IN THE COURT OF APPEALS OF IOWA

No. 0-980 / 10-0679
Filed January 19, 2012

METABANK,
Plaintiff-Appellee,

vs.

ESTATE OF EDWARD J. BOESEN,
Defendant-Appellant/Cross-Appellee.

MAUREEN A. BOESEN,
Third-Party Plaintiff-Appellee/Cross-Appellant,

vs.

METABANK and ESTATE OF EDWARD J. BOESEN,
Third Party Defendants.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Maureen Boesen and the Estate of Edward J. Boesen appeal the district court's ruling granting MetaBank's foreclosure petition. **AFFIRMED.**

James R. Monroe, Des Moines, for appellant Estate of Edward J. Boesen.

Adam C. Van Dike of Connolly O'Malley Lillis Hansen Olson LLP, Des Moines, and Jerrold Wanek of Garten & Wanek, Des Moines, for appellee/cross-appellant Maureen A. Boesen.

Mark McCormick, Thomas L. Flynn, Margaret C. Callahan, and Matthew C. McDermott of Belin McCormick, P.C., Des Moines, for appellee MetaBank.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

In the recently decided case of *Freedom Financial Bank v. Estate of Boesen*, ____ N.W.2d ____, ____ (Iowa 2011), our supreme court considered whether a surviving spouse's dower interest, codified at Iowa Code section 633.211 (2007) as to nonhomestead real property, is subject to a lender's purchase-money mortgage. This case presents the related question of whether a surviving spouse's dower interest under section 633.211 is subject to a nonpurchase-money mortgage that refinanced an existing mortgage and advanced new funds. As in *Freedom Financial Bank*, our resolution of this question is guided by cases dating back to the mid to late 1800s. We begin, however, in the much more recent past, with the somewhat complicated financing used by the deceased spouse to purchase and renovate the property at issue.

I. Background Facts.

On December 20, 2005, Edward Boesen entered into an installment contract for the purchase of a warehouse on Hickman Road in Urbandale, Iowa, from Denny Elwell Family, L.C. (Elwell) for $1.3 million. Edward planned to make substantial improvements to the rundown property by converting it to a multi-tenant, high bay warehouse. The contract provided for monthly interest-only payments until January 3, 2007, when the full amount of the principal and unpaid interest was due, in order to give Edward time to obtain financing for the purchase and renovation of the property. On the same date as the contract was executed, Elwell delivered a warranty deed conveying the property to "Edward J.

Boesen, a married person" to an escrow agent pending satisfaction of the contract.

According to Edward's accountant, whenever Edward purchased real estate he typically formed a limited liability corporation and transferred the real estate to the corporation for liability reasons. In keeping with that practice, Edward formed Boesen Hickman, L.L.C. on January 25, 2006. Boesen Hickman then obtained a loan for $2.1 million from First National Bank Midwest (FNBM) on January 31. As the managing member of Boesen Hickman, Edward signed a promissory note for that amount, with an initial advance of $1,322,290.40 to Boesen Hickman.

The note indicated the purpose of the loan was "Renovation of Warehouse on Hickman" but contained a "Purchase Money Loan" clause authorizing the bank to "include the name of the seller on the check or draft for this Note." The note was secured by a mortgage on the property, which warranted that Boesen Hickman "is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell, mortgage and warrant the Property." FNBM issued a check to Elwell for $1,308,975.40 on January 31, 2006, satisfying Edward's obligations under the December 20, 2005 installment contract.

In the spring of 2006, Elwell discovered the escrowed warranty deed conveying the property to Edward had not been recorded. Elwell accordingly issued a new deed conveying the property to "Edward J. Boesen, a married person," on July 3, 2006. On August 2, a warranty deed conveying the property to Boesen Hickman was signed by Edward and Maureen Boesen, as husband

and wife.[1] On that same date, Fidelity Bank agreed to loan $2,846,150 to Boesen Hickman, which was again secured by a mortgage on the property. Boesen Hickman used $2,100,992.92 of those funds to pay the FNBM note in full on August 2. The remaining funds were to be used to pay for ongoing construction on the property.[2]

Shortly after obtaining the Fidelity Bank loan, Edward approached the bank's loan officer and asked to refinance the loan so that he could acquire $500,000 in cash equity from the property to invest in an ethanol plant. The bank was not willing to refinance the loan to fund Edward's desired investment opportunity.

Edward accordingly contacted the plaintiff in this case, MetaBank. He requested a "$380,000 non-revolving line of credit for Ed Boesen Investments to complete the construction project at 9943 Hickman Road, Urbandale." MetaBank agreed to lend Edward that amount and issued a check to him personally on November 21, 2006. The bank later loaned Edward an additional $900,000 on December 29 "to pay construction expenses prior to year end." That loan was secured by a mortgage on the Hickman warehouse property with Boesen Hickman as the mortgagor. The mortgage stated it secured "[a]ny and all debts owed to MetaBank" with $4.9 million in credit available—the anticipated value of the property after construction was completed.

Several months later, on March 2, 2007, MetaBank entered into a "Commercial Promissory Note" with Boesen Hickman for $3,920,000. The note

[1] Maureen claims her signature on this deed was forged.

[2] At the time the Fidelity Bank loan was made, Edward informed a representative from the bank that $500,000 in repairs to the property had already been performed.

was secured by the December 29, 2006 mortgage executed by Boesen Hickman and MetaBank. The funds from the loan were used to pay off the two earlier advances of $380,000 and $900,000 to Edward personally, as well as the Fidelity Bank loan.

II. Prior Proceedings.

Edward died intestate on July 15, 2008, leaving Maureen as his surviving spouse. The MetaBank mortgage thereafter fell into default. MetaBank issued a notice of default and filed its petition to foreclose the mortgage in September 2008 naming, among others, the Estate of Edward J. Boesen as a defendant. The bank sought judgment for the $3,784,817.34 remaining due on the note, plus interest, late charges, attorney fees, and costs. The estate filed an answer, asserting as an affirmative defense that the mortgage was void because Maureen had not relinquished her statutory dower interest in the property under section 633.211. Maureen later intervened in the suit as a third-party plaintiff and brought a quiet title action against MetaBank, alleging she was the "absolute owner in fee simple of" the warehouse property by virtue of her statutory dower interest.

The estate, Maureen, and MetaBank filed motions for summary judgment. Maureen argued that upon Edward's death, she "took ownership of the warehouse property free of all debts and encumbrances as a result of her statutory dower interest under Iowa Code section 633.211." The estate agreed Maureen retained her statutory dower interest in the property, but argued her

interest was "subject to all of the debts of Ed Boesen's insolvent estate."[3] MetaBank responded that Maureen had no statutory dower interest in the property because Edward (1) never personally paid for the purchase of the property and (2) held it as an intermediary for Boesen Hickman.

The district court partially granted the estate's motion for summary judgment, finding that if "Maureen has a statutory share interest, it is subject to the debts and claims in the estate."[4] The court then denied the remainder of the motions, determining that "factual issues remain[ed] as to whether Maureen Boesen has a dower interest in the property at all, and if so, for what value."

The case proceeded to a bench trial in December 2009, following which the district court entered a ruling dismissing Maureen's quiet title action and granting MetaBank's foreclosure petition. The court agreed with MetaBank's position, finding (1) a "surviving spouse cannot assert a dower interest against the seller or against one who stands in the shoes of the seller, for example, by virtue of having paid the purchase price," and (2) "no dower interest comes into existence when the deceased spouse held the property for the benefit of another

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[3] The estate also argued that Maureen's signature on the August 2, 2006 deed conveying the property to Boesen Hickman was forged, thus voiding the conveyance of her interest to that entity. The district court rejected that argument, finding the "August 2, 2006 deed as a matter of law was a valid conveyance of Ed Boesen's interest to Boesen Hickman." The estate does not challenge this determination on appeal.

[4] Maureen appeals this portion of the court's ruling, arguing the court erred in finding her statutory dower share in the property is subject to the estate's other debts and charges. Though we need not and do not reach this issue due to our conclusion that Maureen has no dower interest in the property, we note our supreme court decided this question in Maureen's favor in *Freedom Financial Bank*. ____ N.W.2d at ____ (holding section 633.211(1) "provides a surviving spouse an interest in real estate free and clear of the debts and charges of the decedent's estate"). We additionally note Maureen has asserted no claim to the surplus, if any, remaining after the sale of the property. *Cf. id.* (finding Maureen had a dower interest in the sale surplus of the property).

or took title merely as an intermediary." A judgment and decree of foreclosure was subsequently entered by the court.

The estate appealed, and Maureen cross-appealed.

III. Scope and Standards of Review.

The parties agree our review of this foreclosure and quiet title proceeding, which was tried in equity, is de novo.[5] *See* Iowa Code § 654.1; *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011).

IV. Discussion.

A. Whether MetaBank's Nonpurchase-money Mortgage is Superior to Maureen's Claimed Statutory Dower Interest?

Maureen and the estate contend her statutory dower share under Iowa Code section 633.211 provides her with an interest in the warehouse property that is superior to MetaBank's mortgage. Section 633.211 states in relevant part:

> If the decedent dies intestate leaving a surviving spouse and leaving no issue or leaving issue all of whom are the issue of the surviving spouse, the surviving spouse shall receive the following share:
>
> 1. All the value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or by other judicial sale, and to which the surviving spouse has made no relinquishment of right.

This statute is a codification of the long-held "general rule of the wife's inchoate right in land of which her husband may be seised at any time during the

[5] Given our de novo standard of review, we reject Maureen's argument that the trial court erred in deeming as established the undisputed facts from the court's prior summary judgment ruling. *See Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968) (stating we do not need to consider assignments of error in the trial court's findings of facts and conclusions of law separately, but make such findings and conclusions from our de novo review as we deem appropriate). We additionally note many of these facts were conceded by Maureen in her summary judgment filings and in a pre-trial stipulation entered into by the parties.

existence of their marriage relation." *Sullivan v. Sullivan*, 139 Iowa 679, 683, 117 N.W. 1086, 1087 (1908). "It is also an equally well-recognized general proposition that no act or omission on the part of the husband will defeat her right." *Id.*; *see also Warner v. Trs. of Norwegian Cemetery Ass'n*, 139 Iowa 115, 117, 117 N.W. 39, 42 (1908) ("The dower right, given by statute to a wife in the property of her husband, though inchoate pending the life of the husband, is in the nature of a property right, and she cannot be divested of it by any act of her husband, whether done in good faith, or in fraud. . . .").

Like all general rules, however, "it is subject to some limitations or exceptions." *Sullivan*, 139 Iowa at 684, 117 N.W. at 1087. One such exception concerns a purchase-money mortgage, which our supreme court recently considered in *Freedom Financial Bank*.[6] *See id.* (stating where "the husband purchasing the land . . . mortgage[s] the same to its full value to secure the purchase price, and although the wife fails or refuses to join in the mortgage, her dower right is subject thereto"); *accord Thomas v. Hanson*, 44 Iowa 651, 653 (1876) (finding a widow's dower interest was subject to the lien of a purchase-money mortgage).

A purchase-money mortgage is defined by Iowa Code section 654.12B(2) as a mortgage

> [t]aken by a lender who, by making an advance or incurring an obligation, provides funds to enable the purchaser to acquire rights in the real estate, including all costs in connection with the purchase, if the funds are in fact so used.

[6] The *Freedom Financial Bank* case involved a foreclosure proceeding brought by a different lender against Maureen and the Estate of Edward J. Boesen for a tract of real estate purchased by Edward in Ankeny.

Such a mortgage "'is predicated on the theory that upon the simultaneous execution of the deed and mortgage the title to the land does not for a single moment rest in the purchaser.'" *Freedom Financial Bank*, ____ N.W.2d at ____ (citation omitted). "Through a legal fiction, the title 'merely passes through [the purchaser's] hands and, without stopping, vests in the mortgagee.'" *Id.* (citation omitted). "Accordingly, 'no lien of any character' can attach prior to the purchase-money mortgage. . . ." *Id.* (citation omitted); *see also* Iowa Code § 654.12B ("The lien created by a recorded purchase money mortgage shall have priority over and is senior to . . . any other right, title, interest, or lien arising either directly or indirectly by, through, or under the purchaser.").

The priority of purchase-money mortgages over a spouse's statutory dower interest is a long-standing and well-accepted proposition. *Freedom Financial Bank*, ____ N.W.2d at ____ (holding widow's statutory dower interest attached after and was subordinate to purchase-money mortgage executed by deceased spouse). Here, however, we are not dealing with a purchase-money mortgage. The mortgage held by MetaBank was used to refinance the mortgage held by Fidelity Bank, which in turn had been used to refinance the original mortgage held by FNBM on the property. Additional money was advanced to Boesen Hickman under both the MetaBank mortgage and the Fidelity Bank mortgage for renovation of the property. Under Iowa Code section 654.12B(2), "a mortgage given to secure funds which are used to pay off another mortgage is not a purchase-money mortgage," except when the mortgage "is a refinancing of an existing purchase money mortgage between the same lender and purchaser and no new funds are advanced."

MetaBank nevertheless argues "Maureen cannot claim a dower interest superior to MetaBank because Ed Boesen never paid Elwell for the warehouse property and MetaBank claims through the entity—i.e., Boesen Hickman—that did pay the purchase price." Though the issue is not free from doubt, we agree with MetaBank and conclude, as the district court did, that this case is controlled by our supreme court's opinion in *Barnes v. Gay*, 7 Iowa 26 (1858).

In *Barnes*, the deceased spouse, Thomas Barnes, entered into a contract to purchase land for $150 from an individual named Boak. 7 Iowa at 27. Barnes and his family took possession of the land and made improvements on it. *Id.* He later assigned his interest in the land to a man named Gay, whom he owed $300 for goods. *Id.* By the time the contract for the land came due, Barnes had paid only $60 towards the purchase price. *Id.* at 29. Gay paid the amount remaining due on the contract and took the deed to the land from Boak. *Id.* Gay later agreed that if Barnes paid him $500, he would transfer the deed to the lot to him. *Id.* Barnes secured a loan for $500 from an individual named Chamberlain, who in exchange received a deed for the land from Gay. *Id.* Barnes failed to pay the $500 owed to Chamberlain, and the land was sold back to Gay. *Id.* at 30. After Barnes died, his widow asserted a dower interest in the land. *Id.* at 32.

The court denied the widow's claim, finding "the insuperable difficulty" with her claim was

> that Barnes had never paid for the property, whilst the [widow's] claim is *against those who stand in the place of the vendor*. She could not have set up this claim against Boak, and the least that can be said is, that Gay and Chamberlain stand in his place. . . . [S]he cannot sustain the claim against the vendor, *or those occupying his position*, in a contract not performed.

Id. (emphasis added). The lesson of *Barnes*, according to MetaBank,

> is that the deceased spouse's failure to pay the purchase price prevents the surviving spouse from claiming dower not only against the immediate contract seller but against any party who stands in the shoes of the seller by virtue of having paid off the contract.

We agree.

A surviving spouse's dower interest cannot exceed the interest held in the property by the deceased spouse. *See Freedom Financial Bank*, ____ N.W.2d at ____ ("Maureen's statutory dower cannot bestow upon her a property interest greater than Edward ever possessed."); *Sullivan*, 139 Iowa at 687, 117 N.W. at 1089 ("The claim of dower can be of no higher quality than the seisin of the husband at the instant when the concurrence of such seisin and the wife's coverture give it birth."); *Thomas*, 44 Iowa at 652 ("'[W]ife's inchoate right of dower could not have been greater or better than her husband's original right to the lot.'" (citation omitted)). Thus, as MetaBank argues, "Maureen cannot take the warehouse property free and clear as dower because Ed Boesen, having failed to personally pay for the property, never held the property free and clear."

This result is supported by cases from other jurisdictions. *See Howell v. Bush*, 54 Miss. 437 (1877) ("[A] mere change in the form of the evidence of indebtedness will not operate to discharge a lien given to secure a debt, unless it is apparent that the parties intended to extinguish the lien."); *Swift v. Kraemer*, 13 Cal. 526 (1859) ("[A]s to the debts secured by the original mortgage . . . we regard the cancellation of the old mortgages and the substitution of the new, as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old."); *Hugunin v. Cochrane*, 51 Ill. 302, 305 (1869)

(noting a widow's dower interest is subordinate to a vendor's lien "where the purchase money has not been paid, against the vendee, and all persons claiming as volunteers, or with notice under him"); *see also* 28 C.J.S. *Dower & Curtesy* § 44, at 136 (2008) ("If a subsequent encumbrancer or purchaser from the vendee is compelled to discharge the lien of the vendor, he or she will be entitled to be substitute in the place of the vendor.").

The attempts by Maureen and the estate to distinguish *Barnes* from the facts presented here fall short. Although the estate argues Edward personally paid the purchase price for the property, the record clearly shows he did not, as FNBM issued a check for $1,308,975.40 to Elwell on January 31, 2006, pursuant to the promissory note and mortgage executed by Boesen Hickman on that same date. And contrary to the estate's arguments otherwise, *Barnes* did not involve a purchase-money mortgage. Furthermore, whether the December 20, 2005 installment contract was an executory or earnest money contract is irrelevant in our view, as *Barnes* also involved a contract that was later satisfied in full by a third party.

B. Whether Edward Took Title to the Property in Trust or as an Intermediary for Boesen Hickman?

We also agree with the district court's alternative reason for denying Maureen's claim to the property, which rests on another exception to the statutory dower rule as discussed in the case of *Paige v. Paige*, 71 Iowa 318, 32 N.W. 360 (1887).

In *Paige*, the deceased spouse and his business partner purchased a sawmill and obtained a deed to the property in their individual names. 71 Iowa at

320, 32 N.W. at 361, 363. Four days later, the two men formed a new partnership to operate the mill and paid for the property with partnership funds. *Id.* The widow of one of the partners claimed a dower interest in the property after his death. The court rejected her claim, finding that although the deceased spouse held title in his individual name, the property in all actuality belonged to the partnership. *Id.* at 326-27, 32 N.W. at 364; *see also Sullivan*, 139 Iowa at 684, 117 N.W. at 1087 (noting a wife's statutory dower interest would not attach where "the husband takes title to land in trust for another, or takes title as a mere intermediary between others"). The facts of this case are comparable to *Paige* and fit within the exception noted in *Sullivan* and other cases. *See, e.g.*, *Hugunin*, 51 Ill. at 305 ("Where a husband is seized of an estate to hold in trust for another, it is a familiar rule that the wife shall not be endowed of such estate, although he is manifestly seized of the fee.").

Edward entered into the installment contract with Elwell for the purchase of the warehouse on December 20, 2005. The following month, on January 25, 2006, he established Boesen Hickman. Five days later, Boesen Hickman executed a promissory note and mortgage with FNBM for the payment of the contract. Although Edward thereafter received a deed to the property in his own name, he conveyed the property to Boesen Hickman a short time later. These facts show that, like the deceased spouse in *Paige*, Edward held title to the property in trust or as an intermediary for Boesen Hickman. Maureen accordingly had no statutory dower interest in the property.

V. Conclusion.

As in *Freedom Financial Bank*, we find the result reached in this case is not unfair to Maureen. Though dower is favored by the courts, "it is not to be allowed at the expense of clearly inequitable results, unless the statute clearly requires it." *Sullivan*, 139 Iowa at 687, 117 N.W. at 1089. To allow Maureen a statutory dower interest in the full value of the property "free and clear" of MetaBank's claim for $3.7 million would, we believe, "work manifest injustice and wrong." *Id.*

We accordingly affirm the judgment of the district court dismissing Maureen's quiet title petition and granting MetaBank's foreclosure petition.

AFFIRMED.