IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

TOM RILEY LAW FIRM, P.C.,	)	
Plaintiff-Appellant,	)	
vs.	)	
LINDA PADZENSKY,	)	Filed May 31, 1988 225
Defendant-Appellee,	)	8-79
DAVID R. KINZENBAW,	)	87-596
Defendant.	)	

Appeal from the Iowa District Court for Linn County (No. EQ 7965) - Thomas M. Horan, Judge.

Plaintiff appeals an order establishing Defendant Linda Padzensky's judgment as a first lien on a tract of land in Linn County. **REVERSED AND REMANDED.**

Peter C. Riley of the Tom Riley Law Firm, P.C., Cedar Rapids, for the plaintiff-appellant.

John Ehrhart, Cedar Rapids, for the defendant-appellee Linda Padzensky.

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

SACKETT, J.

We address the issue of whether a deed given by a mortgagor to a mortgagee merged title in the mortgagee and elevated a judgment lien to a first lien on the property. The judgment lien was placed on the land subsequent to the mortgage but prior to the deed. We determine the deed did not merge title. We reverse the trial court and remand for further proceedings.

Plaintiff-Appellant Tom Riley Law Firm, P.C., brought this action in foreclosure seeking to establish a mortgage as a first lien on a lot in Linn County, Iowa. The mortgage was given to plaintiff in consideration of legal services performed for and to be performed for Defendant David Kinzenbaw. Kinzenbaw gave plaintiff the mortgage on October 21, 1981. On December 1, 1981, plaintiff and Kinzenbaw entered into an agreement as to the amount of the fee Kinzenbaw owed plaintiff. On February 24, 1982, Defendant Linda Padzensky obtained a judgment in Linn County against Kinzenbaw. The judgment then became a lien on the lot. Plaintiff had represented Kinzenbaw in the litigation that formed the basis of the Padzensky judgment and had knowledge of the lien.

On April 23, 1982, Kinzenbaw conveyed the lot to plaintiff by special warranty deed. The special warranty deed contained the following language:

> By this instrument grantor conveys all of his interest under a contract for the purchase of the above-described property dated May 1, 1981, and filed of record on May 5, 1981, in Volume 1870 at page 232 in the office of the Linn County Recorder.
>
> This Special Warranty Deed is given in satisfaction of an assignment and conveyance for security purposes dated October 21, 1981, and filed for record on October 21, 1981, in Volume 1888 at page 345 in the office of the Linn County Recorder.

Plaintiff sought to foreclose its mortgage. The trial court determined there was merger in plaintiff of the two estates and found Padzensky had the first lien on the real estate. Plaintiff appeals those findings.

This suit is in equity. Our review is de novo. Iowa R. App. P. 4.

Plaintiff claims the special warranty deed did not merge its valid lien into the title. Where the mortgagor deeds the property to the mortgagee, the deed is presumed to be but a continuation of the security and the right of redemption is presumed to continue. Koch v. Wasson, 161 N.W.2d 173, 176 (Iowa 1968). Such transfers will be scrutinized and upheld only where it is perfectly fair, based upon adequate consideration, and it clearly and unmistakably appears that an absolute sale and not a transfer for security only was within the contemplation of the parties. Id. at 177; (quoting Guttenfelder v. Iebsen, 230 Iowa 1980, 1084, 300 N.W. 299, 301 (1941)).

This is not a dispute between the mortgagor and mortgagee. The parties agree Kinzenbaw claims no interest in the property. Kinzenbaw is not seeking redemption rights or equitable relief. Defendant therefore contends the estates merged and the inquiry should end here. We disagree. To constitute a merger the two estates must unite in the same person in the same right. 59 C.J.S. Mortgages § 437(b), at 674 (1949). In order that there be merger it is necessary the same person or persons become seized of the entire property liable to pay the debt and the whole debt. Clark v. Rowell, 298 N.Y.S. 232, 238 (N.Y. Co. Ct. 1937). The special warranty deed extinguished any rights Kinzenbaw had in the property, including his rights of redemption. But a merger ordinarily will not result where it would operate against the interests of the mortgagee. The presumption is the mortgagee intends what would best accord his or her interests. 59 C.J.S. Mortgages § 441(a), at 681 (1949). While not controlling, the holding of the Nebraska Supreme Court is instructive. In Overland-Wolf, Inc. v. Koory, 162 N.W.2d 889, 890-91 (Neb. 1968), the Nebraska court said:

> Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may

> keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself.

The Nebraska position is in accord with Michigan. In Sylvania Savings Bank Co. v. Turner, 183 N.W.2d 894, 896 (Mich. Ct. App. 1970), the Michigan court said:

> When a mortgagee acquires fee title to the mortgaged property he frequently has no further reason to keep alive the lien of the mortgage. In such event the lien may merge into the fee and extinguish the debt. But whether this occurs depends fundamentally on the mortgagee's intention. If it is in his interest to preserve his lien separately from the fee, it will ordinarily be concluded that he did not intend to merge the lien into the fee.

We determine before there can be a merger there must be a showing plaintiff intended there be a merger. It is the intention of the mortgagee that is controlling. Overland-Wolf, 162 N.W.2d at 891. It would be contrary to the interest of plaintiff to eliminate the first mortgage by merger. The evidence clearly shows plaintiff did not intend to merge its security interest and the fee. See Sylvania, 183 N.W.2d at 897; 5 H. Tiffany, Real Property § 1484, at 518-19 (3rd ed. 1939). In fact, there is no evidence plaintiff intended merger.

We reverse the trial court's order establishing defendant's judgment as a first lien on the premises. No determination having been made by the trial court of the amount secured by the mortgage, we remand to the trial court for further proceedings to determine the balance due on the debt secured by the mortgage at the time of the special warranty deed. Plaintiff has the burden of proof on this issue as well as the duty to account for all payments and credits made on the account. The trial court on remand shall determine this amount and establish it as a first lien on the property in question. The judgment of defendant shall be established as a second lien. Such further orders shall be entered to establish foreclosure and redemption rights as are equitable.

REVERSED AND REMANDED.