IN THE COURT OF APPEALS OF IOWA

No. 3-523 / 12-2031
Filed September 5, 2013

**WELLS FARGO BANK, N.A.,
SUCCESSOR BY MERGER TO WELLS
FARGO HOME MORTGAGE, INC.**
Plaintiff,

vs.

**VALLEY BANK AND TRUST n/k/a
STATE SAVINGS BANK,**
Defendant-Appellant,

and

PRIMEBANK,
Defendant-Appellee.

Appeal from the Iowa District Court for Plymouth County, Jeffery A. Neary, Judge.

Valley Bank and Trust n/k/a State Savings Bank (Valley) appeals the district court ruling condemning and establishing a priority of surplus funds in a foreclosure action. **REVERSED AND REMANDED.**

John P. Loughlin of Loughlin Law Firm, Cherokee, for appellant.

Scott Bixenman of Murphy, Collins & Bixenman, P.L.C., Le Mars, for appellee.

David M. Erickson, Des Moines, and Donald Pavelka, Council Bluffs, for Wells Fargo Bank, N.A.

Thomas J. Miller, Attorney General, and Pamela D. Griebel, Assistant Attorney General, for State of Iowa.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Valley Bank and Trust n/k/a State Savings Bank (Valley) appeals the district court ruling condemning and establishing a priority of surplus funds in a foreclosure action. Valley argues the district court erred when it decided a future advances clause in the mortgage did not establish Valley's priority in collecting on a promissory note. Because we find the parties intended to cover both notes with the mortgage, we reverse and remand.

I. Background Facts and Proceedings

This case concerns an "Open-End Real Estate Mortgage" and two promissory notes executed by Edward and Kristine Lewin. The issue presented is whether a future advances clause, otherwise known as a dragnet clause, applies to a second promissory note executed on the same date as the mortgage. If it does, Valley has a priority position to collect against surplus funds remaining from a foreclosure action. If the clause does not apply, Primebank has the priority position.

The mortgage, executed on June 29, 2004, and recorded on July 7, 2004, contains a future advances clause which attempts to secure any future loans between the lender and borrower. The mortgage secured credit in the amount of $46,500.

On the date the mortgage was completed, the Lewins executed two promissory notes. The first, for the sum of $46,500, was secured by "Real property shown on the mortgage dated June 29, 2004." The second, in the

amount of $111,357.58, was secured by "Assignments dated 6/29/04 of 100% corporate stock of Cars, Inc."[1]

The foreclosure petition was brought by Wells Fargo Bank against the Lewins, Valley, Primebank, and others. A foreclosure decree was issued by the district court establishing the priority of lien holders. Wells Fargo was the most senior lien holder, followed by Valley and Primebank. Following a sheriff's sale, resulting in a surplus after the Wells Fargo lien was satisfied, Valley sought to condemn funds to recover on the two notes under the mortgage. Primebank resisted and argued the mortgage did not serve as security on the second note and Valley's superior security interest was limited only to the outstanding balance on the first note. The district court agreed. In the ruling condemning funds, the district court determined the mortgage secured only the first note and Valley had priority over Primebank in the amount of $26,150.28. Funds were condemned in that amount to Valley, with the remaining funds to be paid to Primebank.

II. Scope of Review

Because the original action was tried in equity, our review is de novo. Iowa R. App. P. 6.907. We give weight to the findings of the trial court, though we are not bound by them. *Nat'l Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 888 (Iowa 1989).

III. Discussion

The district court examined the future advances clause and determined it applies "only to those [loans and advances] which identify the security as the real

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[1] The second promissory note was signed by Edward Lewin only. Cars, Inc. was a business then owned by the Lewins.

estate which is the subject of this action." Valley argues this ruling is in error and the mortgage applies to any existing debt between the Lewins and Valley.

The open-end real estate mortgage at the center of this dispute contains a clause titled "secured debt defined." In addition to securing the $46,500 loan, the clause describes the secured collateral as:

> All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt and whether or not such future advances or obligations are incurred for any purpose that was related or unrelated to the purpose of the Evidence of Debt.

Traditionally, Iowa law has disfavored future advances clauses drafted by the lender. *See Farmers Trust & Sav. Bank v. Manning*, 311 N.W.2d 285, 289 (Iowa 1981). The Iowa Code, however, specifically provides for the enforceability of such clauses provided certain conditions are satisfied. *See* Iowa Code § 654.12A (2011). Our courts have accordingly upheld future advances clauses. *See, e.g.*, *Poweshiek Cnty. Sav. Bank v. Hendrickson*, No. 04-0927, 2005 WL 1224745 (Iowa Ct. App. May 25, 2005).

The district court appears to rely upon the common law "relatedness" rule for future advances clauses. Our supreme court discussed this rule in *Freese Leasing, Inc. v. Union Trust & Savings Bank*, 253 N.W.2d 921, 925 (Iowa 1977). In *Freese*, the court held future advances clauses will not apply to subsequent debts unless they are of the "same kind and quality" as the original debt or if they do not "relate to the same transaction or series of transactions as the principal

obligation." 235 N.W.2d at 935.[2] The language of a future advances clause primarily serves to help ascertain the intent of the parties when forming the contract. *See Moeller*, 434 N.W.2d at 891 ("[O]ur concern should focus on what the parties intended when securing the original security agreement."); *see also* Iowa R. App. P. 6.904(3)(n) ("In the construction of written contracts, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says.").

Upon a review of the record, we find the parties intended to include the $46,500 debt as well as any future loans, including the $111,357.58 loan on the same date, with the mortgage. The language of the future advances clause applies to any future advances under any promissory note, and specifically disavows any relatedness requirement. The clause also rejects any requirement the mortgage be specifically referenced in a future note. The clause is broad in its scope, and is not buried in the document in a way that might be misleading or allow for surprise. The title of the mortgage itself, as an "open-end real estate mortgage" alerts any reader to the presence of a future advances clause and the possibility of later loans being superior, further minimizing the risk of surprise. The parties clearly stated their intent to cover such notes in the future advances clause.

Primebank raises one additional argument that requires discussion. It argues the note in this case was not a subsequent loan but a contemporaneous

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[2] *Freese* predates the 1984 enactment of section 654.12A. In *Moeller*, 434 N.W.2d at 891, our supreme court reasserted the continued validity of the relatedness rule stated in *Freese*.

loan. The loans were executed on the same date; however, we are unable to determine from the record which loan was executed first. The broad language of the future advances clause renders the issue moot. The clause covers loans existing at the time of the mortgage as well as loans existing subsequent to the mortgage. The clause covers the $111,357.58 loan regardless of whether it was executed first or second. We find no support in Iowa law for the proposition that, to qualify as a future advance, a subsequent loan must be executed on a separate day or after some minimum passage of time.

The future advances clause shows the intent of the parties to apply the mortgage to both loans. Accordingly the ruling of the district court is reversed and the matter remanded directing the $32,270.59 previously paid to Primebank be paid to Valley.

REVERSED AND REMANDED.

Vaitheswaran, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully disagree with the majority's conclusion the future advances clause resulted in the mortgage providing security for Valley's second $111,357.58 promissory note.

After the sheriff's sale and satisfaction of the first lien, there remained approximately $68,000 to be distributed to the junior lien holders. Valley claimed $26,150.28 for the unpaid balance of note number 5-950, dated June 29, 2004, in the original amount of $46,500, clearly secured by the mortgage instrument of the same date. It then claimed $58,735.24 for the unpaid balance of note number 5-949, also dated June 29, 2004, in the original amount of $111,357.58, secured by a separate security agreement.

The district court ordered the full unpaid balance of $26,150.28 for note number 5-950 to be paid to Valley, and the remaining amount, $32,270.59, paid to Primebank. Citing both Iowa Code section 629.4, "Lienholder's advancements—enforcement," and 654.12A, "Priority of advances under mortgages," the district court found the maximum amount of credit (plus associated interests and costs) was clearly set forth in the mortgage in the amount of $46,500. It further found "it also encompasses other loans and advances *up to that amount* made by the Bank to the Lewins by reference, but only to those which identify the security as the real estate which is the subject of this action." (Emphasis added.)

This is consistent with the clear language on the front page of the mortgage, which states: "Notice: This mortgage secures credit in the amount of

$46,500. Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens." Additionally, the maximum obligation limit clause in paragraph three of the mortgage reads:

> The total principal amount of the Secured Debt (hereafter defined) secured by this Mortgage *at any one time shall not exceed the amount stated above.* This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Mortgage and does not apply to advances (or interest accrued on such advances) made under the terms of this Mortgage to protect Lender's security and to perform any of the covenants contained in this Mortgage. Future advances are contemplated and, along with other future obligations, are secured by this Mortgage even though all or part may not yet be advanced. Nothing in this Mortgage, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

(Emphasis added). The majority focuses on the later language of the mortgage, paragraph four, and concludes this paragraph creates an expansive security interest under its "dragnet clause," regardless of the nature of the future advancement. In doing so, the "maximum obligation limit" clause is obscured.

"Dragnet clauses are not favored in equity. Our cases say they should be carefully scrutinized and strictly construed." *Freese*, 253 N.W.2d at 925. However, while the future advances clause here does not restrict the type of loan the mortgage could secure, the plain language of the maximum obligation limit clause restricts other debt that could be secured by the mortgage.

As the majority notes, both the mortgage and second promissory note were executed the same day. The full amount of note number 5-950, $46,500, was secured by the mortgage, but no more could be secured, due to the

document's "maximum obligation limit" contained in paragraph three, clearly stating the indebtedness "shall not exceed the amount stated above," that is, $46,500. That left the second note, 5-494, unsecured by the mortgage. Therefore, a separate security agreement was executed the same day, specifying how the $111,357.58 was to be secured: "SECURITY: This note is separately secured by, (describe separate document by type and date): ASSIGNMENTS DATED 06/29/04 of 100% OF CORPORATE STOCK OF CARS, INC." This language shows the additional loan was separately secured, which was necessary because the mortgage instrument clearly spelled out the maximum amount it could secure. Additional security was required for the additional funds loaned by Valley.

Therefore, regardless of the expansive future advances clause in paragraph four of the mortgage instrument, no amount of the second promissory note could be secured by the mortgage at the time it was executed. As such, I would affirm the holding of the district court.