IN THE COURT OF APPEALS OF IOWA

Filed November 26, 1986

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6-328
85-1669

SUR-GRO FINANCE, INC., Assignee of SUR-GRO PLANT FOOD CO., INC.,

Plaintiff-Appellant,

vs.

FRANKLIN J. SMITH; PHYLLIS ANN SMITH; HANK SMITH, INC.;

Defendants-Appellees,

SOUTH CENTRAL IOWA PRODUCTION CREDIT ASSOCIATION; KATHRYN E. HUGHES; HOLLIE E. HUGHES; FARM SERVICE COMPANY, HUMESTON; RON LIVINGSTON,

Defendants.

Appeal from the Iowa District Court for Decatur County (1502) - Arthur E. Gamble, Judge.

Plaintiff appeals the judgment in an action seeking to set aside a decree of foreclosure. **AFFIRMED.**

Robert A. Rolfe, Lamoni, Iowa, for plaintiff-appellant.

Charles L. Elson of Elson & Fulton, Leon, Iowa, for defendants-appellees.

John D. Lloyd of Reynoldson, Van Werden, Kimes, Reynoldson, Lloyd & Wieck, Osceola, Iowa, for defendant South Central Iowa PCA.

Heard by Snell, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Plaintiff appeals the judgment in an action seeking to set aside a decree of foreclosure. We affirm the decision of the district court. Defendants cross-appeal the district court judgment. Defendant's cross-appeal is dismissed.

In 1983 an action was brought by a mortgagee to foreclosure farm land owned by Hollie and Kathryn Hughes. The Small Business Administration (SBA) and South Central Iowa Production Credit Association, as holder of second and third mortgages, were also named as defendants, as was plaintiff, holder of a junior lien. The foreclosure plaintiff subsequently assigned its interest to Franklin and Phyllis Smith. The SBA assigned its interest to a corporation controlled by the Smiths. Counsel representing the Smiths, their corporation, and Hollie Hughes negotiated a settlement on January 29, 1985, by which the corporation placed $15,000 in escrow for the benefit of Hughes, who placed in escrow a quit claim deed conveying to it all his rights "including right to immediate possession and all rights of redemption." The deed was not immediately recorded and, without having the fact of its execution disclosed to him, counsel for plaintiff junior lienholder Sur-Gro, approved as to form, a decree of foreclosure entered on May 31, 1985.

Plaintiff subsequently brought an action to set aside the decree of foreclosure and obtained a stay of execution. The Smiths and their corporation filed a counterclaim for damages pursuant to Iowa Rule of Civil Procedure 253(e). In refusing to set aside the decree of foreclosure the trial court rejected plaintiff's theory that the quit claim deed executed by Hughes merged the mortgage, title, and debt in a manner extinguishing the mortgage upon which the foreclosure was based. The trial court also found no fraud or irregularity arising out of that transaction but that defendants' conduct was sufficient reason to bar their counterclaim for damages. Costs were taxed in equal shares to each of the Smiths and their corporation.

On appeal, plaintiff asserts that the evidence was sufficient to establish both a merger of title, debt, and mortgage, extinguishing the mortgage upon which the foreclosure was based, and fraud and/or irregularity requiring that the judgment be set aside under Iowa Rule of Civil Procedure 252. Defendants assert that this appeal was barred under Iowa Code section 626.60 when a stay of execution was obtained; that they should have been awarded a judgment under Iowa Rule of Civil Procedure 253(e); and that costs should not have been taxed against them.

Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

Whether a given transaction results in the discharge of the mortgage or the mortgage debt depends on the circumstances of the particular case and the intent of the parties. 59 C.J.S. Mortgages § 444 (1949). The right to save the estate in equity after the forfeiture at law has been called the "equity of redemption." 59 C.J.S. Mortgages § 1(3) (1949). It is true that the purchase or acquisition of the equity of redemption in mortgaged premises by the mortgagee may result in the merger of the two estates. Wilhelmi v. Leonard, 13 Iowa 330, 338 (1862). However, the merger of mortgage and deed is always a question of intent. Lutz v. Cunningham, 240 Iowa 1037, 1056, 38 N.W.2d 638, 648 (1949). The acceptance of legal title by the mortgagee does not operate as a merger where none is intended and it is against the interests of the mortgagee. Gray v. Nelson, 77 Iowa 63, 66, 41 N.W. 566, 566-67 (1889). In the absence of a contrary intent, the acquisition of the equity of redemption by the mortgagee will not result in a merger if the continued existence of the mortgage is necessary to protect him against intervening liens of third persons and the mortgagee intended to keep the mortgage alive for protection against junior lienholders. 59 C.J.S. Mortgages § 441 (1949); Banker's Trust v. Stallcop, 223 Iowa 1344, 1347, 275 N.W. 120, 121 (1937). Defendants Hank Smith, Inc.

and the Smiths personally did not intend to merge either the first or second mortgage with the quit claim deed. The mortgagees intended to keep both mortgages alive. The evidence shows that the Smiths intended to foreclose the first mortgage and maintain the lien of the Hank Smith, Inc. second mortgage for protection against the junior creditors. The avoidance of the appearance of merger was the whole purpose of setting up the company Hank Smith, Inc.

It is true, as plaintiff argues, that in Kulp v. Trustees of Iowa College, 217 Iowa 310, 313, 251 N.W. 703, 704-05 (1933), it was held that an action could not be maintained on a mortgage for which the debt had been previously satisfied. However, this principle must be seen in light of the intent of the parties. In Kulp, the mortgagee had no interest in or intent that the mortgage survive in order to protect itself from liens of third persons; rather, the mortgagee asserted only that, due to waste, the mortgage obligation was not satisfied even though the mortgage was satisfied. 251 N.W. at 704. Since our courts have held that the mortgagee has an election in equity to prevent a merger and keep a mortgage alive to protect himself against other liens or incumbrances, Banker's Trust Co. v. Stallcop, 275 N.W. at 121, and since the mortgagees in this case clearly intended to prevent a merger so as to protect themselves from other liens, we find that no merger occurred. Sur-Gro, as a subordinate junior lienholder, could not, therefore, become of higher class.

Plaintiff also alleges that defendants acted fraudulently and/or irregularly in obtaining the foreclosure and therefore the judgment should be set aside under Iowa Rule of Civil Procedure 252. The plaintiff has the burden of proving fraud by clear and convincing evidence. Miller v. AMF Harley-Davidson Motor Co., 328 N.W.2d 348, 353 (Iowa Ct. App. 1982). To justify setting aside a decree, it must be shown that the fraud prevented a litigant from receiving an adjudication on the merits of the case. Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa

1981). We agree with the district court's conclusion that since there was no merger, there could be no change in position of Sur-Gro and therefore, Sur-Gro could have suffered no damages. Proof of damages is a required element of the alleged fraud to set aside a judgment. Id. We are also unconvinced that the defendants made any material misrepresentation to the plaintiff. See id. The mortgagee is not required to indicate an intention to keep the mortgage alive after having received the equity of the mortgage from the mortgagor until another party is about to acquire from the mortgagee an interest in one of the estates. Bankers Trust Co. v. Stallcop, 275 N.W. at 121. We find that plaintiff has not carried its burden of proving fraud or irregularity by clear and convincing evidence.

We have found no merit in defendants' assertion that this appeal is barred under Iowa Code section 626.60 (1985). Defendants contend that since a stay of execution had been obtained by plaintiff in this case, the supreme court is without jurisdiction to hearing this appeal. We agree with cross-appellee Sur-Gro's contention that it is not the decree of foreclosure itself which is being appealed. The judgment and decree of foreclosure was File No. CE 1313, dated May 31, 1985. The appeal in this case is being taken on the court's ruling on the fraud or irregularity alleged by Sur-Gro and was File No. 1502, dated October 15, 1985. This latter ruling dismissed plaintiff's Rule 252 petition. Plaintiff retains the right to appeal that adverse ruling.

Defendants also claim that they should have been awarded a judgment under Iowa Rule of Civil Procedure 253(e). Assessment of damages, if the original judgment is affirmed after a stay under Rule of Civil Procedure 246, is in the discretion of the court. Iowa R. Civ. P. 253(e). The trial court found that the action was brought in good faith by Sur-Gro. We defer to the discretion of the trial court in assessing costs and damages. Palumbo v. W.D. Jenkins Lumber, 188 Iowa 133, 137, 175 N.W. 770, 771 (1920).

For the foregoing reasons, we find no error and affirm the trial court.

AFFIRMED.

Snell, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I cannot agree with the majority. Plaintiff has no right to appeal this case and we should not entertain the appeal. Plaintiff obtained a stay of execution of the judgment in the foreclosure action. It is this judgment he asks us to set aside.

Iowa Code §626.60 (1985) provides "[n]o appeal shall be allowed after a stay of execution has been obtained." The right of appeal is statutory and not constitutional. Appellate review is purely statutory and subject to strict construction. The legislature may give or take it away at its pleasure. See Farmers Trust & Savings Bank v. Manning, 359 N.W.2d 461, 463 (Iowa 1983); Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 614 (Iowa 1976); Vander Berg v. Bailey, 207 Iowa 797, 799, 223 N.W. 515, 516 (1929); Northwestern Mutual Life Ins. Co. v. Hansen, 205 Iowa 789, 794, 218 N.W. 502, 505 (1928).

The legislature in §626.60 clearly took away the right to appeal from a judgment after a stay of execution had been obtained. We should follow the legislative dictate.