IN THE COURT OF APPEALS OF IOWA

No. 7-375 / 96-1733

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SMITH, SCHNEIDER, STILES, WIMER, HUDSON, SERANGELI, ROBINSON, MALLANEY, SHINDLER & SCALISE, P.C.,

Plaintiffs-Appellees,

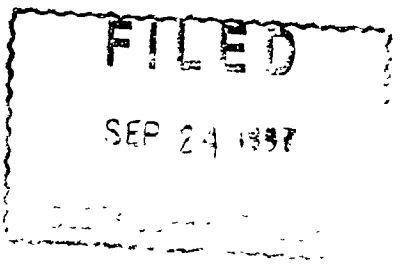
vs.

DAVID GARST,

Defendant,

FIRST BANK & TRUST CO. OF GLIDDEN, IOWA,

Intervenor-Appellant.



Appeal from the Iowa District Court for Carroll County, William C. Ostlund, Judge.

The First Bank & Trust Co. of Glidden, Iowa, appeals a district court judgment in favor of plaintiffs on plaintiffs' action to garnish rent payments to satisfy their lien for attorney fees. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellant.

William S. Smith and Michael P. Mallaney of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellees.

Considered by Cady, P.J., Huitink, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

This case began when a law firm obtained a judgment against David Garst in an action for unpaid attorney fees. Garst owned real property and leased livestock facilities to a tenant in exchange for rent of $3000 per month. The law firm garnished the rent payment to collect on its judgment. First Bank and Trust Company, which held two mortgages on the property, intervened in the garnishment proceedings and asserted it had a superior right to the rent payment pursuant to clauses in the mortgages securing rents. The district court initially ruled in favor of the bank, but following the law firm's rule 179(b) motion ruled in favor of the law firm. The bank appeals and we affirm.

The mortgages secured the real estate and "all rights, easements, appurtenances, rents, leases and existing and future improvements and fixtures." A covenant to the mortgages provided Garst assign the rents and profits of the property to the bank, but could collect and retain the rents as long as he was not in default. The covenant provided if Garst defaulted the bank could have the court appoint a receiver to take possession and manage the property and collect the rents.

In its petition of intervention, the bank requested the court determine the bank's rights under the mortgage to be superior to any rights of the law firm as garnishing judgment creditor. The bank requested the court order the return of any sums received by the law firm or enter judgment in the amount of any funds the law firm received but not returned to the bank. Although it might be implied by the relief

requested that Garst was in default, the bank did not make this allegation in its petition.

In its answer, the law firm asserted the mortgages provided Garst was free to use the rents unless in default. Following a telephone hearing, the court issued an order finding the bank had a superior right to the rents and ordering the law firm to return any sums received or collected. The court reasoned the mortgage was superior to a subsequent garnishment and the bank did not have to petition for foreclosure and for appointment of a receiver for the lien to be effective.

The law firm filed a rule 179(b) motion advising the court it did not address language in the mortgage allowing Garst to retain the rents absent default. The law firm also alerted the court to the bank's failure to allege or present any evidence of Garst's default. The court modified its previous order and dismissed the petition of intervention. The court reasoned absent a claim or evidence of default, the law firm had a superior claim to the rents. The bank filed a rule 179(b) motion raising the issue of default for the first time and attaching an affidavit asserting Garst was in default. The court denied the motion because the affidavit was not submitted at the time of adjudication and was therefore untimely.

The parties agree our review is at law. *Padzensky v. Kinzenbaw*, 343 N.W.2d 467, 469 (Iowa 1984). The district court's findings of fact are binding if supported by substantial evidence, and the bank had the burden to establish its priority to the funds. *Id.*

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The bank argues the court erred by relying on the covenants to the mortgages because they merely enhance its procedural remedies and do not deprive the granting clauses of their effectiveness. The bank argues the pledge of rents in the granting clauses creates a lien upon execution of the mortgage without the necessity of declaring a default or seeking a receiver. The bank argues the lien is superior to the law firm's attachment lien The law firm counters the bank is precluded from arguing on appeal that Garst was in default because it presented no such evidence to the district court. The law firm argues the bank waived its claim based on the covenants to the mortgages for failing to raise this issue in the proceedings before the district court.

Regardless of the effect the covenants have on the granting clauses, the bank could not obtain an order requiring the law firm to return funds absent a showing Garst was in default. Otherwise, the bank would be seeking, at most, a declaratory judgment on lien priorities in the event Garst ever defaulted. The bank did not allege or present any evidence of default until after the court issued its order. Then, through a rule 179(b) motion, the bank submitted an affidavit purporting to establish Garst's default.

It is proper, through a rule 179(b) motion, to seek to enlarge or amend a judgment or decree. The judgment or decree may be enlarged or modified, however, only based on evidence before the court prior to entry of the judgment or decree. Rule 179(b) is an inappropriate vehicle for reopening the record for additional

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evidence to correct omissions made in the trial of an issue. *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The law firm's answer to the petition of intervention raised the issue of the covenants allowing Garst to retain the rents unless in default. Thus, the bank was on notice default was an issue, but failed to present evidence of default. Its failure to do so precludes it from relying on any purported facts that Garst was in default. Absent any evidence of default, the district court's ruling was correct.

AFFIRMED.