IN THE COURT OF APPEALS OF IOWA

FILED
MAR 0 9 1988
CLERK SUPREME COURT

CITIZENS SAVINGS BANK and SMALL BUSINESS ADMINISTRATION, An Agency of the U.S. Government,

Plaintiffs-Appellees,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant-Appellant,

and COLBURN & SON, INC., a Corporation, and EARL LAWRENCE,

Defendants.

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Filed March 9, 1988

7-106
86-231

Appeal from the Iowa District Court for Sac County (No. 15856) - R.K. Richardson, Judge.

Defendant American Motorists Insurance Company appeals from the trial court's order entering judgment on an insurance contract. **AFFIRMED AS MODIFIED.**

Thomas L. McCullough, of the McCullough Law Firm, Sac City, for plaintiffs-appellees.

M. Gene Blackburn, of the Blackburn Law Firm, Ft. Dodge, for defendant-appellant American Motorists Insurance Company.

Heard by Oxberger, C.J., and Snell, and Sackett, JJ., but considered by Oxberger, C.J., and Donielson, and Sackett, JJ.

SACKETT, J.

We address the issue of a lender's recovery under a fire policy covering the building and contents of a grocery store where the owner was convicted of intentionally burning the building.

The building and contents of an A.G.I. grocery store in Sac City were destroyed by fire. The fire was of an incendiary nature, and the owner subsequently was charged and convicted of arson in connection with the fire. The owner had given Plaintiffs Citizens Savings Bank and Small Business Administration a mortgage on the real estate and a security interest in the contents of the store. The mortgage and security interest were outstanding at the time of the fire. Defendant American Motorists Insurance Company insured the building and contents at the time it burned. The policy foreclosed the owner from recovery because of the arson.

Plaintiffs were not foreclosed from recovering the building insurance because of the following clause in the policy:

> MORTGAGE CLAUSE - - - APPLICABLE ONLY TO BUILDINGS . . . . As it applies to the interest of any mortgagee designated in the Declarations, this insurance shall not be affected by any of the following:
>
> (a) any act or neglect of the mortgagor or owner of the described buildings;

The mortgage clause was limited to buildings. Plaintiffs claimed it was the intention of the parties the mortgage clause also extend to the personal property. Plaintiffs brought suit seeking to reform the insurance contract. The trial court ordered the policy should be reformed to provide coverage on the personal property under the policy with the loss payable as "the interest" as that term is used in the aforementioned clause.

This case was tried solely on the contention that there was a mutual mistake and the policy should be reformed.

On the previous appeal we reversed the trial court, and determined the policy should not have been reformed and plaintiffs could not recover under the insurance for the loss of the personal property. Plaintiffs had not specified or made clear in their original action the amount of recovery they sought for loss of the building and the amount they sought for loss of the personal property. Consequently we remanded to the trial court with instructions that plaintiffs cannot recover for the personal property loss. We ordered the trial court to modify plaintiffs' judgment by reducing the judgment by the amount the trial court allowed for recovery on personal property.

On remand the trial court did not, as we had ordered, reduce the judgment by the amount allowed for recovery on the personal property. Instead, the trial court determined the cause was remanded for determination of the amounts due and owing on the real estate mortgage alone. The trial court then determined the amount due on the mortgage was $126,617.42, determined the cost to repair the building was $102,964, and entered judgment against defendant in that amount.

Defendant again appeals contending (1) the trial court incorrectly determined there was $126,617.42 due on the mortgages at the time of the fire, and (2) the only amount of recovery allowed under the policy is the value of the building at the time of the fire. Plaintiffs contend the second issue is raised for the first time on appeal.

Although the issues were not tried as directed on remand, neither party objected to the trial court's approach. We therefore accept the issues as framed at the trial court level. However, because of the manner in which the trial

court framed the issues, the value of the building at the time of the fire became relevant. We therefore remanded for further evidence on that issue. The trial court on November 30, 1987, entered an order finding the value of the building to be in the amount of $102,500 and entering judgment in that amount. That order has come back to us and the parties have filed supplemental briefs.

Plaintiffs contend the order on remand is not before us and we have no jurisdiction to entertain the appeal because defendant did not file a notice of appeal from the November 30, 1987, order. There is no basis for plaintiff's argument. Our order on remand plainly stated "We retain jurisdiction."

We consider the issues on appeal to be that (1) the trial court misapplied the facts to determine the amount owed on the mortgages at the time of the fire, and (2) the trial court incorrectly determined the value of the building to be $102,500.

This matter was tried in equity and our review is de novo. Iowa R. App. P. 4. We consider all the evidence. We give weight to the findings of the trial court, particularly when considering the credibility of witnesses but are not bound by them. Iowa R. App. P. 14(f)(7).

Defendant contends the trial court erred in determining the amount due on the real estate mortgage and took the amount due on the combined debt. It has been determined the only amount plaintiffs can recover is that amount due on the mortgage on the real estate. Plaintiffs have the burden of proof to show the amount they should recover.

The original grocery store owner gave plaintiffs two separate real estate mortgages on the property in question. The first was given on February 8, 1979. The mortgage provided it was security for a promissory note of February 8, 1979, in the principal sum of $96,000. The second mortgage is dated June 27,

1980, and was security for a promissory note dated June 27, 1980, in the principal amount of $46,000. Neither real estate mortgage was released at the time of the fire. Additionally, on the dates of the mortgages security agreements were given on certain personal property to secure the same notes.

At the same time the notes were taken the Small Business Administration allocated a certain portion of the proceeds of each note for acquisition of land and acquisition of buildings or building construction. Defendant argues recovery is limited to the extent of the debt which was secured by the real estate at the time of the loss.

While we recognize the notes were secured by personal property as well as real estate, the fact they were secured by the real estate mortgage makes them a lien on the land and the entire debt could be recovered on the building insurance so long as the debt does not exceed the value of the building at the time of the fire. We need therefore to address defendant's contention that the value determined by the trial court is too high.

Defendant points out the purchase price in 1978 was $41,000 and the 1981 assessment by the Sac County assessor was $64,080. Two appraisers for the bank valued the building on the date of the fire to be $102,000 and $102,500. Both appraisals were dated November 3, 1987. Defendant challenges the trial court's acceptance of plaintiffs' appraisals. Defendant contends it is suspect that the appraisals were given on the same day and were only $500 apart. Defendant contends when considered with the purchase price the assessors' value is more credible. See Fleener v. Bd. of Supervisors, 246 N.W.2d 335, 337 (Iowa 1976). Cf. Riso v. Pottawattamie Bd. of Review, 362 N.W.2d 513, 519 (Iowa 1985) (assessor values property for tax purposes at actual value).

On our de novo review we determine the value to be $80,000. We modify the judgment to $80,000 Costs on this appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.