FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

COMMUNITY STATE BANK,	)	
Plaintiff-Appellant,	)	Filed August 26, 1987
vs.	)	42
ROBERT L. CLOUSE and **SUSAN K. CLOUSE,**	)	6-461 85-1334
Defendants-Cross-Appellants.	)	

Appeal from the Iowa District Court for Sac County (Eq. No. 16089), Louie F. Beisser, Judge.

Plaintiff appeals from the judgment in a foreclosure action which set aside a deed of trust executed by defendants, asserting that the evidence was insufficient to establish either the existence of a confidential and fiduciary relationship or a breach of it and that they should have been awarded attorney fees. **AFFIRMED.**

Adrian T. Knuth of Thomas & Knuth, Anamosa, for plaintiff-appellant.

Laurel L. Boerner of Boerner & Jacobson, Ida Grove, for defendants-cross-appellants.

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

DONIELSON, J.

In August 1980 appellees, Robert and Susan Clouse, executed two promissory notes in order to finance the purchase of a home in Stanwood, Iowa. The lender on both notes was Union Trust and Savings Bank of Stanwood, predecessor in interest of appellant, Community State Bank of Clarence, Iowa. One note, for $21,500.00, was secured by a mortgage on the newly-purchased property. The second note, for $10,000.00, although initially unsecured, bore a notation that it was to be paid out of the proceeds resulting from the sale of the Clouses' previous home in Odebolt, Iowa. The Clouses' Odebolt home had not yet been sold, however, on the date the note matured. Accordingly, on June 12, 1981, the $10,000.00 note was rewritten and a trust deed on the Clouses' Odebolt home was taken as security by the bank. The note was once again rewritten in December 1981.

The Clouses relocated to their Odebolt home in January 1982 due to a reduction in Robert's employment. Their Stanwood home was sold, after initial difficulty, in June 1983 for $28,000.00. The net proceeds of this sale, although sufficient to discharge the note which had been secured by mortgage of the Stanwood property, was insufficient to discharge the note now secured by the trust deed encumbering the Clouses' Odebolt home. Appellant's predecessor in interest initiated the present action to recover on the December 1981 note and to foreclose on the trust deed. The district court awarded appellant, who had assumed the assets of Union Trust and Savings Bank in July 1984, judgment for the amount due on the December 1981 promissory note. The court, however, found that equitable fraud had induced the Clouses into giving the trust deed. Resultingly, the court vacated and set aside the deed and denied appellant's attorney's fees otherwise recoverable under the trust deed. The bank brings this appeal in order to challenge that portion of the district court's order which

vacated and set aside the trust deed. The Clouses have abandoned their cross-appeal. As this case sounds in equity, our review is de novo. Iowa R. App. P. 4.

Community State Bank contends the district court erred in finding that a confidential relationship existed between the Clouses and Brooke Haesemeyer, an agent of the bank's predecessor in interest. We note that once a confidential relationship is shown to exist between the parties to a conveyance, a presumption against the validity of the conveyance arises and requires the grantee to establish the conveyance's fairness by clear and convincing evidence. King v. King, 291 N.W.2d 22, 24 (Iowa 1980); Daniels v. Fackler, 244 Iowa 1163, 1165, 58 N.W.2d 309, 311 (1953). In addition, once parties are shown to be in a confidential relationship and the trusted party has superior knowledge of the facts, that party has a duty to disclose all material facts of which he is aware, or at least those favorable to his position and adverse to the other. First Nat'l Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). The Clouses bear the burden of establishing the existence of such a relationship by clear and convincing evidence. See King, 291 N.W.2d at 24. Our courts have said that a confidential relationship exists where one has gained the confidence of the other and purports to act or advise with the other's interest in mind. E.g., Kunz v. Kunz, 255 Iowa 1087, 1090, 125 N.W.2d 226, 228 (1963). Although such a relationship is the exception to the rule in the banker-borrower context, Manson State Bank v. Tripp, 248 N.W.2d 105, 108 (Iowa 1976), our courts have not hesitated to find the existence of this relationship between a borrower and a bank's agent given the proper set of circumstances. See Brown, 181 N.W.2d at 182.

In Brown, a banker failed to inform a business's purchaser of a number of encumbrances against the business prior to financing the purchase through a promissory note. Our supreme court, in finding a confidential relationship

to have existed between the bank's agent and the purchaser, noted the record clearly disclosed that the banker "so comported himself that he knew or should have known" that the purchaser "trusted him implicitly." 181 N.W.2d at 182. In addition, the banker "neither said nor did one thing to alert [the purchaser] to the true situation, and by so failing purported to act solely for the purchaser's interests." Id.

In the present case, Haesemeyer was both an employee of Union Trust and Savings Bank--with respect to which Haesemeyer's family held a controlling interest—and the real estate sales person who handled the Clouses' purchase of their Stanwood home. He aided the Clouses in preparing their loan application and presented the application to the bank's loan review committee. That committee was composed of Haesemeyer, his brother, his father, his mother, and one other person. The original $10,000.00 note---which was subsequently rewritten and secured by the trust deed at issue here—was unsecured and contained only the notation that it was to be paid out of the proceeds from the sale of the Clouses' Odebolt home. Haesemeyer typed the note himself. Haesemeyer testified that he did not remember why no formal document of encumbrance was taken out at the time the original note was signed. Nor did he recall what, if anything, he told the Clouses about the possibility of eventually being required to sign a trust deed if their Odebolt home did not sell. The Clouses testified that the original agreement was that the note was to be paid whenever the Odebolt home sold. They also maintain Haesemeyer assured them that the bank would never force the sale of their Odebolt home and that the trust deed was only a formality required by the bank. The substance of this testimony was corroborated at trial by the deposition testimony of a neighbor of the Clouses. This testimony related contemporary discussions between the Clouses and their neighbor wherein was contained discussions of Haesemeyer's assurances to the

Clouses that the bank would not force the sale of their Odebolt home and that the Odebolt home was not used as security for the purchase of the Stanwood property. We find the deposition testimony admissible. See Iowa Rules of Evidence 805, 801(d)(1), 804(a)(5), and 804(b)(1); Iowa Code § 622.66 (1985). Haesemeyer conceded that the Clouses were not told that the renewal of their $10,000.00 note was in any way contingent upon their execution of the trust deed. That Haesemeyer enjoyed the trust and confidence of the Clouses is further suggested and corroborated by later correspondence between the parties wherein the Clouses expressed their trust in Haesemeyer's judgment with respect to the wisdom of an auction of their Stanwood home.

We agree with the district court that the present factual situation discloses a confidential relationship existed between the Clouses and Haesemeyer, an agent of Union Trust and Savings. See also 55 Am. Jur. 2d, Mortgages, § 15 at p. 204 (the essence of a deed of trust in the nature of a mortgage is a confidence reposed in the grantee with respect to the property in question). Accordingly, the bank bears the burden of establishing the objective fairness of the conveyance by clear and convincing evidence. King, 291 N.W.2d at 24.

Without the trust deed, the bank's $10,000.00 note was unsecured. Although Haesemeyer testified he did not know why a trust deed was not signed along with the note, he did state that a quick sale of the Clouses' Odebolt home was anticipated at that time. The ensuing months, however, saw a rapid decline in the pertinent real estate markets. Whereas Haesemeyer characterized the 1980 market as "good," he described that prevailing in 1981 and 1982 as "very depressed." Accordingly, as stated by Haesemeyer, the bank decided "it [would be] better [if] we had a deed of trust."

The Clouses, as noted above however, maintain Haesemeyer told them, prior to their signing the trust deed, that the bank would not force the sale

of their Odebolt home and that the deed was only a formality. Such a statement would be consistent, of course, with the bank's previously unsecured position. Although he denies making this statement, Haesemeyer does admit that the Clouses were not told the renewal of their note was in any way contingent upon their endorsement of the trust deed. As we have noted above, the Clouses' testimony as to the substance of their understanding with Haesemeyer is corroborated by their contemporaneous discussions with their neighbor. It is a well-settled principle of equity that such misrepresentations amounting to fraud in the inducement of a contract, whether innocent or not, give rise to a right of avoidance on the part of the defrauded party. Brown, 181 N.W.2d at 182. We do not think the bank has sufficiently disproved the suggestion that, similar to the situation in Brown, 181 N.W.2d at 184, they dealt with the Clouses "as tools with which to alleviate the result of its own poor loan judgment." As we believe the bank has not proved by clear and convincing evidence the fairness of the conveyance, we affirm the district court.

AFFIRMED.