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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RACCOON VALLEY STATE BANK,	)	
Plaintiff-Appellee,	)	**326**
vs.	)	
DARRELL PETERS MOTOR SALES INC., WELLING USED CARS, INC., DARRELL PETERS, ROSETTA PETERS and **MICHAEL SULLIVAN,**	)	8-649 88-630
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Dallas County (No. 27424), Peter A. Keller, Judge.

Appellants appeal a decree of foreclosure. **AFFIRMED IN PART AND REVERSED IN PART.**

August B. Landis of Neiman, Neiman, Stone & Spellman, P.C., Des Moines, for defendants-appellants.

Jon P. Sullivan of Dickinson, Throckmorton, Parker, Mannheimer & Raife, P.C., Des Moines, for plaintiff-appellee.

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

SACKETT, J.

In this appeal from a decree foreclosing mortgages on a homestead, a vacant lot and the vendor's interest in a real estate contract, we address defendants-appellants Darrell and Rosetta Peters' claims the mortgages were obtained through fraud and undue influence or coercion and foreclosure should have been denied. We reverse that part of the decree foreclosing the mortgage on the homestead. We affirm that part of the decree foreclosing mortgages on the separate vacant lot and the vendor's interest in the real estate contract.

Darrell and Rosetta are husband and wife. They are the only defendants who are parties to this appeal.

Darrell and Rosetta and Darrell Peters Motor Sales, Inc., have maintained a long-standing banking arrangement with plaintiff bank. The bank provided substantial operating capital for Peters Motors, a used car dealership. The continued operation of the dealership was dependent on continued financing. Darrell and Rosetta both worked for Peters Motors. Defendant Welling Used Cars had been operated by defendant Michael Sullivan. In 1984 the two dealerships merged operations of sorts but maintained separate bank accounts. On April 11, 1986, a promissory note[1] of Peters Motors was due. A new note payable in sixty days, on June 10, 1986, was executed.

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1. The note matured on March 31, 1986.

When the note was executed the bank was concerned about the uncollected balance in Peters Motors' account and had information indicating Peters Motors was not a profitable venture. Plaintiff bank asked Darrell and Rosetta for mortgages on the three parcels of real estate to be foreclosed. The mortgages were given.

When the mortgages were given Darrell and Rosetta were engaged in the business and were both obligated by personal guarantees to the bank for the Peters Motors note. Their homestead was not encumbered.

By obtaining the mortgages the bank established a lien on Darrell and Rosetta's unencumbered homestead. A homestead property is ordinarily immune from the attachment of nonpurchase money judgment liens. Iowa Code § 624.23(2). See Cox v. Waudby, 433 N.W.2d 716 (Iowa 1988); Keokuk State Bank v. Eckley, 354 N.W.2d 785, 792 (Iowa App. 1984). We determine had the mortgage not been given the homestead would have been exempt from any money judgment lien obtained on the note.

The vacant lot and vendor's interest in the real estate contract would have been subject to a lien on a money judgment to satisfy the debt. The mortgages may, however, have put the bank ahead of other creditors as to that property.

At the time the conveyances were given the officer taking the conveyances was asked what the Peters were told about the conveyance. He responded:

> Q. Mr. Gubser, do you have any reason to doubt that Darrell Peters and Rosetta Peters understood the significance of the mortgages they gave to the bank? A. I don't think so, at the time we did the mortgages.
> Q. Did you bother to explain any terms of the mortgages to them at that time, if you can recall? A. Specifically, I can't recall, but I know generally I do discuss that with people the signed -- which gives them a period of time to consider it. There were several occasions that Darrell spoke to me and said such things as "You won't take my house, will you?" And I said, have told him many, many times that I'd certainly talk to him first.

On June 6, 1986, Peters Motors voluntarily surrendered their inventory of cars to plaintiff bank and on June 28, 1986 the bank caused them to be sold at public auction. A deficiency remained on the note after the sale of the cars. This action sought to recover the deficiency as against the three parcels. Darrell and Rosetta have discharged personal liability on the notes in bankruptcy.

We determine the mortgage on Darrell and Rosetta's previously unencumbered homestead was given at a time when the bank had serious concern about the profitability of the business and a large debt due them which might not be covered by the existing collateral. It involved the release of substantial homestead rights at or near a time the debt could be called and in fact was called. It was

the bank's attempt to marshall more security when the "ship was going down."

Darrell and Rosetta claim fraud and undue influence as to the conveyance. The bank contends the claim of undue influence cannot be raised at this time because it is an affirmative defense and was not pled. We agree with the bank undue influence needed to be raised as an affirmative defense. See Iowa R. Civ. P. 101 and Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 185 (Iowa App. 1986). We determine the defendants' pleading while not using the exact words alerted plaintiff to the defense which was also argued in posttrial briefs. We consider the issue preserved for review. We determine, as did the trial court, the factual situation does not show fraud.

The conveyance of the homestead was made without disclosure of the homestead exemption and just before the the 1986 general session of the Iowa legislature enacted a new section to Iowa Code section 561 on homesteads regarding waiver of homestead rights. Section 561.22 provides:

> If a homestead exemption waiver is contained in a written contract, the contract must contain a statement in substantially the following form, in boldface type of a minimum size of ten points, and be signed and dated by the person waiving the exemption at the time of the execution of the contract: "I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale, and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract."

Section 561.22 became effective May 30, 1985. We noted in Peoples Bank & Trust Co. v. Lala, 392 N.W.2d at 185, the enactment of section 561.22 further strengthens the longstanding special recognition which the legislature has given to homesteads and reflects the same concern we have that mortgagees must make mortgagors fully aware of the legal effects of a note and mortgage on ordinarily exempt homesteads. And in Peoples Bank, at 188 we said:

> The fact a homestead was already a paid asset removes the transaction from that of a typical purchase-money home mortgage situation. Instead, it places a higher duty on the financial advisor to clearly explain the full ramifications of the transaction and how it will affect the mortgagor's equity position.

Under Iowa law, to set aside an instrument on the ground of undue influence requires:

> [T]here must be such persuasion as results in overpowering the will of a person or prevents him from acting intelligently, understandingly and voluntarily--such influence as destroys the free agency of the grantor and substitutes the will of another person for his own.

Harrison v. City National Bank of Clinton, 210 F.Supp. 362, 373 (S.D. Iowa 1962). See Stephenson v. Stephenson, 247 Iowa 785, 797, 74 N.W.2d 679, 686 (1956); Menary v. Whitney, 244 Iowa 759, 772, 56 N.W.2d 70, 77 (1952); Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 185 (Iowa App. 1986).

Undue influence is any "improper or wrongful constraint, machination, or urgency of persuasion whereby

the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." Undue influence by a third person renders a transaction voidable at the instance the unknowing party becomes victim to it if the third party had reason to know of the undue influence. Kennedy v. Thomsen, 320 N.W.2d 657, 659 (Iowa App. 1982) (citing Restatement (second) of Contracts §§ 164 comment e, 177 comment c (1981)). Evidence as to undue influence must be clear and convincing. Harrison, 210 F.Supp. at 873; Peoples Bank & Trust Co. v. Lala, 392 N.W.2d at 185.

In First National Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970), the court said:

> Ordinarily mere silence on the part of one party, in the arms length transaction, as to material facts discoverable by the other does not serve to create actionable fraud. 12 Williston, Contracts, § 1497 (3rd Ed.). This is not the case, however, where there exists a relationship of trust or confidence, and the trusted party has superior knowledge of the facts. See Loghry v. Capel, 257 Iowa 285, 289, 132 N.W.2d 417; Smith v. New York Life Insurance Company, 208 F.Supp. 240, 243 (D.C.Iowa); 12 Williston, Contracts, § 1497 (3rd Ed.). In the latter situation the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other. See Loghry v. Capel, supra; Smith v. New York Life Insurance Company, supra; 12 Williston, Contracts, §§ 1497, 1515B (3rd Ed.); Restatement, Contracts, §§ 471(c), 472.

It is well established, where one has acted in reliance upon a representation made by another, of such nature as to

influence the "victim" to enter into a transaction, it is material. First National Bank v. Brown, 181 N.W.2d at 182; Rosenberg v. Mississippi Valley Constr. Co., 252 Iowa 483, 486, 106 N.W.2d 78. In a relationship of trust or confidence, the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other. Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373, 375 (Iowa App. 1986).

We find the bank used undue influence in obtaining the mortgage on Darrell and Rosetta's homestead. In making this determination, we have considered all of the following facts:

1. The bank had maintained a long-time business arrangement and was a trusted party and one in whom defendants had maintained confidence.

2. The note and mortgage were given to secure prior indebtedness. No new money was given to defendants.

3. The bank stood in a superior position because defendants were in need of a renewal of the note to continue in business.

4. When the mortgage on the homestead was taken there was substantial information known to the bank the credit would not be continued beyond sixty days.

5. The credit in fact was not continued through the sixty day period.

6. The mortgage gave the bank a lien on defendants' homestead which would otherwise not have been available to them. The bank was put in a superior financial position with relationship to defendants as to the homestead.

7. The bank officer admittedly gave no information to defendants as to their homestead exemption.

8. The facts of nonrenewal and loss of homestead exemption if known to defendant would in all probability resulted in their not executing a mortgage on the homestead.

9. The bank should have reasonably been expected to disclose the fact to defendants the homestead would not be subject to their debt without the mortgage.

10. There is evidence Darrell's health was failing at the time.

11. Defendants received no independent advice before giving the mortgage. Plaintiff did not suggest they obtain independent advice. The note and mortgage were prepared by or for the bank.

We agree with the trial court the other two mortgages should be foreclosed.

AFFIRMED IN PART AND REVERSED IN PART.