IN THE COURT OF APPEALS OF IOWA

No. 8-148 / 07-0418
Filed July 30, 2008

DAVID DENNING,
Plaintiff-Appellant,

vs.

FIRST AMERICAN CLOSING OF IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Home seller appeals the district court's directed verdict and dismissal of his negligence claims against the lender/first mortgage holder's closing agent. **AFFIRMED.**

David A. Morse of Rosenberg, Stowers & Morse, Des Moines, for appellant.

Brian D. Nolan of Nolan, Olson, Hansen & Lautenbaugh & Buckley, L.L.P., Omaha, Nebraska, for appellee.

Heard by Sackett, C.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

David Denning appeals the district court's directed verdict in, and dismissal of, his negligence action against First American Closing of Iowa (FAC). Finding no error, we affirm.

I. BACKGROUND FACTS.

In the fall of 2003, Denning agreed with Roger Fouse to sell to Fouse for $125,000 certain real estate located in Warren County. Denning agreed with Fouse to finance $31,250 of the purchase price by taking a promissory note and a second mortgage. Fouse financed the remaining $93,750 by borrowing that amount from Wells Fargo Home Mortgage, Inc. Wells Fargo hired FAC[1] to attend a closing of the Denning-to-Fouse sale, ensure that all documents provided by Wells Fargo were properly executed and acknowledged, disburse the funds provided by Wells Fargo, protect Wells Fargo's interest by making certain that Wells Fargo had a first lien on the real estate, and return certain documents or copies thereof to Wells Fargo. The documents required by Wells Fargo included a copy of the "executed second mortgage note" for $31,250, but did not include a second mortgage or copy thereof.

On September 30, 2003, the sale was closed and Fouse signed the $31,250 promissory note, which had been prepared by FAC's attorney. A second mortgage was not prepared or executed as a part of the closing. Although the $31,250 promissory note called for monthly payments, Denning and Fouse had privately agreed that such payments did not have to be made.

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[1] Wells Fargo actually hired Russell Closing, the predecessor in interest of First American Closing of Iowa. We will refer to the closing agent as First American Closing (FAC).

In December 2003 Denning became aware that no second mortgage, securing his promissory from Fouse, had been prepared or executed as a part of the September closing. Until that time Denning had not, however, ever requested or suggested that Wells Fargo or FAC should prepare a second mortgage document, or establish a second mortgage lien, on his behalf. All materials provided to FAC came solely from Wells Fargo. Denning did not know what materials or directions Wells Fargo had provided to FAC, and was not even aware that Wells Fargo had provided to FAC a copy of a handwritten addendum to the purchase agreement that mentioned a second mortgage, a mortgage from Fouse to Denning. Denning did not attend the September closing. Although Denning was responsible for and paid $3,000 in closing costs, he was not charged any fees by FAC and he did not pay FAC anything for its services.

When Denning became aware that a second mortgage did not exist, he initiated steps to secure the mortgage to which he and Fouse had agreed. He contacted Wells Fargo, which in turn contacted FAC. FAC and Denning agreed that FAC would have its attorney prepare the mortgage, Denning would be responsible for having it signed by Fouse, and FAC would have it recorded. The mortgage was prepared and available to Denning on January 15, 2004, but he did not secure Fouse's signature until February 27, 2004.

In the meantime, Wells Fargo had on February 26, 2004, commenced an action in Warren County to foreclose its first mortgage.[2] Denning was not made a party to the Wells Fargo foreclosure action, and neither he nor FAC were

[2] The district court's use of January 27, 2004, as the date the second mortgage was executed, and January 26, 2004, as the date Wells Fargo's foreclosure action was commenced, clearly appear to be scrivener's errors.

aware of it. On March 3, 2004, FAC filed the Fouse-to-Denning mortgage in Polk County, instead of filing it in the proper county, Warren County.

On June 22, 2004, a decree was entered foreclosing Wells Fargo's mortgage. A foreclosure sale was scheduled for August 19, 2004. Denning, in whole or large part because of his private, oral arrangement with Fouse waiving the monthly payments required by their promissory note, was unaware of Fouse's lack of payments to Wells Fargo. In August 2004 Denning was driving past the property he had sold to Fouse. He saw that Fouse had moved out and that there was a sign in the yard. Denning "called Warren County and found out it was gone to a sheriff's sale."

Fouse paid Denning nothing, and Denning sued FAC for $31,250, alleging negligence on the part of FAC. The case was tried to the court. Although the parties made a full evidentiary record, the defendant FAC's motion for a "directed verdict" was made, and was considered, as if made at the close of Denning's case in chief.[3] The district court granted FAC's motion, concluding that: (1) there was nothing about the relationship between Denning and FAC that would justify the imposition of a duty on FAC to prepare a second mortgage at the time of closing, and (2) although FAC's eventual undertaking to record the second mortgage gave rise to a duty to record it in the proper county, under the facts FAC's failure to record it in the proper county was not the proximate cause of any damage to Denning.

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[3] As this case was tried to the court without a jury, the motion should have been designated as a motion to dismiss. *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 438 (Iowa 1996); *Kelley v. Nix*, 329 N.W.2d 287, 290 n.1 (Iowa 1983); Iowa R. Civ. P. 1.945. The misnomer is, however, immaterial. *Iowa Coal*, 555 N.W.2d at 438.

Denning appeals on two grounds, questioning:

> I. WHETHER [FAC] HAD A DUTY TO CLOSE THE ENTIRE REAL ESTATE DEAL BETWEEN THE PARTIES RATHER THAN ONLY THAT PORTION WHICH PROTECTED THE FINANCING INSTITUION.
> II. WHETHER [FAC'S] FAILURE TO TIMELY RECORD A MORTGAGE IN THE CORRECT COUNTY WAS NEGLIGENCE.

II. SCOPE AND STANDARDS OF REVIEW.

A motion for involuntary dismissal during trial is equivalent to a motion for directed verdict. *B & B Asphalt Co. v. T.S. McShane, Co.*, 242 N.W.2d 279, 281 (Iowa 1976); *Henschel v. Hawkeye-Security Ins. Co.*, 178 N.W.2d 409, 414 (Iowa 1970). We review a ruling on a motion for directed verdict for correction of errors at law. *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006).

> In reviewing rulings on motions for directed verdict . . . we simply need ask whether there was sufficient evidence to generate a jury question. Evidence is sufficient if there is substantial evidence to support every element of the claim submitted. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. In applying the substantial evidence standard, we – like the district court – view the evidence in the light most favorable to the party against whom the motion[ ] for directed verdict . . . [is] directed.

Jackson v. State Bank of Wapello, 488 N.W.2d 151, 155-56 (Iowa 1992) (citations omitted).

III. SEPTEMBER 2003 CLOSING.

In seeking recovery for FAC's alleged negligence, Denning must prove that FAC owed him a legal duty, and whether under a given set of facts such a duty exists is a question of law. *J.A.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999). In deciding whether a duty exists a court considers: (1) the parties' relationship, (2) the reasonable foreseeability of harm to the injured person, and (3) public policy considerations. *Id.*

Denning first argues that reasonable minds could find that the closing instructions provided by Wells Fargo to FAC imparted a duty to FAC "to secure the second mortgage and [thus] protect Denning's interest." In rejecting this argument the district court stated:

> The scope of [FAC's] actions in the closing was dictated by Wells Fargo. Those directions did not include the preparation of a mortgage running in favor of [Denning]. [Denning's] reliance on the phrase "second mortgage note" in the closing instructions prepared by Wells Fargo is an over-reading of those instructions, and is inadequate to create a duty to prepare a mortgage – the document referenced in the instructions (the note) was prepared as called for.

The record reveals that Wells Fargo required FAC to return to Wells Fargo as part of the closing documents a "copy of executed second mortgage note" to meet the demands of Wells Fargo's underwriter. The district court committed no error in concluding substantial evidence did not support a claim that Wells Fargo's instructions to FAC required FAC to prepare and see to the execution and filing of a second mortgage.

Denning next argues that FAC "had a duty to close this transaction in such a fashion that would effectuate the entire real estate deal that had been struck between Denning and Fouse." The district court granted FAC's motion for directed verdict after concluding "there is no duty arising from [FAC] to [Denning], simply by virtue of its involvement in the real estate closing." In support the court stated:

> [T]here is nothing about the relationship between [Denning and FAC] that would justify the imposition of a duty against [FAC] as urged by Denning. The scope of [FAC's] actions in the closing was dictated by Wells Fargo. . . . The scope of its directives was to ensure that Wells Fargo, the entity which had retained its services, was protected at closing, not [Denning].
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> This limited scope is also pertinent as to the foreseeability issue. It is by no means reasonably foreseeable that a person who

> agrees to take back a second mortgage . . . will be harmed if and when that transaction goes to closing.

Denning testified that no one at FAC told him that they would prepare a second mortgage for the September closing. Denning did not know what instructions Wells Fargo gave to FAC. He did not contact FAC to have a second mortgage prepared, and he did not provide any materials to FAC for preparation of the closing documents. Under the circumstances shown by the record, we agree with the district court that it was not reasonably foreseeable, by FAC, that Denning would be harmed if FAC did not go beyond its instructions from its principal, Wells Fargo, and take steps to effectuate Denning's separate agreement with Fouse.

If Wells Fargo had attended and participated in the closing rather than hiring FAC to handle the closing on its behalf, a court could not find that under the relevant and material facts Wells Fargo had a duty to protect Denning's interest by preparing a second mortgage, seeing to its execution by Fouse, and ensuring that it was properly recorded. Simply put, based on the undisputed facts that are relevant and material to the question, FAC was Wells Fargo's agent alone. There was no relationship between FAC and Denning giving rise to a duty on the part of FAC to prepare a second mortgage for the September 2003 closing. We find no error in the district court so concluding and directing a verdict in favor of FAC on Denning's claim of negligence concerning the September closing.[4]

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[4] Because Denning cites no authority in support of his claim that FAC had a duty to "advise, warn or otherwise tell" Denning that FAC was not going to prepare a second

IV. RECORDING IN THE WRONG COUNTY.

When Denning discovered there was no second mortgage, he called Wells Fargo, which contacted FAC, and FAC's attorney prepared the second mortgage to which Denning and Fouse had agreed.[5] FAC does not dispute the district court's determination that although FAC owed no duty to Denning as a result of its involvement in the real estate closing in September 2003, FAC did subsequently obligate itself to record the mortgage, presumably in the proper county, once Denning secured Fouse's signature. The question is thus whether FAC's wrong county recording can have been a proximate cause of Denning being damaged.

Iowa applies a "but for" test to the cause-in-fact component fact of proximate cause. *Yates*, 721 N.W.2d at 774. "The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm." *Id.*

The district court determined that Denning failed the negative but-for test because "his interest in the property would have been cut off had the mortgage been [properly] recorded in Warren County." This would have occurred because

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mortgage for the September closing, we deem this claim waived. *See* Iowa R. App. P. 6.14(1)(*c*).

[5] It is unclear whether Denning or Fouse reimbursed FAC for attorney fees incurred for drafting the second mortgage.

the second mortgage was not executed by Fouse until the day *after* Wells Fargo commenced its foreclosure action against Fouse.[6]

Denning argues his interest was not cut off by the commencement of Wells Fargo's foreclosure action. Although there is no recent Iowa Supreme Court ruling on this issue, *Cooney v. Coppock*, 119 Iowa 486, 487-88, 93 N.W. 495, 495 (1903), is instructive.

> [O]ne who . . . acquires an interest from the defendant in a foreclosure proceeding . . . *takes subject to the determination of such proceeding*, and, although not made a party, has no equitable right to redeem from the foreclosure sale. . . . It would be intolerable that, after plaintiff has commenced his foreclosure, and made parties to his action all persons *then* having any interest in or lien upon the premises, he should be required to bring in as new parties persons *subsequently* acquiring an interest or lien. To compel him to do so might make it necessary for him to continue indefinitely his action, and postpone the securing of a final decree.

Cooney, 119 Iowa at 487-88, 93 N.W. at 495 (citations omitted) (emphasis added). Relying on *Cooney*, the district court concluded Wells Fargo could file its "foreclosure action based on the interests of record at the commencement of that action, and the resulting decree cuts off the rights of those . . . who obtained interests in the property while the action was pending."

The district court's decision on this issue is also supported by George F. Madsen, *Marshall's Iowa Title Opinions and Standards* section 13.10(A), at 296 (2d ed. 1978),[7] which provides:

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[6] Because it was Denning's obligation to secure Fouse's signature on the second mortgage, the one and one-half month delay between the availability of the mortgage and Denning securing Fouse's signature is not attributable to FAC.

[7] The Iowa Supreme Court has cited with approval Madsen's treatise in *McNertney v. Kahler*, 710 N.W.2d 209, 212 (Iowa 2006); *Baratta v. Polk County Health Services*, 588 N.W.2d 107, 114 (Iowa 1999); *Clemens Graf Droste Zu Vishering v. Kading*, 368 N.W.2d

> If a record search is made down to the date of filing a foreclosure petition, it is unnecessary to make another search for instruments that may have been recorded between the date of the petition and the date of the sheriff's sale, and this would seem to be true even though the interest may have been acquired before the filing of the petition and recorded after.

We therefore find no error in the district court's conclusion that FAC's act of recording Denning's second mortgage in the wrong county was not the cause of damage to Denning because "his interest in the property would have been cut off had the mortgage been recorded in Warren County, based on the undisputed fact it was not executed until after the foreclosure action[8] in that county was commenced." FAC's conduct was not a cause in fact of Denning's harm, and a directed verdict on this issue was therefore also appropriate.

AFFIRMED.

Vaitheswaran, J., concurs; Sackett, C.J., concurs in part and dissents in part.

702, 708 (Iowa 1985); *Ganzer v. Pfab*, 360 N.W.2d 754, 755 (Iowa 1985); and *In re Marriage of McMorrow*, 342 N.W.2d 73, 76 (Iowa 1983).

[8] Denning's reliance on a bankruptcy case discussing the relationship between a potential fraudulent conveyance lawsuit and a bankruptcy stay is unpersuasive. *See In re Rodemeyer*, 99 B.R. 938 (Bankr. N.D. Iowa 1989). *Rodemeyer* does not discuss the effects of the filing of a foreclosure petition. *See id.*

SACKETT, C.J. (concurs in part and dissents in part)

I concur in part and dissent in part.

I cannot accept the majority's conclusion that First American Closing of Iowa owed no duty to plaintiff David Denning to comply with the purchase agreement he entered into with Roger Fouse when it accepted Denning's deed wherein he conveyed away any interest he held in the real estate.

Whether a duty of care exists is a question of law. *J.A.H. v. Wadle & Assocs. P.C.*, 589 N.W.2d 256, 258 (Iowa 1999). In analyzing duty issues, the courts examine: (1) the parties' relationship; (2) the reasonable foreseeability of harm; and (3) the public policy considerations. *Id*. The risk reasonably to be perceived defines the duty to be obeyed and restricts who is owed the duty to a member of a limited class of persons for whose benefit and guidance the service is intended. *See Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 286-87 (Iowa 1981) (determining United Federal Savings and Loan Association was charged with knowledge home buyer might rely on results of appraisal completed by their employee); *Ryan v. Kanne*, 170 N.W.2d 395, 401-02 (Iowa 1969) (finding a duty where accountants under limited circumstances knew or should have foreseen a financial statement they prepared for their clients would be relied on by parties in extending credit or assuming liability).

First American argues they were only hired to close the mortgage for Wells Fargo, an out of state lender.[9] However, to close the mortgage in accordance with the instructions from Wells Fargo it was necessary to close the

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[9] Wells Fargo has offices in Iowa but no Iowa office was involved.

sale between plaintiff and Fouse. First American, to comply with Wells Fargo's directive to "complete vesting on the deed as required by state law," had to assure that plaintiff delivered a warranty deed conveying his entire interest in the property to Fouse. The deed went to First American and it took control of the entire transaction without advising plaintiff they were not representing his interests. Plaintiff paid $3000 in closing costs at the time First American[10] completed the transaction. Plaintiff was justified in relying on his purchase agreement and in believing that it would not be changed without his consent. It was reasonable for him to assume the sale should only have been closed after he received that which it was agreed he would receive in exchange for his deed to Fouse. He did not. The parties' relationship and the reasonable foreseeability of harm to plaintiff if the matter was not correctly closed point to establishing that First American had a duty to plaintiff.

Public policy considerations further support charging First American with a duty to plaintiff. First American represents itself as a "Closer." The duties and responsibilities of a "Closer" do not appear to be defined or regulated by Iowa statutory law.[11] Yet the term "Closer" can lead the average person in plaintiff's shoes who is unfamiliar with real estate law to assume the "Closer" understands Iowa real estate law and also will see that the matter is closed correctly in accordance with the written agreements of the respective parties. The time may come when the Iowa legislature may seek to regulate "Closers." However, in the meantime I am concerned that others may fall into the trap the plaintiff did here.

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[10] No explanation appears in the paperwork as to what services he was to receive if any for the payment of this sum.

[11] Black's Law Dictionary Eighth Edition provides no definition for a "Closer".

To individuals not knowledgeable about real estate transfers, the sale of a piece of real estate may well involve a substantial portion of their net worth. When a seller delivers a deed to a "Closer" he or she should be assured the "Closer" has a duty to see that the closing is handled correctly and the sales contract will not be altered or changed without a party's written assent. *See King v. First Nat'l Bank of Fairbanks*, 647 P.2d 596, 599 (Alaska 1982) (holding purchasers were third-party beneficiaries of contract between bank and seller).

I would find First American had a duty to plaintiff and that First American was negligent in the closing. I would remand to the district court to determine the plaintiff's damages. That said, I find it unnecessary to further address the issue of the mortgage being recorded in the wrong county. I do, however, concur with the majority's conclusion that First American was negligent in recording the deed in the wrong county and that plaintiff's interest in the property was cut off by Wells Fargo's foreclosure action.