IN THE COURT OF APPEALS OF IOWA

No. 8-565 / 07-1742
Filed March 11, 2009

SPAHN & ROSE LUMBER CO.,
Plaintiff,

vs.

LLOYD JONES JR., JODI K. JONES,
AND CHAD ANGELL d/b/a ANGELL
LANDSCAPING,
Defendants,

And

US BANK NATIONAL ASSOCIATION, substituted for
AEGIS LENDING CORPORATION,
Defendant-Appellant,

And

ROXANN MOYER and GRUNDY
NATIONAL BANK,
Intervenors-Appellees.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Mortgagor appeals from the district court's ruling allowing intervention and setting aside its earlier modification of a foreclosure decree. **REVERSED AND REMANDED.**

Matthew E. Laughlin and Behnaz Soulati of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant US Bank National Association.

Kent L. Geffe of Welp & Geffe Law Offices, Marshalltown, for Spahn & Rose Lumber Co.

Lloyd Jones, Marshalltown, pro se.

Jodi K. Jones, Marshalltown, pro se.

Chad Frese of Kaplan & Frese, L.L.P., Marshalltown, for Angell Landscaping.

Erika L. Allen of Heronimus, Schmidt & Allen, Grundy Center, for appellee Grundy National Bank.

William J. Lorenz of Moore, McKibben, Goodman, Lorenz & Ellefson, L.L.P., Marshalltown, for appellee Moyer.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

A junior lien holder, Aegis Lending Corporation (Aegis),[1] appeals asserting the district court erred in stripping it of its statutory rights of redemption. Because we agree with Aegis's position, we reverse and remand for further proceedings.

I. Background Facts and Proceedings.

In 2003 the real estate[2] at issue was owned by Lloyd Jones Jr. and Jodi Jones, who were building a residence on it. The property became subject to three liens: the first arises from materials and supplies purchased from Spahn & Rose Lumber Company, whose mechanic's lien was filed on November 8, 2004; the second lien arises from a mortgage to Aegis dated November 16, 2004, which was recorded on November 23, 2004; and the third lien arises from work performed by Chad Angell d/b/a Angell Landscaping, whose mechanic's lien was filed on July 15, 2005.

On November 7, 2005, Spahn & Rose filed a petition to foreclose its mechanic's lien. Notice was given to all interested parties, including the Joneses and Aegis. On June 1, 2006, the district court entered a decree of foreclosure declaring Spahn & Rose's mechanic's lien "superior and paramount to the interests, claims, or liens of the other Defendants," as Aegis and Angell Landscaping were junior lien holders. The decree ordered the property sold to satisfy the amount due and "that on or after the date of Sale the Defendants or

[1] After the appeal, by order of the supreme court, US Bank National Association was substituted for Aegis Lending Corporation. However, for ease of understanding, we will continue to refer to the mortgagee as Aegis.

[2] The property at issue is legally described as: Lot One of Lot One of the Southeast Quarter of the Southwest Quarter, and Lots Four and Five lying West of the center line of the public road in the Southwest Quarter of the Southeast Quarter, all in Section 26 in Township 83 North, Range 18 West of the 5th P.M., Marshall County, Iowa.

any persons claiming by, through, or under them be forever barred and foreclosed of all interest in or equities to the premises." The court also ordered that if the real estate was sold, a writ of possession "issue to the Sheriff of Marshall county, Iowa, commanding him to put the grantee under Sheriff's Deed in possession of the premises deeded to him." Finally, if the proceeds from the sale exceeded the amount due to Spahn & Rose, the court reserved jurisdiction to "determine the interests of the parties in any overplus resulting from the sale." The decree of foreclosure was silent as to any rights of redemption.

The sheriff's office issued notice of the sale, which was also published in newspapers, and included the following erroneous statement: "This sale is not subject to redemption." Shortly before the scheduled sale, Roxann Moyer and her husband learned the property was to be sold at sheriff's sale and contacted Grundy National Bank about financing. Grundy National Bank agreed to provide financing so long as the property was not subject to redemption, and directed Moyer to "make absolutely sure that there was not right of redemption." Moyer phoned the Sheriff's office and checked the posted notice, which both indicated there was no right of redemption. However, Moyer did not review the public records nor seek a legal opinion as to the status of title following the foreclosure.

On August 22, 2006, a sheriff's sale was held. Aegis did not attend the sale because it had been advised by its legal counsel that its interests would be protected by a one-year right of redemption. Following a competitive bidding process, the property was sold to Moyer for $190,000. Moyer received a sheriff's deed, which she recorded August 23, 2006, and Moyer and her husband took possession of the property. On October 2, 2006, Moyer and her husband

executed a mortgage to Grundy National Bank in the sum of $195,000, which was recorded on October 12, 2006.

On August 28, 2006, the district court entered an order noting that more than $111,000 remained after Spahn & Rose's mechanic's lien was satisfied. The court set a hearing for September 13, 2006, to determine the distribution of the overage. The hearing was continued until October 2, 2006, as Aegis had not received notice of the hearing.

On October 2, 2006, Aegis filed a "Statement of Amount Owed" stating that the consideration for its promissory note was $390,100, with a current balance of $408,710.68. That same day, an unreported hearing was held, without notice to Moyer, "to determine the disbursement of proceeds following the sheriff's sale." On November 13, 2006, the district court issued an order finding that Aegis was owed $408,710.68. The surplus remaining from the sale of $111,000 was turned over to Aegis. However, as Aegis's lien was not fully satisfied, there was no surplus for Angell Landscaping, who had a lien junior to Aegis. Finally, the order stated:

> At the time of the hearing, the parties also raised the issue that the Foreclosure Decree does not contain a redemption period as required by Iowa Code Chapter 628. The Court finds that there shall be a one year right to redemption as provided for under the Iowa Code Chapter 628. The one year right of redemption shall begin as of the sale date of August 22, 2006.

The court declared the sheriff's deed issued following the sale "void" and ordered the sheriff "to issue a certificate of purchase to the purchaser at sale which is consistent with this Order."

Upon receiving notice of the court's ruling, Roxann Moyer filed a motion to intervene and a motion to modify, vacate, or set aside the court's November 13, 2006 ruling. Grundy National Bank also filed a motion to intervene, alleging it had obtained a mortgage on the property following the sheriff's sale. Aegis resisted the motions.

On July 19, 2007, following a hearing, the district court entered its findings of fact, conclusions of law, and order. First, the district court found that Moyer, as the record title holder, and Grundy National Bank, as the mortgage holder, had a right to intervene in the action pursuant to Iowa Rule of Civil Procedure 1.407(1)(*b*).[3] The district court sustained Moyer's and Grundy National Bank's motion to intervene.[4] Next, the district court found that Moyer was a good faith purchaser as she had relied on the Sheriff's notice and pronouncements that the property was sold "as not subject to redemption." Pursuant to Iowa Rule of Civil Procedure 1.1015(1), because Moyer was a good faith purchaser, the "title she received by virtue of the sheriff's deed on August 22, 2006 cannot subsequently be affected or impaired by the order of November 13, 2006."[5] The district court

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[3] Iowa R. Civ. P. 1.407(1)(*b*) provides for intervention of right

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[4] On appeal, Aegis does not raise the issue of whether Moyer and Grundy National Bank had a right to intervene in an action pursuant to Iowa Rule of Civil Procedure 1.407(1)(*b*).

[5] In the alternative, Aegis argued that even if Moyer was a good faith purchaser Iowa Rule of Civil Procedure 1.1015 did not apply because (1) the November 13, 2006 order simply "clarified" the foreclosure decree and (2) redemption rights cannot be waived. First, the district court found that the foreclosure decree was not "clarified," but was "modified" because additional redemption rights were created. Next, the district court acknowledged that redemption rights cannot be waived. However, because the

vacated the order of November 13, 2006, "to the extent that it voids the Sheriff's Deed and grants a one-year period of redemption."

Aegis appeals and asserts that the district court erred in concluding the property is not subject to a one-year period of redemption. In the alternative, Aegis contends the sheriff's sale should be set aside due to mistake.

II. Scope and Standard of Review.

Our review of this equity action is de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, but we are not bound by them. Iowa R. App. P. 6.14(5)(*g*).

III. Analysis.

Iowa Code chapter 628 (2005) provides creditors, under certain circumstances, with rights of redemption for a period of one year. *See, e.g.*, Iowa Code § 628.5 (if no redemption is made by debtor); Iowa Code § 628.8 (creditors may redeem from each other). The parties do not dispute that Aegis had a one-year redemption period. Rather, the dispute lies with the district court's finding that Moyer was a good faith purchaser, which resulted in stripping Aegis of its statutory right of redemption. Aegis contends that Moyer is not a good faith

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foreclosure decree was silent as to redemption rights and Aegis did not appeal this ruling, the decree as written became the law in this case. Although we do not need to reach these issues as we conclude Moyer was not a good faith purchaser, we note that the foreclosure decree was not modified by the November 12, 2006 order because no additional redemption rights were created as the statute establishing lien holders' redemption rights was in place long before the foreclosure decree was entered. Additionally, the Iowa Code does not require a foreclosure decree to enumerate or even mention statutory redemption rights for junior lien holders. *See generally* Iowa Code ch. 654. A default judgment against any junior lien holder merely allows the petition to be granted as pled against those junior lien holders. The decree simply confirmed the status Aegis knew it held, which was that of a junior lien holder. Aegis takes no issue with that adjudication and hence there was no basis for an appeal and its statutory rights of redemption under Iowa Code section 628 remained intact and in effect.

purchaser because she had constructive notice of its statutory right of redemption; thus, the district court erred in depriving it of its statutory right of redemption. We agree.

"The rule is well established that to be a good faith purchaser for value, one must show that he made the purchase before he had notice of the claim of another, express or implied." *Moser v. Thorp Sales Corp. (Moser II)*, 312 N.W.2d 881, 886 (Iowa 1981); *see also Moser v. Thorp Sales Corp. (Moser I)*, 256 N.W.2d 900, 910-11 (Iowa 1977) (defining a good faith purchaser as "one who takes a conveyance of real estate in good faith from the holders of legal title, paying a valuable consideration for it without notice of outstanding equities"). Implied notice includes record notice. *See* Iowa Code §§ 558.11; .41; .55 (providing that the status of title to real estate is a matter of record); *Bartels v. Hennessey Bros., Inc.*, 164 N.W.2d 87, 94 (Iowa 1969) ("Absent express notice given, a land purchaser generally has three established sources of information to which he should turn for ascertainment of existing rights in any property he proposes to buy: (1) the records in the County Recorder's office where basic rights involved are recorded; (2) other public records, to discover existence of rights not always disclosed in the County Recorder's office, i.e., judgments, liens and taxes; and (3) an inspection of the land itself, to determine by observation any rights which may exist apart from our recording system by virtue of occupancy, use or otherwise."); 77 Am. Jur. 2d *Vendor and Purchaser* § 384, at 433-34 (2006) (stating that in order to be considered a good faith purchaser, one cannot have actual or constructive notice, which includes record notice and inquiry notice, of another's claimed interest). Thus, all documents and

instruments properly recorded put the public on notice of the status of title. *See, e.g.*, *Bartels*, 164 N.W.2d at 94 ("The proposition is indisputable and clear, founded in reason, and sanctioned by authority, that if an ordinarily diligent search of the records will bring to an inquirer knowledge of a prior encumbrance or alienation, he is presumed to know of it." (citation omitted)). Further, record notice is applicable in the context of a foreclosure sale and a purchaser at a foreclosure sale is charged with the notice of such material facts as the record discloses. *Moser I*, 256 N.W.2d at 911, 912; 55 Am. Jur. 2d *Mortgages* § 793, at 398-99 (1996). Moyer was on such notice.

However, the district court concluded that Moyer was a good faith purchaser because she relied on the faulty sheriff's notice and pronouncements stating the property was not subject to redemption. This is not sufficient to create a good faith purchaser and thereby destroy statutory rights of redemption for junior lien holders. It has long been held that the sheriff's notice of sale and informal inquiries present no guarantees of the legal status of title to real estate in Iowa. *See Hamsmith v. Espy*, 19 Iowa 444, 446 (1865) ("In making a sale under execution, the sheriff or other public officer professes to sell only the interest or estate of the judgment debtor. He gives no warranty. The law proclaims in the ears of all who propose to buy—caveat emptor, and look out, take notice, beware of the title for which you bid."); 55 Am. Jur. 2d *Mortgages* § 793, at 399 (1996) ("He or she may not rely upon statements made by the officer conducting the sale as to the condition of the title."). One intending to buy encumbered property at a foreclosure sale must examine the title to the property. *Moser I*, 256 N.W.2d at 912. If Moyer buys without examination, she does so at

her peril and must suffer whatever loss is occasioned by her neglect to make the proper examination. *Id.*; 55 Am. Jur. 2d *Mortgages* § 793, at 398-99 (1996). While it is unfortunate the notice of sheriff's sale was incorrect, that fact offers Moyer no relief because Moyer, like all members of the public, had constructive notice of the status of title to the real estate through the properly recorded public records readily available for her examination. *Emmert v. Neiman*, 245 Iowa 931, 935, 65 N.W.2d 606, 608 (1954) (stating the purchaser must examine, judge, and test title for himself). Had Moyer conducted such an investigation, most typically by seeking competent legal advice, she would have been informed of the status of the record title, and advised of the statutory rights of redemption held by the junior lien holders. Armed with that information, Moyer would have been able to proceed with caution in bidding on the property and all subsequent actions she undertook. Thus, we find that Moyer was not a "good faith purchaser" because she was on notice of all public records pertaining to title to the real estate but failed to properly investigate the status of title.

Further, Moyer cannot seek relief under "equitable considerations" when she pursued this purchase without having done a proper title search. A purchaser will ordinarily only be protected against outstanding equities of which she had no notice, actual or constructive, before the sale. *Rippe v. Badger*, 125 Iowa 725, 727, 101 N.W. 642, 642 (1904). In this case, Moyer had notice, but she failed to investigate what was readily available to her as well as the rest of the public. If a buyer chooses not to have title to property examined, and later complains of a title defect, the buyer must live by that choice. *Moser I*, 256 N.W.2d at 912; *see also Rippe*, 125 Iowa at 727, 101 N.W.2d at 642 ("The

maxim of caveat emptor unquestionably applies to a sale under execution, and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien attached."); 55 Am. Jur. 2d Mortgages § 793, at 398-99 (1996). The courts cannot remedy the situation by circumventing statutory law, thereby eroding the rights of a legitimate lien holder only to favor the ill-informed buyer.

We find that Moyer was not a good faith purchaser. Thus, the district court erred in depriving Aegis of its statutory redemption right. We reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Vogel, P.J. and Miller, J. concur. Mahan, J. dissents.

MAHAN, J. (dissenting)

I respectfully dissent. "Once equity has obtained jurisdiction of a controversy it will determine all questions material or necessary to accomplish full and complete justice between the parties." *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 895 (Iowa 1981) (internal quotation omitted). Under the unique circumstances of this case, I would hold that the equities lie with Roxann Moyer and not with the junior lien holder "whose act of omission or commission made the loss possible." *Keefe v. Cropper*, 196 Iowa 1179, 1185, 194 N.W. 305, 308 (1923). I would affirm the district court.

On November 7, 2005, Spahn & Rose filed a petition to foreclose its mechanic's lien. Notice was given to all interested parties, including the Joneses and Aegis. Neither the Joneses nor Aegis filed an appearance or answer. On December 16, 2005, default was entered against Aegis and the Joneses.

On June 1, 2006, the district court entered a decree of foreclosure declaring Spahn & Rose's mechanic's lien "superior and paramount to the interest, claims or liens of the other Defendants." The decree ordered the property sold to satisfy the amount due and "that on or after the date of Sale the Defendants or any persons claiming by, through or under them be forever barred and foreclosed of all interest in or equities to the premises."

Moyer and her husband learned the property was for sale just days before the August 22, 2006 sheriff's sale and they inquired repeatedly as to whether the sale was subject to redemption. Each inquiry was met with a response that the sale was not subject to redemption. As noted by the majority opinion, the property was sold on August 22, 2006, and notices—posted and published in

newspapers—all stated the sale was without right to redemption. Prior to the sale, Moyer had spoken with a realtor, Chris Brodine of Coldwell Banker (who had viewed the property prior to sale and had discussed listing the property with the Joneses), who "assured [the Moyers] that his attorneys had checked the whole property out and that there was no right of redemption." They did not hire an attorney to investigate title. Brodine bid against Moyer at the sheriff's sale. Moyer received a sheriff's deed that day, not a sheriff's certificate which would normally issue if the sale were subject to redemption.[6]

On August 28, 2006, the district court entered an order noting that more than $111,000 remained after Spahn & Rose's mechanic's lien was satisfied. The court set a hearing to determine who of the junior lien holders was entitled to the overage. On the date of hearing, however, the court entered an order indicating Aegis had not received notice of the hearing. The court noted that the attorney for Aegis had been in contact with the attorney for Spahn & Rose "for information on this lawsuit on behalf of Aegis," but did not file an appearance and Aegis "eventually defaulted." The court rescheduled the hearing to ensure "that all interested parties have received notice of the need to dispose of the $111,000 and that all have an equal opportunity to be heard on the subject." However, notice was not given to Moyer.

[6] *See* Iowa Code § 626.95 ("If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but, if subject to redemption, a certificate"). A sheriff's deed is presumptive evidence of the regularity of all previous proceedings. *See id.* § 626.100.

The October 2, 2006 hearing resulted in the district court stating the June 1, 2006 foreclosure decree included a one-year right of redemption. Moyer and her mortgagor thereafter were allowed to intervene.

At the July 10, 2007 hearing, the stipulated evidence and live testimony tended to show that the bidding on the property began at the amount of judgment, $78,487.33. The next bid was $80,000 and continued in $5000 increments. Roxann Moyer was first bidding against Darrell Eaton; but when the bidding reached $130,000, Eaton dropped out and Chris Brodine began bidding. Moyer was the successful bidder at $190,000. Moyer received a sheriff's deed that day and recorded the deed on August 23, 2006. Moyer and her husband executed and delivered a mortgage to the Grundy National Bank in the sum of $195,000 on October 2, 2006.

Following the purchase, Moyer and her husband took possession of the real estate and found the partially constructed residence had been stripped of finished woodwork, including wood doors and trim, an expensive built-in heater in the garage, medicine cabinets, sinks, and a number of fixtures. They secured the premises and began work to complete the residence. Within days of purchasing the real estate at sheriff's sale, Moyer and her husband entered into an agreement to purchase an adjoining acreage for $53,000, property in which they would otherwise have had no interest. They closed on the sale of the adjoining land in October 2006.

The record reveals Moyer and her husband, in addition to the amounts paid for the properties, expended in excess of $100,000 on purchasing the subject real estate, completing construction of the residence, and furnishing their

new residence. Moyer's husband spent more than 650 hours working to finish the residence.

Aegis asked the court to set aside the sheriff's sale. Such a remedy may be available in equity: each case must be determined according to the facts of the particular case. *Equitable Life Ins. Co. v. Carpenter*, 202 Iowa 1334, 1337, 212 N.W. 145, 146 (1927). For example, in *Equitable Life* the court set aside a foreclosure sale where there was clearly a clerical error made by the clerk in the entry of the judgment, all of the parties to the original proceeding were before the court, "and the rights of no third persons had in any way intervened." *Id*.; *see also Bates v. Pabst*, 223 Iowa 534, 542, 273 N.W. 151, 155 (1937) (noting the "equities are entirely with the appellant").

This is not the case in which the equities require setting aside a sheriff's sale. Here, the district court was faced with dueling claims to a property. Aegis sat silently while the sheriff's sale proceeded with the condition that the sale was not subject to redemption and while Moyer expended considerable time, effort, and money in completing construction of the residence on the property and purchased additional, adjoining property. Only then did Aegis come to the court, without notice to the purchaser, and ask that its redemption rights be noted and the sheriff's deed be voided.

"[W]hen a loss occurs and one of the two persons must sustain the loss it must be borne by the one whose act of omission or commission made the loss possible." *Keefe*, 196 Iowa at 1185, 194 N.W. at 308. Aegis was in the position to correct the error in the notice of sheriff's sale, but did not do so. It argues it did

nothing more than it was allowed to do under the law, wait and redeem within one year. However, the equities in this case do not support Aegis.

Moyer repeatedly inquired as to whether the sheriff's sale was subject to redemption. Relying upon the belief that the sale was not subject to redemption, she engaged in competitive bidding that resulted in her purchase of the property. Aegis does not contend the amount paid was below market value. *See Federal Land Bank of Omaha v. Reinhardt*, 428 N.W.2d 672, 673 (Iowa Ct. App. 1988) (setting aside sheriff's sale where sale price for property was "grossly inadequate"). Moyer obtained a sheriff's deed on the day of the sale, and she and her husband expended considerable effort and additional funds in reliance on the sale not being subject to redemption.

We are not presented with a case where the party shares no responsibility for the error resulting in a voidable sheriff's sale. *See*, *e.g.*, *Farmers Sav. Bank v. Gerhart,* 372 N.W.2d 238, 246 (Iowa 1985) (specifically noting, "Defendants share none of the responsibility for the mistakes that have caused this protracted litigation"; and vacating sheriff's sale on special conditions where enforcement of the sheriff's sale would impose an oppressive burden on the bank and result in a substantial windfall to defendants). Rather, under the particular facts and circumstances of this case and as between these parties, I would find that the equities lie with Moyer.

It has been said that "one who, through carelessness or inattention to duty, brings misfortune upon himself, will not, as a rule be heard to complain." *In re Marriage of Heneman*, 393 N.W.2d 797, 800 (Iowa Ct. App. 1986) (quoting *Windus v. Great Plains Gas*, 255 Iowa 587, 595, 122 N.W.2d 901, 906 (1963)).

Aegis should not be heard to complain about its loss of its right to redemption when it could have avoided the entire situation. To allow Aegis now to reap the benefit of Moyer's efforts to improve the property would be inequitable. I would refuse to set aside the sheriff's sale under the circumstances of this case.