IN THE COURT OF APPEALS OF IOWA

No. 8-567 / 07-1768
Filed September 17, 2008

BANK OF AMERICA, N.A., Successor by Merger to Bank of America, FSB,
Plaintiff-Appellee,

vs.

BANK ONE, N.A.,
Defendant-Appellant,

ERLING H. DINUSSON, DIANA L. DINUSSON, UNITED STATES OF AMERICA and STATE OF IOWA,
Defendants.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

A junior lienholder appeals from the district court's denial of the lienholder's motion to vacate the foreclosure decree. **AFFIRMED.**

Garry McCubbin of Kozeny & McCubbin, St. Louis, Missouri, for appellant.

James Sarcone of Belin Law Firm, Des Moines, for appellee.

Considered by Sackett, C.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

A junior lienholder named in a foreclosure action failed to appear. As a result, the district court's foreclosure decree omitted reference to that lienholder's priority status. The junior lienholder moved to vacate the decree and now appeals the denial of that motion. We affirm.

I. Background Facts and Proceedings

Bank of America filed a mortgage foreclosure petition and amended petition naming the debtors and the following three lienholders as defendants: Bank One, the United States of America, and the State of Iowa. As to Bank One, Bank of America alleged:

> Bank One, N.A. is included as a Defendant herein because of a mortgage in the sum of $73,000, covering the above property executed in favor of AmerUs Home Equity by Erling H. Dinusson and Diana L. Dinusson filed April 4, 2000 in Doc. #2080-09194 of the Scott County, Iowa records and assigned to Bank One N.A. by assignment filed December 31, 2000 in Doc. #2001-47733 of the Scott County, Iowa records.

Bank of America requested that its lien "be declared to be prior and paramount to the lien and interest of the Defendants upon and in the said property."

Bank One did not appear or file an answer and a default was entered against it. In a subsequent foreclosure decree, the district court decided the relative priorities of the named lienholders. The court concluded Bank of America's lien was superior to the interests, claims, or liens of the other defendants. The court further concluded the State of Iowa possessed the second lien priority and the United States of America possessed the third lien priority. The court stated, "[a]ny surplus from the sheriff's sale of the above

property shall be applied to the payment of liens in their order of priority." No mention was made of the lien assigned to and held by Bank One.

Bank One moved to set aside the default judgment and, when that motion was denied, it filed a petition to modify final judgment pursuant to Iowa Rules of Civil Procedure 1.1012 and 1.1013. Bank One alleged:

> There was mistake and irregularity in the final judgment, to wit:
>
> > Plaintiff failed to incorporate Petitioner's lien interest in the determination of the priority of liens, which is contrary to existing law. The court has entered orders, based upon the erroneous decree, providing that the surplus would be disbursed to lienholders whose priority is subordinate to Petitioner.

The district court denied the petition and this appeal followed.

II. Analysis

Iowa Rule of Civil Procedure 1.1012 specifies the grounds for modifying a judgment. Those grounds include "irregularity or fraud practiced in obtaining" the judgment. Iowa R. Civ. P. 1.1012(2). The focus here is on "irregularity."

> "Irregularity" is defined as:
>
> > The doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.

Forsmark v. State, 349 N.W.2d 763, 767 (Iowa 1984) (quoting Black's Law Dictionary 744 (5th ed. 1979)). The rule covers the following situations:

> First, the rule covers cases in which a party suffers an adverse ruling due to action or inaction by the court or court personnel. Second, the action or inaction must be contrary to (1) some prescribed rule, (2) mode of procedure, or (3) court practice

> involved in the conduct of a lawsuit. Finally, the party alleging the irregularity must not have caused, been a party to, or had prior knowledge of the breach of the rule, mode of procedure, or practice of the court.

In re Marriage of Cutler, 588 N.W.2d 425, 429 (Iowa 1999) (citations omitted).

Bank One argues that the decree contained the following "irregularities": (1) the decree was inconsistent with the relief Bank of America sought in its original and amended petitions and (2) the decree was inconsistent with Iowa's priority lien statute.

A. Irregularity Based on Inconsistency with Petition

Iowa Rule of Civil Procedure 1.976 limits the scope of a judgment as follows:

> The judgment may award any relief consistent with the petition and embraced in its issues; but unless the defaulting party has appeared, it cannot exceed what is demanded.

Bank One contends the district court violated this rule when it omitted reference to its lien, as that relief was not requested by Bank of America in its petition. We disagree.

Bank of America's petition contained a request for a judicial determination of lien priorities. The court complied with the request and prioritized the liens of the parties that appeared. The court's decree was consistent with the requested relief and did not "exceed that which [the plaintiff] demanded in his petition." *Claeys v. Moldenschardt*, 169 N.W.2d 885, 886 (Iowa 1969) (quoting *Rayburn v. Maher*, 227 Iowa 274, 285, 288 N.W. 131, 141 (1939)). Rule 1.976, therefore, was not violated.

We recognize that the district court accepted "each and all of the material allegations" of the petition as true. One could surmise from those allegations that Bank One's lien was superior to those of the other named junior lienholders. Had Bank One appeared, it could have pointed this out, but its absence did not affect "the judgment to which the prevailing party [was] entitled." Iowa R. Civ. P. 1.973(2) (explaining judgment on default). The court's omission of Bank One from the priority analysis was not an expansion of the relief requested by Bank of America but simply an acknowledgment of the reality that Bank One was not present to have its rights adjudicated. *See Embassy Tower Care, Inc. v. Tweedy*, 516 N.W.2d 831, 834 (Iowa 1994) (noting claimed irregularity "stemmed from [defaulting defendant's] own actions").

In sum, the irregularity, if any, did not stem from an inconsistency between the prayers for relief and the relief granted but from Bank One's decision to default after being duly apprised of its interest in the foreclosure action. *Cf. Heyer v. Peterson*, 307 N.W.2d 1, 6 (Iowa 1981) (concluding petition "failed to reasonably inform [the father] that custody was to be, or even could be, dealt with in the proceeding to establish paternity").

B. Irregularity Based on Noncompliance with Iowa Code § 654.9

Bank One next contends the foreclosure decree "deprived a superior priority lienholder of excess sale proceeds and instead awarded the proceeds to parties with inferior priority liens, contrary to the mandate of Iowa Code § 654.9."[1]

[1] Iowa Code section 654.9 (2005) states in part, "If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order."

It maintains this was an "irregularity" justifying modification of the decree. We cannot agree.

The focus of Rule 1.1012 is on court practices or procedures involving "the conduct of a lawsuit." *Cutler*, 588 N.W.2d. at 429; *see also Costello v. McFadden*, 553 N.W.2d 607, 612 (Iowa 1996). Bank One here challenges the merits of the court's foreclosure decree rather than the court's conduct of the lawsuit. A motion to vacate for "irregularity" was not the proper vehicle for raising such a challenge.

We conclude the district court did not err in denying Bank One's motion to vacate the foreclosure decree.

AFFIRMED.