IN THE COURT OF APPEALS OF IOWA 000219

No. 7-258 / 95-2068

MONTICELLO STATE BANK,
Plaintiff-Appellee,
vs.
KENNETH RAY GILLMORE and WILMA A. GILLMORE,
Defendants-Appellants,
and
KENNETH F. DOLEZAL, RICHARD A. BAKKEN, SHIRLEY BAKKEN, RANDY BAKKEN, SANDY BAKKEN, DONALD CARUTHERS, and JEFF CARUTHERS,
Defendants.

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MONTICELLO STATE BANK,
Plaintiff-Appellee,
vs.
KENNETH RAY GILLMORE, WILMA A. GILLMORE, KENNETH F. DOLEZAL, RICHARD A. BAKKEN, SHIRLEY BAKKEN, RANDY BAKKEN, SANDY BAKKEN, DONALD CARUTHERS, and JEFF CARUTHERS,
Defendants-Appellants.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Thomas L. Koehler and Harold J. Swailes, Judges.

The Gillmores appeal from various district court orders regarding the foreclosures of two mortgages and a deed of trust. **AFFIRMED.**

Kenneth F. Dolezal of Dolezal, Lindeman & Davison, Cedar Rapids, for appellants.

H. Raymond Terpstra II, of Terpstra, Terpstra & Epping, Cedar Rapids for appellee.

Considered by Cady, P.J., Streit, J., and Habhab, S.J.*
*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

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CADY, P. J.

Kenneth and Wilma Gillmore appeal the district court's foreclosure of two mortgages and a deed of trust held by Monticello State Bank and dismissal of their counterclaim against the bank. The Gillmores claim the district court erred by failing to consider the equities between the parties, denying the admission of evidence regarding mediation, permitting attorney fees without itemization, and dismissing their counterclaim as a discovery sanction. During the pendency of the appeal, Monticello State Bank moved to dismiss the appeal after the Gillmores redeemed the real estate. We dismiss in part and affirm in part.

The Gillmores obtained a $295,000 loan from Monticello State Bank in 1991. The loan was secured by three separate parcels of land. These parcels were known as "South Place," "North Place," and "Humboldt County" property. The Gillmores executed a deed of trust on South Place, and mortgages on North Place and Humboldt County property. The terms of the note called for two payments each year of $18,083.56, with the balance due on July 15, 1996. The loan commitment letter and mortgages contained numerous additional terms, including an obligation for the Gillmores maintain property insurance with the bank as the loss payee.

The Gillmores did not timely make their first payment under the note and missed or were unable to pay the full amount of subsequent payments. They fell delinquent on other obligations, including insurance and real estate taxes. Their

financial problems soon resulted in the sale of a portion of north place, and many disputes began to arise between the Gillmores and the bank.

On July 19, 1994, four days after one of the semi-annual payments on the note came due, Monticello gave notice to cure after the Gillmore's failed to pay $12,000 of the payment and failed to keep the real estate taxes current. The notice to cure stated if the defaults were not timely cured, the note would become due and payable in full The Gillmores did not cure and after obtaining a mediation release, the note was accelerated. A mediation release was obtained on August 25, 1994, and the bank instituted a foreclosure action on September 16, 1994.

The Gillmores responded to the action by alleging numerous defenses, including bad faith conduct by the bank, and waiver or course of dealing by accepting late payments and failing to object to delinquent taxes. They also brought a counterclaim for fraud, breach of contract, and intentional interference with a business relationship.

The district court dismissed the counterclaim prior to trial as a sanction for the Gillmores' failure to comply with a court-ordered production of documents. Following a trial, the district court granted foreclosure, and awarded attorney fees to the bank of $17,056.12. The fees were based on an affidavit submitted at trial.

I. Motion to Dismiss

We first address the motion to dismiss before proceeding to the issues on appeal. Monticello made a motion to dismiss the appeal after the Gillmores redeemed

the property by purchasing the certificate of sale at the sheriff's sale. The Gillmores acknowledge Monticello has been paid in full and they have regained the property. Monticello maintains the appeal is moot.

Generally, we do not consider evidence not contained in the trial record. *See Boss Hotels Co., v. Des Moines*, 141 N.W.2d 541, 545 (Iowa 1966). However, matters technically outside the record may be considered in order to establish a claim of mootness. *In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992). Thus, matters which have transpired after the appeal was taken may be considered for this limited purpose. *Id.*

We also typically do not review proceedings merely for the purpose of settling abstract questions. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826-27 (Iowa 1994). A case is moot when the issues involved have become academic or nonexistent, or when judgment, if rendered, will have no effect on the controversy. *First Nat'l Bank in Lenox v. Heimke*, 407 N.W.2d 344, 345-46 (Iowa 1987) (public policy exception to mootness doctrine justified consideration of farm mediation statute in foreclosure action).

The Gillmores redeemed the foreclosed property. Monticello has been paid in full and the Gillmores have their property. There could be no foreclosure now, and the issue whether the trial court erred in determining the equities between the parties in the foreclosure proceeding has been rendered moot. *Hites v. Oldenburger*, 165 N.W. 327, 327 (Iowa 1917) (when mortgagor has been paid in full, the question as to the right of foreclosure becomes moot). Similarly, the question whether the district

court erred in admitting certain evidence at trial becomes moot. We conclude the only issues remaining for our review are the Gillmores' challenge to the attorney fees and the dismissal of the counterclaim. *See Farmers Trust & Sav. Bank v. Manning,* 359 N.W.2d 461, 464 (Iowa 1984) (statutory rule that debtor cannot proceed with both redemption and appeal does not apply to adverse ruling on compulsory counterclaim)

II. Attorney Fees

The standard of review for an award of attorney's fees is abuse of discretion. *Vaughn v. Must, Inc.* 542 N.W.2d 533, 541 (Iowa 1996); *see also 3 S Co., Inc. v Zarek*, 504 N.W 2d 153, 156-57 (Iowa App. 1993). The trial court has considerable discretion in awarding attorney fees and may consider time spent, the nature and extent of service, amount involved, difficulty in handling and importance of issues, responsibility assumed, and results obtained. *3 S Co., Inc.*, 504 N.W.2d at 156-57 Additionally, the trial court is considered an expert on the matter of reasonable attorney fees. *Edson v. Chambers*, 519 N.W.2d 832, 834 (Iowa App. 1994).

The Gillmores are appealing attorney fees of $17, 056.12, abstracting fees of $240.00, and abstracting costs of $702.25. They claim the district court erred in failing to require itemization of attorney fees to determine reasonableness. Monticello claims such a review invades the attorney-client privilege. There is nothing in the record to indicate the trial court did not fully consider the merits of each side before determining the attorney fees and abstracting costs were reasonable.

In fact, in a later hearing for additional fees, the district court looked at an itemized statement for additional attorney fees and determined the billing statements contained attorney-client work product materials and should be sealed. We therefore believe the district court fully considered the arguments of both sides and did not abuse its discretion in its awarding of attorney fees and abstracting costs.

III. Dismissal Sanction

Our review of discovery sanctions is for the correction of errors at law Iowa R. App. P. 4, *Bindel v. Larrington*, 543 N.W.2d 912, 914 (Iowa App. 1995). The imposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion. *Bindel*, 543 N.W 2d at 914. An abuse of discretion occurs when the ruling rests on grounds or reasons clearly untenable or unreasonable. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 681 (Iowa 1995); *Wagner v. Miller*, 555 N.W.2d 246, 249 (Iowa App. 1996).

The Gillmores claim the district court abused its discretion by dismissing a counterclaim as a sanction for the Gillmores' failure to respond to Monticello's request for production of documents. We find the trial court did not abuse its discretion in dismissing the Gillmores' claim.

When the trial court imposes the drastic sanction of dismissal, the trial court's discretion narrows. *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988); *Wagner*, 555 N.W.2d at 249. However, this does not require us to find the trial court abused its discretion because less drastic sanctions are available.

McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981); *Bindel*, 543 N.W.2d at 914. Nevertheless, dismissal is a drastic measure, and it should not be ordered absent willfulness, fault, or bad faith. *Postma v. Sioux Center News*, 393 N.W.2d 314, 318 (Iowa 1986); *Wagner v. Miller*, 555 N.W.2d 246, 250 (Iowa App. 1996) (dismissal of suit was appropriate sanction for investors' willful failure to comply with discovery requests); *Bindel v. Larrington*, 543 N.W.2d 912, 914 (Iowa App. 1995) (no abuse of discretion in application of dismissal sanction where injured party did not comply with discovery request until three months past the deadline).

Monticello served interrogatories and a request for production of documents on the Gillmores and subsequently agreed to an extension of time for the Gillmores. When the Gillmores failed to respond after the extension of time had been granted, Monticello filed a motion to compel discovery and for sanctions. The trial court granted the motion to compel and directed the Gillmores to comply within ten days. When the Gillmores failed to comply with this order, Monticello for the second time filed a motion to compel and for sanctions. The trial court again ordered the Gillmores to comply and again the Gillmores failed to comply. Additionally, Monticello filed additional requests for production of documents which the Gillmores ignored. We find evidence of additional bad faith by the Gillmores in Wilma Gillmore's trial testimony that she destroyed and re-wrote a diary Monticello requested. While dismissal may have been a drastic measure, it was appropriate in view of the willful nature of the discovery violations.

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We dismiss as moot the Gillmores' claim based on the equities and on the evidentiary issue. We affirm the trial court's decision regarding attorney fees and the compulsory counterclaim.

AFFIRMED.