IN THE COURT OF APPEALS OF IOWA

No. 0-407 / 09-1816
Filed July 28, 2010

**FFMLT 04-FF10, BANK OF NEW YORK,
as Successor in Interest to JP MORGAN
CHASE BANK, N.A., as Trustee,**
Plaintiff-Appellee,

vs.

BARBRA J. SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Barbra Smith appeals from a district court order denying her motion to quash the special execution and sale of her residence and grant declaratory relief. **REVERSED AND REMANDED WITH DIRECTIONS.**

Robert C. Griffin, Des Moines, for appellant.

Benjamin W. Hopkins, of Petosa, Petosa & Boecker, L.L.P., Clive, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Barbra Smith appeals from a district court order denying her motion to quash the special execution and sale of her residence and grant declaratory relief. Smith contends the district court erred because the foreclosure judgment entered on July 5, 2007, was null and void pursuant to the statute of limitations in Iowa Code section 615.1 (2007), and thus, no execution could issue thereon. For the following reasons, we reverse.

I. Background Facts and Proceedings.

Smith resides in a single-family residence at 371 NE 52nd Street in Des Moines, Iowa, with the legal description of Lot 2, W.H. Dean Place, An Official Plat, Polk County, Iowa. On April 4, 2007, Bank of New York filed an action to foreclose upon Smith's mortgage. Smith filed her demand for a six-month delay of sale on April 13, 2007 pursuant to Iowa Code section 654.21, which provides:

> At any time prior to entry of judgment, the mortgagor may file a demand for delay of sale. . . . [I]f the demand is filed and the mortgaged property is the residence of the mortgagor and is a one-family or two-family dwelling, the sale shall be held promptly after the expiration of twelve months, or six months if the petition includes a waiver of deficiency judgment, from entry of judgment.

On July 5, 2007, the district court entered an in rem foreclosure decree in favor of Bank of New York, which provided for the execution sale of Smith's residence. However, the demand to delay sale Smith filed prohibited Bank of New York from seeking execution on the foreclosure judgment until six months after the foreclosure decree was filed.

On July 24, 2009, a special execution was issued for enforcement of the July 5, 2007 foreclosure judgment. Thereafter, Smith filed a motion to quash the

special execution and sale of her residence and grant declaratory relief, contending the two-year statute of limitations imposed in Iowa Code section 615.1 rendered the foreclosure judgment null and void and prohibited its execution. Bank of New York subsequently filed a resistance to Smith's motion to quash, arguing the two-year statute of limitations was tolled for six months as a result of Smith's demand to delay sale.

On October 29, 2009, the district court denied Smith's motion to quash the special execution and sale and grant declaratory relief, finding "it [did] not have the discretion to stop the sale of the real property in this cause." This ruling allowed the special execution and subsequent sheriff's sale, scheduled for the same day, to proceed. Bank of New York purchased the property at the sheriff's sale and now asserts legal title to it. However, Smith continues to reside on the property. Smith now appeals.

II. Scope and Standard of Review.

We review a district court's denial of a motion to quash based on statutory construction for errors at law. *War Eagle Vill. Apartments v. Plummer*, 775 N.W.2d 714, 717 (Iowa 2009). Consequently, we must determine if the district court correctly interpreted Iowa Code section 615.1.

III. Preservation of Error.

We first address whether error was preserved. Bank of New York contends error was not preserved because Smith did not introduce into evidence any supporting facts to prove the applicability of section 615.1. Specifically, Bank of New York argues Smith only filed a bare motion to quash and presented no

evidence to the district court that the property was a one-family or two-family dwelling at the time the foreclosure judgment was entered.

Before an issue can be reviewed on appeal, it must be both raised and decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The failure to present evidence may result in the failure to preserve error. *Spies v. Prybil*, 160 N.W.2d 505, 507 (Iowa 1968). Here Bank of New York contends no evidence was presented that the property in question was a one or two-family dwelling. However, the resistance alleged the statute of limitations was tolled by Smith's demand to delay the sale for six months. Iowa law only permits a six-month delay in a sheriff's sale where the mortgaged property is the defendant's residence and is a one-family or two-family dwelling. Iowa Code §§ 654.20, .21. Thus there are no disputed facts, and the only dispute is the legal issue of whether Smith's demand to delay sale tolled the statute of limitations, which Smith raised in her motion to quash. Since the district court ruled on Smith's motion on October 29, 2009, by concluding it did not have discretion to stop the sale, the legal issue on appeal was both raised and decided by the district court. For the above reasons, error was preserved.

IV. Discussion.

When the district court entered the foreclosure decree on July 5, 2007, Iowa Code section 615.1 provided, in part:[1]

[1] The section was later re-formatted as follows:

> 1. After the expiration of a period of two years from the date of entry of judgment, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action, a judgment entered in either of the following actions shall be null and void, all liens shall be extinguished, and no execution shall be issued for any purpose other than as a setoff or counterclaim:

> A judgment in an action for the foreclosure of a real estate mortgage, deed of trust, or real estate contract upon property which at the time of judgment is either used for an agricultural purpose as defined in section 535.13 or a one-family or two-family dwelling which is the residence of the mortgagor, or in any action on a claim for rent shall be null and void, all liens shall be extinguished, and no execution shall be issued for any purpose other than as a setoff or counterclaim after the expiration of a period of two years, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action, from the entry thereof.

It is not disputed that the July 5, 2007 judgment was entered in an action for the foreclosure of a real estate mortgage, the property at issue is a one-family dwelling, and the property is the mortgagor's (Smith's) residence. The issue,

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> a. An action for the foreclosure of a real estate mortgage, deed of trust, or real estate contract upon property which at the time of judgment is either used for an agricultural purpose as defined in section 535.13 or as a one-family or two-family dwelling which is the residence of the mortgagor.
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> b. An action on a claim for rent.
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> 2. As used in this section, "mortgagor" means a mortgagor or a borrower executing a deed of trust as provided in chapter 654 or a vendee of a real estate contract.

2008 Iowa Acts ch. 1031, § 66.

In 2009, the legislature again amended section 615.1, which now reads:

> 1. After the expiration of a period of two years from the date of entry of judgment, exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action *or order of court*, a judgment entered in *any* of the following actions shall be null and void, all liens shall be extinguished, and no execution shall be issued *except* as a setoff or counterclaim:
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> a. *(1) For a real estate mortgage, deed of trust, or real estate contract executed prior to July 1, 2009, an* action for the foreclosure of *the* real estate mortgage, deed of trust, or real estate contract upon property which at the time *the foreclosure is commenced* is either used for an agricultural purpose as defined in section 535.13 or as a one-family or two-family dwelling which is the residence of the mortgagor.
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> *(2) For a real estate mortgage, deed of trust, or real estate contract executed on or after July 1, 2009, an action for the foreclosure of the real estate mortgage, deed of trust, or real estate contract upon property which at the time of the execution of the mortgage, deed, or contract is either used for, or is being acquired for, an agricultural purpose as defined in section 535.13 or as a one-family or two-family dwelling which is the residence of the mortgagor.*
>
> b. An action on a claim for rent.

2009 Iowa Acts ch. 51, §2 (new language in italics).

rather, is one of statutory construction. We must determine whether Smith's demand to delay sale pursuant to section 654.21 tolled the two-year statute of limitations for six months, which would render the July 24, 2009 special execution within the two-year limit and maintain the validity of the July 5, 2007 judgment; or whether the demand to delay sale did not toll the statute of limitations, which would render the July 24, 2009 special execution outside the two-year limit and the July 5, 2007 judgment null and void.

The goal of statutory construction is to determine legislative intent. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000). Legislative intent must be determined from "the words chosen by the legislature, not what it should or might have said." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). The first step in ascertaining legislative intent is examining the language in the statute. *Estate of Ryan v. Heritage Trails Ass'ns, Inc.*, 745 N.W.2d 724, 729 (Iowa 2008). The meaning of a statute may not be extended, enlarged, or otherwise changed. *Auen*, 679 N.W.2d at 590. Therefore, no exception or exemption exists if no exception or exemption is found in the statute. *Rohrig v. Whitney*, 12 N.W.2d 866, 868 (Iowa 1944). Furthermore, the expression of one thing in the statute implies the exclusion of others not mentioned. *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002).

The legislature enacted chapter 615 of the Iowa Code during the Depression era to aid judgment debtors in financial distress by placing limitations on judgments. *Hell v. Schult*, 238 Iowa 511, 514-15, 28 N.W.2d 1, 3 (1947). The language of section 615.1 at issue unambiguously limits the lifespan of judgments obtained through mortgage foreclosure proceedings to two years,

except as setoffs or counterclaims, "exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action." The statute does not mention any tolling of the two-year statute of limitations during any action other than during pending bankruptcy proceedings. Iowa Code § 615.1. "This court may not, under the guise of construction, enlarge or otherwise change the terms of a statute. The express mention of one thing in a statute implies the exclusion of others." *Lacina v. Maxwell*, 501 N.W.2d 531, 533 (Iowa 1993) (finding that where an earlier version of section 615.1 "unambiguously omit[ted] foreclosure of a real estate contract" from the express list of applicable actions the statute was inapplicable to real estate contracts).

Iowa Code section 615.3 provides:

> Judgments hereafter rendered on promissory obligations secured by mortgage or deed of trust of real estate, but without foreclosure against said security, shall not be subject to renewal by action thereon, and, after the lapse of two years from the date of rendition, shall be without force and effect for any purpose whatsoever except as a setoff or counterclaim.

Our supreme court previously found no ambiguity in section 615.3 "that would permit [it] to expand or restrict [the statute's] 'fresh start' provisions beyond those plainly allowed for setoff or counterclaim." *Houghton State Bank v. Peterson*, 477 N.W.2d 94, 95 (Iowa 1991). There, the bank argued that although "not legally prevented from levying execution while suit was pending, it was *effectively* prevented from doing so until the relative priority of the lien holders was fixed by the court and affirmed on appeal." *Id.* The court rejected the argument that the statute of limitations was tolled during the pendency of a

lawsuit, noting that "the plain words of the statute make no room for exception" even if the remedy is harsh. *Id.* at 95-96.

Section 615.3 contains the same broad language as section 615.1, but applies to judgments rendered on promissory obligations secured by a mortgage, but without foreclosure against the security. Like section 615.3, the plain words of section 615.1 make no room for exception other than as setoffs and counterclaims, "exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action."

Our supreme court has also acknowledged an exception that tolls the applicable statute of limitations when a party is prevented from exercising a legal remedy due to pending litigation. *Id.* at 95. However, this exception is not applicable in this case.

Bank of New York cites *Lincoln Joint Stock Bank v. Bundt*, 234 Iowa 1011, 1017-19, 14 N.W.2d 865, 868 (1944), in support of its argument that section 615.1 was tolled for six months because the delay in execution was the result of Smith's actions. Bank of New York argues *Bundt* held that the two-year statute of limitations is tolled when actions of the debtor cause the delay in execution. Bank of New York contends Smith's invocation of section 654.21 (demand to delay sale) tolled the two-year statute of limitations for six months.

Bank of New York's reliance on *Bundt* is misplaced. First, *Bundt* noted that the appellee undertook to enforce its judgment by the issuance of an execution and sale thereunder, which "was timely." *Bundt*, 234 Iowa at 1016, 14 N.W.2d at 867. The sale, however, left a deficiency judgment. *Id.* at 1012, 14 N.W.2d at 865. The owner of the land prior to foreclosure sought to invoke the

two-year limitations period of 615.1 (then section 11033.1 (1939)) to bar the bank from collecting on the deficiency judgment. *Id.* at 1015, 14 N.W.2d at 867. The owner was seeking the payment of rents and profits in the hands of a receiver that had accumulated during the pendency of bankruptcy proceedings. *Id*. at 1012-13, 14 N.W.2d at 865-66.

The *Bundt* court noted that bankruptcy proceedings act as an automatic stay. *Id.* at 1018, 14 N.W.2d at 868. The court stated, "if Section [615.1] were applicable, it was tolled by [appellant's] own activities and she cannot now claim the benefit of the statute." *Id.* Bank of New York's attempt to apply this sentence so broadly as to bar application of the statute due to any activities of a mortgagor is not supported by *Bundt*.

The legislature codified this bankruptcy tolling by amending section 615.1 to add the language, "exclusive of any time during which execution on the judgment was stayed pending a bankruptcy action." 2006 Iowa Acts, ch. 1132, § 2. When interpreting laws, we are guided by the rule of "expressio unius est exclusio alterious." *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008). "This rule recognizes that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.'" *Meinders,* 645 N.W.2d at 637 (quoting *Marcus v. Young,* 538 N.W.2d 285, 289 (Iowa 1995)). The specific inclusion in section 615.1 of the bankruptcy tolling implies that no other exception or exemption exists. Application of the rule is further supported by the legislature's 2009 amendment (set out in full in footnote 1) inserting after the bankruptcy exception, an

additional exception via an "order of court."[2] It is clear the legislature will list exceptions if it intends exceptions to apply.

We also note that section 654.21 states specifically that "the sale shall be held promptly after" the statutory delay period, which tends to weaken the bank's claim that the demand tolls the two-year limitations period found in chapter 615.

Bank of New York also contends any issue concerning the validity of the foreclosure judgment is moot because it already bought the property at the sheriff's sale. We find this claim without merit because we have the power to declare a judgment null and void, even if the judgment has previously been executed. *See Hell*, 238 Iowa at 513-14, 28 N.W.2d at 2-3 (holding the two-year statute of limitations had run, rendering the judgment null and void even though a levy had been made on the property and the debtor's credits had already been garnished). "A void judgment ordinarily cannot be made valid and operative by . . . a sale on execution held under it." *Halverson v. Hageman*, 249 Iowa 1381, 1390, 92 N.W.2d 569, 575 (1958) (citation omitted). The fact that an execution sale has occurred does not moot the issue presented.

V. Conclusion.

We conclude the legislature did not intend a demand to delay sale obtained pursuant to Iowa Code section 654.21 to toll the two-year statute of limitations in section 615.1. Therefore, the July 24, 2009 special execution of the July 5, 2007 foreclosure judgment came nineteen days too late, rendering the judgment null and void.

[2] Unfortunately for the Bank of New York, the 2009 amendment only applies to judgments entered on or after the effective date of the Act, July 1, 2009. 2009 Iowa Acts ch. 51, § 17(2).

We reverse the decision of the district court and remand for entry of a decree declaring the sheriff's sale null and void, returning legal title to Smith, and declaring the July 5, 2007 foreclosure judgment null and void for any purpose other than setoff or counterclaim. Costs are assessed to the Bank of New York.

REVERSED AND REMANDED WITH DIRECTIONS.