FILED
APR - 8 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CURTIS PETERSEN, d/b/a Economy Plumbing & Heating,

Plaintiff,

vs.

RICHARD L. MAYER and PHYLLIS J. MAYER, et al.,

Defendants.

MIDWEST FEDERAL SAVINGS & LOAN ASSOCIATION OF EASTERN, IOWA,

Cross-Claimant-Appellee,

vs.

RICHARD L. MAYER and PHYLLIS J. MAYER, husband and wife,

Defendants to Cross-Claim-Appellants.

RICHARD L. MAYER and PHYLLIS J. MAYER, husband and wife,

Cross-Claimants,

vs.

MIDWEST FEDERAL SAVINGS & LOAN ASSOCIATION OF EASTERN, IOWA,

Defendants to Cross-Claim.

Filed April 8, 1983

2-404
2-68312

Appeal from Clinton District Court - C. H. Pelton, Judge.

Defendants, mortgagors, appeal from the trial court's judgment of foreclosure in favor of cross-claimant, mortgagee. REVERSED.

J. Drew Chambers of Shaff, Farwell & Senneff, Clinton, Iowa, for defendants to cross-claim-appellants.

James D. Bruhn of Holleran, Shaw, Murphy & Stoutner, Clinton, Iowa, for cross-claimant-appellee.

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

PER CURIAM

The parties to this action are not strangers to this court, the subject matter of this appeal having previously been presented to this court. Prior to any discussion of the merits of this controversy, we must initially unravel the procedural labyrinth in which the parties have enveloped themselves. In the action which generated the first appeal, defendants, Richard and Phyllis Mayer, sued cross-claimant, Midwest Federal Savings and Loan Association, for breach of contract and breach of fiduciary duty based upon Midwest's advancement of sums from the Mayers' loan construction account to the general contractor without receiving lien waivers from the subcontractors that they had been paid by the general contractor. That action was commenced on August 16, 1979, and a judgment for the Mayers was entered on June 12, 1980. The trial court ordered Midwest to apply the remaining sums in the Mayers' construction account toward the satisfaction of the mechanics' liens which had been filed against the Mayers' property. The Mayers, unsatisfied with this result, appealed from the trial court's judgment. This appeal was transferred to the court of appeals.

This action originated on June 8, 1979, when a subcontractor, Curtis Petersen, filed a petition of foreclosure of his mechanics lien against the Mayers' property. Through various cross-claims and other procedural mechanisms, the action evolved into one in which Midwest, after receiving assignment of interests from the subcontractors having liens against the Mayers' home, sought foreclosure as mortgagee. Midwest's basis for foreclosure was that the Mayers were in default in the payment of monthly installments under the note and mortgage securing the notice which were executed in consideration of the construction loan. The Mayers set up various defenses to the foreclosure action[1] including: (1) their

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[1] The defenses proffered by the Mayers in the present action were based in part on the trial court's judgment which was subsequently modified in the first appeal.

nonpayment was excused due to Midwest's breach of its fiduciary duty as found by the trial court in the Mayers' breach of contract/fiduciary duty action; (2) Midwest had failed to procure the satisfaction of the subcontractors' liens as ordered by the trial court in the contract action and had instead acquired only an assignment of interest, thus making it inequitable for Midwest to foreclose; and (3) Midwest had failed to give a thirty day notice of its intention to foreclose as required by the mortgage until eleven months after the foreclosure action was commenced. The trial court entered a judgment in favor of Midwest, ordering foreclosure on September 25, 1981. The present appeal is from this judgment.

On April 27, 1982, this court issued its decision in the first appeal affirming in part, reversing in part, and remanding the trial court's judgment in the breach of contract/fiduciary duty action. In that case, this court ordered that Midwest return $24,806, the amount Midwest wrongly released to the general contractor, to the Mayers' construction account. Midwest was "also ordered to disburse funds from said construction account to the [Mayers] as they are needed to pay the liens filed against the home, and to pay for the cost of completion of the home." Mayer v. Kvarsgaard, No. 2-65651, slip op. at 4 (Iowa Ct. App. 1982) (emphasis added). The trial court in the present action did not have the benefit of the first appellate disposition at the time the judgment in this second action was rendered.

The trial court in the present action considered the issues in the following context:

> The Court's effort to restore Mayers and Midwest to where they should have been is apparently doomed to failure since Mayers have refused to make installment payments on the note and have occupied the premises since Mid-March 1979. Surely Midwest cannot be expected to finance the Mayers without ever being paid; so foreclosure seems inevitable. Upon foreclosure, the Mayers lose the land and house they want and Midwest ends up with the land and an unfinished house they do not want unless the Mayers redeem or a higher court reviews both of this Court's decisions on this controversy and starts over reaching a better or different result.

We agree with the trial court that the Mayers cannot live indefinitely in the home without making payments; however, we disagree with the trial court's judgment granting foreclosure.

I. Scope of Review. Our review is **de novo.** Iowa R. App. P. 4; Iowa Code § 654.1 (1981).

II. Defenses. "The only common-law defenses to a mortgage foreclosure suit have been held to be payment, discharge, release, satisfaction or the absence of a valid lien from the inception." 59 C.J.S. Mortgages § 618(a) (1949). "The fact that the mortgagor may have a right to an accounting against the mortgagee arising out of transactions in connection with which a mortgage was given will not prevent a foreclosure of the mortgage when due according to its terms . . . ." 59 C.J.S. Mortgages § 506(b) (1949). Nor may the equity jurisdiction of the court necessarily supply defenses to the mortgagor. In a mortgage foreclosure action the court has stated:

> In brief, this case is governed by the contract of the parties. Johnston v. Robertson, 179 Iowa 838. The principles of equity jurisprudence applicable to penalties and forfeitures may not be invoked. The relations of the parties are contractual and it is not the function of a court to reframe a contract for the parties thereto so that less hardship will result. Plaintiff has seen fit to hold the defendants to the stipulations. As the mortgage is written, it is written. More v. Crandell, 146 Iowa 25.

Thompson v. Hart, 195 Iowa 582, 584, 191 N.W. 365, 366 (1923). The Mayers' defenses which are predicated upon the negligence of Midwest and Midwest's failure to procure the satisfaction of liens as required by the trial court may entitle Mayers to an accounting, but we need not determine whether such defenses are a bar to foreclosure. The Mayers raise a defense based upon the construction and application of the mortgage which we believe is dispositive of this appeal.

III. Notice. The Mayers argue that they were not given the required thirty day notice as mandated by paragraph 18 of the mortgage. Midwest concedes

that notice was untimely, but that Midwest should be excused from doing a useless and meaningless thing such as providing the paragraph 18 notice to the Mayers.

Paragraph 18 provides:

> 18. Acceleration; remedies. Except as provided in ¶17 hereof, upon borrowers breach of any covenant or agreement of borrower in this mortgage, including the covenants to pay when due any sum secured by this mortgage, lender, prior to acceleration, shall mail notice to borrower as provided in ¶14 hereof specifying: (1) the breach; (2) the action required to cure such breach; (3) a date not less than 30 days from the date the notice is mailed to borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sum secured by this mortgage, foreclosure by judicial proceeding and sale of the property. The notice shall further inform borrower of the right to reinstate, after acceleration and the right to assert in the foreclosure proceeding, the nonexistence of a default or any other defense of borrower to acceleration and foreclosure. If the breach is not cured on or before the date specified in the notice, lender may declare all of the sums secured by this mortgage to be immediately due and payable without further demand and may foreclose this mortgage by judicial proceeding.

It was stipulated by the parties that such notice was not given to the Mayers prior to the foreclosure action. The present action was commenced on May 8, 1979, by a subcontractor; Midwest filed its cross-claim against the Mayers seeking foreclosure of the mortgage on January 8, 1980. The notice required by paragraph 18 notice was not given to the Mayers until December 2, 1980.

Midwest claims that its failure to provide the requisite notice should be excused providing notice would have been a useless and meaningless act. Midwest relies heavily upon the court's statement in Thompson v. Hirt, 195 Iowa at 587, 191 N.W. at 367-68. Thompson involved a foreclosure action in which the mortgagee provided no notice or demand to the mortgagor.

> It would be a peculiar rule that would require a mortgagee who has paid taxes or assessments to protect his securities to notify the mortgagor and demand reimbursement from him as preliminary to an enforcement of a contractual right. [citations omitted]

> Furthermore, it may be asserted by the plaintiffs that a demand or notice would have been a useless and meaningless proceeding as the defendants claim they were not liable for the assessment. Under such circumstances what would it avail to make a demand? It would have been merely perfunctory and formal. A demand is unnecessary to the maintaining of any action where the party upon whom a demand is said to be necessary asserts in the action any claim or right, in respect to the subject of the controversy, so inconsistent with that of the adverse party that it is presumed that a demand would have been unavailing. [citations omitted]

Id. Unlike paragraph 18 in the present mortgage, the contract in Thompson stated that it could "be foreclosed at once without demand at second party's option." Id. at 583, 191 N.W. at 366.

Although we may agree with Midwest's assertion that chapter 654 has no statutory notice requirement, the parties nonetheless are free to contract for notice. See Citizens First National Bank v. Hoyt, 297 N.W.2d 329, 331-32 (Iowa 1980) (Consumer Credit Code applicable to the parties transactions where a provision was inserted into contract even though not a consumer transaction). See also First Northwestern National Bank v. Crouch, 287 N.W.2d 151 (Iowa 1980). In the present case the parties' contract requires a thirty day notice prior to bringing a foreclosure action. Just as we hold the Mayers to the terms of the mortgage, so also do we hold Midwest. "As the mortgage is written, it is written." Thompson v. Hirt, 195 Iowa at 584, 191 N.W. at 366. The court has stated that in foreclosure actions that the statutes must be strictly followed, Beach v. Youngblood, 215 Iowa 979, 989, 247 N.W. 545, 550 (1933); we see no justification for not requiring the parties to adhere strictly to the terms of their mortgage in foreclosure actions as well. We find that Midwest did not provide the requisite notice and that such notice was not a futile or meaningless gesture. Accordingly, we reverse the trial court's judgment of foreclosure.

REVERSED.