IN THE COURT OF APPEALS OF IOWA

No. 7-600 / 06-1744
Filed October 12, 2007

PATRICIA TULLIS,
Plaintiff-Appellant,

vs.

ANDREW S. WEEKS,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Plaintiff Patricia Tullis appeals, contending the district court erred in failing to find a real estate transaction, whereby she transferred real estate to defendant Andrew Weeks, was a security transaction and not a sale. **REVERSED AND REMANDED.**

Laura Lockard, of Iowa Legal Aid, Des Moines, for appellant.

Jason Springer, Des Moines, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiff Patricia Tullis appeals, contending the district court erred in failing to find a real estate transaction, whereby she transferred real estate to defendant Andrew Weeks, was a security transaction and not a sale. She contends the transaction created an equitable mortgage and she should be given an opportunity to pay off the mortgage and reclaim the property. We agree and reverse and remand.

NO APPELLATE BRIEF. Weeks has not filed an appellate brief. We have a number of options available to us due to this failure. *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979). On the failure of the appellee to file a brief, the appellant is not entitled to a reversal as a matter of right, but the court may, within its discretion, handle the matter in a manner most consonant with justice and its own convenience. *Bowen v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976). We need not search the record to find a theory upon which to affirm the judgment and may confine ourselves to the objections raised by the appellant, or treat the failure to file a brief as a concession of the truth of the facts as stated by appellant, or even as a confession of error, if the appellant's brief appears reasonably to sustain such action. *See id*.

In this case, we elect to both limit our consideration to the issues and arguments in the appellant's brief, *see Jefferson County v. Barton-Douglas Contractors, Inc.,* 282 N.W.2d 155, 157 (Iowa 1979), and will not go beyond the ruling of the trial court in searching for a theory upon which to affirm its decision. *See Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 153 (Iowa 1979).

SCOPE OF REVIEW. This matter was tried in equity. Our review is de novo. Iowa R. App. P. 6.4; *Klotz v. Klotz*, 440 N.W.2d 406, 408 (Iowa Ct. App. 1989).

BACKGROUND. Tullis's father died testate and left a house he owned at 2728 Sheridan Avenue in Des Moines to Tullis. It was the house Tullis had lived in her entire life. The house was valued for tax purposes at $90,000. Tullis found herself in need of money to pay real estate taxes and attorney fees, among other things. In early 2004 Tullis attempted to obtain a loan with the house as security from Iowa Mortgage. Tullis had not been employed for two years, and as a consequence was unable to obtain a loan from Iowa Mortgage. Christy Frank, an employee of Iowa Mortgage who was working with Tullis, said she would help Tullis make other arrangements. Frank contacted her fiancé, Andrew Weeks, to help Tullis get the money she needed.

Weeks was able to provide Tullis with $40,000. An agreement was reached which included: (1) a deed from the estate conveying the property to Weeks for $40,000, (2) an agreement signed April 9, 2004, whereby Weeks agreed to sell the real estate to Tullis on contract for $50,000 with a two-year balloon payment required, interest at 10.5%,[1] and a further provision that the loan must be paid in full on the 1st day of May, 2006, (3) a lease of the property entered into on May 24, 2004, from Weeks to Tullis to commence April 1, 2004, and run through April 2006 for $520 a month, which included an option for Tullis

[1] The interest rate is actually substantially higher than this because Tullis obtained only $40,000 but is paying interest on $50,000.

to repurchase the house.[2] The rent Tullis was to pay was to be credited against the payment to repurchase the property if the option was exercised. The April 9th agreement was made an addendum to the lease.

Tullis fell behind on rent payments. On July 31, 2005, Tullis advised Weeks in writing that she wished to exercise her option to purchase the home outlined in Section 18 of the lease. She offered to pay a balance of $49,749.75, which she said was pursuant to an amortization schedule. Weeks did not honor the option. His opinion was that because she was behind on her rent payments the option was null and void.[3]

On August 31, 2005, Tullis filed a petition to quiet title and enforce her option claiming (1) specific performance, (2) deed as security, and (3) fraudulent practice. The case went to trial and the district court, among other things, found

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[2] 18. **OPTION TO PURCHASE.** In consideration of $1.00, in hand received, the Landlord gives to Tenant the Option of Purchase the leased premises according to the following terms:

> a. **EXERCISE OF OPTION.** Tenant shall exercise its option to purchase by giving written notice to the Landlord at least 10 days prior to the proposed closing date. The Tenant shall be allowed to sell the Real Estate above and beyond the payoff amount to a bonafide-purchaser and shall receive all proceeds above and beyond the said payoff. The closing date will be set as soon as is reasonably practical.
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> b. **PRICE.** The total purchase price for the Real Estate is the remaining balance pursuant to the attached amortization schedule.
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> c. **REAL ESTATE TAXES.** The Landlord shall be responsible for all property taxes prorated to the day of the Tenant selling the property.
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> d. **SPECIAL ASSESSMENTS.** Tenant shall be liable for all special assessments on the property when the option is exercised owed after the date of the signing of this Lease.
>
> e. **DEED.** Upon payment of the purchase price, the Landlord shall convey the Real Estate to the Landlord or their assignees, by Warranty Deed, free and clear of all liens, restrictions, and encumbrances except as provided herein. Any general warranties of title shall extend only to the date of this contract, with special warranties as to acts of the Landlord continuing up to the time of delivery of Deed.

[3] The district court disagreed with Weeks that a delinquency in her rent payments caused the option to be null and void but found because Tullis was behind in her rent payments the offer was not adequate.

the deed to the property given to Weeks by Tullis's father's estate did not create a deed of security and was not a mortgage. This finding and the request for a right to redeem are the only issues that Tullis has raised on appeal. We have elected, because of Weeks's failure to file an appellee brief, to limit our consideration to the issues raised by Tullis. Consequently these are the only issues we will address and we limit our discussion to facts and law relevant to these issues.

EQUITABLE MORTGAGE. A conveyance absolute on its face may, by proper evidence, be shown to be but a mortgage. *Steckelberg v. Randolph*, 404 N.W.2d 144, 148-149 (Iowa 1987); *Trucks v. Lindsey*, 18 Iowa 504, 504 (1865). It is a well-established rule that, where a conveyance absolute upon its face is accompanied by a contract or agreement, by which the grantee undertakes to reconvey the land to the grantor on specified conditions, and the terms of such agreement or the circumstances under which it was made render it doubtful whether a mortgage or conditional sale was intended, the courts will hold it to be a mortgage. *Collins v. Isaacson*, 261 Iowa 1236, 1243, 158 N.W.2d 14, 18 (1968); *Greene v. Bride & Son Constr. Co*., 252 Iowa 220, 224-25, 106 N.W.2d 603, 606-07 (1960); *Brown v. Hermance*, 233 Iowa 510, 514-15, 10 N.W.2d 66, 68 (1943); *Fort v. Colby*, 165 Iowa 95, 102, 144 N.W.2d 393, 395 (1913).

It is proper to show by parole evidence a warranty deed was in fact intended as security only, and upon payment of the debt the debtor is decreed to be the legal, as well as the equitable, owner of the property. *Collins*, 261 Iowa at 1243, 158 N.W.2d at 18. If a deed is to be construed as a security instrument, the supportive evidence must be clear, satisfactory, and convincing. *See Lovlie*

v. Plumb, 250 N.W.2d 56, 59 (Iowa 1977); *North v. Manning Trust & Sav. Bank*, 169 N.W.2d 780, 784 (Iowa 1969). In arriving at the intention of the parties courts look behind the form of the instruments to the real relationship between the parties. *Collins*, 261 Iowa at 1243, 158 N.W.2d at 18. The instruments will be read in the light of the surrounding circumstances and the practical construction the parties themselves placed thereon. *Id.*; *Guttenfelder v. Iebsen*, 230 Iowa 1080, 1084, 300 N.W. 299, 301-02 (1941).

If it is unclear whether a mortgage or absolute deed was intended, we resolve the doubt in favor of an equitable mortgage. *Greene*, 252 Iowa at 226-27, 106 N.W.2d at 607; *Fort*, 165 Iowa at 102, 144 N.W. at 395. We are reluctant to recognize as an absolute conveyance an agreement between the parties that continues or creates an obligor-obligee relationship. *Steckelberg*, 404 N.W.2d at 148-49; *see also Koch v. Wasson*, 161 N.W.2d 173, 177 (Iowa 1968) (citing *Guttenfelder*, 230 Iowa at 1084, 300 N.W. at 301).

With these principles in mind we look at the following factors: (1) intent of the parties to the transaction, (2) consideration for transfer, and (3) retention of possession.

INTENT OF THE PARTIES. In determining intent of the parties, courts look behind the form of an instrument to ascertain the actual relationship between participants. Furthermore, a document will be read in light of surrounding circumstances and given such practical construction as is placed thereon by the concerned parties. *Lovlie*, 250 N.W.2d at 59; *see also Collins*, 261 Iowa at 1243, 158 N.W.2d at 18; *Fort*, 165 Iowa at 102, 144 N.W. at 395.

It is clear Tullis's intent was to convey title to her home to Weeks as a security arrangement rather than an absolute conveyance. Weeks was aware that she was seeking such an arrangement and not a sale of her property. Frank, who referred Tullis to Weeks, testified the agreement Tullis and Weeks made, "was more of a mortgage than a rental agreement."

CONSIDERATION FOR TRANSFER. Weeks advanced Tullis $40,000 for a property valued at $90,000. The inadequacy of consideration is a strong circumstance tending to show the transaction was intended to be a mortgage. *Koch*, 161 N.W.2d at 176-80; *Greene*, 252 Iowa at 226, 106 N.W.2d at 607.

RETENTION OF POSSESSION. Tullis retained possession of the property. Retention of possession by the grantor is considered a circumstance consistent with the claim of creditor-debtor relationship and inconsistent with the theory of absolute conveyance. *Koch,* 161 N.W.2d at 176-180; *Guttenfelder,* 230 Iowa at 1084, 300 N.W. at 301. Resolving all doubts in favor of finding a mortgage, the only conclusion we can reach is that the transaction between Weeks and Tullis created an equitable mortgage. *See Brown*, 233 Iowa at 514-15, 10 N.W.2d at 68.

REDEMPTION RIGHTS. An equitable redemption right attaches necessarily and conclusively to any grant given as security. Also, equity forbids an irredeemable mortgage. *Lovlie,* 250 N.W.2d at 59; *see also Koch*, 161 N.W.2d at 176. The equity right of redemption is the right of the mortgagor to pay what is owed to the mortgagee and take the property. *Koch*, 161 N.W.2d at 178-80; *Swartz v. State*, 243 Iowa 128, 134, 49 N.W.2d 475, 478 (1951). We therefore remand to the district court to determine the amount owed and when

the amount is determined to establish a reasonable period for Tullis to redeem. We do not retain jurisdiction. Costs on appeal are taxed to Weeks.

REVERSED AND REMANDED.