

IN THE COURT OF APPEALS OF IOWA

No. 3-684 / 12-2203
Filed September 5, 2013

FREEDOM FINANCIAL BANK,
Plaintiff-Appellee,

vs.

MAUREEN ANN BOESEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson,
Judge.

Maureen Boesen appeals from the district court's ruling that funds from
the sale of real estate should be used to pay the foreclosing bank the interest,
late fees, and attorney fees incurred after the sale of the property. **AFFIRMED.**

Louis Hockenber of Sullivan & Ward, P.C., West Des Moines, for
appellee.

Adam Van Dike, Des Moines, for appellant.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Maureen Boesen appeals from the district court's ruling awarding Freedom Financial the interest, late fees, and appellate attorney fees the bank incurred after the sale of the foreclosed property. She contends that the bank is only entitled to fees and expenses incurred through the date of sale. Upon review, we affirm the ruling of the district court.

I. Background Facts and Proceedings.

After a prior appeal between the parties, a new issue arose after remand. In the prior appeal, our supreme court briefly outlined the facts:

Edward J. Boesen obtained a purchase-money mortgage from Freedom Financial Bank to invest in commercial real estate in Ankeny, Iowa. The signature of his wife, Maureen, was forged in executing the purchase-money mortgage. After Edward's death, Freedom Financial attempted to foreclose its mortgage, but Maureen and the Boesen Estate asserted Maureen's fraudulent signature voided the mortgage.

The district court granted Freedom Financial summary judgment, concluding its purchase-money mortgage was superior to Maureen's statutory dower interest and the estate's other debts and charges. The district court ordered any excess sale proceeds to be paid to the estate, not Maureen. The court of appeals affirmed the district court's award of summary judgment to Freedom Financial, but reversed the district court's determination that the foreclosure sale surplus be paid to the estate and instead held Maureen's statutory dower interest took priority over the estate's other debts and charges.

Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 805 (Iowa 2011). The supreme court affirmed the court of appeals decision and remanded for further proceedings. *Id.*

The decree of foreclosure entered on February 25, 2009, provided judgment in favor of the bank in the amount of "\$228,056.42, plus interest at the

rate of 7.25% after August 5, 2008; for all court costs accruing herein; for abstracting fees of \$265; \$1,078 for insurance costs, for attorney fees of \$10,500 through February 25, 2009; and for other expenses incurred by Plaintiff herein including advancements made by Plaintiff for real estate taxes and other sums.”¹

The decree also provided that any surplus remaining after the sale be paid to Edward Boesen’s estate. However as noted, the supreme court subsequently determined the remaining surplus should be paid to Maureen.

On April 29, 2009, the parcel was sold to the City of Ankeny for \$290,000. The bank placed the proceeds² from the sale in an escrow account pending the result of the appeal.

In accordance with the supreme court’s decision, on January 9, 2012, the bank filed its application for order on remand and affidavit relative to attorney fees. Maureen then filed a reply to which the bank responded. Following a hearing, the district court’s May 23, 2012 ruling ordered that “all funds currently escrowed be released and applied towards satisfaction of the judgment entered herein pursuant to the terms of the decree of foreclosure. . . . Whatever amounts remain should then be applied toward payment of the additional interest accruing herein, late fees, and attorney’s fees Any amounts remaining after payment of the foregoing shall then be paid to defendant Maureen A. Boesen.”

¹ The bank’s petition sought monies due owed in the sum of \$228,056.42 as of August 5, 2008, “plus attorney fees and costs, and plus any and all other debts of the Defendants to the Plaintiffs. Interest, attorney fees and costs will accrue thereafter.”

² Although the parcel was sold for \$290,000, Freedom Financial placed only \$280,910.81 in the escrow account. The difference between the two amounts consisted of prorated taxes, transfer tax, and other costs of sale.

However, if the bank is paid all fees and costs incurred after the sale of the property, no remaining surplus funds will exist. Following the ruling Maureen filed a motion to amend or enlarge which was denied by the district court after a hearing. She appeals.

II. Standard of Review.

Because this is an action in equity, we review the decision of the district court de novo. See Iowa R. App. P. 6.907.

III. Discussion.

This case turns on the “surplus from the foreclosure sale” which we awarded, and our supreme court confirmed, to Maureen. We begin by noting that neither court suggested the amount of that surplus was fixed or had already been determined. See *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802 (Iowa 2011); see also *Freedom Fin. Bank v. Estate of Boesen*, No. 09-0397, 2010 WL 2757375, at *8 (Iowa Ct. App. July 14, 2010) (deciding that “the excess from the sale, if any, be paid” to Maureen rather than the estate). We also note that Maureen was not assured there would actually be a surplus to be distributed after the completion of court proceedings. See *id.* Rather, our supreme court simply held that Maureen’s interest in the surplus is prior to that of her husband’s estate and thus that she, rather than the estate, is entitled to any surplus that might exist after the mortgage debt, interest, fees, court costs, and other legal expenses were discharged. See *Estate of Boesen*, 805 N.W.2d at 805.

On appeal, Maureen concedes that the district court was correct in its finding that “charges and fees legitimately accrued in enforcing Freedom

Financial's mortgage are allowable under the terms of the mortgage contract" and could be properly recovered by the bank. The mortgage contract in question states, "Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorney's fees, court costs, and other legal expenses."

That being said, Maureen's stance on appeal is that the bank is only allowed to recover the costs, fees, and interest which it incurred prior to the sale of the parcel.³ She does not argue that the charges and fees which accrued after that date are not "legitimate" or unreasonable and therefore are not recoverable. Instead, she argues that the "surplus"⁴ was determined by the sale of the property and that it became her personal property, as she was not a party to the mortgage and cannot be held responsible for fees and costs accruing after the sale. Thus, she argues that the bank may not recover from her personal funds.

The bank agrees with Maureen's proposition that it may not seek to recover from her personally. Instead, the bank clarifies that it only seeks to recover funds from the proceeds received for the sale of the parcel. In support of its right to do so, it points out that our supreme court has already determined that the proceeds of the sale are subject to fees and costs of the bank as set forth in the purchase money mortgage. See *Estate of Boesen*, 805 N.W.2d at 808.

³ In her response to Freedom Financial's itemization of costs, Maureen listed the amount recoverable by the bank as \$257,113.26.

⁴ The surplus, as calculated by Boesen, being the difference between the \$280,910.81 Freedom Financial received as proceeds from the sale minus the amount of the promissory note as well as the costs, fees, and interest which had accrued up to the time of the sale.

Because there is not a surplus until the fees and costs of the bank have been satisfied, Maureen's original premise that the amount in excess of those fees and costs became her personal funds on the day of the sale is flawed. As stated in the purchase money mortgage, "Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorney's fees, court costs, and other legal expenses." Our supreme court has concluded that unless the contract or statute otherwise provides, attorney fees includes appellate attorney fees. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982); see also *Souls Farms, Inc. v. Schafer*, 797 N.W.2d 92, 111 (Iowa 2011) (affirming trial attorney fees and remanding to fix reasonable appellate attorney fees).

We decline Maureen's invitation to rely upon the parties' agreement to escrow the sale proceeds, pending the outcome of the initial appeal, to limit the bank's recovery. This issue was not raised or decided by the district court and therefore not preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (issues must first be raised and decided by the district court before we will decide them on appeal).

Accordingly, we affirm the district court's ruling that the bank may use the proceeds from the sale to satisfy the reasonable attorney fees, interests, and expenses it has incurred both before and after the sale of the property as determined by the district court.

AFFIRMED.