IN THE COURT OF APPEALS OF IOWA

No. 3-418 / 12-1818
Filed July 10, 2013

EARLHAM SAVINGS BANK,
Plaintiff-Appellee,

vs.

STEVEN L. MORRELL and JANICE CLAIR,
Defendants-Appellants,

Appeal from the Iowa District Court for Dallas County, Gary G. Kimes, Judge.

The defendants appeal the district court's ruling granting Earlham Savings Bank's foreclosure petition. **AFFIRMED.**

S.P. DeVolder of The DeVolder Law Firm, Norwalk, for appellants.

Chet A. Mellema and Thomas M. Boes of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Doyle, P.J., and Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

DOYLE, P.J.

In this mortgage foreclosure action, the defendants Stephen Morrell and Janice Clair appeal the district court's judgment and decree of foreclosure in favor of Earlham Savings Bank. The defendants contend the district court erred in finding (1) Clair's signature was not required on the mortgage because the defendants did not prove they had a common-law marriage at the time the mortgage was formed; (2) the mortgage secured Morrell's first and second loans; and (3) Earlham Savings Bank established Morrell had defaulted and the amount of the default. We affirm.

I. Scope and Standards of Review.

"Review of an equitable claim to foreclose a mortgage is de novo. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 98 (Iowa 2004) (internal quotation marks and citation omitted).

II. Background Facts and Proceedings.

Steven Morrell and Janice Clair began a relationship in 2000, and they began living together in Morrell's residence in Waukee shortly thereafter. Both had previously been married. In 2003, Morrell purchased from his parents the residential property in which he and Clair lived. The warranty deed from the purchase specifically conveyed the property to "Steve Morrell, a single person." Morrell and Clair have never obtained a marriage license, nor have they had a marriage ceremony.

Morrell owned a business specializing in heating and cooling systems. Since its opening, the business used Earlham Savings Bank as the business's lender. The business's main contact with the Bank was Loan Officer James Adkins. The business also had a corporate checking account with the Bank.

In March 2008, Adkins informed Morrell that the business's corporate checking account was overdrawn by $75,000. Adkins requested that Morrell come to the Bank and take care of the overdrafts, and it was proposed that Morrell take out a home equity loan against the equity in his residential property to cover the overdrafts.

Morrell then applied for a home equity loan with the Bank. Morrell met with Atkins, and Morrell provided his partially completed loan application form to Adkins. The form asked for the applicant's marital status, but Morrell had not checked any box to indicate his status. It is undisputed that Atkins checked the "unmarried" box on the application for Morrell. However, the parties dispute the conversation Adkins and Morrell had concerning his marital status prior thereto.

Ultimately, Morrell's home equity line of credit from the Bank was approved with a credit limit of $75,000. Before closing on the loan, the Bank had a title search completed to ensure that Morrell's home was free from title defects and encumbrances. The title company provided a certificate to the Bank, which indicated the property had been transferred to "Steve Morrell, a single person." Additionally, Morrell provided his 2006 U.S. individual income tax return to the Bank. The filing status on the return indicated Morrell was the "head of the household." The "single" and "married" statuses were not checked on the return. In the exemptions section of the return, the "spouse" box was not checked.

However, Morrell listed Janice Clair, along with the couple's child born in 2006, as dependents. Under the "Dependent's relationship to you" column, Morrell's return stated "other" for Clair.

As security for the line of credit, the Bank took a security interest in "a real estate mortgage dated March 26, 2008." The first page of the loan document prepared by the Bank stated the line of credit was a "consumer credit transaction." Additionally, the loan documents indicated the borrower was "Steven L. Morrell," and Morrell signed for the loan. No other signature for a borrower was requested or received. Atkins signed the loan documents for the Bank.

In conjunction with the loan, Morrell executed an open-end mortgage with the Bank. The mortgage stated the mortgagor was "Steven L. Morrell, A Single Person." The mortgage was secured by Morrell's residential property. The mortgage document was signed by Morrell as the mortgagor. Beneath Morrell's signature, is an acknowledgment signed by Adkins as the notary public stating:

> On this 26th day of March, 2008 before me, a Notary Public in the state of Iowa, personally appeared Steven L Morrell, A Single Person, to me known to be the person(s) named in and who executed the foregoing instrument, and acknowledged that he/she/they executed the same as his/her/their voluntary act and deed.

Following the acknowledgment, the mortgage set forth a homestead waiver, stating: "I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale; and that by signing this contract, I voluntarily give up my rights to this protection for this property with

respect to claims based upon this contract." Morrell's signature follows the waiver. Clair did not sign the mortgage.

On October 16, 2008, Morrell's business took out another loan with the Bank in the amount of $110,000 to cover more overdrafts. Morrell signed the promissory note for the loan as "Steven L. Morrell, Manager/Member." The note was secured by numerous items, including Morrell's March 26, 2008 open-end mortgage secured by his personal residence, as well as three other mortgages on different property. The document listing the security items for the October 16, 2008 loan stated the money was "being advanced under the open-end feature of the Real Estate Mortgages listed . . . ." That document was signed by "Steven L. Morrell, Manager/Member." Additionally, a commercial security agreement, listing the four mortgages as security, was executed and signed by "Steven L. Morrell," with Morrell's business as the stated debtor.

Morrell failed to make payments as agreed under both loans. In 2010, the Bank filed a foreclosure petition without redemption. The petition, as later amended, stated Morrell had defaulted and was "currently in default in his obligations to [the Bank] under the [Line of Credit], Second Loan and Mortgage." The petition indicated the line of credit and mortgage referenced were the line of credit and subsequent open-end mortgage executed in March 2008. The "second loan" referred to in the petition was the October 2008 $110,000 business loan for Morrell's business. The amended petition stated the Bank was owed at that time $66,727.38, plus accrued interest of $5939.75 and a per diem interest charge of $12.80, under Morrell's line of credit. Additionally, the petition stated the Bank was owed at that time "the sum of $110,000 plus accrued interest of

$20,070.45" on the second loan. The Bank's petition stated Morrell and Janice Clair were parties in possession of the real estate, but it asserted any claims they had were subordinate or inferior to the Bank's claim.

In June 2011, Morrell filed his answer and affirmative defenses. His answer stated he was married and "presumably has been married at all material times." Among other things, Morrell asserted as a defense the mortgage was void pursuant to the provisions of Iowa Code section 561.13 (Supp. 2007). Clair also filed an answer and asserted the same affirmative defenses as Morrell.

The Bank filed a motion for summary judgment. Morrell and Clair resisted, again asserting the mortgage was void because they were married and Clair had not signed the mortgage. Additionally, they asserted that even if the court determined they were not married, the second loan was void because there was non-compliance with the requirements of a three-day notice of rescission. The court denied the motion, finding a fact issue existed as to whether Morrell and Clair were married.

In August 2012, a trial on the petition for foreclosure was held. Adkins testified he asked Morrell if he was married, and Morrell responded: "No. I'm not married." Morrell's 2006 and 2007 U.S. individual income tax returns were admitted into evidence after being offered by the Bank to show Morrell was not holding himself out as married at the time the loans were executed. Atkins also testified Morrell never indicated at any time that he was going to use the proceeds of the line of credit for anything other than commercial purposes.

Morrell testified that he and Clair were married under the common law at the time he executed relevant loan and mortgage documents. He testified that

he and Clair continuously cohabitated. He testified that a few months before he and Clair's first child was born in 2006, he and Clair discussed becoming husband and wife. He testified that right before the child was born, he and Clair "struck an agreement" that they were married in Iowa under the common law. Morrell testified that since that time, he and Clair have been continuously living together as husband and wife. He testified that after their child was born he changed his and Clair's insurance policies to a single-family policy. Morrell also testified that shortly after their first child was born, Clair introduced herself to Adkins as Morrell's wife.

Morrell testified he asked Adkins when he was getting ready to sign the documents if Clair also needed to sign because of their common law marriage. He testified that Adkins told him she did not have to sign because Morrell's name was the only one on the deed. He testified Adkins did not go through the mortgage documents with him in great detail; rather Adkins only showed him where he needed to sign. Morrell did not deny signing the various mortgage documents, and he admitted that virtually the entirety of the proceeds of both loans was used to cover checks written by his business. He testified he did not see that he was listed as a single person on the mortgage before he signed, but he admitted he knew when he signed the mortgage the Bank would foreclose on his residential mortgage and take possession if he defaulted on the loan. He also testified he had no idea that the additional $110,000 business loan would increase the mortgage on his residential property.

Morrell testified he did not tell Clair about the 2008 transactions until 2009, after he talked to his attorney about declaring bankruptcy. Morrell explained he

had declared Clair as his dependent in 2006 on his tax returns even though they were married because they did not have a marriage certificate and he thought that was the best way to do it. He testified that he changed the filing status of his 2008 income tax return to "married filing jointly" upon the advice of his attorney in the summer of 2009.

Clair testified that she and Morrell had agreed to be married under the common law. She also testified that she kept her maiden name, but she would not correct people if they referred to her as Jan Morrell. She testified she told Adkins she was Morrell's wife. Additionally, four witnesses acquainted with Morrell and Clair testified Morrell and Clair were married.

Following the trial, the district court entered its ruling in favor of the Bank. The court found "the objective and public record reflect[ed] that Morrell's statements, written and otherwise, do not indicate his intent and agreement to be married to Clair in 2008 and specifically when he executed the mortgage on March 26, 2008." Additionally, the court found both the line of credit and second loan were used for business purposes and could not be considered consumer credit transactions. The court also found that even if the line of credit was a consumer credit transaction, the Bank provided Morrell the requisite notice. The court entered a judgment *in rem* in favor of the Bank in the amount of $66,727.38 (principal) and $10,149.97 (accrued interest) on the line of credit, and $110,000 (principal) and $24,853.19 (accrued interest) on the second loan, along with other fees not relevant here.

The defendants now appeal. They contend the district court erred in finding (1) Clair's signature was not required on the mortgage under Iowa Code

section 561.13 because the defendants did not prove they had a common-law marriage at the time the mortgage was formed; (2) the mortgage secured Morrell's first and second loans; and (3) Earlham Savings Bank established Morrell had defaulted and the amount of the default. We address their arguments in turn.

III. Discussion.

A. Common Law Marriage and Iowa Code Section 561.13.

Iowa Code section 561.13 provides special procedures to protect homestead rights, and it defines this protection in a comprehensive manner.[1] *Martin v. Martin*, 720 N.W.2d 732, 737-38 (Iowa 2006). Relevant here, section 561.13 provides:

> A conveyance or encumbrance of, or contract to convey or encumber the homestead, *if the owner is married*, is not valid, unless and until the spouse of the owner executes the same or a like instrument, or a power of attorney for the execution of the same or a like instrument . . . .

(Emphasis added.) Consequently, a mortgage, not signed by the spouse of the owner, is void, as to both the owner and the spouse. *Beal Bank v. Siems*, 670 N.W.2d 119, 124 (Iowa 2003).

Morrell and Clair admit they were not married ceremonially as governed by Iowa Code sections 595.1-.21, but they assert they were married by operation of common law. *See In re Marriage of Martin*, 681 N.W.2d 612, 616 (Iowa 2004) (noting two forms of marriage are recognized in Iowa, ceremonial and common

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[1] Iowa Code section 561.13 was amended in 2007 and again later in 2011. *See* 2011 Iowa Acts ch. 11, § 1; 2007 Iowa Acts ch. 68, § 1. Although the amended language is not relevant to our discussion in this case, we note that the applicable section is now found in 561.13 subsection (1). *See* 2007 Iowa Acts ch. 68, § 1; Iowa Code § 561.13(1). All references herein will be to the 2007 Supplemental Code.

law). Based upon their claim of common-law marriage, they contend the mortgage is void as to both of them because Clair did not sign the loan documents encumbering the residential property.

Claims of common-law marriage are carefully scrutinized, and the party claiming a common-law marriage exists bears the burden of proving its existence. *Id.* at 617. Where both parties are living, a common law marriage must be shown by a preponderance of the evidence. *In re Marriage of Winegard*, 257 N.W.2d 609, 615 (Iowa 1977). In order to establish a common-law marriage, three elements must be proven: "(1) [present] intent and agreement . . . to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife." *Martin*, 681 N.W.2d 617. There is no question the second element, continuous cohabitation, is satisfied here. The dispute centers on the first and third elements.

The first element, the condition of a present intent and agreement to be married, "reflects the contractual nature of marriage." *Id.* Common-law marriage does not require an express agreement of the couple. *Id.* Rather, if "one party intends present marriage and the conduct of the other party reflects the same intent," an implicit agreement may exist to support a common-law marriage. *Id.* Evidence supporting a present intent and agreement includes the parties' conduct and their general reputation in the community. *Id.*

The third element, declaring or holding out to the public that the couple is married, "is considered to be the acid test of a common law marriage." *Id.* at 618. "In other words, there can be no secret common-law marriage." *In re Estate of Dallman*, 228 N.W.2d 187, 190 (Iowa 1975). However, all public

declarations do not have to be entirely consistent with marriage. *Martin*, 681 N.W.2d 618; *see also In re Fisher's Estate*, 176 N.W.2d 801, 806-07 (Iowa 1970) (noting inconsistencies, yet still finding a common-law marriage existed when the parties represented themselves as married for purposes of a life insurance application); *In re Estate of Stodola*, 519 N.W.2d 97 (Iowa Ct. App. 1994) (finding the existence of a common-law marriage where the parties represented their status as married on insurance and retirement beneficiary forms although there also were instances when the parties represented themselves as single persons). "A substantial holding out to the public in general is sufficient." *Martin*, 681 N.W.2d at 618 (finding no common-law marriage despite a general reputation of marriage where there were inconsistent public acts and declarations).

Upon our thorough de novo review of the record, we agree with the district court's conclusion that Morrell and Clair did not establish by a preponderance of evidence that they both had a present intent to be married and were holding themselves out to the public as married. Implicit in this ruling is the conclusion the district court, as the trier of fact, found Adkins to be more credible and believed his version of the conversation with Morrell concerning his marital status. It strains belief that Morrell would not correct his marital status on the various documents, including the initial loan application, if he had the present intent to be and declared himself as married. Moreover, Morrell signed the loan documents as "a single person," and he never requested it be changed or "corrected." Indeed, Morrell did not even tell Clair about the loans secured by his residence until after he had failed to make payments on them.

Although the parties told a few individuals that they were common-law married after the birth of their first child, and they provided a veterinary bill in the name of "Jan Morrell" and an application for a family insurance policy, these statements and items cannot be considered general and substantial, let alone clear, consistent, and convincing. The parties did not file taxes jointly as a married couple until 2009, after Morrell executed the mortgage documents and was in arrears. They provided no utility bills, bank statements, or homeowner's or automobile insurance policies in their joint names.

While "[h]omestead rights are jealously guarded by the law," *Michel*, 683 N.W.2d at 101, the plain language of section 561.13 only protects the homestead of one's spouse. The defendants note the Bank did not call "witnesses from the public[,] such as persons who knew or socialized with the couple," to contest the defendants' claim of common-law marriage. However, the Bank was not required to prove the defendants were not married; the burden of establishing a common-law marriage fell squarely upon the defendants. *Martin*, 681 N.W.2d 617. Considering all the facts and circumstances, we conclude the district court did not err in finding Morrell and Clair failed to establish a common-law marriage. Accordingly, Clair was not required to sign the mortgage or loan documents encumbering Morrell's residential property, and the district court did not err in so determining. We therefore affirm on this issue.

B. Mortgage as Security for Both Loans.

The defendants next argue that because the home equity loan of $75,000 was labeled a "consumer credit transaction" at the top of the home equity line of credit agreement, the second loan of $110,000 secured by the residence was

also a consumer credit transaction. As their argument goes, because the second loan was a consumer credit transaction but Morrell was not given the requisite notice of a borrower's right of rescission under the Truth in Lending Act, 15 U.S.C. § 1635 (2007), the district court erred in granting the Bank's petition for foreclosure of the residential property.

Iowa Code section 537.3201 requires that those who have duties or obligations imposed upon them under the federal Truth in Lending Act ("Act") comply with that Act, including making or giving to consumers the disclosures, information, and notices required under the Act. Among the required disclosures of the Act is notice of the debtor's right to rescind:

> in the case of any *consumer credit transaction* . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the [debtor] shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction *or the delivery of the information and rescission forms required under this section* . . . . The creditor shall clearly and conspicuously disclose . . . to any [debtor] in a transaction subject to this section the rights of the [debtor] under this section. The creditor shall also provide . . . appropriate forms for the [borrower] to exercise his right to rescind any transaction subject to this section.

15 U.S.C. § 1635(a) (emphasis added). If a lender fails to provide the required disclosure, the debtor's right to rescind is extended up to three years following the closing of the transaction. *See* 15 U.S.C. §§ 1635(a), (f); 12 C.F.R. § 226.23(a)(3); *see also Paglia v. Elliott*, 373 N.W.2d 121, 126 (Iowa 1985).

However, "[n]ot every loan transaction which results in a security interest in the debtor's residence is subject to this statutory right of rescission." *Toy Nat'l Bank of Sioux City v. McGarr*, 286 N.W.2d 376, 378 (Iowa 1979) (hereinafter

"*Toy*"). The Act defines a "consumer credit transaction" as "any transaction in which credit is offered or extended to an individual for personal, family, or household purposes." 15 U.S.C. § 1679a(2). Additionally, the Act expressly states it does not apply to "[c]redit transactions involving extensions of credit *primarily* for business, commercial, or agricultural purposes . . . ." *Id.* § 1603(1) (emphasis added). Thus, for the transaction to be subject to the Act, "it must be a consumer loan rather than a business or commercial one." *Toy*, 286 N.W.2d at 378; *see also* 15 U.S.C. §§ 1603(1), 1679a(2). In categorizing a transaction under the Act, "a court should examine the transaction as a whole and the purpose for which the credit was extended. The substance of the transaction is more important than the form or the lender's motive and consequently the [debtor's] purpose should guide the analysis." *Maus v. Toder*, 681 F. Supp. 2d 1007, 1017 (D. Minn. 2010) (internal citations omitted).

Here, there is no dispute that both loans to Morrell were extended to cover his business's significant overdrafts with the Bank. Morrell admitted that virtually all of the loan proceeds were for that purpose. The defendants cite *Toy* for the proposition that our supreme court "opted for a categorical rule—that the characterization of the first loan alone determines whether any future advances (even if for an opposite purpose—e.g., business as opposed to personal) is governed by the Act's consumer lending requirements." However, the defendants misconstrue the holding of that case. *Toy*, 286 N.W.2d at 377-78. *Toy* concerned several different loan transactions. *Id.* at 377. Initially, the husband took out a personal loan to purchase a "pleasure boat." *Id.* The husband later executed a second note, the proceeds from which were deposited

in the account of a corporation solely owned by the husband. *Id.* The husband and wife subsequently refinanced the second note, and they executed a second mortgage on their residence to secure the note. *Id.* The boat loan and the business loan were consolidated a few months later into one note, and that note was secured by a new second mortgage. *Id.* After the creditor accelerated the note, the wife attempted to rescind both the second mortgage and the new second mortgage, asserting those transactions fell within the provisions of the Act, "giving her the right to rescind the transaction until the third day following the receipt of certain required disclosures." The creditor admitted it had not provided any disclosures, but asserted the transactions were not subject to the Act. *Id.*

As noted above, our supreme court reflected that not every loan transaction where a debtor's residence is given as a security interest is required to receive a right of rescission under the Act. *Id.* at 378. The court found that in order to resolve whether notices of a right to rescind the mortgages were required under the Act, "the relationship between the parties must be analyzed step-by-step, focusing on each transaction separately." *Id.* The court observed that the boat loan was clearly a consumer loan transaction falling within the restrictions of the Act, and, "[j]ust as clearly, the [second note] "was for business purposes and, thus, exempted from the Act." *Id.* The court rejected the wife's request to construe both mortgages as consumer loan transactions, explaining:

> Such a view would create uncertainty in the application of the Act and could completely swallow the business purpose exception. The only workable approach is to characterize a loan transaction by the use to which the proceeds are originally placed and maintain the same characterization throughout the life of the loan.

Id. "The decision to pledge one's home as security for a business loan does not lose its quality as a business decision merely because of the nature of the collateral." *Id.* The court ultimately decided the issue must be determined by whether the funds together were primarily used for consumer or business purposes. *Id.* In that case, comparing the "ratio of private purpose funds to business purpose funds" where the ratio was "only slightly greater than one-to-twelve," the court determined the proceeds were "not primarily for personal purposes." *Id.* The court then concluded the loans were not consumer credit transactions and the Act was inapplicable to them; therefore "no such statutory right of rescission existed." *Id.* Because the wife's "attempt to rescind the loan transactions was ineffectual," the court held "the trial court did not err in ordering foreclosure." *Id.*

There is no question the second loan's proceeds received by Morrell were used to cover his business's overdrafts. Consequently, the language on the initial home equity loan documentation did not render the second loan a consumer credit transaction. Accordingly, we find the district court did not err on this issue.

C. Mortgage Cap.

On appeal, the defendants assert for the first time that the court erred in granting the Bank's petition for foreclosure because the Bank was in breach of the open-end mortgage, executed in conjunction with the home equity line of credit, because that mortgage only secured credit "in the amount of $150,000." This issue was not raised or decided by the district court, nor was an Iowa Rule of Civil Procedure 1.904 motion to expand or enlarge filed. The issue is therefore

not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

D. Default and Amount Owed.

Finally, the defendants contend the district court erred in finding Morrell defaulted and in its determination of the amount owed, asserting the Bank failed to establish these elements. Upon our de novo review, we disagree.

At trial, the Bank entered into evidence copies of its loan transaction history for both loans. Adkins testified as to the amounts owed, stating the amounts were still outstanding and that Morrell was in default on both loans. Additionally, Adkins testified the last payment on the line of credit was September 2009, and he testified there was never a payment made on the second loan. There was no evidence or testimony presented by the defendants that Morrell was not in default, or that the amounts the Bank stated it was owed were incorrect. The district court found Morrell was in default, and the Bank was owed the amounts it claimed. Now, for the first time on appeal, the defendants question the amount the Bank states it was owed. We cannot take new evidence or retry this case on appeal. Upon our de novo review of the trial record, we find no reason to disturb the district court's findings that Morrell was in default on both loans and the Bank was owed the amounts set forth in the court's judgment and decree. We therefore affirm on this issue.

IV. Conclusion.

For the foregoing reasons, we affirm the district court's ruling entering judgment and a decree of foreclosure in favor of the Bank.

AFFIRMED.