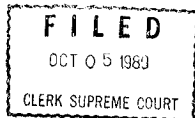


IN THE COURT OF APPEALS OF IOWA

9-379 / 89-202



THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Appellee,

vs.

88

JOHN J. CUROE FARM, INC., HAWKEYE BANK
& TRUST COMPANY a/k/a HAWKEYE BANK & TRUST,
JOHN J. CUROE and JANICE R. CUROE,

Appellants.

Appeal from the Iowa District Court for Dubuque County,
Alan Pearson, Judge.

Appellants appeal a district court order granting
appellee's motion for summary judgment foreclosing two
mortgages on appellants' land and holding them personally
liable on the two notes forming the basis for the
mortgage. **AFFIRMED.**

Dave Hughes, Cascade, for appellants.

Jerry P. Alt of Duncan, Jones, Riley & Finley, P.C.,
Des Moines, appellee.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

SCHLEGEL, J.

89

Appellants appeal a district court order granting appellee's motion for summary judgment foreclosing two mortgages on the Curoes' land and holding the Curoes personally liable on the two notes forming the basis for the mortgage. We affirm the trial court.

The Curoes contend that: (1) the interest rates established in the two notes are invalid as usurious pursuant to Iowa Code chapter 535; and (2) dismissal of Equitable's first foreclosure action and the Curoes' bankruptcy petition precludes Equitable's filing of this second foreclosure action.

In 1975 and 1982, John J. Curoe Farm, Inc., executed a note and mortgage for money. John and Janice Curoe personally guaranteed these notes. The Curoes eventually defaulted on these notes.

In April 1987, Equitable filed a petition for foreclosure. A decree of foreclosure was entered on August 7, 1987.

On August 24, 1987, John J. Curoe Farm, Inc., filed for bankruptcy under chapter 11. Equitable was unsuccessful in having the automatic stay lifted as to its foreclosure action. Equitable then dismissed the foreclosure action without prejudice.

On April 7, 1988, the bankruptcy court dismissed the bankruptcy petition of John Curoe Farm, Inc. On June 23,

1988, the current foreclosure action was brought. Both Equitable and the Curoes filed motions for summary judgment.

The district court denied the Curoes' motion but granted Equitable's motion. The district court foreclosed the two mortgages and found the Curoes personally liable on the two notes. The Curoes have filed this appeal.

This is an equitable action and therefore our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id.

Appellant contends that the amount of interest charged by the appellee amounts to usury. The rate of interest makes no difference because the defense of usury is not available to a corporation. Iowa Code § 535.2(2). And under the holding in Doggett v. Heritage Concepts, Inc., 298 N.W.2d 310 (Iowa 1980), the personal guarantors of the debt cannot raise the defense either. "The rule generally followed today does not permit the secondarily liable individual to interpose the usury defense. We adopt the rule as followed generally." Id. at 312. Appellant makes the interesting argument that the usurious charges are against the guarantors personally and therefore, the defense is available to them. This logic is circular at best. There is no significant difference between this case

and the Doggett case. The guarantors were both responsible personally but only after the primary debtor defaulted. Iowa law does not allow the defense of usury in this situation.

Appellant next contends the trial court should not have applied the law of the case in this action. It is not entirely clear that the trial court relied entirely on this doctrine, and even if it did, it makes no difference. Our scope of review is de novo and, therefore, we are entitled to make our own determination as to the law to be applied.

Appellants' final contention is that this action cannot be brought for a third time before the court under the two dismissal rule. Iowa Rule of Civil Procedure 215 states that a second voluntary dismissal on the same cause shall operate as an adjudication against that party on the merits. In this case the second dismissal was not voluntary within the meaning of the rule because it was a dismissal by the court. In Schaefer v. Schaefer, 66 N.W.2d 428, 432 (Iowa 1954), the court specifically held, "Although this was a second dismissal it was by the court and not by the plaintiff. It is when there is a second dismissal by a party to an action that the rule has application." The second dismissal did not constitute an adjudication on the merits.

AFFIRMED.