FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THORP CREDIT, INC.,	)	
Plaintiff,	)	Filed February 23, 1983
vs.	)	
JAMES W. REX, LINDA K. REX,	)	
JAY WARREN REX,	)	
Appellant,	)	2-297 2-67326
R-2, INC., LEONARD W. REX, JOHN WILLIAM REX, CAROLINE REX, REX BROTHERS, JOSEPH W. REX, IRENE REX, THE ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, ALL UNKNOWN CLAIMANTS TO CERTAIN REAL PROPERTY LOCATED IN VAN BUREN COUNTY, IOWA, INCLUDING BUT NOT LIMITED TO THE HEIRS AND/OR DEVISEES OF ANNA E. REX, a/k/a ANNA ELIZABETH REX,	)	
Defendants.	)	

Appeal from Van Buren District Court - Dick R. Schlegel, Judge.

Defendant Jay Rex appeals from a foreclosure on his half interest in Van Buren County farmland following default on a loan made by plaintiff, Thorp Credit, Inc., to defendants James and Linda Rex. AFFIRMED.

Craig R. Foss of Foss & Kuiken, Fairfield, and Paul D. Refior, Warsaw, Indiana, for defendant-appellant, Jay Rex.

E. Ralph Walker and Marilyn S. Scheer of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ. Schlegel, J., takes no part.

DONIELSON, J.

Defendant Jay Rex appeals from a foreclosure on his half interest in Van Buren County farmland following default on a loan made by plaintiff, Thorp Credit, Inc., to defendants James and Linda Rex. On appeal, Jay asserts: (1) that the court abused its discretion by denying a request for a continuance to obtain the attendance of a witness, and by refusing to leave the record open after trial to allow introduction of a deposition of this witness; (2) that the court's findings of fact are so contradictory, and contrary to the evidence, that they should not be given the "weight" usually allowed them in review of equity cases; and (3) that the loan transaction and the mortgages securing it were void on grounds of duress, undue influence, fraud in the inducement, denial of reasonable expectations, impossibility, lack of consideration, and unconscionability. We affirm.

Plaintiff, Thorp Credit, commenced a replevin action at law for the personal property security and an equitable action to foreclose the mortgage. The two actions were consolidated for trial by agreement of the parties. While the trial court did conclude that "the actions were tried under equity rules," the record demonstrates that it treated the replevin action as one at law. Accordingly, our review of the issues relating to the replevin action is on assigned error, while those relating to the mortgage foreclosure are reviewed de novo. Iowa R. App. P. 4.

I.

In 1978, defendants Linda Rex and James Rex borrowed $297,050 from plaintiff, Thorp Credit, to finance construction of a rodeo and horse complex on their farm. As security for the loan, Linda and James granted security interest in virtually all their personal property, and executed mortgages on their farmland. Defendant Jay Rex, James' brother, had a joint half interest in the land and mortgaged his interest at the request of Thorp Credit although he was not a participant

in the rodeo project. In a letter, defendant Leonard Rex, the father of James and Jay, waived his retained life estate in the house on the "home place" at the request of Thorp Credit.

Due to various problems, the rodeo project was never developed. The building, which was the heart of the project, was eventually delivered, but by that time James and Linda could neither pay for it nor pay to erect it. In March, 1980, Thorp commenced a replevin action at law for the personal property security and an equitable action to foreclose the mortgage. The two actions were consolidated for trial which was held more than a year later. The court granted the replevin and foreclosed the mortgages, with the exception that Leonard's life interest was preserved.

James and Linda appealed, but they voluntarily dismissed the appeal. One day later Jay filed this appeal. We stress that Jay is the only remaining appellant and thus restrict this appeal to claims applicable only to him, even though his brief is somewhat directed to obtaining relief for the other defendants as well.

II.

Jay's first contention is that the court erred in refusing to grant the motion made at the opening of trial by James' and Linda's attorney for a continuance to secure the presence of Larry Maynes, a Thorp Credit employee who had been present at the closing. We disagree.

Iowa Rule of Civil Procedure 183 governs this situation and provides, in part:

> A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves.

The trial court is vested with "very broad" discretion to grant or deny a motion for continuance and its ruling will be disturbed on appeal "only where it appears that the trial court has abused its discretion." State v. Wright, 274

N.W.2d 307, 310 (Iowa 1979) (quoting State v. McGinnis, 243 N.W.2d 583, 586 (Iowa 1976)). In ruling on such motions, the general rule is that "continuances will not be granted for a want of defense preparation in the absence of a showing of good excuse." State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978); see also State v. Youngbear, 229 N.W.2d 728, 734 (Iowa 1975) (defense counsel who did not accompany motion with affidavits establishing prior diligent efforts did not comply with Rule 183(b) and did not show good excuse).

In the instant case, the trial was held beginning April 6, 1981, nearly one year after the action was commenced. The trial certificate was filed February 23rd and a pretrial conference was held March 30th. Only a few days before the actual trial began, Linda Rex and James Rex retained an additional attorney to assist the attorney who had represented them throughout the course of the litigation. They moved the court to continue the case to allow the additional attorney time to prepare for trial. They also sought to secure the presence of Larry Maynes, a Thorp employee who had been present at the closing. The court denied the motion.

In a final attempt to secure the testimony of Larry Maynes, the defendants Linda and James Rex moved the court to leave the record open to receive the deposition of Larry Maynes. Appellant Jay Rex joined in this motion. The court overruled the motion, reserving the right to change the ruling if it became apparent that Larry Mayne's testimony was essential to the issues before the court. At the close of the evidence, the court made the following ruling before closing the record and taking the case under advisement:

> At the end of the first day of trial, defendants indicated they might have a desire to leave the record open for the deposing of Mr. Maynes. It was helpful that the defendants, helpful to the Court, that the defendants stated that desire, because from then on, the Court listened carefully to determine what testimony specifically Mr. Maynes would be likely to provide in the way of additional facts or

> evidence in this case, which might assist the Court in making a determination on the issues involved here, including the affirmative defenses which now have been submitted; and the Court concludes that if all the statements attributed to Mr. Maynes by the defendants were taken as true, it would not change the substance of the case.
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> Nobody has tried to show the Court any testimony of Mr. Maynes which would alter the factual circumstances of this matter; and at the time I realize that because some matters beyond the control of anyone that is involved in this case at this time, there was a period of delay in the case that was longer than normal. However, this does not cause the court to feel that there was not adequate time for preparation of discovery.
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> If the defendants themselves felt that Larry Maynes was so important to the outcome of this matter and that he held the key or some key to the facts in this matter, it was within their province to urge their attorneys to find Mr. Maynes and talk with him, at least before trial began.

We agree with the trial court that there appears no "good excuse" for failure to secure Larry Maynes' deposition at an earlier time. The court concluded that, under the circumstances of this case, "substantial justice" would not be more nearly obtained by leaving the record open and continuing the case so that defendants could locate and depose Larry Maynes. Under the principles set forth above, we find no abuse of discretion in this ruling. To constitute an abuse of discretion the court must have exercised such discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)).

III.

In his second assignment of error, Jay urges this court to hold that the trial court's findings of fact are inconsistent and defective and thus should not be persuasive in this appeal. He complains that the entire action should be treated

on appeal as though it was tried in equity since the court began trying the replevin action in equity and, midway through trial, started treating it as an action at law. He thus urges us to review all findings de novo with little regard for the trial court's findings due to alleged inconsistencies in those findings. We note that, even in cases reviewed de novo, we give weight to the trial court's findings, especially where the credibility of witnesses is involved or where there is conflicting evidence. Iowa R. App. P. 14(f)(7); see also Tamm, Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Schnable v. Display Sign Service Inc., 219 N.W.2d 546, 549 (Iowa 1974). We review the record in the instant case with this principle in mind.

Jay's specific complaint concerns the fact that Leonard's life estate in the occupancy of the family home was preserved under a prior equitable lien, while the transfer of Jay's interest under the mortgage contract was upheld. We review only the claim that Jay's interest was improperly transferred since neither Leonard nor Thorp Credit have appealed the issue relating to the life estate interest. We find that Jay's execution of the mortgage was sufficient to pledge his interest in the property as security for the loan. See First v. Byrne, 238 Iowa 712, 718-19, 28 N.W.2d 509, 512 (1947) (when each co-tenant pledges his individual interest in a joint mortgage, separate liens are created upon the separate interests). Because Jay's interest was mortgaged to secure the debt of Linda and James, a relationship of suretyship was created and as such "the surety [is] held liable as such only to the extent of the property mortgaged." Id. We believe this was the intent of the parties when the mortgage was executed. See Freese Leasing v. Union Trust & Savings Bank, 253 N.W.2d 921, 924 (Iowa 1977). The evidence in the record amply demonstrates that Jay understood the nature of the transaction and the risks involved. The trial court's findings were not inconsistent with this evidence.

IV.

Jay's final contention is that the transaction between Jay and Thorp Credit is so grossly unfair that it should be denied enforcement. Specifically, he asserts that the entire transaction should be denied enforcement for the following reasons: 1) undue influence; 2) duress; 3) fraud in the inducement; 4) denial of reasonable expectations; 5) impossibility of performance; 6) lack of consideration; 7) substantive unconscionability; and 8) procedural unconscionability. Initially, at the beginning of trial, defendants sought to amend their answer to include these grounds as affirmative defenses. The court denied the motion as being in violation of the pretrial order which stated that no further amendments to the pleadings would be permitted. At the close of the evidence, defendants moved, pursuant to Iowa Rule of Civil Procedure 88, to conform the pleadings to the evidence adduced at trial which would bear on the affirmative defenses previously raised. The court granted the motion finding such defenses to have been tried by consent of the parties since "there was evidence the Court heard that if believed, would tend to support certain of the affirmative defenses." In its findings of fact and conclusions of law the court held:

> The court finds that there is insufficient evidence to prove the affirmative defenses offered by the defendants, as to any and all of said defenses. The court finds that the defendants have failed to sustain their burden of proof of such defenses.
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> The evidence in this case does not demonstrate that plaintiff exercised any conduct that overpowered defendants' will or induced them to do or forbear an act differently than if freely acting. The evidence shows, to the contrary, that Rexes were fully aware of the intended protection of the lender, by executing security instruments, and that the loan made was what they felt they needed to make the project start. the evidence shows that they were relying upon other farming engagements to generate the cash needed to service the early requirements of the loan.
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> The evidence is insufficient to prove that the actions of

> Thorp were in any way unconscionable, or that Thorp misrepresented facts or committed any fraud upon the Rexes. Likewise, there is no showing that in connection with the financial affairs of Linda and James Rex, Thorp occupied any kind of fiduciary relationship. If any such relationship did in fact exist, Thorp did not breach that relationship. Thorp was not charged with the responsibility to save the Rexes from themselves.

It is important to note that, in this issue, most of the facts upon which Jay relies are those relating to the expectations of and understandings and transactions between James and Linda and Thorp Credit, though James and Linda are not parties to this appeal. He does assert that the documents were prepared entirely by Thorp Credit and that Thorp Credit did not ascertain whether defendants understood the documents before signing them at the closing. Restricting our review only to the issues dealing directly with Jay, we find his challenges to be without merit.

The burden is upon Jay to establish, by a preponderance of the evidence, those matters affirmatively alleged by a preponderance of the evidence. In re Kochs' Estates, 258 Iowa 1251, 1255, 142 N.W.2d 541, 544 (1966). We agree with the trial court that Jay has failed to carry his burden of proof on any of the affirmative defenses. It appears from the record that the documents were adequately explained to Jay and he was given every opportunity to raise any questions he had at the closing. While he may not have read all of the provisions of the document, we do not believe he was misled or that he misunderstood the nature of the transaction he was entering. See Joseph L. Wilmotte and Co. v. Rosenman Brothers, 258 N.W.2d 317, 323 (Iowa 1977); Small v. Ogden, 259 Iowa 1126, 1132, 147 N.W.2d 18, 22 (1966) (a party may be bound by signing a document even though he hasn't read all provisions thereof).

Having considered all of Jay's contentions on appeal and concluded that they are without merit, we affirm the foreclosure on his half interest in the property.

AFFIRMED.