

IN THE COURT OF APPEALS OF IOWA

No. 8-232 / 07-0877

Filed June 25, 2008

BAYVIEW LOAN SERVICING, LLC,
f/k/a INTERBAY FUNDING, LLC,
Plaintiff-Appellee,

vs.

LEO W. REISETTER,
Defendant-Appellant,

SHERRY REISETTER,
Defendant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

A borrower appeals a district court ruling in favor of a lender. **AFFIRMED.**

Jerrold Wanek of Garten & Wanek, Des Moines, for appellant.

Michael J. Cunningham of Howe, Cunningham & Lowe, P.L.C., Des
Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A borrower appeals a district court ruling in favor of a lender. The borrower asserts that the description of the property securing the loan was insufficient to permit foreclosure, an adequate description was attached only after the mortgage instrument was executed, and the lender, therefore, had no legal interest in the property. The borrower also asserts that the lender did not seek leave of court to amend its petition and, accordingly, waived its right to a personal judgment against him. We affirm.

I. Background Facts and Proceedings

Leo Reisetter is the owner of a repair shop in Marshalltown with an address of 308 South Third Avenue. That address only refers to the front half of a building on the property. The property actually encompasses the addresses 308, 310, 312, and 314 South Third Avenue.

Reisetter and his wife had a loan from Liberty Bank. The bank secured the loan by obtaining a mortgage on the business property. The address listed on the mortgage was 308 South Third Avenue. Reisetter refinanced the debt through Bayview Loan Servicing (Bayview) and used the loan proceeds to pay off Liberty Bank and release its mortgage. The mortgage and security agreement with Bayview listed the mortgaged property as 308 South Third Avenue. An attachment set forth the legal description.

Reisetter defaulted on his payments to Bayview and Bayview sued.¹ The petition requested foreclosure of the mortgage. The petition's prayer for relief

¹ The petition was filed against Reisetter and his wife but his wife was later dismissed on summary judgment.

also sought a personal judgment against the Reisetters. The body of the document, however, stated Bayview was waiving its right to a deficiency judgment. Bayview later amended its petition to delete that allegation but did not file a motion to amend.

In his answer, Reisetter asserted that the legal description in the attachment was included after the mortgage was executed, altering the mortgage and requiring that it be disregarded. The parties filed cross-motions for summary judgment. Those motions were denied as to Bayview and Reisetter. The court concluded the issue “whether the mortgage lacks sufficient specificity to be enforceable” was a question for the fact-finder.

Following trial, the district court concluded that equity would imply a security in favor of Bayview. The court foreclosed the mortgage and entered a money judgment against Reisetter in the amount of \$174,503.54. Reisetter appealed.

II. Foreclosure.

To be effective, “a mortgage must describe the property covered with sufficient certainty to identify it, or furnish the means by which, with the aid of extraneous evidence, it may be identified.” 59 C.J.S. *Mortgages* § 99 (1998). Reisetter argues (1) the address listed on the mortgage instrument was an insufficient description of the secured property and (2) sufficient legal description was not included with the instrument he executed but was only attached later.

In response, Bayview does not dispute that the address on the mortgage document did not completely describe the property subject to the mortgage. Bayview focuses on the second prong of Reisetter’s argument concerning the

legal description. On this prong, Bayview notes that the mortgage and security agreement filed with the Marshall County recorder included an attachment with a complete legal description and Reisetter failed to prove that the attachment was not included with the mortgage instrument he executed.

The district court agreed with Bayview, finding that Reisetter did not remember whether the legal description was attached to the mortgage instrument at the time he executed it. On our de novo review, we find support for this finding and we conclude the finding is dispositive. Without proof that the legal description was missing from the executed document, Reisetter could not establish that the mortgage was too vague to enforce.

We find it unnecessary to address the parties' remaining arguments relating to the foreclosure.

III. Personal Liability.

Reisetter next contends Bayview's petition was never "legally amended" to request a personal judgment against him, as opposed to a judgment against the property. As the district court pointed out however, Bayview's original pleading prayed for a personal judgment against Reisetter. Therefore, the personal judgment could have been entered on the basis of that pleading.

Assuming an amendment was necessary to confirm Bayview's request for a personal judgment on the note,² the district court effectively granted Bayview

² Bayview filed a "foreclosure petition" and elected to foreclose without redemption. See Iowa Code §§ 654.5, 654.20 (2005). As part of that process, it originally elected to waive a deficiency judgment. See Iowa Code § 654.26. That provision was later deleted.

Iowa Code section 654.4 precludes separate actions in the same county on the note and on the mortgage. See *Federal Land Bank of Omaha v. Faught Brothers, Inc.*, 468

leave to file it. See Iowa R. Civ. P. 402(4) (requiring party to obtain leave of court if amendment not filed within twenty days after pleading served and consent to file not obtained). Specifically, the court's final ruling stated Bayview was "entitled to the relief it has requested in its Petition as amended" The court did not abuse its discretion in granting leave to amend. *Id.* (stating leave to amend to be "freely given"); *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa Ct. App. 1997) (reviewing ruling for abuse of discretion).

AFFIRMED.

N.W.2d 793, 795 (Iowa 1991) ("We have held that a mortgagee may maintain a personal action on his note against the debtor, and may, after judgment therein, foreclose his mortgage. But we have never held that a mortgagee who has foreclosed his mortgage by good personal service may afterwards maintain the separate action upon his promissory note.").