IN THE COURT OF APPEALS OF IOWA

No. 5-439 / 94-1604

FIRST STATE BANK, LYNNVILLE, IOWA,

Plaintiff-Appellant/Cross-Appellee,

vs.

LEONARD DEVRIES, RALPH DEVRIES, and CORNELIA DEVRIES,

Defendants-Appellees/Cross-Appellants,

and

JOAN KNIERIM,

Defendant-Appellee.

FILED
OCT 31 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

First State Bank brought this action in equity seeking to set aside mortgages given by Leonard Devries and Joan Knierim and asking the priorities and interest in the real estate included in the mortgage and real estate for which it was traded be adjusted. Defendants filed counterclaims alleging the filing of the equity action constituted slander, intentional infliction of emotional distress, abuse of process, and a violation of Iowa Rule of Civil Procedure 80. **AFFIRMED.**

B. C. Clayton and Michael K. Jacobsen of Diehl & Clayton, Newton, for appellant.

Fred J. Kreykes of Kreykes & Shepperd, Pella, for appellee Leonard Devries.

Ken J. Smith of Selby, Updegraff & Smith, Newton, for appellees Ralph and Cornelia Devries.

Thomas T. Tarbox of Smith Law Firm, Des Moines, for appellee Joan Knierim.

Heard by Sackett, P.J., Cady, J., and Oxberger, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SACKETT, J.

Plaintiff-appellant First State Bank of Lynnville, Iowa, appeals from the trial court's refusal to set aside a mortgage as a fraudulent conveyance and establish an in rem judgment against the contract vendor's interest of defendant-appellee Ralph Devries in the land and other lands purchased with the proceeds of the contract. Defendants-appellees and cross-appellants Leonard Devries, Joan Knierim, Ralph Devries, and Cornelia Devries appeal from a ruling on summary judgment dismissing their cross petitions for sanctions and other relief. We affirm.

Defendants-appellees Ralph and Cornelia Devries are husband and wife, and Leonard Devries and Joan Knierim are their two children. Leonard and Joan were indebted to plaintiff and gave the challenged mortgage on land they owned to their parents. Plaintiff contended the mortgage was fraudulent and sued defendants. Defendants filed a counterclaim. The trial court found the pivotal question in the litigation was whether, when the mortgage was given, Leonard and Joan were legitimately indebted to their parents. The trial court resolved the issue in favor of defendants and entered judgment for them. Plaintiff then filed a motion for summary judgment as to the counterclaim and it was sustained. This appeal follows.

The matter was filed in equity. Our review is de novo. Iowa R. App. P. 4.

This has been a long, complicated process; but for the most part, there is agreement to the facts, except on the issue of consideration. For clarity, we set forth those facts relevant to our determination.

The land in question was a 235-acre tract owned by Ralph and Cornelia which they transferred by warranty deed to their children, Leonard and Joan, in March 1968. At the time of the transfer, Leonard and Joan signed a written agreement they would pay to Ralph and Cornelia or the survivor the sum of $2000 per year for life. At the time of transfer there was a Federal Land Bank mortgage on the farm of about $25,000.[1] Only two or three of the promised $2000 annual payments to Ralph and Cornelia were made.

Leonard and Joan became partners in a farming operation and they conducted business with plaintiff and borrowed money from plaintiff bank for a number of years. By June 1984, Leonard and Joan owed plaintiff about $260,000 and were in default on their notes. Plaintiff asked Leonard and Joan to explore other means of financing, which they did but were turned down. Plaintiff then told Leonard and Joan it would advance them additional money only if Leonard and Joan gave plaintiff a second mortgage on the farm land transferred to them by their parents.

On June 28 and June 30, 1984, Leonard and Joan gave their father separate notes and mortgages. At the time the mortgages were given, the evidence is both Leonard and Joan had debts in excess of their assets. The consideration for each

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[1] The mortgages did not indicate Leonard and Joan assumed the Federal Land Bank mortgage, but Leonard and Joan said they did. The mortgage had been increased and at the time Leonard and Joan gave their parents the mortgage, the Federal Land Bank mortgage was about $80,000.

mortgage was stated to be $98,100[2] and was based on $37,100 in delinquent support, $29,000 in future support, and on $35,000 in loans. The parties seriously dispute the facts surrounding these loans. The trial court found Leonard and Joan did owe their parents the approximate amount of the notes and mortgages. The mortgages were recorded on July 16, 1984. None of the defendants specifically told plaintiff of the mortgages, but plaintiff admitted it discovered the mortgages in late 1984.

In 1985, the bank rewrote Leonard and Joan's loans to include accrued interest but advanced no additional funds.[3] Later that year, plaintiff filed a petition to foreclose against the personal property owned by Joan and Leonard in partnership and Leonard's separate machinery and livestock in which plaintiff held a security interest. On March 24, 1986, Leonard filed a bankruptcy petition. When the bankruptcy stay was lifted in September 1986, plaintiff obtained judgments against Leonard's property and a personal judgment against Joan.

Plaintiff subsequently petitioned to prevent Leonard's discharge in bankruptcy but the bankruptcy court ruled in Leonard's favor while finding, "the record is replete with sufficient evidence to indicate defendant [Leonard] did give the plaintiff false financial statements, issue a very questionable mortgage to his parents, convert property that was mortgaged to the plaintiff [bank] to his own use, attempt to hinder

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[2] Actually, $98,100 was the total consideration for both mortgages.

[3] Defendants argue, when plaintiff rewrote the notes in January 1985, this constituted new indebtedness and at that time it was aware of the mortgages given to Ralph and Cornelia and the consideration recited in the mortgage which it now challenges.

and delay the plaintiff, try to conceal records of ownership as well as commit a number of extremely questionable acts that would sustain a finding of non-dischargeability under section 523." The bankruptcy court resolved the issues in Leonard's favor because the bank did not give a timely notice of the sale of certain collateral. No appeal was taken from this decision.

Joan then sued plaintiff in state court, asking the deficiency judgment against her be set aside on the basis plaintiff did not give timely notice of the sale of some of the collateral. The district court refused to set the deficiency judgment against Joan aside. On appeal to this court, the district court was affirmed. *Knierim v. First State Bank*, 488 N.W.2d 454, 460 (Iowa App. 1992).

The real estate was then abandoned by the trustee in bankruptcy and there was a voluntary foreclosure under the provision of Iowa Code section 654.18 (1985) in January 1987. Plaintiff was properly notified but did not seek to redeem.

The farm was then sold on an installment real estate contract and the house on the land was exchanged for a lot in Pella where a house was built. Plaintiff seeks to impose a lien on the vendor interest in the contract as well as the Pella land and house.

Plaintiff filed its petition in equity in November 1992. Plaintiff contends it first discovered its claim when, in taking a deposition in Joan's lawsuit, Joan said she and Leonard just turned the farm back to their parents. Bryce Gause, an officer of plaintiff bank, said this alerted him to the fact the mortgage was a fraudulent conveyance. Defendants contend plaintiff's suit was barred by laches and the applicable statute of limitations. It is agreed the statute of limitations for fraud is five years. Plaintiff contends it did not discover the fraud until June 1990 and, consequently, the suit was timely filed. Defendants further contend plaintiff was barred by its failure to redeem the real estate or to object to defendants' voluntary nonjudicial sale despite having notice of same. Because we have decided this case on other issues, we need not address these contentions advanced by defendant.

Plaintiff contends the mortgages given by Leonard and Joan were fraudulent and should be set aside. In *First State Bank, Belmond v. Kalkwarf*, 495 N.W.2d 708, 712 (Iowa 1993) and in *Production Credit Ass'n v. Shirley*, 485 N.W.2d 469, 471 (Iowa 1992) the court summarized the principles controlling a creditor's claim for fraudulent preferential transfer as follows:

> 1. A debtor may lawfully prefer one creditor over another by way of sale, mortgage, or the giving of security to others even if the debtor's intentions toward the nonpreferred creditor are spiteful and will delay or prevent them from obtaining payment.
> 2. A preferred creditor's knowledge that the debtor's purpose was fraudulent will not defeat his claim, so long as he acts in good faith for his own protection.
> 3. Fraud on the part of the debtor will affect the rights of only those preferred creditors who in some way participate in it.
> 4. When a preferred creditor knows of the debtor's fraudulent intent and accepts a mortgage of security wholly or in part to aid the fraud, that preferred creditor has participated in the wrong and the mortgage is fraudulent and will not be honored.

> 5. Fraud must be found under the circumstances considered as a whole. Some indicia of fraud are: inadequacy of consideration; insolvency of the transferor; and pendency or threat of third-party creditor litigation.
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> 6. A valid preexisting debt is ordinarily sufficient consideration for any conveyance or giving of security, so long as the amount of the antecedent debt is not materially less than the value of the property conveyed or encumbered.
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> 7. A nonpreferred creditor bringing suit has the burden of showing the preferred creditor's intentional participation in the fraudulent preferential transfer by clear and satisfactory evidence.

First State Bank, 495 N.W.2d at 712. *See also Rouse v. Rouse*, 174 N.W.2d 660, 667-69 (Iowa 1970).

Plaintiff contends the trial court incorrectly found there was adequate consideration for the mortgage when given. Plaintiff first contends the support agreement and the failure of Leonard and Joan to provide the promised support was not valid consideration. The trial court found there was no attempt made by plaintiff to challenge the validity of this argument at trial, and the only evidence introduced on the issue was Leonard's financial statements given plaintiff which did not reflect the amount due. The trial court further found these issues had been visited in Leonard's bankruptcy and Ralph and Cornelia had not prepared the financial statements. Plaintiff does not deny the support agreement existed. It contends the agreement was not valid because it was not recorded, was not recited as consideration in the warranty deed from Ralph and Cornelia to their children, no payments had been made on the agreement since 1971, and plaintiff had no notice of the agreement. Plaintiff further contends the agreement had been abandoned and this waived its enforcement so the court should not find the support agreement as consideration for the mortgages. Plaintiff secondly contends, if we agree the support agreement is consideration, we should limit the consideration to the $20,000 price shown by the revenue stamps on the warranty deed. We reject these arguments.

The next argument by plaintiff is, while recognizing Leonard's parents gave him checks totaling $35,000, the checks were gifts and not consideration for the mortgage. It was stipulated in the bankruptcy proceeding the checks were loans.

Just prior to the giving of the mortgage, Leonard had an outstanding check for $12,000 for spring crop expenses written on plaintiff bank which plaintiff refused to honor. Leonard had asked plaintiff for a loan for spring crop expenses and had been refused the loan. Leonard had written a check to the Sully Coop which bounced. Leonard needed money to cover the overdraft and it was advanced by his father and was included in the debt secured by the mortgage. Plaintiff retained a security interest in his crops and subsequently received the crops to apply on Leonard's debt.

Plaintiff's next contention is the finding of indicia of fraud made by the trial court established a fraudulent conveyance and the life support agreement and checks were not adequate consideration. The trial court found indicia of fraud. We agree with the trial court's findings. However, the trial court carefully reviewed the facts and found plaintiff had not shown the support agreement was not valid or the other monies advanced were not owed. The trial court then went on to find, even if indicia of fraud existed, it would be unusual to find a fraudulent conveyance where full consideration is given because it is fundamental the creditor-plaintiff is prejudiced and the obtaining of security by one creditor to the disadvantage of another is generally not considered to create prejudice, and the pivotal question is whether there was consideration for the mortgage. We agree with the trial court. Giving security to one creditor to the preference of another does not in itself constitute a fraudulent transfer. *First State Bank*, 495 N.W.2d at 712.

Plaintiff next contends the conveyance was fraudulent because the amount of money advanced was considerably less than the fair market value of the property at the time the mortgage was given.[4] We reject this argument, as did the trial court. The alleged fraudulent conveyance was a second mortgage or lien and not a conveyance of the land in fee. The mortgage conveyed no more than a lien for the amount of the alleged consideration leaving Leonard and Joan as owners of the fee subject to the first mortgage given Federal Land Bank and the second mortgage given Ralph. A mortgage conveys no interest in or title to lands, but is a lien for the purpose of securing indebtedness. *Burns v. Burns*, 233 Iowa 1092, 1095 (1943). It is a security in the nature of a lien for the debt. *Id.* Plaintiff did not lose the right to claim an interest in the land. The amount of the lien, not the value of the land at the time the mortgages were given, is the determinative factor in deciding whether there was

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[4] Plaintiff introduced evidence the land was worth $415,000 when the mortgage was given in June 1984 and $223,500 in January 1987

adequate consideration. Plaintiff was notified of the foreclosure and took no action to protect its interest or redeem.[5]

Defendants contend they are entitled to a trial on their counterclaim. The trial court in ruling for plaintiff on this issue noted the case had survived summary judgment.

We have considered the arguments advanced by counterclaimants on this issue whether discussed in this opinion or not. We find no valid reason to reverse the trial court on these issues.

AFFIRMED.

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[5] Ralph purchased the property in the foreclosure by paying off the Federal Land Bank's first mortgage lien of $69,747.40, real estate taxes of $19,304.00, and his own mortgage