IN THE COURT OF APPEALS OF IOWA

No. 3-1065 / 13-0426
Filed January 9, 2014

MICHAEL DEVINE, STANLEY M. REEG, and LUCILLE O'CONNELL,
Plaintifsf-Appellees,

vs.

SYLVIA ROGERS, Individually, and as Successor in Interest to EVERETT ROGERS, Deceased,
Defendant-Appellant,

and

CHARLES E. GREEN, BARBARA J. GREEN, and IH MISSISSIPPI VALLEY CREDIT UNION,
Defendants.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Sylvia Rogers appeals from a foreclosure decree. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellant.

Daniel P. Kresowik of Stanley, Lande & Hunter, P.C., Davenport, for appellees.

Heard by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

Sylvia Rogers appeals from a foreclosure decree, contending the trial court erred in finding her interest in the subject property was junior and inferior to the liens of Michael Devine, Stanley Reeg, and Lucille O'Connell. Because the statute of limitations has run on any contract upon which Rogers' lien is based, the district court did not err in concluding it is junior and inferior.

I. Background Facts and Proceedings.

The following facts are supported by the record before us.

In August 1991, Charles and Barbara Green, husband and wife, purchased the Fairyland Park Ballroom (Fairyland) using funds obtained from various sources, including Barbara's parents, Everett and Sylvia Rogers; Lucille O'Connell; and James Richmond.

On November 15, 1991, the Greens executed a promissory note to Lucille O'Connell in the amount of $35,000, with interest in the amount of ten per cent per annum.

That same date, November 15, 1991, the Greens executed a real estate mortgage on Fairyland. The stated consideration was a loan in the amount of $90,000 from the mortgagee, "ROR, a Partnership."

On June 6, 1995, the Greens signed a promissory note to Mike Devine for $50,000, with eleven percent interest per annum. Payment terms were stated: "Principal and interest shall be payable at such time as the undersigned obtain long term financing for short, medium and long term financing of the Fairyland Park Ballroom operation." The Greens also signed a promissory note to Stanley

Reeg for $50,000 on terms identical to the note to Michael Devine. That same date, the Greens signed a document entitled "Grant Mortgage," which reads:

> We, the undersigned, Chuck Green and Barb Green, husband and wife, hereby agree to execute a Mortgage in favor of Mike Devine and Stan Reeg to secure a loan in the amount of $100,000 which will share in the first priority lien position on real estate commonly known as Fairyland Ballroom. This first priority is currently held by Everett Rogers and Sylvia Rogers, husband and wife, and Lucille O'Connell.
>
> The end result will be that all five Mortgagees will share first lien priority.

On February 10, 1996, the Greens executed an "amended" real estate mortgage on Fairyland in the amount of $188,500 to "ROR, a partnership."

Also on February 10, 1996, Everett and Sylvia Rogers, Lucille O'Connell, Michael Devine, and Stanley Reeg signed a document entitled "Agreement," which reads:

> The undersigned have accepted the Amended REAL ESTATE MORTGAGE—IOWA, dated February 10, 1996, from Charles E. Green and Barbara J. Green, husband and wife, Mortgagors, to ROR, a partnership, Mortgagees, a copy of which is attached hereto and incorporated herein by this reference, as security for repayment of their respective attached promissory notes, presently having the following balances as of this date, to wit:
>
> Everett Rogers, Sylvia Rogers and Lucille O'Connell, $88,500.00 unpaid principal plus $31,641.78 interest to date;
>
> Stanley M. Reeg, $50,000 unpaid principal, plus $3,752.05 interest to date;
>
> Michael G. Devine, $50,000 unpaid principal, plus $3,752.05 interest to date.

The Greens made no payments to Everett and Sylvia Rogers at any time and no demands for repayment by the Rogers were ever made.

On September 3, 2010, Michael Devine and Stanley Reeg filed separate petitions for foreclosure, asserting the Greens borrowed $50,000 from each of

them on June 6, 1995; executed a real estate mortgage securing payment; failed to make scheduled payments; and failed to cure defaults. Devine alleged his promissory note had been lost, but asserted the note was essentially identical to a promissory note given to Stanley Reeg by the Greens, a copy of which was attached to the petition.

After consolidation and amendments, this foreclosure action added Lucille O'Connell as a plaintiff,[1] and added as defendants IH Mississippi Valley Credit Union and Sylvia Rogers, individually and as successor in interest to Everett Rogers.

On October 23, 2012, the day before trial, the defendants filed an answer to the third amended petition asserting four affirmative defenses, which state in essence: (1) plaintiffs' claims were founded on written contracts and sought the recovery of real property; "[a]ctions on those written contracts cannot be brought after ten years from the time at which they accrued" and are thus barred by Iowa Code section 614.5 (2009); (2) the claims of Reeg and Devine are not yet due under the terms of their promissory notes; (3) the 1996 mortgage upon which Reeg and Devine rely was not signed by the Greens and no competent evidence can alter the terms of that document; and (4) "[t]he establishment of the claims of the plaintiffs violates the Parole Evidence Rule."

[1] It is not clear when O'Connell became a plaintiff. Pleadings include her name in the signature line prior to the April 2011 first amended petition, which is the first pleading in which her name appears in the caption.

The case went to trial on October 24, 2012. Sylvia Rogers did not appear, but was represented by the defendants' counsel.[2] The Greens acknowledged the loans, and asserted a defense that the statute of limitations had run.

Stanley Reeg testified he loaned $50,000 to Charles and Barbara Green in June 1995, and identified the promissory note evidencing the loan. Reeg stated the Greens signed the "Grant Mortgage"—which was not recorded—"so we [Reeg and Devine] could have legal recourse if he [Charles] didn't pay." Reeg testified he and Devine would not have loaned the Greens money if they were not granted a priority lien on the property, and the Greens told him "it was not a problem." Reeg also testified he was aware of a previous mortgage on Fairyland.[3] Reeg identified the February 10, 1996 agreement, wherein Everett and Sylvia Rogers, Lucille O'Connell, Michael Devine, and Reeg "accepted" the 1996 amended mortgage to ROR as security for their respective loans. Reeg stated he thought ROR was Sylvia and Everett Rogers and Lucille O'Connell, "but today, I hear it was Richmond, O'Connell and the Rogerses."

Reeg also identified an "amended" real estate mortgage concerning Fairyland in the amount of $188,500, which was signed by the Greens on February 10, 1996, and notes the mortgagee was "ROR, a partnership." Reeg stated the mortgage was prepared by the Richmond Law Office. The mortgage was recorded in Scott County on March 4, 1996; filed in Clinton County on June 6, 1996; and re-recorded in Scott County on July 17, 1996. After the Greens signed the amended mortgage and after it was first recorded, changes were

[2] Counsel for Rogers did not appear at oral argument.
[3] This previous mortgage presumably was the 1991 mortgage in which the mortgagee was identified as "ROR, a partnership."

made to the mortgage document—the name of the mortgagee was changed in one place on the form from "ROR, a partnership," to "Everett Rogers, Sylvia Rogers, Lucille O'Connell, Michael G. Devine and Stanley M. Reeg." The following language was also added:

> This mortgage shall be security for loan from Everett Rogers, Sylvia Roger [sic] and Lucille O'Connell in the amount of $88,500.00 unpaid principal plus $31,641.78 interest to 2/10/1996. To Stanley M. Reeg, $50,000.00 unpaid principal, plus $3,752.05 interest to 2/10/1996. To Michael G. Devine, $50,000.00 unpaid principal, plus $3752.05 interest to 2/10/1996.

Reeg did not know who had made the changes to the mortgage, but testified, "I'm assuming it was done at Richmond Law Office." The changes are reflected on the document re-recorded in July 1996. Reeg testified he received payments from the Greens in 2000 and 2001 totaling $6432.08.

Lucille O'Connell then testified. O'Connell, age ninety-one, stated she had been a legal secretary for James Richmond of the Richmond Law Office for thirty-two years. She was personal friends with Charles and Barbara Green and had been their bookkeeper from 1995 through December 2010. O'Connell testified she was also friends with Sylvia Rogers, and knew Reeg and Devine from church and their respective businesses.

O'Connell identified a promissory note from the Greens for $35,000 dated November 15, 1991. She stated she loaned the money for the Greens' purchase of Fairyland. O'Connell testified she received a $2323.77 payment from the Greens on July 14, 1992, $500 of which was designated principal; a $4680

payment on July 30, 2003;[4] a $1000 payment on July 28, 2009; and a $1000 payment on February 23, 2010. O'Connell testified she prepared the 1991 real estate mortgage listing ROR as the mortgagee. She stated ROR was a "temporary partnership" of Sylvia and Everett Rogers (R), O'Connell (O), and Richmond (R). She was not sure who prepared the 1996 amended mortgage, or who recorded it, but she never recorded documents—Richmond did. She did not recall whether she was the person who made changes to the 1996 mortgage after it was signed by the Greens and was first recorded: "I could have because it looks like our typewriter."

Charles Green testified he and his wife, Barbara, have owned Fairyland since August 29, 1991. He testified the Rogerses provided $55,000 in August 1991,[5] but there was no promissory note now to be found, though he asserted there had been one executed. He stated Lucille O'Connell and James Richmond also gave the Greens money in 1991. Charles acknowledged O'Connell loaned them $35,000 and that they owe her the principal sum of $34,500 and interest at ten percent. He also acknowledged that on November 15, 1991, the Greens signed a real estate mortgage in the amount of $90,000 to "ROR, A Partnership." He stated the Greens had never repaid any money to the Rogerses and that the Rogerses had not asked for any money "at this point."

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[4] Apparently this was the amount of a real estate commission O'Connell owed to Charles Green as a result of the sale of her home, which Charles then refunded to O'Connell.

[5] Charles testified the Rogerses loaned the Greens $55,000. He acknowledged that in answers to interrogatories, the sum stated was $85,000. Charles testified, "The reason it's 85, they took Mr. Richmond out." However, the $85,000 figure would not comport with the 1991 mortgage given in the amount of $90,000 to ROR, which included $35,000 owed to O'Connell.

Charles further testified the Greens executed a promissory note to Reeg dated June 6, 1995, and "an identical one" to Devine. Charles stated Richmond's office prepared the promissory notes and other documents involved. He acknowledged receiving $50,000 from Reeg and $50,000 from Devine. He also admitted the Greens had been asked to make payments to O'Connell, Reeg, and Devine over the years. Charles stated the Greens had made some monthly payments to Reeg and Devine in 2000 and 2001.

The Greens made no payments to ROR, though they made some payments to O'Connell as an individual member of the "partnership."

Charles testified he signed the Grant Mortgage in June 1995, which stated the Greens would execute a mortgage in favor of Devine and Reeg. Charles also admitted signing the mortgage dated February 6, 1996, but testified there had been changes made to the document since he signed it. He stated, "The original document that we signed didn't have Mike or Stan's name on it." Charles acknowledged, however, testifying at deposition that the mortgagees were "the five individuals" named on the changed document because "the ROR, when Richmond was out, that was gone."

Charles also testified Sylvia Rogers was ninety-two years old at the time of trial and not in good health. He gave the following testimony in response to questions by the defendants' attorney:

> Q. All right. So as of that date [February 10, 1996], Everett Rogers and Sylvia Rogers signed a document acknowledging that they were entitled to $88,500 plus interest? A. Correct.
>
> Q. That's never been paid? A. No, that's correct.
>
> Q. Of that $88,500, about 35 of that is Lucille's? A. Approximately.

> Q. Okay. A. Like I said, this is the one that could be off on the figure.

Michael Devine testified he made a personal loan of $50,000 to the Greens. He explained a promissory note with the same terms as Reeg's was executed but now was lost. He stated he received payments from the Greens in 2000 and 2001 (totaling $6432.08), but then further demands for payment were met by excuses from Charles Green. He stated he would not have lent the Greens the money in 1996 if he did not share in having first lien priority with the Rogerses and O'Connell.

On February 22, 2013, the district court filed a decree, describing the case as one "of long-suffering creditors who only recently decided to enforce several notes and a mortgage that were executed at least seventeen years ago." The court found Sylvia and Everett Rogers "delivered to their daughter" $55,000, which was to be used to purchase Fairyland Park Ballroom, "the real property that is the subject of this mortgage foreclosure action." The court found the Greens executed a promissory note to O'Connell for $35,000 on November 15, 1991. That same date, the Greens executed a real estate mortgage in favor of ROR, "an acronym that stood for Rogers, O'Connell and Richmond." The court wrote, "Attorney Richmond apparently assigned whatever interest he had in the mortgage to the Rogerses." The court also found Reeg and Devine each loaned the Greens $50,000.

The district court wrote,

> Looking at the equities in this case the court is confronted, on the one hand, with three plaintiffs who slept on their rights under their mortgages for years and who are now suing on promissory notes that are either ancient, have gone missing or contain no actual

> repayment terms. On the other hand, the court has before it two defendants who received at least $135,000.00 that they promised to repay but, over the course of more than two decades, have not repaid enough money to cover the interest accrued.

Because the Greens made their last payments to Reeg and Devine in July 2001 and to O'Connell in 2010, the court found the ten-year statute of limitations for written contracts did not bar their action.

Turning to the question of whether the identification of the mortgagee as ROR in the 1991 and original 1996 mortgages' resulted in voiding the documents, the district court wrote, in part:

> Looking first to the properly executed mortgage, the one recorded March 4, 1996, and undeniably signed by the Greens, it is apparent that the mortgage was given to "ROR, a partnership." There is no evidence that ROR was any kind of legal entity . . . . This alone, however, will not serve to invalidate a mortgage as a binding legal document between the parties. Mortgages run to the individuals to whom they are granted, not merely the names on the face of the document.

The court found ROR referred to Everett and Sylvia Rogers, O'Connell, and Richmond, who "shared a mortgage interest in the real property that is the subject of this dispute." The court went on to determine that Reeg and Devine also had established the right to an equitable mortgage. The court concluded, "Therefore, based on all of the evidence of the assorted mortgages and the documents executed contemporaneously with them, Devine, Reeg and O'Connell all possessed equal priority liens on Fairyland and are entitled to foreclose upon them to recover the defaulted debts owed them by the Greens."

With respect to Sylvia's interest, however, the court found that the evidence presented did not overcome a presumption that the money provided to the Greens by the Rogerses was other than a gift. The district court then wrote,

"Regardless, any lien held by Sylvia Rogers is equal in priority to the liens foreclosed by Devine Reeg and O'Connell."

The court then determined Devine, Reeg, and O'Connell were not entitled to recover the entire balance of the principal and interest accruing since the execution of their respective notes. Citing *Frenzel v*. *Frenzel*, 152 N.W.2d 157, 158-59 (Iowa 1967), the court ruled the plaintiffs were entitled to recover only the payments having accrued within the statute of limitations. The court ordered judgment in rem against Fairyland, ordered the property sold, and declared "the plaintiffs' mortgage is a first lien against the real estate and the lien claim title and interest of every other defendant is junior and inferior and subsequent to plaintiffs' liens."[6]

Sylvia Rogers appeals, contending the court erred in finding the money she gave to the Greens was a gift. She also asserts the court erred in finding any lien she held was "equal in priority to the liens foreclosed by Devine, Reeg and O'Connell," but then ruling the liens of defendants, including Sylvia, were junior, inferior, and subject to foreclosure.

II. Scope and Standard of Review.

Mortgage foreclosure proceedings are equitable in nature. *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388, 390 (Iowa 1988). "Because the proceeding in the district court was tried by equitable proceedings, our review of both the facts and the law is de novo." *Fairfax v. Oaks Dev. Co.*, 713 N.W.2d 704, 706 (Iowa 2006).

[6] Devine, Reeg and O'Connell did not appeal the court's ruling. The Greens' appeal was voluntarily dismissed. Consequently, only Sylvia Rogers' concerns are before us.

III. Discussion.

A mortgage is "a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms." Black's Law Dictionary 1101 (Ninth ed. 2009); *see Frenzel*, 152 N.W.2d at 160 ("The mortgaged property stands as security for the payment thereof 'according to the tenor' of the note.").

As the party asserting the mortgage secured a debt owed to her, Rogers has the burden of proof. *See* Iowa R. App. P. 6.904(3)(e) ("Ordinarily, the burden of proof on an issue is upon the party who would suffer loss if the issue were not established."); *Graber v. City of Ankeny*, 616 N.W.2d 633, 642 (Iowa 2000); *Beyer v. Todd*, 601 N.W.2d 35, 41 (Iowa 1999).

Rogers contends, "All the documentary evidence here supports a loan, not a gift." She notes the 1991 mortgage admits a loan of $90,000; the 1996 mortgage "would support the original 1991 loans plus the $100,000 from Reeg and Devine"; the February 1996 agreement noting $88,500 plus interest owed to O'Connell and the Rogers. She argues Charles Green acknowledged a loan—not a gift—of $55,000 was made by the Rogerses to the Greens. She asserts various documents indicate her lien shared priority with O'Connell, Reeg, and Devine. Rogers argues the trial court's finding the money was a gift "is essentially a finding of an un-pleaded, unproven allegation of lack of consideration."

The plaintiffs respond the evidence does not establish the money given by the Rogerses to the Greens was a loan. The plaintiffs point out there was no

repayment plan, no interest, no demand for repayment, and more basically, there is a question as to the amount of money given by the Rogerses.

In any event, the plaintiffs argue that even if the Rogerses did loan the money to the Greens, any attempt to recover the money now is barred by the statute of limitations. Whether or not the money given by the Rogerses to the Greens was a gift, we agree with the result reached by the district court.[7] Even if we could determine the money was a loan, Rogers does not address the problem presented by the statute of limitations. *See* Iowa Code § 614.1 (2009).

Rogers contends she loaned the Greens money in 1991. The Greens conceded the loan and asserted at trial there had been a signed promissory note. But, because the note is now missing, the plaintiffs argue Rogers is claiming an interest based upon an unwritten contract or loan, which is subject to a five-year statute of limitations. *See id.* § 614.5(4).

A contract is considered written for purposes of the statute of limitations if the essential facts establishing liability of the defendant are clear on the face of the writing. *Matherly v. Hanson*, 359 N.W.2d 450, 454 (Iowa 1984); *Lamb v. Withrow*, 31 Iowa 164, 168 (1870). The only documents available for our review, while providing evidence of liability, lack essential information about any terms of repayment. *See Royal Indem. Co. v. Factory Mut. Ins. Co*., 786 N.W.2d 839, 846

[7] We disagree with the trial court's finding that the money given by the Rogerses in 1991 was a gift. Iowa Code section 633.224 provides, "Every gratuitous inter vivos transfer is presumed to be an absolute gift, and not an advancement. Such presumption is rebuttable." In *In re Marriage of Vrban*, 359 N.W.2d 420, 427 (Iowa 1984), the court found the "parents performed a significant act each time they wrote the word 'loan' on checks," which "clearly designated the funds transferred by each check to be loans for which the parents expected repayment." In the February 1996 agreement, the Rogerses asserted they were entitled to repayment of some part of $88,500. This could be considered a "significant act" by which the Rogerses evidenced they expected repayment.

(Iowa 2010) ("'For a contract to be valid, the parties must express mutual assent to the terms of the contract.' Mutual assent is present when it is clear from the objective evidence that there has been a meeting of the minds. To meet this standard, the contract terms must be sufficiently definite for the court to determine the duty of each party and the conditions of performance." (citations omitted)). In any event, assuming there was a note, "[t]he Iowa authorities and rules are to the effect a note payable on demand is payable upon the date of its execution, and is barred by the statute of limitations in ten years from its date." *Stebens v. Wilkinson*, 87 N.W.2d 16, 17 (Iowa 1957).[8]

The 1996 mortgage signed by the Greens states the mortgage was "in consideration of $188,500 loaned by Mortgagee." Language added by someone after the Greens signed the mortgage includes the statement, "This mortgage shall be security for loan from Everett Rogers, Sylvia Roger[s] and Lucille O'Connell in the amount of $88,500 unpaid principal plus $31,641.78 interest to 2/10/1996." Thus, the most recent document Rogers can point to that sets out any material term of a debt is dated in 1996 where the Greens acknowledged they owed ROR $188,500. The statute of limitations for written contracts is ten years, which would have run in 2006. *See* Iowa Code § 614.5(5). This action for foreclosure was filed in 2010. We observe the defendants argued the entire

[8] This is so even if a demand note provides for interest. *Stebens*, 87 N.W.2d at 19 ("We are convinced the sounder rule is the one to the effect that even though a demand note provides for interest nevertheless the statute of limitations begins to run against an ordinary note payable on demand from the date of its execution, and not from the time of any demand.").

foreclosure action was time barred by the ten-year statute of limitations. Rogers on appeal does not argue otherwise.[9]

Rogers, though a nominal defendant in this action, is seeking to avoid the plaintiffs' foreclosure action by asserting a priority lien on the property at least on par with the plaintiffs. However, her lien is barred by the statute of limitations. "[W]hen a debt is barred by the statute of limitations the remedy upon the mortgage is also barred." *Monast v. Manley*, 293 N.W. 12, 13 (Iowa 1940); *accord Swartz v. Bly*, 183 N.W.2d 733, 738 (Iowa 1971) (citing *Anderson v. Anderson*, 12 N.W.2d 571, 575 (Iowa 1944)). On this basis alone, we affirm the district court.

AFFIRMED.

[9] Neither party addresses Iowa Code section 614.17A, which prohibits certain actions "to recover or establish an interest in or claim to real estate." In *In re Estate of Hord*, 836 N.W.2d 1, 5 (Iowa 2013), our supreme court stated, "[T]he statute bars actions to recover or establish interests in or claims to real estate in two situations: if the claim arose more than ten years previously, *see* [Iowa Code] section 614.17A(1)(a), or if a ten-year extension period expired without the claimant filing a statement triggering an additional ten-year extension, *id.* § 614.17A(2)."