IN THE SUPREME COURT OF IOWA

NO. 19-1689

HOWARD COUNTY NO. EQCV017058

GREAT WESTERN BANK,	:
	:
Plaintiff,	:
v.	:
	:
CONRAD D. CLEMENT; MANACO, CORP.; and PARTIES IN POSSESSION,	:
	:
	:
Defendants.	:
SUE ANN DOUGAN,	:
	:
Appellee/Cross-Appellant,	:
	:
vs.	:
	:
WAYNE JOSEPH MLADY,	:
	:
Appellant/Cross-Appellee	:

APPELLEE-CROSS APPELLANT'S RESPONSIVE BRIEF TO AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

RESPONSIVE BRIEF TO AMICUS CURIAE BRIEF

Sue Ann Dougan agrees with the request of Iowa Bankers Association ("IBA") to determine the applicable contract rate for redemption pursuant to Iowa Code § 628.13. She disagrees with IBA's statement of the issue; some of IBA's assumptions for making the request; and IBA's request for imposition of the default rate and the denial of equitable relief to Dougan to redeem if the default rate is imposed.

One might ask why IBA filed its Amicus Curiae Brief [1] in this case. A bank is not involved. IBA does not claim to speak for Great Western Bank even though it is an association of financial institutions. This is because Great Western Bank accepted Mlady's purchase price of $1,600,001 paid at Sheriff's Sale on May 22, 2017, as full payment for the real estate and for which Mlady received the Certificate of

[1] Amicus Curiae Brief is abbreviated to "ACB" for later citation reference.

Purchase. The computation of interest on the Certificate of Purchase is the compelling issue in this case. [2]

The purchase price left an unsecured deficiency judgment of $250,198.36. App. p. 596. The deficiency judgment is irrelevant to the determination of the rate of interest on the Certificate of Purchase. It continues to draw interest at 21 percent because not paid at the Sheriff's Sale. App. p. 74. There is no evidence relative to Great Western Bank's effort to collect, if any. Great Western Bank had no involvement in this litigation after the Sheriff's Sale; and has no complaint relative to Dougan's efforts to redeem or concern with the applicable contract rate on the Certificate of Purchase during the redemption.

There is no evidence that Mlady, the successful bidder at the Sheriff's Sale, financed the purchase price.

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[2] See the Certificate of Purchase at App. p. 595, which states "Unless redemption is made (ONE YEAR) said purchaser(s), their heirs or assigns will be entitled to a deed conveying all right, title, and interest of said defendants in and to said real estate." App. p. 595 is identified as "Sheriff's Certificate of Purchase." Iowa Code § 628.13(1) and (2) reference "certificate of sale." These names for the document are interchangeable.

Dougan has deposited the $1,938,799.79 necessary to redeem at 21 percent rate, if that rate is imposed by the Supreme Court, with the Clerk of Court without obtaining financing.

IBA's stated purpose for filing the Amicus Curiae Brief is to discuss the importance in "freely contracting with the debtor for a known interest rate, along with the need for certainty required for calculations of redemption amounts by the redeeming party." ACB, p. 4. Dougan agrees with the IBA on both points.

From the very beginning of Dougan's quest to redeem on April 2, 2018, she sought to remove the "guessing game" [3] regarding the "contract rate" for redemption by filing a Petition for safe harbor relief under § 628.21. She sought a determination of the interest rate in order that she could calculate with certainty the redemption amount.

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[3] ACB, p. 8. IBA accuses Dougan's effort to redeem in this case as creating a "guessing game" when, in fact, her efforts and arguments to redeem propose to do just the opposite.

Unfortunately, the District Court denied her right to redeem. App. p. 96. The District Court did not rule on her safe harbor Petition until after remand from the Court of Appeals on September 28, 2019. App. p. 414. Dougan immediately paid the additional amount required by that ruling to redeem at the 21 percent default rate. App. p. 422.

IBA'S MISTAKEN ASSUMPTIONS

Perhaps the IBA filed its Amicus Curiae Brief thinking mistakenly that Dougan has asked the Court "to either ban the use of default rates during redemption or vacating interest accrual altogether during the redemption period . . ." [4]

Dougan has never asked to eliminate interest on the Certificate of Purchase. She has only asked the Court to determine that rate of interest. She has always been ready and willing to pay the necessary amount to redeem. [5]

Neither does Dougan argue for elimination of "default rates during redemption." [6] She argues that the redeeming

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[4] ACB, p. 7.
[5] See Dougan's record of payments at App. p. 422.
[6] ACB, p. 7. Dougan has never criticized Great Western for using two rates in its promissory notes. She has argued, however, that the base rate be used for redemption.

debtor or his or her assignee is encouraged by Iowa statutory policy to redeem and she supports the redeemer's request for financing to make the redemption. If the bank chooses to impose a default rate if that redeeming debtor defaults on a note, Dougan does not argue against the bank's right to impose a default rate in the event of default. Thus, she agrees with the IBA that a bank should be free to contract with a debtor who is financing a purchase at a sheriff's sale or who is attempting to redeem after foreclosure. She agrees that the bank should have the freedom and flexibility to negotiate a competitive rate of interest and to impose a default penalty if a default occurs.

DOUGAN REQUESTS THE COURT TO DECIDE THE APPLICABLE INTEREST RATE FOR REDEMPTION PURSUANT TO IOWA CODE § 628.13 IN THIS CASE SHOULD BE 4.25 PERCENT

However, she asks that the Court determine the contract rate for her redemption which had been illegally denied and she asserts that based upon statutory and economic policy the Court should decide that the applicable contract rate in this case be 4.25 percent.

She asks further for equitable relief to redeem after the one year redemption period, if the Court decides to adopt the default rate, since her right to redeem had been illegally denied during the one year redemption period.

Dougan requests the Court to set precedent for the first time in deciding that the 4.25 percent base rate be applied and not a default rate since the default as it pertains to the Certificate of Purchase was paid at the Sheriff's Sale and statutory and economic policy encourages competitive financing to return foreclosed property to the marketplace.

IBA'S MISSTATEMENT OF THE ISSUE IN THIS CASE

Dougan wishes to clarify IBA's following statement of the issue in this case as "the statutory interpretation of Iowa Code 628.13(1) (2019), referring to the rate in existence **on the date the certificate of sale was issued**, (emphasis supplied) as this rate was clearly 21%." [7] Dougan agrees that the beginning of the accrual of interest on the Certificate of

[7] ACB, p. 6.

Purchase was May 22, 2017. She disagrees that "this rate was clearly 21%."

The issue before the Court correctly stated is the "contract rate on the Certificate of Sale **from** (emphasis supplied) its date." [8] The date of the Certificate of Sale is May 22, 2017.

Dougan's point in asking the Court to consider the reasoning of Royal Manor Apartments, LLC v. Federal Nat. Mortg. Ass'n., 614 F. App'x 228, 235-236 (6th Cir. 2015) is that on May 22, 2017, when the property was purchased at foreclosure sale, the default on the promissory notes was eliminated except for the unsecured deficiency judgment not relative to the redemption; the Certificate of Purchase took the place of the judgment, mortgage, and promissory notes; and as stated in the Foreclosure Decree, statutory redemption rights took their place. App. p. 74.

[8] ACB, p. 5, citing Great Western Bank v. Clement, No. 19-1689, 2020 WL 7383114 at 5 (Iowa Ct. App. Dec. 16, 2020); Iowa Code 628.13(1) (2019). Later, IBA ignores the word "from" in the statute.

The issue is the "contract rate" of interest to be applied to the Certificate of Purchase **from May 22, 2017, forward,** not to the past judgment of Great Western Bank paid by the Sheriff's Sale.

The only two applicable cases dealing with the issue of the applicable contract rate, Waterloo Sav. Bank v. Carpenter, 233 Iowa 671, 9 N.W.2d 818, 821 (Iowa 1943) and Federal Land Bank of Omaha v. Bryant, 445, N.W.2d 761 (Iowa 1989) do not deal with or discuss default. Both cases note the applicable contract rate was that provided in the promissory note. App. p. 88.

§ 628.13 provides that redemption is made by payment to the clerk of the amount of the Certificate of Purchase "with interest at contract rate . . ."

Thus, neither the applicable cases nor the applicable statute are helpful in assisting the Court in deciding what the "contract rate" is on the Certificate of Purchase.

Dougan agrees with IBA with regard to its stated policy ("of the importance in freely contracting with the debtor for a known interest rate . . .") [9] Dougan argues in her petition that legislative policy favors redemption by the debtor or his or her assignee.

She argues that § 628.3 grants the exclusive right to redeem to the debtor and that § 628.25 states the debtor can transfer that right to redeem. She argues that it is in the best interests of the redeeming debtor and the Iowa economy that the debtor or his or her assignee be given the first opportunity to buy the farm back.

IBA essentially agrees with her argument. ACB, p. 6.

IBA'S ERRANT ARGUMENTS FOR THE DEFAULT RATE

However, IBA poses several unconvincing arguments for application of the 21 percent default rate on the Certificate of Purchase, ironically so, because of its stated purpose of facilitating financing by the redeeming debtor or his or her

[9] ACB, p. 4.

assignee to purchase foreclosed real estate in order to return it to the marketplace.

First, it argues for the 21 percent rate as "the rate in existence on the date the certificate of sale was issued, as this rate was clearly 21%." [10] Again, the promissory notes were paid off by the Sheriff's Sale except for a deficiency. The 21 percent rate was not in existence after the notes were paid except only on the deficiency judgment. The rate to be calculated on the Certificate of Purchase **from** (emphasis supplied) its date forward during the redemption period is to be determined. The rate is not "clearly 21%."

Secondly, IBA argues that "If the Iowa legislature wanted to specify the rate in effect during redemption as the standard 'non-default' rate contracted for (in this case at 4.25%), it would have said so in the statute." [11]

Dougan could similarly argue that if the legislature wanted to specify the rate in effect during redemption as the default rate (in this case at 21 percent), it would have said so.

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[10] ACB, p. 6.
[11] ACB, p. 6.

This argument does not answer the question of what is the applicable contract rate. The Supreme Court must decide. And its decision will set precedent for future loans to redeeming debtors and their assignees because this issue has never before been decided.

Thirdly, IBA argues that the default rate would "serve to encourage additional bidders at foreclosure sales in order to put property back to its most provident and productive use." [12] Is the bidder motivated by the rate of return expected on the Certificate of Purchase? Or is the bidder motivated by a desire to purchase a particular parcel of real estate?

IBA does not identify the source or explain the basis of its claimed expertise for asserting this psychological determination. However, the facts of this case show Mlady's motivation for bidding at the Sheriff's Sale was based upon his desire to purchase the real estate, not the return on his investment on the Certificate of Purchase.

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[12] ACB, p. 7.

On remand from the first appeal, the Iowa District Court ruled that Mlady be paid 21 percent on his Certificate of Purchase and that Dougan receive title to the real estate. Mlady could have accepted the 21 percent return on his investment. App. p. 321. Instead he appealed. And Dougan's payments indicate her willingness to redeem, even if the 21 percent is required. App. p. 422.

Fourth, IBA argues for the default rate stating, "Financial institutions in Iowa, as in other states, are not in the business of owning property received in foreclosure" [13] and should have the ability "to contract for any rate of interest, including default rates . . ." [14] Essentially, IBA argues that banks do not want to own the foreclosed real estate, but instead want to finance the purchase of the real estate. Dougan agrees.

If the proposed policy is to encourage returning the foreclosed property into the marketplace, and if the banks do not want to own the foreclosed real estate, what is the

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[13] ACB, p. 7.
[14] ACB, p. 7.

justification for IBA's argument to impose a default rate upon the redeeming debtor?

Dougan agrees that a redeeming debtor should be entitled to finance the repurchase of his or her foreclosed property at competitive rates contained in the original "contract" as opposed to the default rate. Thus, Conrad Clement, or his assignee, Dougan, should be entitled to redeem at the original contract rate of 4.25 percent. Dougan makes no argument that the bank cannot impose a default rate if the debtor defaults on his or her repurchase by redemption.

As a corollary to that argument, she agrees that banks be free to contract with redeeming creditors for a known interest rate. That is the basis of her citation of this policy in Tansil v. McCumber, 206 N.W. 680, 686 (Iowa 1925).

Ironically, IBA argues for the imposition of a default rate of interest during redemption in favor of Mlady who is a bidder and not a redeemer in this case, and contrary to its professed policy for filing its Amicus Curiae Brief of promoting freely

contracting with debtors to facilitate redemption. Why would an enterprising and competitive bank seeking to loan a debtor or his or her assigns money to redeem want to be locked into a mandated default rate of interest?

ALLOWING SUE DOUGAN THE EQUITABLE RIGHT TO REDEEM IF THE COURT WERE TO ADOPT THE 21 PERCENT DEFAULT RATE WOULD NOT CONFUSE THE REDEMPTION PROCESS NOR NEGATIVELY IMPACT FUTURE UNDERWRITING OF LOANS TO REDEEM

IBA states that a second aspect of its purpose in filing the Amicus Curiae Brief is to discuss "the need for certainty required for calculations of redemption amounts by the redeeming party." [15]

Dougan agrees with this need for certainty required for calculation of the redemption amount. Dougan is the consummate victim of uncertainty of what is meant by "contract right" in § 628.13 when the promissory note sued on provides for two rates.

The Sheriff's Sale occurred on May 22, 2017. On April 2, 2018, prior to the expiration of the one year period of

[15] ACB, p. 4.

redemption on May 22, 2018, Dougan applied for safe harbor relief under § 628.21 requesting the Court to rule on the applicable contract rate required for her to redeem under § 628.13, seeking to remove the "guessing game" [16] from the calculation of the redemption amount. App. p. 78. The District Court mistakenly denied Dougan the right to redeem. App. p. 96. The District Court did not rule on her Application until September 28, 2019, after the Court of Appeals had corrected the erroneous District Court decision. App. p. 414, 417. Dougan then promptly paid the additional $1,798.79 on October 9, 2019. App. p. 422. Dougan has never sought to pay less than the amount required to redeem, even though she disagrees that it be computed at 21 percent. The Clerk of Court now holds the funds necessary to redeem in full in the amount of $1,938,799.79 even if the default rate is used to calculate the amount to redeem.

IBA argues that granting Dougan equitable relief in this case to allow her to redeem after the one year period of

[16] ACB, p. 8.

redemption expired would create a "guessing game" [17] for certificate holders and a "subjective extension of the redemption period . . . would negatively impact attracting qualified bids at foreclosure sales." [18] IBA does not explain how.

Further, IBA argues that granting Dougan equitable relief to redeem would inject "subjectivity into the redemption process" which would be "factored by financial institutions when pricing loans." [19]

IBA does not explain how Dougan's action throughout this litigation and in redeeming at the 21 percent rate, if that is the decision of the Court, would result in subjectivity and confusion in the redemption process as opposed to the clarity and certainty Dougan has sought from the beginning in her efforts to redeem.

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[17] ACB, p. 8.
[18] ACB, p. 8.
[19] ACB, p. 8.

Dougan asks now to redeem if the default rate is imposed based upon the equitable principle of Sibley State Bank v. Zylstra No. 19-0126, 2020 WL 4814072 and Tharp v. Kerr, 119 N.W. 267, 268 (Iowa 1909).

Dougan asks the Court to eliminate the determination of the "contract rate" as a guessing game where, as in this case, the promissory notes recite both a base rate of 4.25 percent and a default rate of 21 percent. In the future, bankers will be able to rely upon the decision by the Court in this case as having removed the uncertainty of the applicable contract rate.

CONCLUSION

Even though IBA has mistaken assumptions regarding Dougan's arguments as a basis for filing its Amicus Curiae Brief; has misstated the key issue in this case; and ironically argues for the imposition of the default rate of 21 percent as the contract rate for redemption while espousing a philosophy of encouraging the debtor to redeem, Dougan joins with IBA in requesting the Supreme Court to decide the applicable contract rate for redemption under § 628.13 in order to bring

clarity to and eliminate confusion in the marketplace. She asserts that the 4.25 percent base rate is consistent with the policy of encouraging the debtor to redeem and returning foreclosed real estate to the marketplace. She asserts that allowing her to equitably redeem at 21 percent, if the Court were to decide upon the default rate, would not confuse or create subjectivity in future underwriting of loans to redeeming debtors or their assignees.

Dougan is all for redemption, as is IBA. But Dougan correctly espouses that the way to promote redemption is at a competitive market base rate instead of a mandated default rate.

Submitted and served this 5th day of May, 2021.

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CERTIFICATES OF COST, SERVICE, AND COMPLIANCE

CERTIFICATE OF COST

The undersigned attorney for Appellee-Cross Appellant certifies that the amount actually paid for printing and duplicating the necessary copies of this brief in proof form was **$0.00.**

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee-Cross Appellant certifies that on the date referenced below he filed this Reply Brief to Amicus Curiae with the Clerk of the Supreme Court by EDMS on counsel for Appellant-Cross Appellee at:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,027 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14 point Bookman Old Style font.

Submitted and served this 5th day of May, 2021.

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