IN THE COURT OF APPEALS OF IOWA

No. 6-806 / 04-1854
Filed December 28, 2006

RACCOON VALLEY STATE BANK,
Plaintiff-Appellee,

vs.

DOUGLAS E. GRATIAS, VAL GRATIAS, and SUNCOAST INVESTMENTS, L.L.C.,
Defendants-Appellants.

Appeal from the Iowa District Court for Dallas County, Darrell J. Goodhue, Judge.

Defendants appeal the district court's order granting plaintiffs motion for summary judgment in its action to foreclose on certain real estate. **AFFIRMED.**

William E. Robak of Robak Law Firm, P.C., Des Moines, for appellant.

Jeffrey N. Bump of Bump & Bump, Panora, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Defendants Douglas and Val Gratias and Suncoast Investments, L.L.C. appeal the district court's order granting Plaintiff Raccoon Valley State Bank's (the Bank) motion for summary judgment in its action to foreclose on certain real estate. They separately appeal from the denial of their motion to have the sheriff's sale of the property set aside. The defendants contend the promissory note was an illusory contract, the Bank's notice to cure was defective, and the sheriff's sale should have been set aside based on procedural irregularities and an inadequate sale price. The Bank cross-appeals, contending the district court erred in denying its motion for sanctions. The Bank also requests an award of its appellate attorney fees. We affirm.

I. Background Facts and Proceedings. On January 28, 2000, Douglas and Val Gratias executed a promissory note in the amount of $388,021.85. The note was secured by mortgages on two residential rental properties. The note contained both installment terms and a demand feature, and accrued interest on the outstanding principal balance at the rate of 8.25% per annum. Monthly installments in the amount of $3018.00 were to be paid by the twentieth of each month beginning on March 20, 2000. The full balance of principal and interest was due on February 20, 2015.

The promissory note contained the following language:

> IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THESE TERMS IN WRITING ARE ENFORCABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.

The note further provided that if the Gratiases were in default on the note, the Bank had the right to demand immediate payment of the outstanding principal, accrued unpaid interest, and other accrued charges. The mortgage securing the note stated the Gratiases would be in default if they failed to make a payment on the secured debt when due.

On February 23, 2001, the Gratiases transferred title of the rental properties at issue to Suncoast Investments, L.L.C., which they own.

In 2003, the defendants entered into an agreement to sell one of the residential rental properties, which was encumbered by a mortgage of $95,251.86. On May 21, 2003, the Bank requested a $111,053.01 payoff to release the property. The defendants objected to the amount of the payoff. The real estate agents carrying out the sale attempted to resolve the dispute with the Bank. The Bank agreed that upon receipt of the $111,053.01 payoff and the defendants' updated financial statements, it would make adjustments to the loan terms. The defendants tendered payment but failed to submit the requisite financial information the Bank requested.

Following the payoff, the defendants unilaterally reduced their monthly payment to $2012.00. On July 18, 2003, after receiving two reduced payments, the Bank sent the defendants written notification of their default under the terms of the promissory note. The notification informed the defendants that if they failed to cure the default by July 31, 2003, the Bank would declare the entire balance of the note immediately due and would foreclose the mortgage.

The defendants failed to cure the default by July 31, 2003, and on August 1, 2003, the Bank accelerated the balance due and implemented the eighteen

percent default interest rate provided in the note. On November 6, 2003, the Bank filed a petition to foreclosure the mortgage. The district court granted summary judgment in favor of the Bank on September 15, 2004. Following an Iowa Rule of Civil Procedure 1.904(2) motion, the court entered judgment in favor of the Bank on October 15, 2004. The defendants appealed on November 15, 2004.

On January 18, 2005, the real estate at issue was sold on special execution at a sheriff's sale. The Bank purchased the property for $264,000.00 and a sheriff's deed was issued. The defendants did not attend the sale.

On January 25, 2005, the defendants filed a motion to set aside the sheriff's sale, accusing the Bank of fraud for failing to provide notice of the sheriff's sale to the them or their attorney, by failing to provide an abstract of title to the property to facilitate a sale of the property prior to the sheriff's sale, by disclosing to the deputy sheriff conducting the sale what it expected to bid, and by not bidding the full market value of the property. The Bank resisted the motion and filed a motion for sanctions against the defendants pursuant to Iowa Rule of Civil Procedure 1.413(1). Both motions were denied following a February 9, 2005 hearing. The defendants appealed and the Bank cross-appealed. The appeals arising from the foreclosure and the sheriff's sale were consolidated by order of the supreme court.

II. Summary Judgment. Although equity cases are generally reviewed de novo, review of a case in equity resulting in summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *Keokuk Junction Ry. Co. v. IES Indus., Inc.,* 618 N.W.2d 352, 355 (Iowa 2000).

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A factual issue is material only if the dispute is over facts that might affect the outcome of the suit, given the applicable law. *Lewis v. State ex rel. Miler,* 646 N.W.2d 121, 124 (Iowa Ct. App. 2002). The party moving for summary judgment has the burden of proving the facts are undisputed. *Id.*

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the resisting party. *Id.* Furthermore, every legitimate inference that can be reasonably deduced from the evidence should be afforded the resisting party. *Id.* An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *Id.* (*citing Butler v. Hoover Nature Trail, Inc.,* 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). An inference is not legitimate if it is based upon speculation or conjecture. *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.*

The defendants first contend the court erred in granting the Bank summary judgment because the promissory note provides for payments both in installments and on demand. They assert the note is a partial failure of consideration and illusory.

The American Jurisprudence states:

> A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances, unless: (a) each of the alternative performances would have been consideration if it alone had been bargained for; or (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his or

> her choice events may eliminate the alternatives that would not have been consideration.
>
> A promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance. Words of promise that by their terms make performance entirely optional with the "promisor" do not constitute a promise. In such cases there might theoretically be a bargain to pay for the utterance of the words, but in practice it is performance that is bargained for. Where the apparent assurance of performance is illusory, it is not consideration for a return promise. However, an obligation under a contract is not illusory if the obligated party's discretion must be exercised with reasonableness or good faith. Also, the illusory nature of alternative promises disappears if the contract is executed and the alternative actually performed is not illusory.
>
> A promise in the alternative may be made because each of the alternative performances is the object of desire to the promisee. Or the promisee may desire one performance only, but the promisor may reserve an alternative that he or she deems advantageous. In either type of case the promise is consideration if it cannot be kept without some action or forbearance that would be consideration if it alone were bargained for. However, if the promisor has an unfettered choice of alternatives, and one alternative would not have been consideration if separately bargained for, the promise in the alternative is not consideration.

17A Am. Jur. 2d *Contracts* § 130, at 150-51 (2004).

Although the Bank retained a choice of alternative performances, each of the alternative performances would have been consideration if it alone had been bargained for. Accordingly, the promissory note is supported by consideration. Furthermore, the note is not illusory. Each alternative promise is supported by consideration. By requiring payment on demand the Bank is not discontinuing performance, but rather requiring a valid alternative performance.

To the extent the defendants argue the promissory note was a violation of the implied covenants of good faith and fair dealing, we conclude this issue was not before the district court and therefore we will not consider it on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). We further will not consider the

defendant's contention that the Bank's July 18, 2003 notice to cure letter was defective as the claim was not timely made to the district court.

The defendants contend the district court erred in granting summary judgment in favor to the Bank on the defendants' counterclaim of misrepresentation. They claim the court erred in determining that Iowa Code section 535.17 (2003) bars a counterclaim for the tort of misrepresentation in a foreclosure action.

The defendants' counterclaim of misrepresentation centers on an oral statement modifying the written credit agreement allegedly made by a representative of the Bank. Section 535.17 requires modification to credit agreements to be made in writing. However,

> a credit agreement or modification of a credit agreement which is not in writing, but which is valid in other respects, is enforceable if the party against whom enforcement is sought admits in court that the agreement or modification was made, but no agreement or modification is enforceable under this subsection beyond the terms admitted.

Iowa Code § 535.17(4). The defendants made no such admission. Furthermore, section 535.17(3) states any alleged verbal modification to a credit agreement is unenforceable by way of action of defense. Section 535.17(5)(a) includes "counterclaims . . . to recover damages for the non performance of any duty" in its definition of action. The district court thereby concluded section 535.17 negated not only the defendants' affirmative defenses, but also their counterclaim. We conclude the district court properly determined that section 535.17 barred the defendants' misrepresentation counterclaim. Accordingly, we affirm the district court's grant of summary judgment in favor of the plaintiffs on both their claim and the defendants' counterclaim.

III. Sheriff's Sale. The defendants next contend the district court erred in denying their motion to set aside the sheriff's sale due to various procedural irregularities. The defendants specifically claim the timely notice was not provided, the Bank did not provide the abstract to facilitate a sale prior to the Sheriff's sale to a private buyer, and the purchase price was inadequate.

Our review is de novo. Iowa R. App. P. 6.4. We give weight to the trial court's findings, although we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

"The policy of the law is to uphold judicial sales, and they will not be held invalid for mere irregularities not affecting the power of the sheriff to sell." *Brown v. Butters,* 40 Iowa 544, 546-47 (1875). Generally, a foreclosure sale will not be set aside if the sheriff has substantially complied with the procedures established for a foreclosure sale. *First Nat'l Bank in Fairfield v. Diers,* 430 N.W.2d 412, 415 (Iowa 1988).

Exceptions to the general policy of upholding a sheriff's sale exist where a mistake of fact or law has occurred. *Federal Land Bank of Omaha v. Reinhardt,* 428 N.W.2d 672, 673 (Iowa Ct. App. 1988). However, "a court of equity should be hesitant to set aside a sheriff's sale where one party claims a mistake of fact or law." *Farmers Sav. Bank v. Gerhart,* 372 N.W.2d 238, 244 (Iowa 1985). The court should grant relief "only when enforcement of the sale would impose an oppressive burden on the party seeking vacation and vacation of the sale would result in no substantial hardship other than rescinding the bargain." *Id.* Furthermore, mere inadequacy of the purchase price is not ground for setting aside a sheriff's sale. *Federal Land Bank of Omaha*, 428 N.W.2d at 673.

The sheriff substantially complied with the established procedures and the sale did not impose an oppressive burden to the defendants. Nor do we conclude the Bank's failure to provide an abstract to the defendants prior to the sheriff's sale is grounds to set aside the sale. The testimony at the hearing indicates it would have been impossible to finalize the private sale prior to the sheriff's sale. Accordingly, the district court did not err in denying the defendants' motion to set aside the sale.

IV. Motion for Sanctions. On cross appeal, the Bank contends the district court erred in denying its motion for sanctions.

Rule 1.413(1) states in pertinent part:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. . . . If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

Review of a district court's rule 1.413(1) sanction decision is for an abuse of discretion. *Mathias v. Glandon,* 448 N.W.2d 443, 445 (Iowa 1989). Using the deferential standard of review, we examine the record as to the prefiling inquiry of counsel. *Mathias v. Glandon,* 448 N.W.2d 443, 445 (Iowa 1989). Compliance with the rule is measured by an objective, not subjective, standard of reasonableness under the circumstances. *Id.* Our rule and statute make

sanctions mandatory when a violation occurs, but whether a violation has occurred is a matter for the court to determine, and this involves matters of judgment and degree. *Id.* The test is whether a reasonable attorney would have filed the motion if confronted with the same circumstances. *Fields v. Iowa Dist. Court*, 468 N.W.2d 38, 39 (Iowa 1991).

The filing of the motion to set aside the sheriff's sale was reasonable given the information the defendants' counsel had at the time the motion was filed. While the procedural defects in the sheriff's sale and the testimony elicited at the hearing were not enough to set aside the sale, we cannot conclude the filing of the motion was meant to harass the Bank or increase its litigation costs. Accordingly, we conclude the district court did not abuse its discretion in denying the Bank's motion for sanctions.

V. Appellate Attorney Fees. Finally, the Bank requests an award of its appellate attorney fees. We decline to so award.

AFFIRMED.