Bassman had signature authority, but Nikolas had no authority whatsoever. Four monthly payments were made upon the $140,000 note by Bassman from the "Ingersoll Properties" account. After that the "reserve" account was depleted and Bassman told Nikolas that money to pay the note had "run out," to which Nikolas replied "he didn't have any money."

Plaintiff bank then determined that the six properties were owned by Partnership rather than Nikolas and sent Swanson to discuss the matter with Partnership. Nikolas was not at this meeting. Swanson in effect told Partnership that the bank did not recognize it as having assumed the mortgage and did not approve or disapprove of it as prospective transferee of the mortgage. Pursuant to the mortgage's "due on sale" clause, plaintiff bank notified the Nikolases and their corporation that all sums secured by the mortgage were immediately due and payable.

Nikolas recognized that he was liable to plaintiff bank on the note, however he felt that it was only a "contingent liability." He felt that if the cash flow from the six properties was insufficient Partnership would provide for payment of the note in order to protect its "equity" in the properties. However, Nikolas does not claim that Partnership was obligated to assume or make such payments.

Plaintiff bank's original petition included two counts praying for a deficiency judgment against Investments, Inc., and a foreclosure of the mortgage given by Investments, Inc. Defendant Investments, Inc., filed a confession of judgment on the foreclosure action and waiver of redemption rights to the real estate. Plaintiff bank later amended its petition to include three more counts against Partnership and its individual members. In essence the amended petition alleged that Partnership had impliedly agreed to obtain title to the real estate and impliedly or orally agreed to assume the mortgage and note given by Investments, Inc. The trial court awarded plaintiff judgment on the first two counts, but dismissed the three remaining counts against Partnership and individual partners.

Plaintiff appeals the court's dismissal of counts against Partnership and individual partners alleging that the trial court erred in not finding defendants liable on theories that: 1) Partnership was an undisclosed principal; 2) Partnership had assumed the mortgage and note; and 3) plaintiff bank, as third party bene-

ficiary, is able to enforce any assumption agreement. We affirm the trial court's decision.

I. **Undisclosed Principal.** Plaintiff argues that the evidence was sufficient to establish an agency relationship between Nikolas and Partnership. We find that the parties considered the issues between plaintiff and Partnership and the individual partners to be triable at law. The trial court's findings of fact bind this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). When as here the trial court determines that a party has failed to carry the burden of proof on an issue, we will not interefere unless we find the burden was carried as a matter of law. Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980).

In this case the trial court determined that an agency relationship did not exist. Plaintiff must, of course, first establish the existence of an agency relationship before liability will attach to Partnership.

The burden of proving a principal and agent relationship is upon the party asserting such a relationship. Ioerger v. Schumacher, 203 N.W.2d 572, 575, 576 (Iowa 1973). "An agency results from the manifestations of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to his control, and consent by the other so to act." Ieorger, at 575, 576.

> Where a contract is made with an agent in his own name and apparently upon his own responsibility, an actual agency must exist before his principal may be held liable. In such cases it is not a question of the apparent authority of the agent, but of his real and actual power in the premises.

Sutton v. Horner, 177 Iowa 620, 621, 622, 159 N.W. 222 (1916).

We agree with plaintiff that "an agency may be proven not only by direct evidence of an agreement between the parties but also by circumstantial evidence, such as their words and conduct, from which an intention to create an

agency may be fairly implied." Ieorger, at 576. But it remains that "the question of whether there was a principal-agent relationship ordinarily is one of fact." Id. We cannot say that the facts, as a matter of law, are sufficient to disprove the trial court's findings and demonstrate that Nikolas and Partnership had a principal-agent relationship. Nikolas signed the mortgage note on behalf of Investments, Inc., and himself and his wife. Plaintiff bank, the Bellevue Bank, and for that matter Swanson, all understood Nikolas to be responsible for the repayment of the note. Indeed, he himself understood that to be the situation.

It must be kept in mind that the reason for mortgage and the trade of property was to extinguish a debt owed by Nikolas to Partnership. It cannot be doubted that Nikolas himself was aware of this. All benefits and responsibilities of the mortgage note derive from the fact that Nikolas, an experienced realtor, was attempting to resolve the preexisting debt that he owed to Partnership concerning his purchase of the apartments.

It is at this point where we believe the case at bar can be distinguished from the case Collentine v. Johnson, 203 Iowa 109, 202 N.W. 535 (1925), in which plaintiff Otoe relies so heavily. In Collentine, the court was not dealing with a situation where there was a preexisting debt, and therefore, the court placed heavy reliance on the fact that the undisclosed principal received the entire benefit. More importantly, the purpose of the underlying transaction was for the agent and the undisclosed principal to share in the benefits of the purchase. Here, in contrast, both Nikolas and Partnership are fulfilling the promises and responsibilities they agreed to when Nikolas purchased the apartments. That is, Nikolas is providing cash and other valuable consideration to Partnership for payment of the apartments. If we were to consider the totality of the circumstances as plaintiff here suggests, we could just as easily find a debtor-creditor

situation as an agency relationship. Nikolas is not asserting that he is or was an agent of Partnership. The purpose of the sale to Nikolas was to relieve Partnership of its debts to others. To interpret the record as an assumption of the mortgage would be to negate the original intent of both parties.

II. **Express or Implied Assumption of the Mortgage.** Plaintiff bank, in the alternative, claims that Partnership, and the individual partners, as grantees, expressly or impliedly agreed to assume the mortgage note. Where a grantee of property subject to a mortgage promises to assume and pay a mortgage debt, he becomes personally liable thereon and this liability may be enforced by the mortgagee. First Trust Joint Stock Land Bank v. Thomas, 223 Iowa 810, 274 N.W. 11, 15, 16 (1937). However, a grant of property subject to a mortgage, without showing an agreement to assume, does not impose personal liability on the grantee. Bankers Trust Company v. Knee, 222 Iowa 988, 270 N.W. 438, 440 (1936).

The trial court cited Des Moines Joint Stock Land Bank v. Allen, 220 Iowa 448, 261 N.W. 912 (1935), as its legal foundation and we approve. In Allen the Supreme Court said:

> . . . [W]here property is conveyed subject to an existing mortgage, the grantee is not liable for the payment of such mortgage, unless it appears from the evidence that he agreed to assume it.
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> . . . We think the true rule is that where a grantee takes a conveyance of property subject to a mortgage which is treated as part of the purchase price, the property becomes bound for the payment of the mortgage, but the purchaser is not personally liable for the mortgage debt, unless he specifically agrees to assume the debt.
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> . . . In order to imply a promise, there must have been an intent . . . to assume (the) mortgage. In the absence of such an intent, there can be no implied promise.

Allen at 452, 455.

We believe the evidence sufficiently shows that Partnership carefully worded its intent not to assume personal liability on the document attached to Goldsberry's proposal in November of 1980. Also, Nikolas himself said that he did not expect Partnership to assume any liability but rather he believed it would assume the indebtedness in order to protect its equity interest in the properties.

Neither does the fact that the value of the mortgage replaced Nikolas's total debt to Partnership establish that Partnership is therefore personally liable.

> Nor is the rule . . . (that a grantee assumes no personal liability upon a mortgage except by express agreement) altered by the circumstance that the owner conveys subject to a mortgage, and deducts the amount thereof from the consideration. (Parenthesis supplied.)

Allen at 453.

The Allen court faced a factual situation where there was, like the case at bar, a preexisting debt that spawned a series of transactions and mortgage notes. The parties in Allen, like the parties here, disagreed as to the true nature of the facts surrounding these transactions. Because of the similarities, therefore, it is helpful to look at the factors the Supreme Court of Iowa looked to in Allen. The court noted that "there is considerable difficulty, however, in implying a promise when the facts on which implication is based are in dispute." (Emphasis the court's.) The fundamental element in (the case) is the intent of the parties. (Emphasis ours.) Allen, at 457. The Allen court felt it significant that there was no apparent reason why the defendant in that case would want to assume plaintiff's mortgage. Id. We feel the same about Partnership's intent in taking the six properties subject to Nikolas's mortgage. We can see no reason why Partnership would intend to assume a debt when the whole purpose of the transactions between Nikolas and Partnership was to relieve Partnership of any and all debts. Therefore, we agree with the trial court's decision that Part-

nership did not expressly or impliedly assume the mortgage note from Nikolas or Investments, Inc.

III. Third Party Beneficiary. Plaintiff bank also alleges that because defendant Partnership expressly or impliedly assumed the mortgage note, it may enforce the agreement on the basis that it is a third-party beneficiary. Because we agree with the trial court that no agreement to assume the mortgage had occurred, it follows that this theory is without merit.

We agree with the trial court that defendant Partnership did not assume the mortgage note between Nikolas and plaintiff bank, and therefore affirm its decision.

AFFIRMED.