IN THE COURT OF APPEALS OF IOWA

No. 7-372 / 06-1802
Filed June 27, 2007

AMERIQUEST MORTGAGE COMPANY,
Plaintiff-Appellee,

vs.

LARRY J. LACROIX and
JANICE M. LACROIX,
Defendants-Appellants.

Appeal from the Iowa District Court for Lee (North) County, John G. Linn, Judge.

Larry and Janice LaCroix appeal a district court ruling granting Ameriquest Mortgage Company's foreclosure action against their homestead. **AFFIRMED.**

Robert J. Reding of Hoyer, Reding & Santiago, P.L.C., Fort Madison, for appellant.

Brian G. Sayer of Dunakey & Klatt, P.C., Waterloo, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Larry and Janice LaCroix appeal from the district court's foreclosure decree. We affirm.

I. Background Facts and Prior Proceedings

On June 15, 2002, the LaCroixes borrowed $82,500 from Ameriquest Mortgage Company to buy a home in Fort Madison, Iowa. The home was pledged as security pursuant to a mortgage which required payments of $801.30 on the first day of every month for thirty years.

The Lacroixes' very first mortgage payment, due August 1, 2002, was two weeks late, and the next two payments were even later. Their fourth payment, due November 1, 2002, was not made at all. Ameriquest sent a notice of intention to foreclose on December 4, 2002. The LaCroixes immediately sent a check for $100 and then a check for $1800. The $1800 check was returned because there were insufficient funds in the LaCroixes' checking account. Ameriquest sent a second notice of intention to foreclose on February 4, 2003.

The LaCroixes contacted Ameriquest, and the parties entered into a "Pre-Foreclosure Forbearance Agreement" whereby the LaCroixes agreed to increase their monthly payment to $982.14 for the next nine months in order to pay off the delinquent loan payments. Per the terms of the mortgage agreement and the forbearance agreement, each payment would be applied to the most delinquent payment. At the end of the nine monthly payments, on a date specified as October 20, 2003, the delinquencies would be paid in full and the LaCroixes' monthly payment for November 2003 would return to $801.30.

The LaCroixes made the first four payments under the forbearance agreement in a timely manner. Their fifth payment, due in June, was nearly three weeks late. They did not make the July payment. Instead, they filed for bankruptcy on July 29, 2003. Ameriquest filed a motion for relief from the bankruptcy automatic stay. In early October 2003, the parties and the bankruptcy court signed a "Conditional Order of Settlement" pertaining to the motion for relief from the automatic stay. The "Conditional Order of Settlement" contained the following pertinent provisions:

> 2) Debtors acknowledge that they are due and owing for 2 mortgage payments of $982.14 under the terms of the forebearance agreement signed on February 3, 2003 for the months of July through and including September, 2003.
>
> 3) Debtors agree to make their last forbearance agreement payment on October 20, 2003 and resume regular monthly mortgage payments on the 20th of each month, as per the terms of the original note, beginning on November 20, 2003;
>
> . . . .
>
> 6) Debtors agree to execute and file with the court a reaffirmation agreement within fifteen days of entering this order;
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> . . . .
>
> 10) Debtors and [Ameriquest] agree that [Ameriquest's] motion be and it hereby is **Denied as Settled.**

Pursuant to the "Conditional Order of Settlement," the LaCroixes signed a reaffirmation agreement reaffirming "the entire debt."

During this period, the majority of the communication between the LaCroixes and Ameriquest was through Ameriquest's bankruptcy counsel. In October, the LaCroixes began to make payments on their mortgage by sending checks to their own attorney, who in turn forwarded the checks to Ameriquest's bankruptcy counsel, who forwarded the checks to Ameriquest.

Their first payment was a $1964.28 check to cover the sixth and seventh payments due under the forbearance agreement. Ameriquest applied these funds to the remaining balance due for the May mortgage payment, and the balance due for the June and July mortgage payments.

Ten days later, the LaCroixes made their eighth forbearance agreement payment of $932.14. At this point, the LaCroixes mistakenly believed that their loan was current. However, because they had not made their ninth forbearance agreement payment, they were still more than a month behind on their payments. When they sent a check for $802.00 to cover their November mortgage payment, Ameriquest applied the funds towards their delinquent September payment.

In late November, the LaCroixes sent a check for $804.00 to cover their December mortgage payment. Ameriquest applied the payment towards the October mortgage payment because that was the most delinquent payment still outstanding on the loan.

In late December or early January, the LaCroixes sent Ameriquest another check for $804. This check crossed in the mail with a January 5, 2004 notice of intention to foreclose sent by Ameriquest. This notice indicated the November payment was still delinquent and demanded the LaCroixes pay $3279.86 by February 10, 2004. This figure included the mortgage payments due for November 2003, December 2003, January 2004, and February 2004. The notice also indicated that only "certified funds . . . i.e., money order or cashier's check," would be accepted. Shortly after it sent the notice, Ameriquest received the January 2004 check and applied the proceeds to the November 2003 delinquency.

The LaCroixes believed the notice of intention to foreclose was incorrect, so they did not send the appropriate funds to pay off the delinquent balance on the loan. Instead, they continued to send Ameriquest monthly personal checks for approximately $804.00. In total, they sent six personal checks dated January 28, February 27, March 29, April 27, May 26, and June 27. Ameriquest did not accept any of these checks. The checks were returned with a letter stating "your loan is in default, and this amount will not bring your loan current." In the meantime, the balance due on the loan kept growing.

On July 8, 2004, Ameriquest sent its fourth notice of intention to foreclose. The notice indicated the amount due on the account was now $7717.14. Once again, the notice indicated that "only certified funds" would be accepted. The notice also reiterated that "[*i*]*f the amount received is not the total amount due, your default will not be cured and foreclosure proceedings will continue*." The LaCroixes sent no further payments on their loan.

On September 24, 2004, Ameriquest filed the present foreclosure petition. The matter came for trial on August 28, 2006.[1] Mrs. LaCroix testified she was instructed by Ameriquest's bankruptcy attorneys to pay certain amounts on certain dates. She stated that she made all payments in accordance with Ameriquest's bankruptcy attorney's instructions and a person from Ameriquest had told her the loan was current. Therefore, the LaCroixes contended they were not in default because they had made all required mortgage payments when the notice of intention to foreclose was mailed on January 5, 2004. The

[1] By the time of trial, the LaCroixes had lived in the house for more than two years without making a mortgage payment. They did not escrow their mortgage payments, and at the time of trial they only had $1600 available to pay towards the loan.

LaCroixes also implied that one of the forbearance agreement payments had been forgiven via a new agreement with Ameriquest's bankruptcy counsel. Specifically, they argued the original mortgage agreement and forbearance agreement had been reformed because the "Conditional Order of Settlement" in the bankruptcy proceedings only referenced two outstanding forbearance payments, rather than the three actually due under the forbearance agreement.

The court rejected the LaCroixes' argument that the original written agreements had been reformed through conversations with bankruptcy counsel and the "Conditional Order of Settlement." In doing so, the court noted Mrs. LaCroix's "unsubstantiated" testimony about her discussions with bankruptcy counsel was not credible. The court found the LaCroixes had defaulted on the terms of the loan and granted Ameriquest a foreclosure judgment.

II. Standard of Review

The foreclosure of a real estate mortgage is an action in equity and therefore our review is de novo. Iowa R. App. P. 6.4; *First State Bank v. Kalkwarf*, 495 N.W.2d 708, 711 (Iowa 1993). Although we accord some weight to the findings of the district court, we are not bound by them. *Id.*

III. Merits

On appeal, the Lacroixes contend "the district court erred in allowing the lender to foreclose on a mortgage where [the] parties disagree whether the debtors were current in making mortgage payments when notices to cure were served upon the borrowers" and that the district court erred in rejecting their argument that bankruptcy counsel reformed the loan agreement.

Payment History. After a review of the payment history set forth in the record, we find the LaCroixes were not current on their mortgage payments when Ameriquest sent the January 5, 2004 notice of intention to foreclose. The LaCroixes were making monthly payments; however, because they had missed numerous loan payments during the preceding twelve months, their monthly payments were insufficient to satisfy both the outstanding balance and the current payment schedule. Therefore, they were in default under the terms of the original agreement and the forbearance agreement.

Reformation. The LaCroixes contend the district court erred in rejecting their argument that the "Conditional Order of Settlement" and conversations between Mrs. LaCroix and Ameriquest's bankruptcy attorney "reformed" the existing loan agreement. The LaCroixes base their reformation argument on the following provision in the "Conditional Order of Settlement": "Debtors acknowledge that they are due and owing for 2 mortgage payments of $982.14 under the terms of the forebearance agreement signed on February 3, 2003 for the months of July through and including September, 2003." (Emphasis added.) The LaCroixes argue this sentence, when combined with undocumented discussions with the bankruptcy attorney, reformed the existing loan agreement and, in effect, forgave one of their forbearance payments.

We disagree. While this provision indicates there are two forbearance payments due and owing, the same sentence also indicates there were three months' worth of forbearance payments due and owing—July, August, and September. In order to interpret this provision so as to excuse the LaCroixes from making one forebearance payment, we must ignore the second half of the

sentence and also ignore a provision in the corresponding reaffirmation agreement that states the LaCroixes elect to reaffirm "the entire debt." We do not find sufficient evidence to conclude this typographical error rewrote the existing loan agreement and forgave a $982.14 forbearance agreement payment.

We also find this argument fails because it does not meet the requirements for judicial reformation of an existing contract. A written contract will be reformed

> only if the party seeking reformation clearly and convincingly establishes that it does not express the true agreement of the parties because of fraud or duress, mutual mistake of fact, mistake of law, mistake of one party and fraud or inequitable conduct on the part of the other.

Kufer v. Carson, 230 N.W.2d 500, 504 (Iowa 1975). In this case, there is no argument that the existing mortgage agreement or the forbearance agreement did not express the true agreement of the parties. The LaCroixes only argue the existing written agreement was changed through a *subsequent* oral agreement and a document pertaining to the separate bankruptcy proceeding. Without proof that the existing loan agreement or forbearance agreement did not express the true agreement of the parties, the district court had no basis from which to use its equitable powers to reform the loan agreement. *See Kendall v. Lowther*, 356 N.W.2d 181, 188 (Iowa 1984) ("The remedy of reformation of an instrument is not absolute but lies within the sound discretion of the court of equity and depends upon whether the remedy is essential to the ends of justice."). We find the district court properly refused to use its equitable powers to reform the existing agreement.

We therefore affirm the district court's entry of a foreclosure judgment against the LaCroixes' real estate.

AFFIRMED.