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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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THE FEDERAL LAND BANK OF OMAHA, A Corporation, Plaintiff-Appellee, vs. **HAROLD V. HEEREN** and **MARY E. HEEREN**, husband and wife, Defendants-Appellants, **UNITED STATES OF AMERICA** acting through the **FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE; STATE OF IOWA; FORD MOTOR CREDIT COMPANY; COMMUNITY COOP OIL CO.; SCHAAFS HARDWARE, INC.; CLARK'S HARDWARE, INC.**; and **PLYMOUTH CO-OP OIL CO.**, Defendants.	8-428 87-1508

Appeal from the Iowa District Court for Plymouth County (No. 25272), Richard J. Vipond, Judge.

Defendants-appellants appeal from a district court ruling granting Reinking's application for writ of possession and sustaining the validity of the sheriff's sale to him. **AFFIRMED.**

George R. Remer of the Remer Law Firm, Coon Rapids, for defendants-appellants.

Glenn A. Metcalf of Metcalf, Thompson & Phipps, Moville, for appellee David Reinking.

Gregory N. Lohr of Baron, Sar, Wenell, Lohr & Jarman, Sioux City, for plaintiff-appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM

On July 17, 1987, David Reinking, as a purchaser at foreclosure sale of part of the property in dispute, filed an application for writ of possession. After a trial on the merits, the writ was granted. The defendants appeal. We affirm.

This case arose from the following circumstances. On June 30, 1977, defendants Harold and Mary Heeren received a loan from the Federal Land Bank of Omaha (FLB). The Heerens secured their loan with a real estate mortgage on two parcels of farm property totaling 240 acres. The mortgage contained a waiver of homestead rights.

The Heerens defaulted under the terms of their loan. On October 10, 1984, FLB filed a petition of foreclosure, and a decree of foreclosure was entered January 7, 1985. The sheriff's sale was held March 6, 1985, in accordance with that decree.

On January 28, 1985, pursuant to section 626.84 of the Code, a plan of division of land was prepared and signed by Craig A. Raby, the attorney then representing the Heerens, setting forth instructions to the sheriff as to the manner in which the farm was to be sold. The instructions directed the sheriff to sell the farm in six steps with a forty-acre parcel offered for sale each time. The sixth parcel of forty acres included the homestead, and it was to be sold last.

However, on March 6, 1985, the day of the sheriff's sale, Mr. Raby submitted an amended plan for the division of the land. The Heerens, through Mr. Raby, requested that the sale take place in three steps, with the first step to include the sale of a designated 160 acres, the second step to include the sale of a designated forty acres, and the third step, which was the remaining forty-acre parcel, was to be sold last. The last parcel included the homestead.

Before beginning the sale, the deputy sheriff described the three parcels of land that were to be sold and stated the order and sequence of sale. He explained to those present that the manner of sale was according to Mr. Heeren's wishes. Mr. Heeren nodded his head, indicating his approval. The sheriff then sold the land in accordance with the amended plan of division. David Reinking, the appellee,, purchased the two forty-acre parcels. Mr. Heeren, although present, did not object to the sale. There is no question but that the land sold for its full fair market value.

On February 28, 1986, the Heerens filed an application seeking an injunction enjoining FLB and David Reinking from removing them from their property. They did not ask that the sheriff's sale be set aside. They merely asked that those parties be enjoined from removing them from the land until a class action pending in Audubon County was resolved.

On March 26, 1986, the defendants' application for an injunction was denied. The defendants did not appeal that ruling. On April 15, 1986, the sheriff's deed to David Reinking issued without objections from the defendants. Mr. Reinking has farmed the land since that time and has made improvements to the land.

The Heerens yet remain on the land. They live in a mobile home which is parked on the south forty acres. In addition, some of their machinery yet remains there. The Heerens filed for bankruptcy in May of 1987. After the bankruptcy court lifted the stay, Mr. Reinking filed this application for writ of possession.

The application was filed on July 17, 1987. Hearing was fixed for August 14, 1987. It was not until the date of the hearing that the Heerens filed an answer to the application for writ of possession. In response to Reinking's application, the Heerens for the first time asked the court to set aside the sheriff's sale and deed.

The Heerens seek to have the sheriff's sale voided on the grounds that Iowa Code section 561.5 was not complied with. That section provides:

> Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included, the officer having the execution shall give notice in writing to said owner, and the spouse of such owner, if found within the county, to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case.

Compliance with section 561.5 is relevant. See Welsh v. Citizens National Bank, 420 N.W.2d 473, 475 (Iowa 1988). In Prudential Insurance Company v. Westfall, 219 Iowa 1119, 260 N.W. 344 (1935), the supreme court outlined the sale procedure which should be followed when both homestead and non-homestead property is to be sold. The non-homestead property should be offered before the homestead property in a foreclosure sale. 219 Iowa at 1130, 260 N.W. at 349. If the bid for the non-homestead property is insufficient to cover the judgment, then the homestead property is to be offered separately. Id. If the aggregate of the bid is insufficient to satisfy the judgment, then all the property may be sold en masse. Id.

The failure of the sheriff to follow the procedure set out in section 561.5 and to sell the property in accordance with the procedure outlined in Westfall does not void the sale, but merely makes the sale voidable. Id.

The law with respect to setting aside a sheriff's sale is well established in Iowa. In Coriell v. Ham, IV Greene 455, 460 (Iowa 1854), the Iowa Supreme Court stated:

> It is generally conceded by the authorities that a bona fide purchaser at sheriff's sale, even if that purchaser be the execution plaintiff, is not affected by any irregularity or omission of the sheriff in advertising and conducting the sale. Such purchaser is protected by the presumption that the judgment of a competent court has been correctly rendered, and that the execution in the hands of the sheriff was regularly issued; and that he performed his duty according to law. . . . .
>
> In the absence of fraud, it is the obvious policy of the law to protect judicial sales.

In South Ottumwa Savings Bank v. Sedore, 394 N.W.2d 349, 351 (Iowa 1986), our supreme court stated:

> Iowa law erects a strong presumption in favor of an execution sale. In the absence of fraud, collusion, or other substantial and justifiable prejudice, mere irregularities in the procedures leading to or following an execution sale will not support a debtor's motion to set aside the sale.

Equity requires that if an aggrieved debtor desires to set aside a sheriff's sale, he should bring his action promptly after becoming aware of the irregularity complained of. In this case, the Heerens assert no fraud or collusion. The Heerens knew what property was intended to be sold at execution. Without question, the Heerens instructed the sheriff as to the manner in which the sale was to take place. They were at the sale and gave every indication to the sheriff that the manner of sale which he publicly announced complied and conformed with their wishes. There is no evidence that the sale price was inadequate. The homestead was sold separately, and it is clear from the record that the Heerens understood they had the right to redeem the homestead but were not in a position to do so.

The Heerens at all times have been represented by counsel. It was their attorney who prescribed the method and manner of sale. The sheriff's sale was not challenged until twenty-nine months after the property was sold and sixteen months after the sheriff's deed was issued. During the past sixteen months, the Heerens have stood by without

acting as Mr. Reinking proceeded to make improvements to the land.

As the court stated in Sedore:

> [W]hen the debtor knows (or reasonably should have known) of the irregularity prior to sale, and fails to assert that irregularity until after the redemption period is passed and title is transferred under a sheriff's deed, he or she is effectively estopped to assert this irregularity, absent proof of collusion or fraud.

Id. at 352.

Thus, in the case before us the debtors themselves prescribed the manner of sale. They were acting through counsel, and we must presume that they were aware of their rights under the homestead and foreclosure laws of this State. They failed to assert the irregularities complained of until after the redemption period passed and title was transferred under the sheriff's deed. We agree with the trial court that under these circumstances the defendants are effectively estopped to assert the irregularities complained of. We affirm the trial court.

AFFIRMED.

Donielson, P.J., and Habhab, J., concur; Sackett, J., specially concurs without opinion.