

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 30 1987

CLERK SUPREME COURT

HAMPTON STATE BANK,)

Plaintiff-Appellant,)

vs.)

HAROLD F. BURMESTER and MARVEL G.)

BURMESTER, Individually; HAROLD F.)

BURMESTER, as Executor of the Estate of)

ALVINA BURMESTER, Deceased; DARLENE)

BURMESTER BOHN; FRANKLIN COUNTY,)

IOWA; and COMMODITY CREDIT CORPOR-)

ATION a/k/a COMMODITY CREDIT CORP.,)

Defendants-Appellees.)

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Filed September 30, 1987

7-289
86-1603

Appeal from the Iowa District Court for Franklin County (No. C1225-0585)

- Gilbert Bovard, Judge.

Plaintiff appeals from the trial court order refusing to establish a mortgage lien. **AFFIRMED.**

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

G. A. Cady III, of Hobson, Cady & Drew, Hampton, for the defendants-appellees Harold & Marvel Burmester.

Randall E. Nielsen, of Pappajohn, Shriver, Eide & Nicholas, Mason City, for the defendant-appellee Larry S. Eide, trustee in bankruptcy for Harold & Marvel Burmester.

M. Wayne Oltrogge, Clear Lake, for defendant-appellee.

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

SACKETT, J.

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Plaintiff Hampton State Bank appeals from the trial court order refusing to establish a mortgage lien.

In this case we must determine whether or not a real estate mortgage containing a dragnet clause and given by two tenants in common stands as security for subsequent advances made to one co-tenant and his spouse. We determine this issue was resolved by the Iowa Supreme Court in Farmers Trust & Savings Bank v. Manning, 311 N.W.2d 285, 289-90 (Iowa 1981). We determine the mortgage does not secure the subsequent advances. We affirm the trial court.

Plaintiff Hampton State Bank sought judgment on certain promissory notes and foreclosure of a real estate mortgage. The trial court entered judgment for the bank on the notes against defendants Harold F. Burmester & Marvel G. Burmester, husband and wife, but refused to establish the mortgage as a lien on property owned by Harold and Alvina Burmester as tenants in common. The bank appeals contending the notes were secured by a real estate mortgage and the trial court should have foreclosed the mortgage.

On January 7, 1977, Harold Burmester and his mother, Alvina Burmester, each owned an undivided one-half interest in:

The Northeast Quarter (NE $\frac{1}{4}$) of Section Fourteen (14), Township Ninety-two (92) North, Range Twenty-one (21), West of the 5th P.M., Franklin County, Iowa.

On said date Harold F. Burmester and Marvel G. Burmester, husband and wife, and Alvina Burmester executed a promissory note, in the principal amount of \$189,600 to the Hampton State Bank. Payment of the promissory note was secured by a real estate mortgage of the same date, signed by all three individuals, encumbering the above-described subject premises. The mortgage contained a dragnet clause securing future advances made to mortgagors up to

\$350,000. Separate ledger sheets were maintained with respect to each type of loan. The mortgage loan of Harold Burmester, Marvel Burmester, and Alvina Burmester, in the amount of \$189,600, was characterized as a farm real estate loan and maintained as such on the internal records of the bank.

The Farmers Home Administration injected new money into Harold and Marvel Burmester's farming operation, on April 20, 1979, in the amount of \$400,000. From this sum, approximately \$320,845 was applied to various Hampton State Bank obligations. The farm real estate ledger of the bank reflects a payment to the bank on April 20, 1979, applied to the farm real estate note, in the amount of \$189,600 principal, and a payment of interest in the sum of \$5,282.83, resulting in a closing total liability on the farm real estate mortgage note on April 20, 1979, of \$0.00.

After April 20, 1979, all advances made by the Hampton State Bank were made to Harold Burmester and/or Marvel Burmester only. No subsequent loans were ever made to Alvina Burmester. The January 7, 1977 mortgage was not released by the bank and remained in place.

A co-tenant of real estate may encumber his separate interest in real estate without the consent of the other co-tenant. 20 Am.Jur.2d Cotenancy & Joint Ownership §102, at 203 (1965); 86 C.J.S. Tenancy in Common §116, at 525-26 (1954).

The trial court found the note, dated January 7, 1977, and signed by Harold Burmester, Marvel Burmester, and Alvina Burmester was paid in full with interest on April 20, 1979. The mortgage was not released. The only way in which the moneys advanced after April 20, 1979, to Harold and Marvel Burmester could be secured would be pursuant to the following clause of the mortgage:

1. OPEN END FEATURE. This mortgage shall stand as security for said note and for any and all future and additional advances

made to the mortgagors by the holder of said note, in such amount or amounts so that the total of such future additional advances outstanding and unpaid at any time shall not exceed \$350,000.00; and mortgagee is hereby given authority to make such future and additional advances to mortgagors herein, upon their signed order or receipt, and secured as the original obligation herein . . . (emphasis added)

Such a provision in a mortgage generally is referred to as a dragnet clause. Dragnet clauses, generally, are not favored by the courts and have been strictly construed in the absence of clear, supportive evidence of contrary intention. Such clauses have not been extended to cover future advances, unless the advances are of the same kind and quality or relate to the same transaction or series of transactions as the principal secured, or unless the document evidencing the subsequent advance refers to the mortgage as providing security. Hawkeye Bank & Trust Co. v. Michel, 373 N.W.2d 127, 130 (Iowa 1985); Freese Leasing, Inc. v. Union Trust & Sav. Bank, 253 N.W.2d 921, 927 (Iowa 1977).

In Farmers Trust & Savings Bank v. Manning, 311 N.W.2d 285 (Iowa 1981), a husband and wife executed a promissory note and mortgage, which mortgage contained an open-end provision securing future advances up to \$100,000. The future advances clause of the mortgage contained the identical language as the future advances clause in the present case. The initial note was in the sum of \$69,000; and, thereafter, the mortgagor loaned the husband alone five subsequent, future advances totaling \$31,000. The court found the dragnet clause did not secure the future advances made to the husband only and reversed the trial court for imposing the mortgage security against the husband's interest in the real estate as to the extent future advances made. Holding its express terms, the mortgage provided it shall stand as security on loans made to both mortgagors. Manning, 311 N.W.2d at 289. Construing the terms of this instrument as strictly against the bank, we hold the loans made to Harold and Marvel

alone are not secured by the mortgage. Id. The dragnet clause is effective only if the bank makes future loans jointly to the mortgagors.

The bank argues that the intention of the parties should be carried out and that the trial court failed to do this by not subjecting the undivided interest of Harold Burmester to the bank's mortgage.

At the time of trial, Alvina Burmester was deceased. No evidence was offered that the intention of Alvina Burmester was other than as expressed in the original note and mortgage which she signed. She signed no further documents after January 7, 1977. The loans made to Harold and Marvel Burmester after April 20, 1979, are not secured by the real estate mortgage dated January 7, 1977. The district court was correct in determining they were not. We affirm the trial court.

AFFIRMED.