FILED
JUN 30 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MILLS COUNTY SAVINGS AND LOAN ASSOCIATION,

Plaintiff - Appellee,

vs.

AIRPORT PLAZA, INC.,

Defendant - Appellee,

and

CITIZENS STATE BANK, Oakland, Iowa,

Defendant - Appellant.

Filed June 30, 1978

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2-60564

Appeal from Pottawattamie District Court - E. F. Hanson, Judge.

Defendant bank appeals trial court's decree holding plaintiff's unrecorded mortgage superior to bank's mortgage on finding defendant bank was not a bona fide purchaser for value protected by § 558.41, The Code. - Affirmed.

N. Michael D'Angelo, of Hogzett & D'Angelo, Oakland, for Defendant - Appellant.

Herman W. Walter, Council Bluffs, for Defendant - Appellee.

Glen M. McGee, of Thomas, McGee & Thomas, Glenwood, for Plaintiff - Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Citizens State Bank appeals the trial court's decree foreclosing a mortgage in favor of plaintiff Mills County Savings and Loan Association. The court held plaintiff's mortgage superior to defendant bank's mortgage, where both parties had mortgages on the same property. On appeal, defendant argues the trial court erred in finding defendant was not a bona fide purchaser for value and thereby protected by § 558.41, The Code, where the bank had given value by extending the time for payment of existing notes and by securing future advances. Defendant also argues the court erred in finding plaintiff's mortgage superior where the bank's mortgage was recorded first although executed after plaintiff's mortgage. Our review is de novo. Rule 4, Rules of Appellate Procedure.

The issue on appeal is whether there is consideration to support defendant's mortgage and allow it priority over plaintiff's third mortgage to Airport Plaza, Inc. See § 558.41, The Code. The first two notes and mortgages given to plaintiff by Airport Plaza were for money loaned. The third mortgage was given in exchange for an additional loan together with the consolidation of the unpaid principal and interest from the first two loans. Therefore, there is no issue as to consideration on plaintiff's loans.

Airport Plaza's mortgage to defendant Citizens State Bank was for the purpose of providing additional collateral for existing notes of one of Airport's principal stock holders, another individual, and Mod Tech, Inc. There was no note given by Airport Plaza to support this mortgage. Additionally, there was no debt owed Citizens Bank by Airport Plaza.

The mortgage was given as additional security for the pre-existing debts of parties who are not parties to this action. There was no present consideration extended to Airport Plaza by defendant to support the mortgage. No additional money was advanced by Citizens although the bank president indicated it obligated them to advance additional funds on Airport Plaza, but he did not say to whom these unadvanced funds would go. The evidence reveals the purpose of the mortgage was for additional security to postpone foreclosure of the notes owed by the persons not a party to this action.

Defendant's second allegation on appeal is that the trial court erred in finding its mortgage was junior and inferior to plaintiff's third mortgage. Section 558.41 protects persons such as defendant from prior unrecorded instruments where the subsequent purchaser gives valuable consideration and is without notice, either actual or implied, of the prior unrecorded instrument. In the instant case, notice is not in issue. Therefore, defendant is entitled to priority if it gave valuable consideration in return for Airport Plaza's mortgage--defendant's first issue on appeal.

The rules for determining who are bona fide purchasers entitled to protection against prior equities are the same as those for determining what purchasers are entitled to protection under a recording act. Bell v. Pierschbacher, 245 Iowa 436, 449-50, 62 N.W.2d 734 (1954). In Iowa, the general rule is a mortgagee who takes to secure a pre-existing debt is not a bona fide purchaser. Salem v. Salem, 245 Iowa 62, 73, 60 N.W.2d 772 (1953). However, the giving of further time for the payment of an existing debt by a valid agreement for any period, however short, is a valuable consideration, and is sufficient to support a mortgage as a purchaser for a valuable consideration. Sullivan Savings Institution v. Young, 55 Iowa 132, 134, 7 N.W. 480 (1880); Port v. Embree, 54 Iowa 14, 6 N.W. 83 (1880); Cf. Phelps v. Fockler, 61 Iowa 340, 14 N.W. 729 (1883). Merely giving consideration does not itself entitle one to the status of a bona fide purchaser although it does support the conveyance. Rouse v. Rouse, 174 N.W.2d 660, 669 (Iowa 1970).

In the instant case, the pre-existing debt was not owed by Airport Plaza, a separate entity, but by one of its stockholders, Jack Casperson, a Bill Harriman and Mod Tech, Inc. Airport Plaza received nothing of value from defendant for executing the mortgage except the possibility of being the beneficiary of a future loan. The consideration must actually be paid, and an unperformed obligation, such as to loan money in the future, is not value sufficient to entitle the obligor to protection as a bona fide purchaser. 77 Am. Jur. 2d, Vendor and Purchaser, § 706 (1975). In the instant case, no money was ever loaned by defendant Citizens Bank to Airport Plaza.

Secondly, in the instant case the mortgage given to Citizens Bank was for the

purpose of giving additional security for Casperson's loan. There was no discharge of the pre-existing debt. Neither did defendant change its legal position to its detriment by relying on the mortgage sufficient to establish a preferred position. See 77 Am. Jur. 2d, Vendor and Purchaser, §§ 701-2 (1975); 92 C.J.S. Vendor & Purchaser, § 323 (1955).

Plaintiff's third mortgage was superior to defendant's prior recorded mortgage because defendant failed to establish its entitlement to the status of a bona fide purchaser due to an absence of present, valuable consideration.

AFFIRMED.