IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

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FARMERS SAVINGS BANK,
Joice, Iowa,

Plaintiff-Appellee,

vs.

CHARLES F. GERHART and
PENELOPE J. GERHART,

Defendants-Appellants,

STEVE HUNZIKER, MONTGOMERY
WARD & CO., INC., GARNER READY
MIX, and IOWA DEPT. OF REVENUE,

Defendants.

Filed September 6, 1984

4-219
83-1292

Appeal from the Iowa District Court for Worth County - Ray E. Clough, Judge.

Defendants appeal from denial of their petition to vacate a summary judgment for plaintiff in a foreclosure action. AFFIRMED IN PART AND REMANDED.

Mark S. Soldat, Algona, Iowa, for defendants-appellants.

Craig G. Ensign of Ensign & Ensign, Northwood, Iowa, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendants, Charles and Penelope Gerhart, appeal from denial of their petition to vacate a summary judgment for plaintiff, Farmer Savings Bank (Bank), in a foreclosure action. The Gerharts assert: (1) that the Bank pursued two remedies in violation of Iowa Code section 654.4 and that the failure to require election of remedies constitutes an irregularity sufficient to require vacation of the judgment; (2) that the award of attorney fees pursuant to Iowa Code section 625.22 without notice or hearing on that issue was sufficient to require vacation of the judgment on grounds of irregularity and unavoidable casualty or misfortune; (3) that the entry of summary judgment was substantively and procedurally erroneous in various respects sufficient to establish irregularity requiring vacation of the judgment; and (4) that the failure to file the underlying mortgage with the clerk as required by Iowa Rule of Civil Procedure 228 constitutes neglect or omission sufficient to require vacation of the judgment. We affirm in part and remand for a hearing to determine attorney fees.

On September 30, 1980, Charles Gerhart executed and delivered to the Bank a promissory note and a mortgage securing that note. The mortgage stated it would be security for future advances from the Bank. On October 13, 1980, Charles paid the sum owed on the note. The Bank, however, did not surrender the mortgage.

Over the next several months the Bank loaned Charles additional money. These loans were consolidated into a single promissory note for $17,729.08 on April 2, 1981. The face of the note listed the prior mortgage as security. A separate promissory note was also executed by Charles on April 2. That note was secured by furniture, fixtures, and inventories pursuant to a separate security agreement.

Charles failed to make the payments due on either note. The Bank sent notice to cure on February 18, 1983. On March 8, 1983, the Bank filed an action to

foreclose on the mortgage. A separate action was filed to replevy the property securing the other note in default.

On April 25, 1983, the Bank moved for summary judgment on the foreclosure action. The Gerharts opposed the motion. They asserted, inter alia, genuine issues of material fact existed whether the mortgage had become void upon payment of the first note on October 13, 1980, and whether the notice to cure provisions of the Uniform Consumer Credit Code, Iowa Code ch. 537, were to apply to the note executed on April 2, 1981.

The trial court granted summary judgment for the Bank. In doing so, it relied in part on the verification by oath of the facts in the Bank's petition and motion and the absence of such verification of the Gerharts' answer and resistance to the motion. In fact, the resistance had been verified. The trial court also decided the Gerharts' answer and resistance contained conclusory statements which were not supported with factual detail sufficient to show that the summary judgment should not be granted.

The Gerharts did not appeal the summary judgment, and the mortgage was foreclosed. The Gerharts then filed a petition to vacate the judgment pursuant to Iowa Rule of Civil Procedure 252. After a hearing, the trial court denied the petition to vacate. The Gerharts appeal that denial.

I. Scope of Review. Our review of a proceeding for the vacation of a judgment is not de novo. The trial court has considerable discretion in deciding whether to afford relief when a vacation of judgment is sought. In re Marriage of Bauder, 316 N.W.2d 697, 700 (Iowa Ct. App. 1981). We will reverse only if the trial court abused its discretion. See id.

The Gerharts claim several occurrences connected with the granting and entry of summary judgment in the foreclosure action are irregularities which constitute grounds for vacation under rule 252(b). Rule 252(b) allows a judgment to be vacated for "[i]rregularity or fraud practiced in obtaining the same." Iowa

R. Civ. P. 252(b). The term "irregularity," however, is not defined in the rules and has not been defined in any case decided by an Iowa court.

We believe an irregularity within the context of rule 252(b) is "a want of adherence to some prescribed rule or mode of procedure, consisting either in omitting to do something that is necessary, or in doing it at an unreasonable time or improper manner." 46 Am. Jur. 2d Judgments § 751 (1969). See also Anchor Savings and Loan Association v. Dysart, 189 Kan. 147, 368 P.2d 293, 295 (1962).

II. Violation of Section 654.4. Section 654.4 of the Iowa Code (1983) provides:

> If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost.

The Gerharts assert this section was violated and an irregularity occurred when the trial court failed to make the Bank elect between foreclosure of the mortgage and replevin of the property listed in the security agreement. This argument is misconceived and without merit. By the terms of its language, section 654.4 applies only to a single note which is secured by a mortgage. Suits on other notes not secured by a mortgage are not controlled by this section. The Bank complied with section 654.4 by opting to foreclose the mortgage. It did not sue on the note secured by the mortgage. The replevin action was based on a separate note which was not secured by the mortgage. Therefore, the replevin action was not a suit on the note which required election of remedies. The Bank complied with section 654.4 and no irregularity occurred.

III. Attorney Fees. The trial court's order granting summary judgment awarded the Bank $500 for attorney fees. No hearing was held to determine whether this award was reasonable. The Gerharts assert the award of attorney fees without a hearing was an irregularity. We agree.

In the last few years the Iowa Supreme Court has decided several cases which considered whether a hearing was necessary before a trial court could award attorney fees. In every case the court held that the trial court must conduct a hearing on the matter if an interested party requests it. Maday v. Elview-Stewart Systems Co., 324 N.W.2d 467, 470 (Iowa 1982) (attorney fees under Iowa Code § 91A.8); First Northwestern National Bank v. Crouch, 287 N.W.2d 151, 154 (Iowa 1980) (attorney fees under Iowa Code § 537.5201(8)); State v. Iowa District Court, 286 N.W.2d 22, 24-25 (Iowa 1979) (county entitled to hearing on amount of fee it must pay criminal defender); Parrish v. Denato, 262 N.W.2d 281, 285-86 (Iowa 1978) (court-appointed criminal defender entitled to hearing on attorney fees due him). These cases do not require a hearing in every case. The parties can agree to dispense with a hearing. Maday, 324 N.W.2d at 470. However, "both parties should be given an opportunity for an evidentiary hearing on that issue." Crouch, 287 N.W.2d at 154.

In the case at bar the trial court did not give the Gerharts an opportunity for a hearing on the matter of attorney fees. We conclude this was an irregularity. The trial court's failure to vacate the portion of the judgment related to attorney fees because of this irregularity was an abuse of discretion. See Parrish, 262 N W.2d at 286. We therefore reverse and remand for determination of appropriate attorney fees.

IV. Entry of Summary Judgment. The Gerharts also contend that several irregularities occurred when the trial court ruled on the motion for summary judgment. Their main contention is that the trial court based its judgment on the mistaken belief that their resistance to summary judgment was not verified. They also contend the trial court improperly determined that their pleadings and resistance were conclusions unsupported by fact, and improperly determined that the note was not governed by the notice provisions of the Consumer Credit Code, Iowa Code chapter 537.

The decree on the petition to vacate is silent regarding the mistake about verification. However, because the mistake was pointed out to the trial court, we assume that the trial court impliedly ruled that correcting the mistake would not affect its decision to grant summary judgment for the Bank. Such an implied ruling would be within the discretion of the trial court because the trial court addressed all the allegations made in the resistance when granting the summary judgment.

The rest of the Gerharts' contentions are actually assertions that the trial court erred in applying the law and concluding no issue of material fact existed. The proper method for correcting errors of law is to appeal. The wording of rule 252 does not provide for a judgment to be vacated because of errors of law. Therefore, even if the grant of summary judgment was erroneous, the trial court's refusal to vacate the judgment was correct.

V. Violation of Rule 228. Iowa Rule of Civil Procedure 228 provides:

> The clerk shall not, unless by special order of the court, enter or record any judgment based on a note or other written evidence of indebtedness until such note or writing is first filed with him for cancellation.

It is undisputed that the mortgage which was foreclosed was not filed with the clerk. The Gerharts assert that entry of judgment when the mortgage has not been filed is a mistake of the clerk which constitutes grounds for vacating the judgment under rule 252(a). Considering all the facts in this case, we disagree.

The note which was secured by the mortgage was surrendered for cancellation. In addition, on June 2, 1983, the clerk filed an instrument entitled "Clerk's Acknowledgment of Foreclosure of Mortgage," which states that the mortgage in question was foreclosed by decree. In light of these facts, we conclude the Gerharts had the burden to show some prejudice from the failure to file the mortgage itself. See Webster City Production Credit Association v. Lenz, 268 N.W.2d 182, 184 (Iowa 1978) (judgment not rendered void by failure to comply with rule 228; plaintiff not entitled to relief in absence of prejudice).

Because the Gerharts have not made any showing of prejudice, the trial court did not abuse its discretion in refusing to vacate the judgment.

AFFIRMED IN PART AND REMANDED FOR HEARING TO DETERMINE ATTORNEY FEES.