IN THE COURT OF APPEALS OF IOWA

No. 2-368 / 11-1389
Filed June 27, 2012

WELLS FARGO BANK, N.A., SUCCESSOR,
Plaintiff-Appellee,

vs.

KATHLEEN M. VETICK, JOHN R. VETICK, PREMIER CREDIT UNION and PARTIES IN POSSESSION,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Kathleen and John Vetick appeal from the district court ruling granting summary judgment to the bank in this mortgage foreclosure action. **AFFIRMED.**

Jeffrey M. Lamberti and Stacey C. Rogers of Block, Lamberti & Gocke, P.C., Ankeny, for appellants.

Sarah K. Franklin, Christopher S. Talcott, and David M. Erickson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Kathleen and John Vetick appeal from the district court ruling granting summary judgment to Wells Fargo Bank in this mortgage foreclosure action. Because there is no dispute that both Kathleen and John signed the mortgage and that Kathleen is in default on the loan she has with the bank, the bank is entitled to judgment as a matter of law. We reject the Veticks' Iowa Rule of Civil Procedure 1.943 two-dismissal argument. We affirm the district court.

I. Background Facts and Proceedings.

The following facts are not in dispute.

On June 30, 2003, Kathleen Vetick alone executed a promissory note in favor of the lender (Wells Fargo Home Mortgage, Inc., predecessor in interest to Wells Fargo Bank). The principal amount of the note was $185,962; interest was set at 5.00%; and monthly payments were in the amount of $1470.58.

A notarized purchase money mortgage was signed by "Kathleen M. Vetick, Borrower," and "John R. Vetick, Borrower," which includes these provisions:

> DEFINITIONS
>
> Words used in multiple sections of this document are defined below and *other words are defined in Sections* 3, 11, *13*, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.
>
> . . . .
>
> (D) "Note" means the promissory note signed by Borrower and dated JUNE 30, 2003. The Note states that Borrower owes Lender ONE HUNDRED EIGHTY FIVE THOUSAND NINE HUNDRED SIXTY TWO AND 00/100 Dollars . . . plus interest. . . .
>
> . . . .
>
> This Security Instrument secures to Lender: (i) repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under the Security Instrument and the Note. For this

> purpose, Borrower irrevocably mortgages, grants and conveys to lender, with power of sale, the following described property [in Polk City, Iowa] . . . .
>
> . . . .
>
> BORROWER COVENANTS that Borrower is lawfully seised of the state hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.
>
> . . . .
>
> 13. Joint and Several Liability; Co-signers, Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. *However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument*; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.
>
> . . . .
>
> **IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE, NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.**
>
> BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

(Italics added.) John Vetick's name appears below, with the designation "Borrower" under the signature line. The mortgage was recorded on September 15, 2003.

On February 8, 2008, the bank filed a foreclosure petition, which was dismissed after the Veticks entered into a "Special Forbearance Agreement" on March 28, 2008, and a June 27, 2008 loan modification, which resulted in the

Veticks' payment default being eliminated, the monthly payment obligations reduced, and the maturity date of the promissory note extended. The Veticks stopped making payments under the terms of the 2008 loan modification agreement on December 1, 2008.

On April 13, 2009, the bank filed a second foreclosure petition, which was dismissed after a prior lien on the real estate was discovered.

On October 5, 2010, the bank filed the instant foreclosure petition asserting an unpaid principal of $141,525.87 plus interest, late charges, and other fees and costs.

The Veticks answered and admitted the following allegations of the petition were true:

> 7. To secure payment of the [June 30, 2003] Note, the Defendants, John R. Vetick and Kathleen M. Vetick, executed and delivered to Wells Fargo Home Mortgage, Inc. one certain Mortgage dated June 30, 2003, which Mortgage was filed on September 15, 2003, . . . upon [certain real estate].
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> 8. A copy of the Mortgage together with the Recorder's certificate thereon is attached hereto as Exhibit "B" and by this reference incorporated herein.
>
> 9. The Mortgage and Note provide that in case of default the holder may declare the entire principal and the interest accrued thereon due and payable and the Mortgage maybe foreclosed.
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> 10. The Defendant, Kathleen M. Vetick, has failed to pay the Note and interest thereon as provided by the terms of the Note.

Exhibit B, the mortgage, bears a county recorder stamp from September 15, 2003.

The bank filed a motion for summary judgment. The following were submitted in support of the motion: three pre-2003 mortgages on the same property, and a document entitled "Business Acknowledgments, Agreements and Disclosures" signed by both Veticks on June 16, 2003. Above John Vetick's

signature on the business acknowledgement is a certification that the "undersigned mortgagors, have executed the Mortgage/Deed of Trust in order to pledge our interest in the mortgaged property as security for the mortgage loan given to the Borrowers." Also included in that document is a grant of a limited power of attorney to the lender "to correct and initial all typographical or clerical errors discovered in any of the closing documents executed by me/us." The bank also submitted the June 27, 2008 loan modification agreement that incorporated the terms of the parties' forbearance agreement, as well as a detailed list of payments made on the loan.

The Veticks resisted, generally disputing the amount due as well as contending Exhibit B was not an accurate copy of the mortgage they signed on June 30, 2003, and the mortgage was invalid in any event. Paragraph (B) of the "Definitions" section of the Bank's Exhibit B reads, "'Borrower' is JOHN R VETIK AND KATHLEEN M VETIK, HUSBAND AND WIFE." The Veticks provided a copy of the mortgage, in which Paragraph (B) of the "Definitions" section reads: "'Borrower' is KATHLEEN M VETICK, A MARRIED PERSON." Kathleen Vetick submitted an affidavit that certified, "I have reviewed the Statement of Disputed Facts filed simultaneously herewith and the information contained therein is true and correct."

On May 25, 2011, a hearing was held on the motion for summary judgment at which the Veticks were informed by the court that their affidavit was insufficient to resist the summary judgment. They were granted more time to provide the court with material disputed facts.

The Veticks then filed a cross-motion for summary judgment, contending the bank had "filed in this court nearly identical foreclosure actions against the Veticks on the same note and mortgage" both of which were voluntarily dismissed. They argued that pursuant to Iowa Rule of Civil Procedure 1.943, the second dismissal operated as an adjudication against the bank on the merits and precluded foreclosure "now or in the future" and required "the mortgage be released from the property." Kathleen and John submitted affidavits stating they were each a defendant in two earlier foreclosure actions brought by the same lender, both of which were voluntarily dismissed.

Following a hearing, the district court granted the bank's motion for summary judgment and denied the Veticks' cross-motion for summary judgment. The court rejected the Veticks' contentions that oral representations modified the terms of the loan agreement, pointing out the mortgage specifically provided that the terms could only be changed "by another written agreement."[1] The court noted the Veticks had conceded at the hearing that the bank had correctly stated the amount due to the bank. The court then concluded that no genuine issue of material fact existed to support the Veticks' claim that the mortgage was invalid:

> The Veticks do not dispute that John Vetick actually signed the same mortgage that Kathleen signed. Immediately above John Vetick's signature, as "Borrower," is his affirmation that he "accepts and agrees to the terms and covenants" contained within the Mortgage. This includes the agreement to "mortgage, grant and convey" interest in the subject real estate." Both John and Kathleen Vetick affirmed this intention by contemporaneously

[1] A written modification is also required by Iowa Code section 535.17 (2007), the code in effect at the time the parties executed the loan modification. Section 535.17(2) provides in part, "When a modification is required by this section to be in writing and signed, such requirement cannot be modified except by clear and explicit language in a writing signed by the person against whom the modification is to be enforced."

> signing separate Business Acknowledgements, Agreement, and Disclosures certifying "that the undersigned mortgagors, have executed the Mortgage/Deed of Trust in order to pledge our interest in the mortgaged property as security for the mortgage loan given to the Borrowers." Not only did the Veticks execute this mortgage, they executed three prior mortgages pledging their interest in favor of the Lender.

The court determined that even if the bank had changed the definitions portion of the first page of the mortgage as asserted by the Veticks, John Vetick executed "the same or like instrument" as Kathleen, as required by Iowa Code section 561.13.[2]

As to the Veticks' contention that civil procedure rule 1.943 required that the 2009 voluntary dismissal precluded the bank's instant foreclosure petition, the court ruled that the second lawsuit in 2009 was "based on the modified agreement and later defaults," and was not "based on the same cause" as the 2008 action or the earlier defaults.

The Veticks now appeal.

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[2] Prior to the 2011 Code, section 561.13 read:

> 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.* However, when the homestead is conveyed or encumbered along with or in addition to other real estate, it is not necessary to particularly describe or set aside the tract of land constituting the homestead, whether the homestead is exclusively the subject of the contract or not, but the contract may be enforced as to real estate other than the homestead at the option of the purchaser or encumbrancer. If a spouse who holds only homestead rights and surviving spouse's statutory share in the homestead specifically relinquishes homestead rights in an instrument, including a power of attorney constituting the other spouse as the husband's or wife's attorney in fact, as provided in section 597.5, it is not necessary for the spouse to join in the granting clause of the same or a like instrument.

(Emphasis added.) The section has been amended, *see* 2011 Iowa Acts ch. 11, § 1, but that amendment is not pertinent to the 2003 mortgage at issue here.

II. Scope and Standard of Review.

We review the district court's summary judgment rulings for the correction of errors at law. *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Koeppel*, 808 N.W.2d at 179. We review the record in the light most favorable to the party opposing the motion. *Koeppel*, 808 N.W.2d at 179.

III. Discussion.

The Veticks argue that the mortgage was not valid as to John. They also continue to assert that the prior voluntary dismissals of earlier foreclosure petitions bar this proceeding and require the mortgage be dismissed. We find no merit in any of the Veticks' arguments.

A. The Mortgage is Valid and No Material Fact is in Dispute. Even accepting the Veticks' contention that the mortgage that was recorded was altered on page one—where "borrower" was defined and named—no *material* facts are in dispute. It is undisputed that the definitions portion of the mortgage provides "other words are defined in Sections . . . 13." John Vetick does not contest that he in fact co-signed the mortgage. Pursuant to Section 13, as a co-signer John Vetick agreed he was "co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument."

As to the Veticks' argument that the bank "falsely assured them that they would continue to work with the Veticks to make their mortgage payments more affordable and instructing them to default on their mortgage," we note two problems. First and foremost, the mortgage itself clearly and boldly states—and Iowa Code section 535.17 requires—any modification to the agreement must be in writing.[3] And, in fact, such a written modification occurred after the Veticks' 2008 default, but not as to this default.

Second, under Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. In ruling upon a motion for summary judgment, the court considers "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Iowa R. Civ. P. 1.981(3). The Veticks have provided no affidavit to support their assertion of an oral modification.

The pleadings and admissions on file, together with the affidavits provided by the bank, establish that the Veticks signed the mortgage on the subject

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[3] Section 535.17 further provides:

> 6. This section shall be interpreted and applied purposively to ensure that contract actions and defenses on credit agreements are supported by clear and certain written proof of the terms of such agreements to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements.
>
> 7. This section entirely displaces principles of common law and equity that would make or recognize exceptions to or otherwise limit or dilute the force and effect of its provisions concerning the enforcement in contract law of credit agreements or modifications of credit agreements. However, this section does not displace any additional or other requirements of contract law, which shall continue to apply, with respect to the making of enforceable contracts, including the requirement of consideration or other basis of validation.

Iowa Code § 535.17(6), (7).

property. There is no dispute that following the 2008 loan modification, the Veticks defaulted. "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

The district court did not err in concluding the bank was entitled to judgment as a matter of law.

B. Rule 1.943 is Not Applicable. The Veticks' cross-motion for summary judgment is based on Iowa Rule of Civil Procedure 1.943, which reads in part:

> A dismissal under this rule shall be without prejudice, unless otherwise stated; but *if made by any party who has previously dismissed an action against the same defendant . . . including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits*, unless otherwise ordered by the court, in the interests of justice.

(Emphasis added.) The Veticks contend that the two prior petitions for foreclosure involved the same bank against the same defendants and were "based on the same cause." They cite *Smith v. Lally*, 379 N.W.2d 914 (Iowa 1986), and define "the cause" broadly as the "default on the total outstanding balance owed on the same note and mortgage with the same foreclosure remedy requested on the same real estate."

The simple answer to this contention is that the loan agreement was modified after the first foreclosure action and thus there have not been two voluntary dismissals dealing with the "same note and mortgage."

"[A] voluntary dismissal is a final adjudication only for the purposes of res judicata principles." *Phipps v. Winneshiek Cnty.*, 593 N.W.2d 143, 147 (Iowa 1999). "To sustain a plea of res judicata the former case must involve (1) the

same parties or parties in privity, (2) the same cause of action and (3) the same issues." *Bloom v. Steeve*, 165 N.W.2d 825, 827 (Iowa 1969).

As explained in *Bloom*,

> Where a judgment is rendered in favor of the plaintiff or where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.
>
> Our own cases sustain such a test. In the application of the doctrine of res judicata, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible. . . .
>
> Defendants argue the joint dismissals partake somewhat of a contract. We agree they are some evidence of a contract and note the rule that the practical construction placed on the contract is important evidence of the intention of the parties. Neither party acted in such a way as to give credence to the argument that the claims on the contracts and note were entirely extinguished by defendants' earlier dismissal.

165 N.W.2d at 828 (internal quotation marks and citations omitted).[4]

[4] In their reply brief, the Veticks ask us to follow the reasoning of *U.S. Bank National Association v. Gullotta*, 899 N.E.2d 987, 993 (Ohio 2008), wherein the Ohio Supreme Court held that the lender's dismissal of two previous foreclosure actions operated as an adjudication on the merits such that a third foreclosure action was barred by res judicata. We decline the invitation: the Ohio ruling was based upon very unique facts and did not follow the general rule that subsequent and different defaults present a separate and distinct issue. *See Gullotta*, 899 N.E.2d at 992, 996 (O'Donnell, J. dissenting).

The Ohio court was quite clear that "the question certified to us defies an answer that can apply to all cases." *Id.* at 990. The court stated that in the case before it, res judicata barred the third action, noting these "significant facts": "the underlying note and

This foreclosure action is based on a different loan agreement and different defaults than the 2008 foreclosure. It is not therefore "based on the same cause" and rule 1.943 does not act to bar the action. We therefore affirm.

AFFIRMED.

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mortgage never changed, that upon the initial default, the bank accelerated the payments owed and demanded the same principal payment that it demanded in every complaint, that Gullotta never made another payment after the initial default, and that U.S. Bank never reinstated the loan." *Id*. "Had there been any change as to the terms of the note or mortgage, had any payments been credited, or had the loan been reinstated, then this case would concern a different set of operative facts, and res judicata would not be in play." *Id*. at 993.

In the case before this court, even under the *Gullotta* reasoning, res judicata does not bar this action because the parties entered into a loan modification following the first dismissal; the bank did reinstate the loan; the payments demanded were not the same in every complaint; and the Veticks did make additional payments after the initial default and subsequently defaulted.