IN THE COURT OF APPEALS OF IOWA

No. 0-959 / 10-1015
Filed February 23, 2011

JP MORGAN CHASE BANK
NATIONAL ASSOCIATION,
Successor in Interest to
WASHINGTON MUTUAL BANK
f/k/a WASHINGTON MUTUAL BANK, FA,
Plaintiff-Appellee,

vs.

DENNIS M. HAWKINS, et al.,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Dennis and Jan Hawkins appeal the district court's grant of summary judgment to JP Morgan Chase Bank on its foreclosure petition. **AFFIRMED.**

Kevin Cunningham of Howe, Cunningham, Lowe & Kelso, P.L.C., Urbandale, for appellants.

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

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

This appeal involves a mortgage foreclosure action. Dennis and Jan Hawkins challenge the district court's grant of summary judgment to JP Morgan Chase Bank on its foreclosure petition. They allege the mortgage was invalid under Iowa Code section 561.13 (2009) because only one spouse signed it. Because the homestead exemption statute does not apply to the purchase money mortgage executed in this case, we affirm the district court's grant of summary judgment.

I. Background Facts and Proceedings

On April 25, 2007, Dennis Hawkins executed a promissory note to JP Morgan Chase Bank (the bank) in a principal amount of $100,000 for residential property in Des Moines, payable in installments with a yearly interest rate of 7.75%. On the same day, he executed a purchase money mortgage to the bank. Paragraph twenty-five of the mortgage appeared in all capital letters and professed that by signing this mortgage the borrower was "voluntarily giving up" his homestead exemption rights with respect to claims based on this mortgage. The mortgage listed Dennis as "a married man." His wife, Jan, did not sign the mortgage. The mortgage was filed in the Polk County recorder's office on May 7, 2007.

On October 13, 2009, the bank filed a foreclosure petition against Dennis and his "spouse, if any." The petition indicated the bank elected foreclosure without redemption, meaning the mortgaged property would be sold at auction after entry of judgment unless the defendants demanded to delay the sale. The

petition alleged that on September 1, 2008, the mortgagors executed a modification agreement setting a yearly interest rate of 5.75% on the unpaid principal balance of $110,051.93. The petition also alleged that the note was in default and Dennis owed the bank $109,873.72 plus interest, fees, and costs. Dennis filed a pro se answer[1] on November 9, 2009, demanding a delay of the sale.

The bank sent a notice, dated November 17, 2009, expressing its intent to file a written application for default against Dennis's spouse. On November 20, 2009, Dennis filed a motion to dismiss, contending the bank did not have a valid mortgage because the property was their homestead and his wife did not sign the mortgage. On January 4, 2010, the bank moved for summary judgment on its foreclosure petition against the Hawkins. The bank also filed a request for a default judgment entry under Iowa Rules of Civil Procedure 1.971 and 1.972.

The district court issued its decree on January 27, 2010, concluding Dennis's spouse, Jan, was in default for failing to file pleadings in response to the bank's petition. The decree also reached the merits of the petition, concluding the Hawkins were in default on the mortgage and the bank was entitled to judgment against them. The court foreclosed the mortgage as the first lien against the residential property and delayed the sale for six months based on the request of the mortgagors.

On February 5, 2010, Dennis and Jan filed a motion to amend or enlarge the district court's findings of fact and conclusions of law under Iowa Rule of Civil Procedure 1.904. The Hawkins also sought to renew their motion to dismiss the

[1] The answer was filed on a form developed by Iowa Legal Aid.

foreclosure, alleging the mortgage was invalid because it was not signed by Jan. On that same day, Jan filed a motion to set aside the default judgment under Iowa Rule of Civil Procedure 1.977. The motion alleged Jan believed she was represented by Iowa Legal Aid along with her husband and that the pleadings had been filed on her behalf, as well as her husband's behalf.

On February 12, 2010, the bank resisted the Hawkins' motion to enlarge or amend and the motion to dismiss. The resistance asserted that the mortgaged property was not a homestead entitled to protection under Iowa Code section 561.13 because the foreclosed mortgage was a purchase money mortgage that did not provide the Hawkins a homestead interest in the real estate.

On May 20, 2010, the district court denied the Hawkins' motions. The court reasoned that the homestead exemption in section 561.13 did not apply to the purchase money mortgage. Dennis and Jan Hawkins appeal from this ruling.

II. Standard of Review

The Hawkins advance two issues on appeal: (1) the district court erred in refusing to set aside the default judgment against Jan and (2) the court erred in denying the Hawkins' motion to dismiss the forfeiture action based on the invalidity of the mortgage.

A proceeding to set aside a default judgment under rule 1.977 is at law. *Cent. Nat'l Ins. Co. of Omaha v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). District courts are vested with broad discretion in ruling on a motion to set aside a default judgment. *Id*. We will view the evidence in the light most

favorable to upholding the ruling and will find an abuse of that discretion only if the court's findings of fact are not supported by substantial evidence. *Id*.

Generally, we review an equitable claim to foreclose a mortgage de novo. *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 98 (Iowa 2004). But in this case, review is for correction of legal error, because the appeal challenges the grant of summary judgment. *See Moser v. Thorp Sales Corp*., 312 N.W.2d 881, 886 (Iowa 1981).

III. Mootness

JP Morgan Chase alleges in its appellee's brief that the Hawkins' challenge to the foreclosure action is now moot because the Hawkins did not take action to stay execution of the foreclosure decree and a sheriff sale already occurred.[2] A sheriff's deed was issued to Federal Home Loan Mortgage Company and recorded in the Polk County recorder's office on August 3, 2010. The Hawkins did not file a reply brief to counter the bank's claim of mootness.

"A case is moot when the issues involved have become academic or nonexistent, or when judgment, if rendered, will have no effect on the controversy." *First Nat'l Bank v. Heimke*, 407 N.W.2d 344, 345–46 (Iowa 1987).

> Courts are not organized for the purpose of determining mere abstractions. There must be real, present questions, involving actual interests and rights of the parties, to authorize us to consider the cases in which they arise. We will not settle questions which were involved in rights now no longer existing; and when, in a case

[2] The sheriff sale occurred on July 29, 2010, more than a month after the Hawkins filed their notice of appeal. The Federal Home Loan Mortgage Corporation, as assignee of the plaintiff, bid $120,000 for the property. The assignee filed a satisfaction of judgment on August 5, 2010. While the subsequent procedural actions in this case are technically outside the record of this appeal, we may consider them as we resolve the mootness claim. *See In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992).

> pending in this court, rights cease to exist, the appeal will be dismissed.

Manning v. Heath, 206 Iowa 952, 954, 221 N.W. 560, 561 (1928) (citations omitted).

The purchase of the mortgaged property at a sheriff's sale did not render moot the Hawkins' challenge to the validity of the foreclosure judgment. Iowa's appellate courts have the power to declare a judgment null and void, even if the judgment has previously been executed. *See Hell v. Schult*, 238 Iowa 511, 513–14, 28 N.W.2d 1, 2–3 (1947) (holding 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 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 a sheriff's sale already occurred does not leave the Hawkins without any remedy should they prevail in this appeal. Action may be taken to set aside the sheriff's sale and, ordinarily, the purchaser at a sheriff's sale acquires title subject to any defects for which he may be on notice. *See Hamsmith v. Espy*, 19 Iowa 444, 446 (1865) ("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."); *see also Francksen v. Miller,* 297 N.W.2d 375, 378 (Iowa 1980) (holding where wife was not joined in foreclosure action involving a homestead, "the foreclosure decree and sheriff's deed are valid against the husband but do not entitle [sheriff's sale purchaser] to possession" in his

subsequent forcible entry and detainer action "because they do not conclude [the] wife's rights").

Finding that the Hawkins' rights did not cease to exist when the sheriff's sale was executed, we turn to the merits of their claims.

IV. Analysis

A. Whether the district court erred in declining to set aside the default judgment?

The district court found that the bank complied with the notice requirement in rule 1.972 and was entitled to a default judgment against Jan, who did not file an answer to the forfeiture petition or any other pleadings. Jan asked the district court to set aside the default judgment based on rule 1.977, alleging as good cause that she believed she was being represented by Iowa Legal Aid and that the earlier pleadings were filed on behalf of both her and her husband. The court denied the motion on May 20, 2010.

For good cause shown, a court may set aside a default judgment for "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty." Iowa R. Civ. P. 1.977. In determining if good cause exists, a court must focus on four factors:

> First, did the defaulting party actually intend to defend? Whether the party moved promptly to set aside the default is significant on this point. Second, does the defaulting party assert a claim or defense in good faith? Third, did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake? Last, whether relief is warranted should not depend on who made the mistake.

Cent. Nat'l Ins. Co. of Omaha, 513 N.W.2d at 756.

The underlying purpose of rule 1.977 is "'to allow a determination of controversies on their merits rather than on the basis of nonprejudicial inadvertence or mistake.'" *Brandenburg v. Feterl Mfg. Co.*, 603 N.W.2d 580, 584 (Iowa 1999) (citation omitted).

While it appears from the record that Jan intended to defend against the forfeiture action and was simply mistaken in her belief that she was included in the pleadings filed by Legal Aid on behalf of her husband, we do not have to reach this claim. Jan obtained a determination of the controversy on the merits in the same decree finding her in procedural default. Because our analysis of the merits of the Hawkins' claim concerning their homestead rights and the validity of the mortgage in the next section of this opinion is dispositive of the appeal, we do not need to decide whether to reverse the district court's denial of the motion to set aside the default judgment against Jan.

B. Whether the district court should have found the mortgage invalid because it lacked the wife's signature?

The Hawkins contend the district court should have granted their motion to dismiss the foreclosure action based on the argument the mortgage was void because it was signed by Dennis, indicating he was a married man, but was not signed by his wife, Jan.

Iowa Code section 561.13 provides, in relevant part:

> A conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, is not valid, unless and until the spouse of the owner executes the same or a like instrument, or a power of attorney for the execution of the same or a like instrument . . . .

A mortgage, not signed by the spouse of the owner, is *void*, as to both the owner and the spouse. *Beal Bank v. Siems*, 670 N.W.2d 119, 124 (Iowa 2003).

The bank counters that Dennis signed a purchase money mortgage and the homestead protection codified in section 561.13 does not apply to purchase money mortgages. A purchase money mortgage is a mortgage that a buyer gives a seller, when property is conveyed, to secure the unpaid balance of the purchase price. Black's Law Dictionary 1028 (7th ed. 1999). The bank relies on *Christy v. Dyer*, 14 Iowa 438, 443 (1863), and *Brunsdon v. Brunsdon*, 199 Iowa 1099, 1103, 200 N.W. 823, 825 (1925), for the proposition that Iowa law has long recognized that a purchase money mortgage is not a debt arising after the acquisition of the homestead, and, thus, does not fall under the prospective reach of the homestead statute. The district court adopted this position.

We agree that section 561.13 does not apply here because Dennis entered a purchase money mortgage, giving the bank the mortgage to secure the unpaid purchase price of the mortgaged property. Because the purchase money mortgage is an antecedent debt, the Hawkins do not possess homestead rights as against the bank. *See Utley v. Boone*, 230 Iowa 979, 986, 299 N.W. 437, 440 (1941) (stating general rule to be "one holding under contract is entitled to a homestead exemption except as to the liability under the contract for the unpaid purchase money"); *Anderson v. Renshaw*, 229 Iowa 93, 100, 294 N.W. 274, 278 (1940) (noting that debt used as part of the purchase price of the homestead property "is held to be contracted prior to the acquisition of the homestead and the homestead is not exempt from execution on said judgment"); *Christy*, 14 Iowa

at 442 ("In this State it has been expressly held that a subsequent homestead right will not cut off the original claim for the purchase money."). Because the homestead provisions are not applicable as against the bank, the mortgage in this case was valid despite not meeting the joint spousal-signature requirement necessary for conveying or encumbering a homestead.

The Hawkins cannot show the mortgage was invalid under section 561.13, and they offer no additional defense to the foreclosure action. The district court was correct in determining the bank was entitled to summary judgment.

AFFIRMED.