

IN THE COURT OF APPEALS OF IOWA

No. 6-1026 / 06-0286
Filed January 31, 2007

**DEUTSCHE BANK NATIONAL TRUST COMPANY,
f/k/a BANKERS TRUST COMPANY, N.A.,
As Trustee for ASSET BACKED SECURITIES CORP.
LONG BEACH HOME EQUITY LOAN TRUST 2000 – LB1,**
Plaintiff-Appellee,

vs.

ELLEN M. DE JONG a/k/a ELLEN M. DEJONG,
Defendant-Appellant,

AAA COLLECTIONS, INC., CAPITOL ONE BANK,
SIOUX COUNTY, IOWA,
Defendants.

Appeal from the Iowa District Court for Sioux County, James D. Scott,
Judge.

Appellant appeals the district court's grant of summary judgment to
appellee in a residential foreclosure action. **REVERSED AND REMANDED.**

Brian K. Van Engen of Oostra, Bierma & Van Engen, P.L.C., Sioux
Center, for appellant.

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

Considered by Mahan, P.J., and Vaitheswaran, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.**I. Background Facts & Proceedings**

Ellen De Jong signed a promissory note with Long Beach Mortgage Company on August 30, 2000, for \$59,200, with an adjustable interest rate, and secured by a mortgage on her residential real estate. The parties subsequently entered into an agreement that the unpaid principle on the note was \$76,046.26, with interest at 11.45%. In February 2004, Washington Mutual Home Loans sent De Jong a notice to cure, stating her account was past due in the amount of \$1844.24.

On August 2, 2004, Deutsche Bank National Trust Company filed a petition in district court seeking foreclosure on the residential real estate without redemption, under Iowa Code section 654.20 (2003), claiming De Jong was in default. Deutsche Bank waived its claim to a deficiency judgment. De Jong counterclaimed for lost interest and tortious conduct.

Deutsche Bank filed a motion for summary judgment. The Bank stated De Jong had not made several monthly installment payments. The motion was supported by the affidavit of a representative of Long Beach Mortgage Company, which stated De Jong presently owed the company \$75,796.13, plus interest and attorney fees.

In her resistance to the motion for summary judgment, De Jong asserted the company would not accept partial payments and would hold these payments in a "suspense account," thereby causing her to incur late fees. She claimed there was a discrepancy in the amount owed, and disputed whether any funds

were due when the notice to cure was issued. In a later resistance, De Jong stated she was currently in arrears, but claimed she had been current at the time of the notice to cure and when the petition was filed.

De Jong's resistance was supported by an affidavit of Jan Henryson, the Director of the Center for Financial Education. Henryson stated, "From the cancelled checks and information I received from Ellen De Jong, it appeared as though Ellen De Jong's account was current at the time she received the notice to cure from the Plaintiff." Henryson also stated, "I have been unable to determine the nature or amount of the additional charges which Deutsche Bank National Trust has added to the Defendant's account in order to determine the actual amount which may be owed by the Defendant to the Plaintiff."

The district court granted summary judgment to Deutsche Bank. The court found Deutsche Bank had satisfied its initial burden of proving there was a contract and that De Jong breached the contract. The court found the burden then shifted to De Jong and that she had failed to carry that burden.¹ The court noted De Jong did not deny she was in arrears, but she disputed the amount she was in arrears.

De Jong filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court denied the motion to reconsider. A foreclosure decree was entered against De Jong, ordering that the mortgaged property be sold. De Jong was ordered to pay attorney fees of \$900 and costs of \$310. She now appeals.

¹ In its burden-shifting analysis the district court mistakenly stated the nonmoving party's duty was to show there is no genuine issue for trial. However, the court correctly stated the nonmoving party must demonstrate there is a genuine issue in other parts of its ruling and applied the appropriate rule.

II. Standard of Review

We review a ruling on a motion for summary judgment for the correction of errors at law. Iowa R. App. P. 6.4; *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 112 (Iowa 2006).

III. Merits

A. De Jong contends summary judgment was inappropriate because there was a genuine issue of material fact regarding whether she was in arrears on her payments. De Jong states she was not in arrears when the notice to cure was sent in February 2004 or when the case was filed in August 2004, but later came into arrears as the case progressed.

The burden is on the party moving for summary judgment to prove the facts are undisputed. *Kolarik v. Cory Int'l Corp.*, 721 N.W.2d 159, 162 (Iowa 2006). A party seeking summary judgment must show “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Iowa R. Civ. P. 1.981(3). A genuine issue of material fact is present if reasonable minds could differ on how the issue should be resolved. *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). In considering whether the moving party has met its burden, we view the record in the light most favorable to the nonmoving party. *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006). If the moving party has met its burden to show there are no genuine issues of material fact, the nonmoving party must set forth specific facts to show a genuine factual issue exists. *K & W Elec.*, 712 N.W.2d at 112.

In a mortgage foreclosure action, where the facts are not in dispute summary judgment may be appropriate. *Willow Tree Inv., Inc. v. Wagner*, 453 N.W.2d 641, 642 (Iowa 1990). However, where rational minds could draw different inferences from the facts, summary judgment in a foreclosure action is not appropriate. *First Nat'l Bank v. Kinney*, 454 N.W.2d 589, 592 (Iowa 1990).

Viewing the facts shown by the record in the light most favorable to De Jong, we conclude there is a genuine material fact issue in the present case. A plaintiff in a foreclosure action must show the defendant was in default when the suit was initiated. Jon P. Sullivan, *Real Estate Mortgage Foreclosure* § 4-3, at 38 (3d ed. 2002). While Deutsche Bank asserted De Jong had not made several monthly installment payments, De Jong disputed she was in default at the time the suit was filed. This is supported by Henryson's affidavit. The fact that De Jong later admittedly came into arrears is not relevant, because the pertinent question is whether she was in arrears at the time the petition was filed. *Id.*, see *Farmers Trust & Savings Bank v. Manning*, 311 N.W.2d 285, 288 (Iowa 1981). We determine summary judgment was inappropriate based on the record before us. We reverse the decision of the district court granting summary judgment to Deutsche Bank and remand for further proceedings.

B. The motion for summary judgment did not mention the counterclaims filed by De Jong, and the district court's ruling did not refer to the counterclaims. On appeal, De Jong asserts that if the ruling on the motion for summary judgment applied to her counterclaims, then it was improper.

The motion for summary judgment did not seek any type of relief in regard to the counterclaims. We conclude the grant of summary judgment applied only to Deutsche Bank's foreclosure action, and did not affect the counterclaims.

We reverse the decision of the district court and remand.

REVERSED AND REMANDED.