IN THE COURT OF APPEALS OF IOWA

No. 2-669 / 92-593

FILED
FEB 23 1993
CLERK SUPREME COURT

LARRY CROSSLEY,

Appellant,

vs.

THOMAS C. LILLQUIST, As Sheriff of Winnebago County, LIBERTY BANK & TRUST, and HERTZ FARM MANAGEMENT, INC.,

Appellees.

Appeal from the Iowa District Court for Winnebago County, John S. Mackey, Judge.

Plaintiff appeals from the district court's ruling in a declaratory judgment action. **AFFIRMED.**

Larry A. Crossley, Forest City, pro se, for appellant.

Richard L. Peterson, County Attorney, Forest City, for appellee Sheriff.

Mark L. McManigal of Shearer, Templer, Pingel & Kaplan, P.C., West Des Moines, for appellee Bank.

J. Matthew Anderson of Laird, Heiny, McManigal, Winga, Duffy & Stambaugh, Mason City, for appellee Hertz.

Heard by Donielson, P.J., and Hayden, J., and Perkins, S.J.*

*Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Plaintiff Larry Crossley is the son of Donald and Patricia Crossley (the Crossleys). In 1973 the Crossleys purchased certain real estate in Winnebago County by contract from Frances Ballard. In 1985 the Crossleys borrowed money from the Forest City Bank & Trust Company, now known as Liberty Bank & Trust (the Bank). At the same time, the Crossleys assigned their interest in the property to the Bank as security. The assignment was recorded on April 16, 1985.

On October 31, 1986, Larry and Frances executed an assignment of contract in which Frances purportedly assigned her interest as contract vendor to Larry. The assignment provided:

> As consideration for such assignment Assignee shall by November 30, 1986, make all payments necessary to bring such Contract and Addendum to Contract current through such date. Assignee further agrees to timely make all payments to FRANCES BALLARD that are due and payable to her by DONALD A. CROSSLEY and PATRICIA CROSSLEY under the Contract and Addendum to Contract described above.
>
> Assignor reserves all rights and remedies, to include forfeiture and foreclosure, that were reserved to her in such Contract and Addendum to Contract and may exercise such rights and remedies against the Buyers and/or Assignee if the Contract and/or Addendum to Contract are in default.

On September 7, 1988, Frances and Larry entered into an addendum to the assignment which specifically stated that Larry "shall be treated as the Buyer" of the property. In addition, the addendum released the Crossleys from any liability under the contract. On September 8, 1988, the

Crossleys attempted to revoke their previous assignment to the Bank due to their claim they no longer had any interest in the property. The Crossleys also executed a quit claim deed to Frances.

In October 1988, the Bank filed a petition in equity seeking to recover on the Crossleys' unpaid promissory notes and to foreclose on the property. The Crossleys raised several counterclaims based on fraud and breach of contract. The district court denied the counterclaims and entered judgment in favor of the Bank. The Crossleys and Larry appealed, but did not file a supersedeas bond. The property was sold at a sheriff's sale to the Bank on July 17, 1991.

On appeal, we affirmed the district court. Liberty Bank & Trust v. Crossley, No. 91-849 (Iowa App. Dec. 29, 1992). We found the assignment by the Crossleys to the Bank created a valid equitable mortgage and that the Bank was entitled to foreclose upon the mortgage. We agreed with the district court's conclusion the Crossleys' counterclaims should be denied.

While the case was pending on appeal, the property was placed in receivership and Hertz Farm Management, Inc. was appointed as the receiver. Hertz rented the farm to Larry in 1991, but decided not to rent to him in 1992. The Bank received a sheriff's deed to the property on January 21, 1992. Larry received a notice to quit on March 13, 1992.

On February 21, 1992, Larry filed a petition for declaratory judgment and for a temporary injunction naming the sheriff of Winnebago County, the Bank, and Hertz as defendants. Larry claimed that due to the assignment from Frances he was the owner of the farm. He asked that the sheriff's deed be set aside.

The Bank filed a motion to dismiss claiming that the petition was an improper collateral attack upon the earlier judgment of foreclosure. Hertz later joined this motion to dismiss. The district court found that even if Larry received a vendor's interest due to the assignment from Frances, he held only an interest in personal property, not real property. The court concluded Larry had no basis to challenge the validity of the sheriff's deed. The court therefore refused to render a declaratory judgment and dismissed the petition. Larry has appealed.

We review a declaratory judgment action as any other judgment. Mead v. Iowa State Board of Parole, 331 N.W.2d 102, 103 (Iowa 1983). When the case was tried in equity our review is de novo; when the case was tried at law our review is on error. Id. Larry's petition in this case sought an injunction and other equitable relief. We determine the present case was tried in equity and our review is de novo.

Larry contends the district court should have declared he was the owner of the real estate in question. He points

out that the foreclosure judgment was only against the Crossleys, and not him. He states that the foreclosure judgment did not address the question of what interest he had in the property. Larry again challenges the Bank's equitable mortgage, claiming that his interest in the property is superior to that of the Bank. He also claims the sheriff's deed is defective on its face.

A motion to dismiss admits all well-pleaded facts in a petition for the purpose of testing their legal sufficiency. Wright v. Thompson, 254 Iowa 342, 347, 117 N.W.2d 520, 523 (1962). A motion to dismiss is sustainable only when it appears to a certainty the pleader has failed to state a claim on which relief may be granted. Ewurs v. Irving, 344 N.W.2d 273, 275 (Iowa App. 1983). These principles apply to declaratory judgments as well as other actions. Id.

We determine Larry's petition is clearly a collateral attack upon the judgment of foreclosure. His petition challenges the validity of the Bank's equitable mortgage and the sheriff's deed to the Bank, issues which are properly part of the previous action. We also note Larry was a party to that case and raised several issues in appeal No. 91-849.

Generally, a decree or judgment cannot be attacked collaterally. Morris Plan Co. v. Bruner, 458 N.W.2d 853, 855 (Iowa App. 1990). A judgment which is void for lack of

jurisdiction may be subject to collateral attack. Id. A judgment may also be subject to collateral attack when it is based upon extrinsic fraud. Mauer v. Rohde, 257 N.W.2d 489, 496 (Iowa 1977).

Larry has not claimed the court lacked jurisdiction to enter the judgment of foreclosure. He has also made no allegations of extrinsic fraud. Therefore, Larry has not alleged any sufficient basis for making a collateral attack upon the judgment of foreclosure.

Moreover, even if the present action were not an improper collateral attack upon the judgment of foreclosure, Larry has failed to state a claim on which relief may be granted. In a contract for the purchase of real estate, the seller effectively divests herself of all interest in the property except the right to collect the purchase price. Fellmer v. Gruber, 261 N.W.2d 173, 174 (Iowa 1978). The seller's interest is considered to be personal property, not an interest in real property. United Central Bank v. Kruse, 439 N.W.2d 849, 853 (Iowa 1989). Thus, assuming the assignment placed Larry in the position of the contract vendor, Larry's interest is a personal property interest in the contract, not an interest in the real estate.

Larry raised a second issue in his appeal, but at oral argument the parties agreed this issue was moot. We therefore will not address it in our opinion.

We affirm the district court decision dismissing the petition for declaratory judgment. Costs of this appeal are assessed to Larry Crossley.

AFFIRMED.