FILED
MAR 31 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HOMER FOSTER, HERBERT FOSTER, AND DEBBIE DALE FOSTER,

Plaintiffs-Appellees,

vs.

JOHN TABKE AND KATIE TABKE,

Defendants-Appellants.

Filed March 31, 1980

JOHN TABKE,

Plaintiff-Appellant,

vs.

HOMER FOSTER, HOWARD LOGAN, HERBERT FOSTER, DEBBIE DALE FOSTER, AND FIRST TRUST AND SAVINGS OF MOVILLE, IOWA,

Defendants-Appellees.

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2-63063 & 64

Appeal from Woodbury District Court - Lawrence W. McCormick, Judge.

Grantors appeal adverse judgments in consolidated actions for declaratory judgment and forcible entry and detainer in which grantees were declared owners of certain real property. Appellants assert trial court erred in holding the transactions in question between the parties constituted a conveyance of absolute fee title to grantees rather than a security interest. AFFIRMED.

Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland and Killinger, Sioux City, for defendants-appellants, John and Katie Tabke.

Bruce A. Crary of Crary, Huff, Yates, and Clem, P.C., Sioux City, for defendants-appellees, Howard Logan and First Trust and Savings of Moville, Iowa.

Richard Rhinehart of Rhinehart, Bikakis, and Vohs, Sioux City, for plaintiffs-appellees, Homer Foster, Herbert Foster and Debbie Dale Foster.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Appellants, John and Katie Tabke, appeal adverse judgments in consolidated actions for declaratory judgment and forcible entry and detainer in which appellees, Homer Foster, Howard Logan, Herbert Foster, Debbie Dale Foster, and First Trust and Savings Bank, were declared owners of certain real property. Appellants[1] assert trial court erred in holding the transaction in question between the parties constituted a conveyance of absolute fee title to appellees rather than a security interest. We affirm.

In 1941, appellants John and Katie Tabke began farming a 320-acre farm legally described as the West One-half (W 1/2) of Section Sixteen (16), Township Eighty-eight (88), North Range Forty-five (45), West of the 5th P.M., near Moville, Woodbury County, Iowa. On November 13, 1964, they executed a real estate mortgage on this property in the amount of $39,802 to the Toy National Bank in Sioux City, Iowa, as mortgagee. Shortly thereafter, the Tabkes executed a second mortgage against the same real estate, as well as all their personal property, in favor of the Sioux City Production Credit Association.[2] On February 11, 1970, the Toy National Bank instituted a foreclosure action against the Tabkes and was granted a decree of foreclosure on April 21, 1970. At a May 26, 1970 execution sale, A. L. Peterson purchased the property for $41,352. The PCA, as second mortgagee, subsequently instituted its own foreclosure action against the Tabkes, obtaining a judgment for $74,531 on April 9, 1971. The PCA then redeemed the real property from Peterson, making the total indebtedness due from the Tabkes, $111,663.

An auction sale was scheduled by the PCA for the latter part of February 1972, at which time all of the real and personal property of the Tabkes was to be sold in satisfaction of the debt. This auction never took place, however, as the Tabkes, on February 16, 1972, entered into an agreement with their long-time farm neighbor Homer Foster, Howard Logan, a neighboring farm owner and officer of the First Trust and Savings Bank of Moville, and the PCA. The agreement required the Tabkes to grant a warranty deed for the property to the Association. The PCA in turn deeded title to the real property, and ownership of all personal property of the Tabkes, to Foster and Logan

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[1] Reference to "appellant" throughout the opinion will be to John Tabke.

[2] Hereinafter referred to as the PCA.

in exchange for their payment of the $111,663 owed by the Tabkes to the PCA and assumption of any delinquent real estate taxes. As a result of this transaction, Logan received title to the one-half of the farm described as the Southwest Quarter of Section Sixteen, Township Eighty-eight; Homer Foster received title to the half described as the Northwest Quarter of Section Sixteen, Township Eighty-eight. Foster simultaneously executed a mortgage on his share of the property to the First Trust and Savings Bank to secure a part of his purchase price.

In exchange for deeding the property to the PCA, Foster and Logan granted the Tabkes a five-year cash lease of the property at the rate of $10,000 per year from March 1972 through February 1977, and a five-year option to repurchase conditioned upon performance of the lease. Settlement figures for repurchase of the property were provided in the option.

The lease and option documents were drafted by Glen Metcalf, a Moville attorney, who had represented the Tabkes previously in both the Toy National Bank and the PCA foreclosure actions. He, at this time, was employed as legal counsel to First Trust and Savings Bank of Moville.[3] Consequently, at trial, Metcalf testified he acted only as scrivener of the two agreements for all interested parties. Both documents were executed by Foster and Logan, but neither was signed by the Tabkes. Despite this fact, Foster and Logan enforced provisions of the cash lease by requiring the Tabkes to pay the first year's rent of $10,000.

On April 11, 1973, the attorney for Logan and Foster contacted Metcalf and requested all documents pertaining to the property be returned to Logan since they had never been executed by the Tabkes and a meeting of the minds had not been reached by the parties. The Tabkes were not informed of this action. Nevertheless, the Tabkes remained in possession of the property.

During 1972, the Tabkes farmed the property without any financial assistance but found it very difficult. In early 1973, the FHA finally agreed to grant the Tabkes an operating loan if they would enter into a crop-share lease arrangement with Logan and Foster rather than the cash lease. Thereafter, in June 1973, the Tabkes entered into a crop-share lease with Foster and Logan. The Tabkes remained in possession of the

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[3] Metcalf had served in this capacity for a number of years prior to 1972.

property as hold-over tenants from year to year until August 25, 1977, when notice of termination of the farm tenancy was served on them by Foster and Logan. The Tabkes, however, refused to vacate and continued in possession of the property.

On December 21, 1977, Logan sold, on contract, his portion of the farm to Herbert and Debbie Foster, son and daughter-in-law of Homer Foster. When the Tabkes failed to deliver possession of the farm on March 1, 1978, the Fosters, on March 8, 1978, served the Tabkes with Notice to Quit demanding surrender of the premises. The Tabkes also disregarded this notice.

Appellees, Homer, Herbert, and Debbie Foster, then filed an action for forcible entry and detainer on March 15, 1978. The Fosters alleged they were owners of the property and demanded judgment removing the Tabkes from possession thereof. The Tabkes answered, admitting possession, but denying the Fosters had title to the property. On April 7, 1978, the Tabkes filed their action for declaratory judgment against appellees Howard Logan, Homer, Herbert, and Debbie Foster, and the First Trust and Savings Bank of Moville. The Tabkes asserted the appellees had only a security interest in the property and requested the court fix an amount they would be required to pay to redeem the property. Foster and Logan counterclaimed and prayed for judgment in the amount of $8,708 against the Tabkes for failure to pay a portion of the rent due under the share-crop lease. The actions were consolidated for trial to the court.[4] Trial court found the warranty deed of John and Katie Tabke to the PCA and the PCA's deed to Foster and Logan conveyed title of the property in fee to Foster and Logan and that no security interest was created. Foster and Logan also were awarded $2,928 on their counterclaim. The Tabkes appeal from this judgment.[5]

I. Scope of Review. An action in equity to have a deed, absolute in form, declared a mortgage is **de novo.** Blum v. Keene, 245 Iowa 867, 899, 63 N.W.2d 197, 214 (1954).[6] We are not bound by trial court's findings of fact, but we give weight to those findings "where the credibility of the testimony of witnesses has an important bearing." Id.

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[4] The Tabkes appeared pro se.

[5] No appeal is taken from the counterclaim.

[6] Despite the provisions of sections 648.5 and 648.15, The Code 1977, trial court, upon consent of the parties, granted appellants' motion to have appellees' action for forcible entry and detainer recaptioned as an action at law.

II. Applicable Principles of Law. Generally, a deed absolute in form is presumed to convey a fee title to the property. Miller v. Martin, 246 Iowa 910, 915, 70 N.W.2d 141, 144 (1955); Hinman v. Sage, 208 Iowa 982, 984, 221 N.W. 472, 473 (1928). Parol evidence is admissible to show a transfer of title absolute on its face was intended as security only. Lovlie v. Plumb, 250 N.W.2d 56, 59 (Iowa 1977). The burden is on the party asserting a mortgage to establish the true nature of the transaction by clear, satisfactory and convincing proof, such that "no reasonable uncertainty or doubt as to the truth thereof confronts the trier of fact." Greene v. Bride & Son Construction Co., 252 Iowa 220, 227, 106 N.W.2d 603, 608 (1960) (quoting Miller, 246 Iowa at 915, 70 N.W.2d at 144); North v. Manning Trust and Savings Bank, 169 N.W.2d 780, 784 (Iowa 1969); Collins v. Isaacson, 261 Iowa 1236, 1243, 158 N.W.2d 14, 18 (1968). In determining whether a deed absolute in form should be decreed a mortgage, each case must be determined by consideration of its own peculiar facts and circumstances. Lovlie, 250 N.W.2d at 59; Brown v. Hermance, 233 Iowa 510, 514, 10 N.W.2d 66, 68 (1943); Fort v. Colby, 165 Iowa 95, 127, 144 N.W. 393, 405 (1918). We will look behind the form of the instrument to ascertain the actual relationship between the participants. Lovlie, 250 N.W.2d at 56. "Ordinarily, the question is largely one of [the parties'] intention" at the time the instrument was executed. Hinman, 208 Iowa at 985, 221 N.W. at 473. Subsequent transactions may be relevant to explain the nature of the original transaction. Miller, 246 Iowa at 914, 70 N.W.2d at 143. As the court said in Cold v. Beh, 152 Iowa 368, 373, 132 N.W. 73, 75 (1911):

> And hence the court must take into consideration the price, the circumstances, all the antecedent facts, the situation of the parties, and from these determine the true nature of the transaction. . . . Now, if the relation of creditor and debtor in any given case continues, and the debt still subsists, we can readily see that the relation of the mortgagee and the mortgagor still remains. If, however, the debt is extinguished by a fair agreement, and the grantor has the privilege merely of refunding if he pleases by a given time, and thereby entitles himself to a reconveyance, there is a conditional sale and the equity of redemption does not continue; for a mortgage without a debt or a debtor without a debt can not exist. The contract being fairly made, a court of equity will not relieve the grantor who neglects to perform the condition on which the privilege of repurchasing depended; for, while the policy of the law prohibits the conversion of a real mortgage into a sale, it does not prohibit the making of conditional sales. If it did, then, in the language of Chief Justice Marshall, a court of chancery would become in a considerable degree the guardian of adults as of infants.

III. Discussion. On appeal, the Tabkes assert the evidence was sufficient to establish a mortgage was intended and, in support of this contention, point to several factors: the agreement to reconvey; inadequacy of consideration; the method of arriving at the repurchase price; their retention of possession of the property; their financial conditions; absence of legal advice; existence of a debtor-creditor relationship; and rent paid. We will discuss those factors we believe are relevant.

A. Adequacy of Consideration. "Inadequacy of consideration is a strong circumstance tending to show the transaction was intended to be a mortgage." Koch v. Wasson, 161 N.W.2d 173, 178 (Iowa 1968), Greene, 252 Iowa at 226, 106 N.W.2d at 607; Fort, 165 Iowa at 123, 144 N.W. at 403.[7] Trial court found the real estate in question had a fair market value of $300 to $325 per acre. Appellant valued the farm at approximately $600 per acre. Appellee Logan testified the bank loaned Homer Foster approximately 60% of the appraised value of Foster's share. Foster's mortgage to the bank was $40,000. Homer Foster testified, without objection, the PCA had appraised the land at $300 to $325 per acre.

While we do not believe fair market value and appraised value are necessarily synonymous, we find trial court's valuation is well within the permissible range of the evidence and will not disturb it on appeal. See In re Marriage of Baer, 203 N.W.2d 551, 554 (Iowa 1973). Accepting trial court's values, we conclude appellants' 320 acres of farm land had a value of $96,000-$104,000 in 1972 and that appellees' consideration of $111,663 was adequate.

B. Existence of a Debtor-Creditor Relationship. Another important factor is the existence of a debtor-creditor relationship. Where the relationship predates the challenged transaction, the courts closely scrutinize the transaction because the deed from a debtor to a creditor under such circumstances is likely to be for additional security. Guttenfelder v. Iebsen, 230 Iowa 1080, 1082-83, 300 N.W. 299, 301 (1941). A pre-existing debtor-creditor relationship, however, is not a necessary condition for establishing a mortgage. It is sufficient if the debtor-creditor relationship is created by the challenged transaction. Koch, 161 N.W.2d at 177; Collins, 261 Iowa at 1245, 158 N.W.2d at 18.

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[7] Rendleman, Absolute Conveyance as a Mortgage in Iowa, 18 DRAKE L. REV. 197, 199 (1969), asserts inadequacy of consideration is the major deciding factor.

In the instant case, "[o]n the face of the transaction, the relationship of debtor-creditor between the parties does not exist." Hinman, 208 Iowa at 895, 221 N.W. at 474. Neither the option to repurchase nor the cash lease implied any obligations upon appellants to pay an indebtedness to appellees or to repurchase the land. See Shanda v. Clutier State Bank, 220 Iowa 290, 296, 260 N.W. 841, 844 (1935); Cold, 152 Iowa at 378, 132 N.W. at 77. Based on these documents, no action could have been maintained by appellees against the appellants to recover the $111,663 or to require appellants to specifically perform the option agreement. While the cash lease obligated appellants to pay $10,000 per year as rent, this document was not signed by appellants and is not sufficient to warrant a conclusion appellees could have enforced the lease's provisions against appellants at the time of the transaction, despite the fact they paid the balance of the first year's rent after being threatened with eviction by appellees. We also note, unlike the circumstances in Collins, supra, Jones v. Gillett, 142 Iowa 506, 512-13, 118 N.W. 314, 317 (1908), and Conlee v. Heying, 94 Iowa 734, 735, 62 N.W. 678, 679 (1895), wherein the rental fixed was approximately what the interest on the consideration recited in the deed, plus taxes, would have been, there is no evidence to show the rental amounts under the lease herein represent anything other than a fair rental value of the leased property.

C. Appellants' Financial Condition. Courts also take into account the grantor's financial condition. Koch, 161 N.W.2d at 178. Appellants' financial condition at the time of the transaction was strained due to the PCA's judgment. A sale had been scheduled to sell appellants' real and personal property. However, it also should be noted any right of redemption appellants may have had in the real estate had expired in April 1971. There is no evidence to suggest the PCA purchased from Peterson for appellants' benefit.

Trial court reasonably concluded, as did the court in Shanda, appellants entered the transaction with appellees Foster and Logan for the purpose of being relieved of the $111,663 judgment, thereby removing their personal property and future earnings from jeopardy, while being assured of the opportunity to rent the property and repurchase it at a later date. Shanda, 220 Iowa at 296, 260 N.W. at 843.

D. Agreement to Reconvey. Where a deed absolute is accompanied by a contract or agreement to reconvey under specified conditions, and the terms of the agreement or the circumstances under which it was made render it doubtful whether a

mortgage or conditional sale was intended, the court will hold the deed and contract to be a mortgage. Koch, 161 N.W.2d at 177; Brown, 233 Iowa at 515, 10 N.W.2d at 69. The parties agree the deed, lease, and repurchase option in this case were part of one transaction. The option was to be executed "as part of the consideration for execution of the said lease."[8] Neither the lease nor the option was signed by appellants. The evidence shows appellants wanted the 30-day forfeiture provision of the lease extended to 60 days, a change effected in the document signed by appellees Foster and Logan. There is conflicting evidence as to why appellant did not sign the documents. At one point he testified he was not apprised of the necessity of signing. There also is some indication he did not sign because he disagreed with Metcalf's rounding the alleged interest figures to the nearest $50 in arriving at the settlement figures for repurchase. We do not believe these facts mitigate appellants' burden to prove by clear and convincing evidence the deed was in fact a mortgage.

E. Method of Arriving at Re-Purchase Price. Appellants argue the fact appellees paid only the exact amount required to satisfy appellants' debt to the PCA is a strong circumstance suggesting the conveyance was for security only. While this is a factor entitled to some weight, see, e.g., Jones, supra, and Fort, supra, in light of the adequacy of the consideration paid by appellees Foster and Logan, we conclude this evidence does not assist appellants in meeting their burden of proof.

F. Absence of Legal Advice. Absence of legal advice to the grantor is a factor to be weighed where the grantor asserts a mere mortgage was intended. Koch, 161 N.W.2d at 178. While the record establishes appellant had no independent legal representation, this does not lead us to conclude the parties were in an unequal bargaining position or that appellants were the victims of any overreaching. See Blum, 245 Iowa at 889, 63 N.W.2d at 209. Attorney Metcalf had represented all parties in the past and stated he acted merely as a scrivener in this case. He also testified he explained the legal effect of the various documents and the importance of signing them. Deferring to trial court's superior position in observing the credibility of the witnesses, we conclude appellants were not prejudiced by the absence of independent legal counsel.

G. Rent. Payment of rent by the grantor is a circumstance mitigating in favor of an absolute conveyance but is rarely determinative. Collins, 261 Iowa at 1244,

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[8] App. p. 130.

158 N.W.2d at 19; Brown, 233 Iowa at 515, 10 N.W.2d at 68. In light of our other discussion, we conclude this is cumulative evidence in support of a finding the parties intended the conveyance to be one of absolute fee title.

H. Preliminary Negotiations and Statements at Time of Transaction. Appellant testified the transaction "was started when I [appellant] went to Homer Foster to discuss if he was interested in some sort of a financial arrangement to help me pay PCA and continue farming."[9] Appellant further emphasizes the following testimony of Homer Foster:

> Q. And did you agree to this for the transfer of the deed to you as security?
>
> A. We agreed to buy the farm, yes, John, at this agreement with PCA, yes.
>
> Q. (Mr. Tabke continuing) Now, the time—the time was prior to March 14, 1972, and did you agree to pay my debt to PCA for my transfer of a deed to you?
>
> A. Yes, I think so.
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> App. p. 115.

Following a noon recess, Mr. Foster testified he wanted to change his last answer to "no."

We conclude this evidence also is insufficient to establish the parties intended a mere loan transaction. Noticeably absent in this case are facts which have been persuasive in other cases, such as a grantor who paid part of the purchase price pursuant to an option or a right of redemption, Brown, 233 Iowa at 515, 10 N.W.2d at 68, or established an intent or desire to do so but could not afford a portion of the price, Jones, 142 Iowa at 512, 118 N.W. at 316. These factors are entitled to considerable weight. Neither is this a case wherein the grantor had a valuable equity to preserve as in Collins, 261 Iowa at 1238, 158 N.W.2d at 19, and Fort, 165 Iowa at 125, 144 N.W. at 394. The transaction did not take place within the one year period of redemption as in Greene, 252 Iowa at 223, 106 N.W.2d at 605. Appellees were neither in the business of making loans nor previously had loaned money to appellant as in Greene, supra, and Keeline v. Clark, 132 Iowa 360, 106 N.W. 257 (1906).

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[9] App. p. 62.

I. Subsequent Conduct. In contrast to the behavior of the parties in such cases as Collins, Brown,[10] and Conlee, there is no conduct on the part of the parties to indicate anything other than a landlord-tenant relationship existed between the parties in this case.

J. Other Factors. There is no evidence appellants made any improvements upon the property. Conlee, 94 Iowa at 736, 62 N.W. at 679. Appellees paid all taxes. Retention of possession by appellants is consistent with both a theory of absolute conveyance, accompanied by a lease, and mere mortgage.

In light of our consideration of all relevant factors, we conclude appellants have failed to prove by clear, satisfactory and convincing evidence the transaction in question was not an absolute conveyance of fee title.

Judgment of trial court is affirmed.

AFFIRMED.

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[10] A letter of May 3, 1941, after an August 1940 conveyance, stated "I am interested in knowing if you plan to take care of the loan on your house this spring." Brown, 233 Iowa at 513, 10 N.W.2d at 68.