IN THE SUPREME COURT OF IOWA

NO. 19-1689

WAYNE JOSEPH MLADY,
Appellant-Cross Appellee,

vs.

SUE ANN DOUGAN,
Appellee-Cross Appellant.

Appeal from the Iowa District Court for Howard County
The Honorable John J. Bauercamper
No. EQCV017058

APPELLANT/CROSS-APPELLEE'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW FROM THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 16, 2020

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TABLE OF CONTENTS

Page

STATEMENT RESISTING FURTHER REVIEW

Iowa Rule of Appellate Procedure 6.1103(1)(b) generally requires the applicant allege: "(1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter; (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court; (3) The court of appeals has decided a case where there is an important question of changing legal principles; [and/or] (4) The case presents an issue of broad public importance that the supreme court should ultimately determine." Dougan fails to identify which grounds she relies upon for further review for either issue. Application, p. 4. In addition, as set forth herein, neither issue is appropriate for further review and as such should be denied.

TABLE OF AUTHORITIES

Page

CASES

STATUTES/RULES

BACKGROUND

This is the second appeal between the parties regarding redemption of foreclosed agricultural property.

After foreclosure and entry of default judgment, Wayne Mlady ("Mlady") purchased agricultural property via sheriff's sale. The agricultural property debtor assigned his right to redeem the property to Sue Ann Dougan ("Dougan"). The district court found the assignment invalid and unenforceable, such that Dougan was not eligible to redeem, leading to the first appeal.

The Court of Appeals reversed and remanded to the district court for entry of a judgment consistent with its opinion that the assignment was valid and enforceable but directing the district court to determine whether Dougan's redemption was timely. On remand, the district court found the redemption timely and that the interest rate accrued after the sheriff's sale at the rate of 21%. Both parties appealed.

The Court of Appeals reversed the district court's determination as to timeliness and affirmed the interest rate of 21%. Dougan seeks further review. As set forth herein, further review should be denied.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE APPLICABLE INTEREST RATE FOR REDEMPTION WAS 21%.

A. This Matter was Properly Routed to, and Determined by, the Court of Appeals.

Dougan again insists that this case presents "a substantial issue of first impression." Application, p. 7. This Court implicitly rejected that argument when it made its initial determination to route this matter to the Court of Appeals. The district court and the Court of Appeals utilized well-established and familiar rules of contract construction and interpretation in their determination that the applicable interest rate was 21%.

The district court did not need to engage in a complicated analysis of the terms of the Notes when it determined: "The original note rate was contractually increased by the terms of the note to the default rate." Remand Ruling (App. 320). In the construction of written contracts, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 6.904(3)(n). The Notes unambiguously provided for the contract rate to be 21% in the event of maturity and/or

default. Notes (App. 603-606). The Court of Appeals agreed with the district court, further acknowledging:

> The order granting default judgment on the bank's foreclosure action decrees Clement owes "[p]rincipal, interest, late charges and fees as of the 21st day of March, 2017 in the aggregate amount of $1,791,695.84" and "[i]nterest accruing per day as against the Notes in the aggregate daily rate of $933.942 from and after the 21st day of March, 2017." The notice of sheriff's sale states, "Accruing Costs: PLUS 933.94 per day from 03/21/2017 = $57,904.28." The $933.33 daily rate of interest corresponds to the default interest rate. We affirm the denial of Dougan's motion to enlarge or amend the findings of the June 12, 2019 order, which determined the interest rate on the sheriff's certificate of sale is 21%.

Opinion, pp. 5-6.

B. The Court of Appeals was Well Within its Discretion to Disregard an Unpublished Sixth Circuit Decision when it Analyzed the Iowa Contracts and Redemption Statute at Issue in this Matter.

Dougan continues to argue for application of an unpublished decision issued by the Sixth Circuit to support her argument that she need only pay 4.25% in order to redeem. Application, p.10 (citing *Royal Manor Apartments, LLC v. Federal Nat. Mortg. Ass'n.*, 614 F. App'x 228 (6th Cir. 2015)). As Mlady previously argued to the Court of Appeals, even if the cited decision were authoritative, it is neither on point nor persuasive.

In *Royal Manor Apartments, LLC*, the purchaser paid an amount at the foreclosure sale *equal to the entire amount due on mortgage*. *Id.* at 230. Under Michigan law, *if the entire amount due is paid then the mortgage is extinguished*. *Id.* at 236 (citing *Bank of Three Oaks v. Lakefront Properties*, 444 N.W.2d 217, 219 (Mich. 1989)) (noting that Michigan case law provides that property purchased at a foreclosure sale *for an amount equal to the amount due on the mortgage* satisfies the debt and extinguishes the mortgage). The Sixth Circuit determined under the facts:

> Thus, upon foreclosure, no payments from Royal Manor to Fannie Mae remained past due; indeed, no payments were due at all. Under the terms of the note, the default interest rate of 9.74% applies only so long as payments remain past due for 30 days or more; otherwise, the rate of 5.74% applies. Therefore the "interest rate provided for by the mortgage" for purposes of MCL § 600.3240(2) should be the baseline rate of 5.74% as specified in the note.

Royal Manor Apartments, LLC, 614 F. App'x at 236.

Even if Michigan law applied here by analogy, the facts are not the same. Here, a deficiency judgment remains in the amount of $250,198.36. Certificate of Purchase (App. 595-597). In other words, the property was not purchased for an amount *equal to the amount due* on the mortgage. Dougan's continuing attempt to apply *Royal Manor's* interpretation of Michigan law to provide for payment of the baseline

interest rate where the purchaser *fully paid the mortgage debt* should be found inapposite.

Dougan's reliance on *Royal Manor Apartments, LLC* is misplaced and inapplicable to the facts before this Court. The applicable contract rate in this case was fixed at 21% as of September 25, 2016. No authority exists via Iowa statutory or common law to support reversion to the baseline (variable) rate of 4.25%. This Court should reject Dougan's arguments for adoption of the reasoning of the unpublished Sixth Circuit decision as neither persuasive nor analogous to the facts before it.

C. This Court Should Reject Dougan's Alternative Contract Theories and Legislative Policy Arguments.

Dougan asserts:

> The question being asked the Court is what is the contract rate on the Certification of Purchase which accrues interest after the default has been eliminated by the Sheriff's Sale. As stated in the Certificate of Purchase, the judgment has been paid off (except for a deficiency which is irrelevant to this case) and the Certificate issued to the highest bidder.
>
> Why should the Court choose the base rate?

Application, p. 12.

Parsing this, Mlady begins with the fact that a certificate of purchase cannot be in default. It is merely evidence of purchase of foreclosed property at a sheriff's sale. The certificate sets forth: "a

description of the property and the amount of money paid by such purchaser, and stating that, unless redemption is made within one year thereafter, or such other time as may be specifically provided for particular actions according to law, the purchaser or the purchaser's heirs or assigns will be entitled to a deed for the same." Iowa Code § 626.95.

Iowa Code § 628.13 requires that the redeemer pay "interest at contract rate on the certificate of sale from its date." The "contract rate" is not a rate set by the Certificate of Purchase. It is a rate negotiated by the parties and set forth in writing in the foreclosed Notes. The Certificate of Purchase simply sets forth the beginning amount in the redemption equation. *See* Iowa Code § 628.13 (requiring Dougan pay "into the clerk's office of the amount of the certificate, and…").

Dougan next appears to argue that the "legislative policy provided by the statutory scheme of redemption" dictates that the interest rate for redemption should be 4.25%. Application, p. 12. This argument should be rejected.

Here, the district court and the Court of Appeals properly analyzed Iowa Code § 628.13, the promissory notes, and the notice of sheriff's sale. Further, lenders and borrowers may "agree in writing to

pay *any* rate of interest." Iowa Code § 535.2(2)(a)(5). Inclusion of the descriptor "any" includes a fixed rate, variable rate, or any other rate subject to terms or conditions as agreed upon the parties in writing. The parties could have, but did not, provide that the base rate continued even in case of default. Parties may contract for any rate of interest, including different interest rates because of change of circumstances between a lender and a borrower. *Federal Land Bank of Omaha v. Wilmarth*, 252 N.W.2d 507, 510 (Iowa 1934).

Mlady can find no authority for using legislative policy as a substitute for court interpretation of the applicable statute and legal documents at issue in this matter.

II. THE COURT OF APPEALS PROPERLY DETERMINED DOUGAN FAILED TO TIMELY REDEEM AND PROPERLY DEEMED HER FAILURE BEYOND THE REACH OF EQUITABLE RELIEF.

The Court of Appeals outlined the limits placed by the redemption statute:

> The statutory right to redeem set forth in Iowa Code section 628.3 dates to 1851. *See Farmers Tr. & Sav. Bank v. Manning*, 359 N.W.2d 461, 464 (Iowa 1984). Since that time, our supreme court has observed that the redemption statute "must be strictly complied with." *Nw. Mut. Life Ins. Co. v. Hansen*, 218 N.W. 502, 505 (Iowa 1928). Failure to act within the one-year redemption period puts the holder of a right of

> redemption "beyond the reach of equitable relief." *Tharp v. Kerr*, 119 N.W. 267, 268 (Iowa 1909). Under such circumstance, the court has "no discretion nor power of mercy" to allow redemption. *Cent. State Bank v. Lord*, 215 N.W. 716, 718 (Iowa 1927).

Opinion, p.8.

Dougan no longer disputes that her attempt at redemption was untimely. Application, pp. 16-17. Instead, she shifts her argument to try and fit within the limited category of cases where Iowa courts have allowed equitable relief. To attempt to do so, Dougan now insists her attorney's "mistake was not his alone." *Id.*

The record does not support this new allegation that the district court should be deemed responsible for her attorney's mistake in calculating the payoff amount. Dougan was advised by *two attorneys* as to applicable interest rate:

> Q [by Attorney Duffy] And did you -- were you advised by me, through Attorney Sween in Albert Lea, that the rate of interest might be an issue in terms of your redemption?
> A. Recently.
> Q. And that we would have to apply to the court to have the court decide that?
> A. Yes.

Id. at 21:6-12 (App. 471).

Two days before the redemption period expired on May 23, 2018, Dougan made a payment of $247,001.00 to the Clerk of Court "as a protective deposit in order to redeem if the Trial Court should eventually decide that the applicable rate of interest on the Certificate of Purchase was 21 percent instead of 4.25 percent." Supplement to Brief in Support of Petition To: (a) Determine Applicable Rate of Interest on Purchase (App. 182-186); Dougan Second Payment (App. 602).

Due to her attorney's negligence, the "protective deposit" did not fully cover the amount required to redeem prior to the expiration of the redemption period. *See* July 22, 2019 Hearing Transcript at 3:20-24 (App. 613) (acknowledging "her attorney miscalculated the second provisional payment of $247,001 deposited with the clerk on May 21, 2018, and underpaid that by $1,798.79") and Dougan Rule 1.904 Brief in Support (App. 371) (again admitting her attorney's error in computing interest).

Dougan has not previously attempted to cast blame on the district court for her error. She does so now in an effort to fall within the limited circumstances where the Iowa Supreme Court has allowed equitable relief. This case does not so fall.

The Iowa Supreme Court has explained the type of mistake for which a court of equity may relieve a party from the consequences of not strictly complying with a legal duty:

> A mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time.

SDG Macerich Properties, L.P. v. Stanek Inc., 648 N.W.2d 581, 587 (Iowa 2002) (citations omitted).

In *SDG Macerich Properties, L.P.*, the court reversed and remanded the lower court's grant of equitable relief to a plaintiff who forgot to timely exercise an option to renew a lease agreement. The court determined the district court improperly applied a test set forth in *F.B. Fountain Co. v. Stein*, 118 A. 47, 49–50 (Conn. 1922) ("*Fountain* test"), which analyzed whether equity should intervene where the plaintiff's action was mere negligence. Under the *Fountain* test, the district court considered: (1) whether the plaintiff's conduct was "the result of an honest mistake or oversight and not intentional, willful, or grossly negligent conduct; (2) whether the [defendant] has changed positions or been damaged by the delay; (3) the extent of the delay; and (4) whether the delay would work an unconscionable hardship on the [defendant]."

SDG Macerich Properties, L.P., 648 N.W.2d at 585. In other words, the district court determined that mere negligence would not bar equity relief to the plaintiff. The Iowa Supreme Court disagreed, finding the plaintiff admitted it forgot to exercise its option "because of a mere oversight." *Id.* at 587. The court declined to "use equitable principles to save a party from the circumstances it created." *Id*.

Iowa courts similarly strictly limit the use of equitable principles when evaluating a redeemer's negligent failure to timely pay the required redemption amount. No Iowa case supports a finding of equitable compliance with the statutory requirement that the full redemption amount be deposited in the case of the redeemer's attorney's negligence.

Dougan argues that the Court of Appeals' recent decision in *Sibley State Bank v. Zylstra,* No. 19-0126, 2020 WL 4814072 (Iowa Ct. App. Aug. 19, 2020) supports equitable relief in this matter. *Zylstra*'s reasoning and holding, however, is consistent with the Court of Appeals' decision in this case. In *Zysltra*, the Court of Appeals similarly refused to use its equitable powers to allow for an extension of the one-year timeframe to credit an additional payment in order to match the correct redemption amount:

> Like the district court, we are disinclined to move the goal posts as a matter of equity. Our supreme court has been reluctant to extend this statutory deadline.

Zylstra, No. 19-0126, 2020 WL 4814072 at *6 (citing *Fed. Land Bank of Omaha v. Heeren*, 398 N.W.2d 839, 844 (Iowa 1987); *Hansen*, 218 N.W. at 505 (endorsing strict compliance with redemption statute).

Dougan argues that her use of the "safe harbor" provided under Iowa Code § 628.21 should support equitable relief. Application, p. 18. Her argument ignores the requirement that she "deposit the necessary amount." Iowa Code § 628.21. This means that she was still required to deposit the full redemption amount. *See Hansen*, 218 N.W. at 502 (Iowa 1928) ("plaintiff must actually deposit the requisite amount, and not merely tender it in his pleadings") (citation omitted).

Dougan's reliance on language from *Tharp* is also misplaced. Application, p. 8. In *Tharp,* the court declined to accept plaintiff's assertion that equity should intervene and allow a later redemption where plaintiff alleged he mis-read a letter from the clerk and sheriff setting forth the expiration date of the redemption period. 119 N.W. at 269. Analogously to the present facts, the *Tharp* plaintiff alleged he had been and was still willing to pay the necessary amount to redeem. *Id.* at 267.

Dougan points to additional cases as indicating there is "room for equity in this case." Application, p. 16. In both cases, the court equitably allowed late redemption where the error or mistake was made by the clerk, rather than the redeemer. *Olson v. Sievert,* 30 N.W.2d 157, 159 (Iowa 1947) (allowing late redemption where error made by deputy clerk rather than the redeemer and redeemer's failure to discover the clerk's error was not negligent); *Wakefield v. Rotherham*, 25 N.W. 697, 698 (Iowa 1885) (allowing late redemption where error made by clerk and redeemer "was guilty of no negligence in the matter").

This Court should reject Dougan's insistence that equity should serve to excuse her negligent failure to timely redeem. Dougan should not be able to invoke equity to deprive Mlady of a property for which he properly followed the statute's dictates.

CONCLUSION

WHEREFORE, Mlady respectfully requests this Court decline further review.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on January 11, 2021 I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This Resistance complies with the typeface and type-volume limitation of Iowa R. App. P. 6.1103(4) because this Resistance has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Calisto MT and contains 2,832words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(*a*).

/s/ Dawn M. Gibson — Jan. 11, 2021
Date