IN THE COURT OF APPEALS OF IOWA

No. 6-833 / 06-0116
Filed November 30, 2006

SHARON KAY SUSIE,
Plaintiff-Appellant,

vs.

GROVER BENNETT,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman (summary judgment), and Michael S. Walsh (trial), Judges.

Plaintiff appeals the district court's judgment for defendant on her claim for damages relating to a real estate transaction. **AFFIRMED.**

Robert B. Deck, Sioux City, for appellant.

Timothy Scherle of Bikakis, Mayne, Arneson, Karpuk & Hindman, Sioux City, for appellee.

Considered by Mahan, P.J., and Miller, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HENDRICKSON, S.J.

Sharon K. Susie appeals from a district court ruling granting defendant's motions for summary judgment on Counts I and II, and dismissing Count III after a trial. Susie, in her petitions, claimed damages from Bennett in three small claims actions relating to problems she had encountered with the purchase of real estate from Bennett. The actions were consolidated and transferred to district court. On appeal to this court, we affirm.

I. Background Facts & Proceedings

On February 27, 1998, Sharon and Larry Susie entered into a contract with Grover Bennett for the purchase of real estate in the sum of $55,000 payable in monthly installments.[1] In May 2002, Bennett brought a foreclosure action based on Susie's failure to make the contract payments. In her response to the foreclosure action Susie claimed that Bennett had breached the terms of the real estate contract in that (1) there was an abandoned well on the property for which she had incurred expenses to repair, (2) Bennett failed to inform Susie where the property was receiving its water supply, (3) Bennett failed to disclose hazardous materials were buried on the property, and (4) Bennett failed to disclose that a tax assessment would ultimately be placed against the property for what is called the Malloy Road Water Main Project.

On January 13, 2003, the district court entered a decree of foreclosure concluding that there was a balance due on the contract of $35,394.94 for principal and interest through November of 2002, plus interest at the rate of

[1] Larry Susie is no longer a party to the proceedings. It appears Sharon Susie is now the sole party in interest under the contract.

seven percent thereafter on the unpaid balance. The court specifically ruled that Susie had failed to prove that Bennett had concealed or misrepresented the physical condition of the property or its improvements before the parties entered into the purchase contract. The court also concluded that Susie had failed to prove she had relied on any concealment or misrepresentations and that Susie had purchased the property in an "as is condition without any warranties."

This court affirmed the decision of the trial court on November 26, 2003, discussing the Susies' affirmative defense of equitable estoppel, as follows:

> The district court determined the Susies failed to show they detrimentally relied on any concealment or misrepresentation by Bennett when they entered into the contract. For the most part, the incidents which the Susies cite as causing detrimental reliance occurred after the contract was signed. The auction of the property, the failure of the well, and the Groundwater Hazard Statement all occurred after the closing. Because they did not happen before the contract was signed, the Susies could not have relied upon Bennett's conduct in entering into the contract.

Bennett v. Susie, No. 03-0198 (Iowa Ct. App. Nov. 26, 2003). An application for further review was denied by the supreme court.

On or before March 22, 2004, Susie paid the full amount Bennett claimed was due under the real estate contract and on that date Bennett delivered a warranty deed to Susie.

Thereafter, on April 6, 2004, Susie filed three small claims actions against Bennett. The claims were consolidated and transferred to the district court. The court ordered Susie to recast the claims into one petition, which was filed on February 28, 2005. The recast petition made allegations in three counts for damages. The first count alleged that after the purchase of the property pursuant

to the 1998 real estate contract Bennett intentionally and/or negligently damaged the well and pump and other equipment which serviced the well. The second count claimed damages based upon alleged misrepresentations in a Groundwater Hazard Statement warranting the property to be free from solid waste and hazardous waste. The third count sought damages based on an outstanding tax assessment at the time Bennett delivered a warranty deed for the property.

Bennett filed motions for summary judgment in his favor on each count of the recast petition. The motion was resisted by Susie. The district court granted summary judgment on Counts I and II of the recast petition, concluding the claims by Susie were compulsory counterclaims to the foreclosure action. The court stated with respect to Count I:

> It is this Court's conclusion that the claim relating to any actions of Mr. Bennett (which occurred before or after the signing of the contract) had matured as of 5/24/02. At that time, the claim she had against Mr. Bennett was not the subject of a pending action. Nor was the presence of indispensable parties of whom jurisdiction could not be acquired necessary to adjudicate the claim. The Court further finds that this claim arises out of the transaction or occurrence that was the bases of Mr. Bennett's foreclosure action as that has been defined by Iowa case law. This Court concludes that there is a logical relationship between Ms. Susie's claim and the foreclosure action. If there wasn't such a logical relationship, why else would Ms. Susie raise these facts as an affirmative defense in the foreclosure action? Ms. Susie testified that one of the reasons she got behind in her contract payments in the first year of the contract was because of the expenses she incurred fixing the well . . . .

The district court's grant of summary judgment on Count II was based on the same reasoning.

The court denied summary judgment on Count III, but concluded, after a hearing, that the final installment of the special assessment which came due after Bennett had given a warranty deed to Susie was Susie's obligation since she unilaterally chose to pay the special assessment in installments. She had paid all of the installments except the last one, which did not come due until after she received the warranty deed from Bennett.

Susie filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which the district court overruled. Susie now appeals.

II. Standard of Review

Our review is for the correction of errors at law. Iowa R. App. P. 6.4.

III. Summary Judgment

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the nonmoving party. *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006). "In a nutshell, the summary judgment procedure does not contemplate that a district court may try issues of fact, but must determine only whether there are issues to be tried." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006).

A. Susie contends the district court erred by granting summary judgment to Bennett on Count I, because that claim was not mature at the time she filed her answer to the foreclosure action, and thus it was not a compulsory

counterclaim. She claims Bennett damaged the pump and well after she purchased the property, but before he transferred possession. She states she knew of the damage to the pump and well prior to the foreclosure litigation, but did not know the damage had been caused by Bennett.

Iowa Rule of Civil Procedure 1.241 provides:

> A pleading must contain a counterclaim for every claim then matured, and not the subject of a pending action, held by the pleader against any opposing party and arising out of the transaction or occurrence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be acquired. A final judgment on the merits shall bar such a counterclaim, although not pleaded.

The objective of this rule is to avoid a multiplicity of suits and dispose of all related issues in a single case. *Hettinger v. Farmers & Merchs. Sav. Bank*, 436 N.W.2d 377, 379 (Iowa Ct. App. 1988).

A cause of action matures when a claimant has sustained actual loss or resulting damage. *Stoller Fisheries v. American Title Ins. Co.*, 258 N.W.2d 336, 341 (Iowa 1977); *Raymon v. Norwest Bank Marion, N.A.*, 414 N.W.2d 661, 664 (Iowa Ct. App. 1987). In *Walters v. Iowa-Des Moines National Bank*, 295 N.W.2d 430, 433 (Iowa 1980), the supreme court stated:

> When the foreclosure action was started, it was clear Iowa-Des Moines would not provide the financing which Walters says it had agreed to provide. Walters knew this. The claim had then matured, if indeed it had not done so earlier.

Similarly, in *Raymon*, 414 N.W.2d at 664, we determined that where a party alleged he had sustained damages prior to an earlier foreclosure action, his

claims based on those damages should have been brought as a compulsory counterclaim in the foreclosure proceedings.

The district court found, "Ms. Susie knew of the problems relating to the well as early as 1988 and had incurred expenses to repair/improve the well prior to the filing of the foreclosure action in June of 2002." In fact, Susie raised a counterclaim regarding the well based on principles of equitable estoppel in the foreclosure action. We determine Susie's claims regarding the well had matured at the time of the foreclosure action, and should have been brought as a compulsory counterclaim under rule 1.241. We further conclude that her assertion she did not know the alleged damage was caused by Bennett is not supported by the record.

B. Susie claims the district court erred in granting summary judgment to Bennett on Counts I and II because the court relied on evidence outside the record. She asserts the court improperly considered the trial transcript from the foreclosure action. She points out that Bennett submitted only a portion of the transcript from the foreclosure case, and the district court should only have considered those pages, not the entire transcript.

If Susie believed the district court relied on evidence outside the record, she should have alerted the district court to this issue by filing a motion following entry of the summary judgment ruling. *See Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 198 (Iowa 2004). Where an issue is not raised in resistance to a motion for summary judgment, and is not included in a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), it is waived. *Davison v. State*,

671 N.W.2d 519, 521 (Iowa Ct. App. 2003). We conclude Susie failed to preserve error on this issue by raising it before the district court.

We find no error in the district court's grant of summary judgment in this case.

IV. Special Assessment

The real estate contract provided Susie would be responsible for all special assessments which arose after March 1, 1998. Thereafter, on April 26, 1999, the City of Sioux City made a special assessment against Susie's property for $1161.60 for the Malloy Road Water Main Project. Susie sought permission from the City to pay the special assessment in installments, and the City agreed. Susie made payments in 2001, 2002, 2003, and 2004, and a final payment was due in 2005.

In the meantime, in May 2002, Bennett filed a petition to foreclose the real estate contract. The district court entered judgment against Susie for $35,394.94, which was the amount due under the contract, plus attorney fees. After the appeal process was completed, Bennett sought payment of $50,463.39, which included the judgment of $35,394.94, interest of $3156.65, costs of $349.42, and attorney fees of $11,562.38. Susie paid this amount, and in March 2004, received a warranty deed, which stated the property was "free and clear of all liens and encumbrances . . . ."

In Count III, Susie claimed that after receiving the warranty deed she learned the special assessment against the property for the water project had not been paid in full, and she requested damages against Bennett due to his alleged

misrepresentation in the warranty deed that the property was "free and clear of all liens and encumbrances . . . ."

The district court noted the amount which Susie paid in the foreclosure judgment did not include any payment for the special assessment. The court found, "The contractual obligation of the plaintiffs to pay the special assessments was not nullified by the foreclosure decree or the giving of the warranty deed, and that obligation remained in effect." The court concluded the real estate contract did not merge into the warranty deed with regard to Susie's obligation to pay off the special assessment.

On appeal, Susie contends her obligation under the contract to pay the special assessment did not continue after the foreclosure decree. She states that upon foreclosure of the contract, the contract obligations merged into the judgment. She asserts that because Bennett did not request payment for the special assessment in the foreclosure action, he cannot now claim she had responsibility for paying the special assessment.

The general rule in Iowa is that a deed in fulfillment of a real estate contract merges the provisions of the contract into the deed. *In re Estate of Epstein*, 561 N.W.2d 82, 86 (Iowa Ct. App. 1996). It is also the rule, however,

> if the contract contain collateral agreements or conditions which are not incorporated in the deed, and which are not inconsistent with the terms of the deed as executed, the contract will be deemed to live, for the purpose of the enforcement of such collateral agreements or conditions.

Lovlie v. Plumb, 250 N.W.2d 56, 62 (Iowa 1977) (citation omitted). A party claiming a contract has not merged into the deed has the burden of proof on this

issue. *Id.* Whether collateral provisions are merged into a deed depends upon the intention of the parties. *Phelan v. Peeters*, 260 Iowa 1359, 1362, 152 N.W.2d 601, 603 (1967).

As the district court noted, there was no reason to include any provisions concerning the special assessment in the warranty deed. Under the terms of the real estate contract, the responsibility to pay the special assessment clearly lay with Susie. Susie was required to pay the City for the special assessment, not Bennett, so the amount of the special assessment was not included in the judgment for Bennett. Susie's obligation to pay the special assessment was collateral to the transfer of title in the deed. We determine the district court did not err in concluding the obligation to pay the special assessment did not merge into the warranty deed.

Susie also asks the court to give effect to the provision in the warranty deed that the property was free and clear from liens and encumbrances. She asserts that due to this language, Bennett should be responsible to pay the special assessment. The district court stated, "Even though the deed warrants that title is being given free from any liens or encumbrances, the deed does not specifically mention the special assessment in dispute here." The court concluded there was no express conflict between the contract and the deed.

Susie claims the case of *Gray v. Van Gordon*, 187 Iowa 835, 840, 174 N.W. 588, 590 (1919), undermines the district court's conclusion. *Gray*, 187 Iowa at 839-40, 174 N.W. at 589-90, noted that covenants collateral to the deed do not necessarily merge into the deed, but found the deed at issue there

specifically covered special assessment liens, and so the provisions of the contract merged in to the language of the deed. In the present case, the provision for special assessments is collateral to the deed, and was not specifically covered in the deed. We find no error in the district court's conclusion on this issue.

We affirm the decision of the district court.

AFFIRMED.