

IN THE COURT OF APPEALS OF IOWA

No. 9-585 / 08-1420
Filed September 2, 2009

NATIONWIDE ADVANTAGE MORTGAGE COMPANY,
Plaintiff-Appellee,

vs.

SERGIO J. ORTIZ, a/k/a
SERGIO ORTIZ,
Defendant-Appellant,

CITY OF SIOUX CITY,
Defendant.

Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

Sergio Ortiz appeals the district court decision granting summary judgment to the plaintiff in this foreclosure action. **REVERSED AND REMANDED.**

Jennifer Cerutti and Andrea Buckley, Iowa Legal Aid, Sioux City, for appellant.

Mollie Pawlosky and Jon Sullivan of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee.

Thomas J. Miller, Attorney General, and Grant Dugdale, Assistant Attorney General, for defendant.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SCHECHTMAN, S.J.

Sergio Ortiz, the mortgagor, appeals from the district court's granting of a motion for summary judgment to the mortgagee assignee, Nationwide Advantage Mortgage Company (Nationwide), resulting in a decree of foreclosure upon his homestead. We reverse and remand.

I. Scope of Review.

Although foreclosure proceedings rest in equity, our review from the grant of summary judgment is for corrections of error at law. *Norwest Credit, Inc. v. City of Davenport*, 626 N.W.2d 153, 155 (Iowa 2001). The court "cannot find facts de novo in an appeal from summary judgment." *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 886 (Iowa 1981). When our review requires an interpretation of the scope and meaning of a statute, it is also for corrections at law. *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1997). The grant or denial of a motion for summary judgment is reviewed in the light most favorable to the non-moving party. *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000). Judgment is rendered if the pleadings, discovery, and affidavits on file show there is no genuine issue of material fact such that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

II. Relevant Statute.

Iowa Code section 561.13 (2007) provides, in relevant part:

A conveyance or encumbrance of . . . 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, and the instrument or power of attorney sets out the legal description of the homestead.

A mortgage, not signed by the spouse of the owner, is *void*, as to both the owner and the spouse. *Beal Bank v. Siems*, 670 N.W.2d 119, 124 (Iowa 2003). The case of *Martin v. Martin*, 720 N.W.2d 732, 738 (Iowa 2006), had a similar holding as it relates to a deed (“Section 561.13 makes a deed *invalid*—that is, *void*—without the signature of both spouses, not merely voidable by the spouse who did not sign.”).

III. Summary Judgment Proceeding.

The petition has attached the mortgage and note, each signed by Sergio J. Ortiz, on March 26, 2004, in South Sioux City, Nebraska. The mortgage encumbers Lot 21, The Glen, 1st Filing, an Addition to Sioux City, Woodbury County, Iowa. It describes the mortgagor as “Sergio J. Ortiz, a single person.” The mortgage provides, among other provisions:

Borrower shall occupy, establish, and use the Property as Borrower’s principal residence within sixty days after the execution of this Security Instrument . . . and shall continue to occupy the Property as Borrower’s principal residence for at least one year after the date of occupancy.

Also attached to the petition was an assignment by the mortgagee, Dakota County State Bank, to Nationwide Advantage Mortgage Company, dated the same day.

Ortiz’s answer admits its execution, and sets forth his statement of material facts: “The mortgage is void as to both husband and wife, without the signature of the wife.” The motion for summary judgment contained an affidavit that the time of payment on the note was accelerated due to default, and verified

the amounts due. The resistance contained an affidavit from Ortiz that set forth these facts:

[M]y primary language is Spanish.

I can only understand a little written and spoken English.

....

... I was asked several questions. These questions were translated through a realtor I was asked my marital status. I answered that I was separated.

All of the documents were in English. They were not translated line by line or paragraph by paragraph. . . .

In February/March 2002 I married Josefina Rodriguez De La Torre in Mexico.

Josephina Rodriguez De La Torre and I separated in August 2002.

Josephina Rodriguez De La Torre and I were divorced in August 2006 in Mexico.

The brief filed by Nationwide addressed the issue of equitable estoppel, which was responded to by Ortiz. In its reply brief to the motion, Nationwide raised the additional issues of bona fide purchaser for value and equitable mortgage, though neither was pled.¹

The material facts, about which there was no genuine issue, as set forth by the district court in its ruling, were:

On March 26, 2004, Ortiz executed a note and mortgage to secure financing from Dakota County State Bank for the purchase of real property located at 3201 Sycamore Terrace in Sioux City, Iowa. Ortiz has since used that real estate as his homestead. The note and mortgage references Ortiz as a single person. Dakota County State Bank thereafter assigned and otherwise transferred its interest in the note and mortgage to Nationwide. Ortiz has failed to make the required payments and, thus, has defaulted on his obligations under the note and mortgage.

At the time Ortiz executed the note and mortgage, he spoke and understood only Spanish. The terms of the note and mortgage

¹ The reply brief of Nationwide sets forth other documents in English that Ortiz had previously signed, that indicated a single status. These were not a part of an affidavit nor shown that they were available at closing.

and information obtained from Ortiz were translated by a Realtor, Benito Molina, who worked at Century 21 at the time. The documents, including the note and mortgage, were otherwise written/printed only in English.

When asked about his marital status, Ortiz informed the translator that he was separated. Through the translation, it was then indicated on the note and mortgage that Ortiz was single. When the note and mortgage were executed in March 2004, however, Ortiz was, in fact, married. He married Josephina Rodriguez De La Torre in Mexico in February or March 2002. Ortiz and his spouse separated in August of 2002. He then obtained a divorce in Mexico, which was not finalized until August of 2006.

The district court, after citing the *Martin* and *Beal* cases, concluded:

Despite the apparent inequities, the Court finds based upon this record viewed in a light most favorable to Ortiz that the mortgage executed by Ortiz on March 26, 2004, is invalid and void due to the lack of execution by his spouse and pursuant to Iowa Code section 561.13. Because the mortgage is invalid, foreclosure is unavailable to Nationwide absent some other theory of recovery.

The district court then proceeded to address the issue of equitable estoppel, determining that Nationwide had proven the four factors, set forth in *Rubes v. Mega Life & Health Insurance Co.*, 642 N.W.2d 263, 271 (Iowa 2002).² The district court did consider Nationwide's alternative claim that as an assignee, it was a bona fide purchaser for value without notice of any infirmities to the mortgage. It concluded it was moot, due to its finding of equitable estoppel, but "established."

The district court granted the motion for summary judgment. The court directed Nationwide to prepare a foreclosure decree, which it signed and filed

² These factors are: (1) the opposing party misrepresented or concealed material facts; (2) the party relying on estoppel lacked knowledge of the true facts; (3) the party misrepresenting or concealing the true facts intended the deceived party to act on those representations; and (4) detrimental reliance by the party to whom the representations were made. *Rubes*, 642 N.W.2d at 271.

several days later. A judgment in rem in the sum of \$75,045.71 was entered. The subject mortgage was foreclosed and the real estate, owned by Ortiz, directed to be sold to satisfy the judgment and costs.

IV. Analysis.

Nationwide now contends that the district court was right for the wrong reasons; that the court was in error to find that the mortgage was void, asserting that section 561.13 does not apply to a purchase money mortgage. Nationwide distinguishes *Beal* as not being a purchase money mortgage, but an encumbrance on previously owned realty.

The purchase money mortgage issue was not addressed by the trial court nor was it the subject of a motion to enlarge or amend under Iowa Rule of Civil Procedure 1.904(2). Matters that are not brought to the attention of the district court are not preserved for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Nationwide addressed solely the issues of equitable estoppel, equitable mortgage, and bona fide purchaser for value (though only in its reply brief), which all assumed homestead status.

Given that assumption, with the pleadings and affidavits before it, we agree with the district court that the real estate mortgage was invalid and void at the time of its execution. It was conclusive that Ortiz was married on the date of the note and mortgage. That he was separated at the time is of no consequence, as the statute applies "if the owner is married." See Iowa Code § 561.13. Because the mortgage was not signed by Josefina, and constituted her

husband's homestead,³ it is void as to both she and Ortiz as they were husband and wife at the time. See *Beal*, 670 N.W.2d at 124.

It is undisputed that Ortiz, at closing, stated that he was "separated" in answer to a query concerning his marital status. The fact that the question was proposed would infer that his status had not been determined up to that juncture. The record of the response the Spanish translator, a realtor, gave to the scrivener is absent. The mortgage document was prepared by Nationwide's assignor. Viewing the undisputed material facts, as determined by the motion court, in the light most favorable to Ortiz, they support the annulment of the mortgage. See *Keokuk Junction Ry. Co.*, 618 N.W.2d at 355.

We do not agree with the district court that the doctrines of equitable estoppel and/or equitable mortgage⁴ are available to overcome a void mortgage; that is, that Ortiz is estopped from raising the defense of the statute. As we read *Martin*, the district court was obligated to apply section 561.13 in the absence of "fraud or mistake." 720 N.W. 2d at 738. The district court fell victim to the tendency to attempt to mold a fair result, in equity, under the particular

³ Though Nationwide did not dispute the homestead status in district court, it contests that factual finding, on appeal, for the reason that Josefina never lived in the house or in the U.S. Our focus is not on where the spouse lives, but rather on "whether 'the owner' used the house as a home. . . ." See *Beal Bank*, 670 NW 2d at 124. "It has been the well-settled law of this court to construe the homestead status liberally in favor of the owner of the home." *Hunt, Hill & Betts v. Moore*, 219 Iowa 451, 453, 258 NW 114, 115 (1934).

⁴ The district court foreclosed the mortgage that it had held void under the statute, reciting its recording data in the Woodbury County recorder's office in its decree of foreclosure. Thus it created an equitable mortgage from the same instrument and terms as the voided mortgage (a lien created by contract but not sufficient as a legal mortgage will generally be recognized as an equitable mortgage.). *Klotz v. Klotz*, 440 NW 2d 406, 408 (Iowa Ct. App. 1989).

circumstances that it faced. Our supreme court recognized this bent in *Martin*, 720 N.W.2d at 738:

Moreover, while it may be tempting for trial judges to fashion remedies viewed to be fair and just under the particular circumstances of a case, the law has defined those concepts and must dominate the decision making process. Absent constitutional concerns, it is not for courts to overlook the language of a statute to reach a particular result deemed unjust under the particular circumstances of a case.

(Citations omitted).

In *Iowa State Bank & Trust v. Michel*, 683 N.W.2d 95, 107 (Iowa 2004), the district court fashioned an equitable mortgage in face of a different homestead statute. “[C]ourts of equity are bound by statutes and follow the law in [the] absence of fraud or mistake.” *Michel*, 683 N.W.2d at 107 (quoting *Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987)). “This rule preserves the integrity of the legislature’s judgment that certain transactions will be given effect only if they comply with the requirements set out in the statute.” *Id.*; see also *Brunsdon v. Brunsdon*, 199 Iowa 1099, 1113, 200 N.W. 823, 829 (1924) (“The conclusion arrived at in this case may result in a grave injustice being done to appellees, but a court of equity cannot so expand its proper jurisdiction as to completely override statutes or ignore established doctrines.”)

Accordingly, we hold that the district court erred in relying on the concepts of equitable estoppel and equitable mortgage to grant relief to Nationwide, notwithstanding section 561.13. The district court had no justification, in equity, to scrap the statute and leap to a remedy that negates the statute designed to protect a homestead. We decline to consider the bona fide purchaser argument

as we agree with Ortiz that he did not have an adequate opportunity to respond to it below, which was first raised in Nationwide's summary judgment reply brief. As previously noted, we also decline to consider the purchase money mortgage argument, as not raised at the summary judgment level.

V. Conclusion.

The granting of summary judgment is reversed and the foreclosure decree emanating therefrom vacated. The matter is remanded to the district court, back to square one. For further clarification on remand, the issues of fraud, mistake, purchase money mortgage, and bona fide purchaser for value are all on the table (if appropriately raised), as their merits were not addressed in the motion for summary judgment and/or on this appeal.

REVERSED AND REMANDED.