IN THE COURT OF APPEALS OF IOWA

No. 3-563 / 12-2303
Filed July 10, 2013

IN THE MATTER OF THE ESTATE OF

STANLEY DUANE MARQUETTE,
Deceased.

STEVE CLIFTON, d.b.a. BYLAND, INC.,
Appellant,

KENNETH CROSSER and APRIL HAMMACK,
Appellees.

Appeal from the Iowa District Court for Wapello County, James Q. Blomgren, Judge.

The appellants claim the district court erred in awarding a Court Officer Deed to the appellees for a section of an alley not included in the original deed. **AFFIRMED**.

Michael J. Moreland and Nicholas T. Maxwell of Harrison, Moreland, Webber & Simplot, Ottumwa, for appellant.

Cynthia D. Hucks, Ottumwa, and Lloyd E. Keith of Keith Law Firm, Ottumwa, for appellees.

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

VOGEL, P.J.

I. Factual and Procedural Background

Stanley Marquette, now deceased, was the owner of four parcels of adjacent residential real estate in Ottumwa, Iowa, in addition to some farm real estate. The residential parcels were located at the following three local addresses[1]: 2502 North Court, 2514 Clearview, and 109 East Elmdale. The property currently at issue is the north eight feet of an alley that runs east to west between 2502 North Court and 2514 Clearview.

Stanley Marquette's estate was initially administered by his brother, Kenneth Marquette.[2] The report and inventory of assets, which was filed on December 2, 2009, contained the legal descriptions of all the lots, except for the north half of the alley.

Kenneth Marquette engaged real estate agent Joe Traul to sell the four parcels in the estate, and Traul arranged for Byland, Inc., by its president, Steven W. Clifton (Clifton), to purchase the four residential properties. However, after the probate court approved this purchase agreement, it was discovered the note on the Clearview property was in default, and its mortgage was being foreclosed by Wells Fargo Bank as assignee of a February 18, 2005 recorded mortgage. As such, Clifton entered into a second agreement on June 10, 2011, whereby he agreed to purchase the remaining three parcels of real estate located at 2502 North Court and 109 East Elmdale. He understood from his real estate agent that he was offering to purchase all the residential property not subject to

[1] Two of the lots share one local address.
[2] South Ottumwa Savings Bank was later appointed substitute administrator.

foreclosure proceedings. Neither the first nor second purchase agreement included the north half of the alley in the properties' legal descriptions, though the south half of the alley was described as part of the 2502 North Court property. A Court Officer's Deed was given to Clifton for the 2502 North Court and 109 East Elmdale properties. The deed's legal description of the properties mirrored the descriptions in the second purchase agreement and did not contain the north half of the alley.

On June 20, 2011, a foreclosure decree and order quieting title was entered in favor of Wells Fargo Bank. The decree did not describe the north half of the alley. On April 13, 2012, a sheriff's deed was issued to the Bank, who in turn sold and conveyed the property to Kenneth Crosser and April Hammack by special warranty deed on July 16, 2012. The deed to Crosser and Hammack did not describe the alley. However, the abstract of title, prepared by Truitt Abstracting Company on June 5, 2012, in anticipation of Crosser and Hammack's purchase of the Clearview property, did include the disputed alleyway.[3] Relying on the abstract of title, the representation of their realtor, and

[3] The abstract of title to the Clearview property contains the following description:

> Lot Twenty-five (25) in Block Four (4) in North Ottumwa, being a subdivision of the Fractional South Half of Section Seven (7), Township Seventy-two (72), Range Thirteen (13) Wapello County, Iowa, AND The North Half of the Sixteen foot wide East and West Alley, lying between Clearview Street and Kenwood Street and abutting Lot 25 in Block 4 in North Ottumwa Addition to the City of Ottumwa, on the South, all in the City of Ottumwa, Wapello County, Iowa.

Additionally, it shows Stanley Marquette received two deeds: one dated July 26, 1989, which does not include the north half of the alley; and one dated July 28, 1989, which does include the north half of the alley, with the notation, "This Deed Supplements Warranty Deed Filed First." Marquette mortgaged the Clearview property three times. The first mortgage was to South Ottumwa Savings Bank filed July 31, 1989, which does not include the north half of the alley. The next mortgage to Ameriquest Mortgage Company filed January 20, 2000, does include the north half of the alley. These first two

Lloyd Keith, the attorney for the estate's administrator, Crosser and Hammack believed the north half of the alley was part of the Clearview property and would be conveyed to them.

On July 23, 2012, Keith filed an amended inventory listing the north half of the alley as a fifth parcel. Later that day, after being informed by someone in Clifton's company Clifton did not wish to own the alley, Keith delivered a deed to Crosser and Hammack that included the north half of the alley. However, a few hours later, Clifton informed Keith he believed he should own the alley as part of his purchase of all the estate's property not in foreclosure. As such, Keith delivered another deed to Clifton that also contained the north half of the alley. Both Clifton and Crosser and Hammack were instructed not to record their deeds until the issue was adjudicated. Keith then filed an "Application for Court Order to Direct the Disposition of Real Estate" on July 30, 2012, to determine to whom the disputed portion of the alley belonged.

On August 20, 2012, the district court held a hearing on Keith's application. In the hearing, Clifton and Traul testified their understanding was that Clifton was to purchase all of the residential property held in the estate that

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mortgages were both released. The third mortgage, filed February 18, 2005, was held by Mortgage Electronic Registration Systems, Inc. ("MERS"), as mortgagee, with GE Money Bank as lender. This mortgage does *not* include the description of the north half of the alley. It was assigned by instrument filed December 30, 2010, to Wells Fargo Bank, N.A., again without the inclusion of the legal description for the north half of the alley. The abstract also reflects the probate inventory that was filed, but none of the properties listed included a description of the north half of the alley. None of the foreclosure proceedings, including the abstract's summary of the proceedings, the petition for foreclosure and alternative action to quiet title, the court's foreclosure decree, or the Sherriff's deed conveying the lot to Wells Fargo included the north half of the alley. However, at entry number twenty-three of the abstract there appears: "ABSTRACTER'S NOTE: The following Tax information if (sic) furnished but not certified to: Parcel #400-007411200023000–Lot 25 Block 4; also N1/2 alley adj on S."

was not subject to foreclosure, including the north half of the alley. Crosser testified he was not going to purchase the Clearview property without the north half of the alley, and that Keith told him it would be conveyed to him. Keith explained that "generally when alleys are split up, one half goes to the adjoining parcel and one half goes to the other adjoining parcel." He said it was just an oversight the north half of the alley had been omitted from the probate inventory and proceedings.

The district court ruled in favor of Crosser and Hammack, declaring they were entitled to a Court Officer Deed for the north half of the alley. This ruling was based on the abstract of title, which included a legal description of the north half of the alley. The court also faulted Clifton, a licensed realtor for over thirty years, for not reviewing his purchase agreement or deed, especially considering both contained the south half of the alley in the legal description.

Clifton appeals this decision, claiming the district court erred in awarding the Court Officer Deed to Hammack and Crosser. Specifically, Clifton contends he proved by clear and convincing evidence that reformation of his original deed was warranted, given the intent of the parties to transfer all residential lots in the estate not subject to foreclosure, which would have included the north half of the alley.

II. Standard of Review

As the district court noted, this is an action determining the title of real property, which is a suit in equity. *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 886 (Iowa 1981). We review the court's decision de novo. *See Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004). Suits based in equity allow the court

considerable flexibility in determining the equities between the parties and in framing a remedy. *Hosteng Concrete & Gravel*, *Inc*. *v*. *Tullar*, 524 N.W.2d 445, 448 (Iowa Ct. App. 1994). With regard to actions to quiet title, a court sitting in equity has the power to grant reformation of an instrument, though the party seeking reformation must show by clear and convincing evidence the agreement, as written, does not conform to the original understanding. *Id.*

III. Conveyance of the North Half of the Alley

Reformation of a legal instrument is proper even when the parties are not part of the original contract, as long as they were in privity with the original party. *Id.* at 449. As such, a purchaser at an execution, judicial, or foreclosure sale could be entitled to reformation of their deed, if the equities of the situation support this outcome. *Id.*

This was the result in *Hosteng*, which is factually similar to the case at hand. In *Hosteng*, the Tullars mortgaged their residential property. *Id.* at 447. The mortgage instrument did not describe a ten-foot strip of abandoned alleyway abutting the property, though the strip was described in the Tullars' deed. *Id.* The mortgage was foreclosed upon, the Tullars moved out, then Hosteng bought it from the bank and made improvements. *Id.* The Tullars testified they did not initially believe they owned the strip of land once the mortgage was foreclosed upon. *Id.* However, when they learned the mortgage instrument did not describe the strip, they filed suit to quiet title, claiming they still owned the small piece of land. *Id.* at 448. The court held there was a mutual mistake in the original mortgage instrument, such that Hosteng, as the bank's successor in interest, was entitled to a reformation of his deed so as to include the strip of land. *Id.* at 449.

Here, the north half of the alley was not included in the mortgage conveyance to Mortgage Electronic Registration Systems, Inc., then Wells Fargo as its successor in interest. This is reflected in the abstract of title, which shows the north half of the alley was never described in the mortgage documents. The foreclosure proceedings, including the petition for foreclosure, the court's foreclosure decree, and the Sherriff's deed conveying the lot to Wells Fargo, reflect this omission as well.

Traditionally, a grantor cannot convey property he does not own. *See generally Kelroy v*. *City of Clear Lake*, 5 N.W.2d 12, 18 (Iowa 1942) (stating if grantors did not own the strip of land at issue they had nothing to convey). However, it appears there was a mutual mistake with respect to the property's description in the mortgage instrument held by Wells Fargo. The Clearview property's abstract of title, which included a "supplemental" warranty deed to Stanley Marquette in 1989, includes the north half of the alley in the legal description. A prior mortgage in 2000 also included the alley. As such, it is clear the north half of the alley is part of the Clearview property, even though the mortgage and foreclosure documents did not reference it. Due to the fact Crosser and Hammack are in privity of contract with Wells Fargo, which suffered from the original mortgagee's omission, Crosser and Hammack are entitled to reformation of the deed to include the north half of the alley. *See Hosteng Concrete & Gravel*, 524 N.W.2d at 449. Consequently, the district court was correct in awarding the Court Officer Deed to the north half of the alley to Crosser and Hammack.

AFFIRMED.