

IN THE COURT OF APPEALS OF IOWA

No. 6-294 / 04-2011

Filed July 12, 2006

**DEUTSCHE BANK TRUST COMPANY,
f/k/a BANKERS TRUST COMPANY,
as Trustee,**
Plaintiff-Appellee,

vs.

LISA GREEN, PREMIER DENTAL, ALUMINUM
SEAMLESS GUTTER SERVICE, and
CREDIT BUREAU ENTERPRISES, INC.,
Defendants,

ROBERT MIELL,
Interested Party-Appellant/Cross-Appellee,

JAMES WILLMSEN,
Intervenor-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Purchaser at a sheriff's sale appeals district court ruling granting a motion
to set aside the sale. **AFFIRMED.**

Walter J. Steggall, Jr. and Brett S. Nitzschke, Cedar Rapids, for appellant.
John H. Ehrhart, Cedar Rapids, for appellee James Willmsen.
Gregory Greiner and Garry McCubbin of Kozeny & McCubbin, L.C., Des
Moines, for appellee Deutsche Bank Trust Company.

Heard by Mahan, P.J., Hecht, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9208 (2005).

MAHAN, P.J.

Robert Miell, purchaser at a sheriff's sale, appeals from a district court order granting intervenor Jim Willmsen's motion to set aside the sale. We affirm.

I. Background Facts and Proceedings

Duetsche Bank commenced this mortgage foreclosure action against Lisa Green. Judgment was entered in the decree of foreclosure on February 10, 2004. A sheriff's sale of the property was scheduled for August 17, 2004.

On July 2, 2004, Willmsen entered into a contract with Green to purchase the property for \$89,000. Willmsen, a realtor, had seen the foreclosure notice in the newspaper and initiated contact with Green regarding the purchase of the property. On August 10, 2004, Green conveyed the property and a warranty deed to Willmsen in fulfillment of their contract. Of the \$89,000 Willmsen paid Green for the property, Green received \$16,071.76.¹ A check for the remaining \$69,857.94 was sent by Superior Escrow, the company handling the sale for Willmsen, to the loan servicer for Deutsch Bank, in full satisfaction of Green's mortgage on the property. The bank received the mortgage payoff funds on August 11, and the check cleared the bank on August 16.

The bank's loan servicer advised the bank's law firm on August 16 that the mortgage loan payoff had been received and the sheriff's sale should be cancelled. Accordingly, the law firm sent a fax to the sheriff's office requesting cancellation of the sheriff's sale scheduled for the next day. The law firm received confirmation of receipt of its fax, but did not follow up with a phone call to the sheriff's office to verify receipt of the fax.

¹ Green is not a party to this appeal.

The sheriff's sale was not cancelled. The sheriff's deputy in charge of the sale never received the faxed notice to cancel the sale. According to the deputy, the office receives many faxes during the course of the day, and several persons have access to the machine and disburse incoming faxes.

On August 17 the property was sold by sheriff's sale to Miell for the sum of \$68,533.43.² The funds Miell obtained to purchase the property came from an equity line of credit with an interest rate of six and one-half percent. Miell received a sheriff's deed, which he recorded that same day, and a writ of possession. Superior Escrow recorded Willmsen's warranty deed on August 18.

Willmsen filed a motion to set aside the sheriff's sale on August 23. He requested that the sale be set aside and that the court make an "equitable adjustment" to provide for repayment of his losses. Miell resisted.

At the hearing on the motion, Willmsen testified that after his August 10 purchase, he mortgaged the property to Banker's Trust Company. He expended over \$7000 remodeling the home, paid utility expenses on the property, incurred interest on his mortgage loan, and paid attorney fees. He further testified that two or three workers were working at the property during the daylight hours between August 10 and 17, and that a dumpster had been placed on the property.

Miell, who owns approximately 1000 rental properties and purchases on average one property per week at sheriff's sales, testified he would lose a minimum of \$50,000, in addition to the \$68,533.43 he paid for the property, if the sale was set aside. His losses include lost appreciation on the property, interest

² The bank's law firm currently holds these proceeds.

paid on the equity line of credit he used to purchase the property, lost rental value, and attorney fees. The money he had tied up in this property prevented him from purchasing another property as a replacement investment. Miell further testified he viewed the property prior to his purchase at the sheriff's sale and saw no indication of any person being in possession of the property.

The district court concluded, "equity dictates that the sale in this case should be set aside due to the sheriff's unintentional mistake in failing to cancel the sale." The court further concluded vacation of the sheriff's sale "would not result in a substantial hardship to Mr. Miell other than rescinding the sale," and that Willmsen "has shown that enforcement of the sale would impose an oppressive burden on him." The court granted the motion to set aside the sheriff's sale, confirmed ownership in Willmsen, and ordered the return of \$68,533.43 to Miell.

Miell appeals, arguing the district court erred in setting aside the sheriff's sale. In the alternative, he requests that if this court affirms the district court's decision to set aside the sale, it should modify the district court's decision by conditioning the set aside of the sale on Willmsen paying trial and appellate court costs, including all sale expenses and attorney fees assessed as costs. He requests we remand the case for a hearing to determine court costs, sale expenses, attorney fees, and any other relevant damages.

Willmsen cross-appealed, requesting the case be remanded for entry of judgment against the bank for his trial and appellate attorney fees. At oral argument, counsel for Willmsen withdrew the cross-appeal. The bank has filed a brief in support of affirming the district court's decision.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We give weight to the findings of fact of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Merits

“The policy of the law is to uphold judicial sales, and they will not be held invalid for mere irregularities not affecting the power of the sheriff to sell.” *Brown v. Butters*, 40 Iowa 544, 546-47 (1875). Generally, a foreclosure sale will not be set aside if the sheriff has substantially complied with the procedures established for a foreclosure sale. *First Nat’l Bank in Fairfield v. Diers*, 430 N.W.2d 412, 415 (Iowa 1988).

Exceptions to the general policy of upholding a sheriff’s sale exist where a mistake of fact or law has occurred. *Federal Land Bank of Omaha v. Reinhardt*, 428 N.W.2d 672, 673 (Iowa Ct. App. 1988). However, “a court of equity should be hesitant to set aside a sheriff’s sale where one party claims a mistake of fact or law.” *Farmers Sav. Bank v. Gerhart*, 372 N.W.2d 238, 244 (Iowa 1985). The court should grant relief “only when enforcement of the sale would impose an oppressive burden on the party seeking vacation and vacation of the sale would result in no substantial hardship other than rescinding the bargain.” *Id.*

In this case, a mistake occurred when the bank’s law firm sent a fax which was received by the sheriff’s office, but apparently not disbursed to the proper official. Fault for the mistake, however, is not solely attributable to the sheriff’s office, as the district court concluded. The bank’s law firm, the party responsible

for cancelling the sale, never followed up with the sheriff's office to confirm cancellation of the sale. The court, sitting in equity, has the power to vacate the sheriff's sale based on the mistake that occurred in this case.

We conclude equity dictates the sheriff's sale be set aside because Willmsen presented evidence to demonstrate enforcement of the sheriff's sale would impose an oppressive burden on him. Willmsen mortgaged the property shortly after his purchase. He expended over \$7000 remodeling the home, in addition to paying utilities and interest and principal payments on the underlying mortgage. While Miell testified vacation of the sale would result in a hardship to him, we conclude any hardship is not "substantial" such that it outweighs the burden that would be imposed on Willmsen if the sheriff's sale were enforced.³

We conclude the district court fairly balanced the equities between the parties. Therefore, we affirm the district court's order setting aside the sheriff's sale and ordering the return of the amount paid for the property to Miell. We deny Miell's request for remand to determine costs and attorney fees.

AFFIRMED.

³ We find no evidence in the record to support Miell's testimony at trial that his losses would be a minimum of \$50,000, in addition to the sum paid for the property. In contrast, Willmsen submitted mortgage documents, receipts and other evidence to support his testimony.