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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1248**

Hendel Construction, LLC,
Appellant,

vs.

Security State Bank of Howard Lake,
Respondent.

**Filed March 31, 2009
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27-CV-07-19768

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

After respondent Security State Bank of Howard Lake (the bank) foreclosed its second mortgage, appellant Hendel Construction, LLC, a junior lienholder, sought a declaratory judgment requiring the bank to disclose information regarding its first

mortgage to enable appellant to decide whether to exercise its right of redemption. Appellant also requested a temporary restraining order (TRO) to toll the running of the redemption period. The district court denied the request for a TRO and granted summary judgment to the bank. Appellant challenges both the denial of the TRO and summary judgment.

Because the district court did not abuse its discretion by refusing to grant a TRO, and because a senior lienholder has no duty under Minnesota law to disclose information about a non-foreclosed mortgage to a prospective bidder at the foreclosure sale of a lien subordinate to the non-foreclosed mortgage, we affirm.

FACTS

In December 2005, appellant entered into an agreement with Executive Homesites, LLC (Executive), designating appellant as the exclusive builder for a 12-lot development owned by Executive. Executive granted a first and second mortgage on the property to respondent Security Bank of Howard Lake (the bank). Appellant purchased four of the lots (the Hendel lots) from Executive in January 2006 for \$1.2 million; a portion of the purchase price was paid to the bank to release the first and second mortgages against the Hendel lots. Executive retained the remaining eight lots (the foreclosure lots).

On February 7, 2007, the bank foreclosed its second mortgage against the foreclosure lots by advertisement, but did not foreclose its first mortgage. At the sheriff's sale on April 4, 2007, the bank purchased the foreclosure lots for \$446,480.50. This meant that the period during which Executive could redeem ended on October 4, 2007.

On September 7, 2007, appellant received a default judgment against Executive in the amount of \$100,000 based on a violation of its agreement with Executive that appellant would be the exclusive builder for the development. Appellant filed this judgment creating a lien against the foreclosure lots on September 24, 2007, or shortly thereafter.

In August 2007, appellant contacted the bank asking for information about the first mortgage, which had not been foreclosed, so that appellant could evaluate whether it should exercise its anticipated right to redeem the foreclosure lots. The bank refused to release any information about the first mortgage, citing confidentiality reasons. The bank also stated that it was involved in negotiations with other parties for the purchase of the property. Appellant wrote a second letter to the bank on September 4, 2007, asking for the information and accusing the bank of bad faith. The bank continued to refuse to disclose information about the first mortgage, as did Executive. Appellant sought financing for purchase of the foreclosure lots, but was unable to obtain financing without the first mortgage information.

On September 27, 2007, appellant sued the bank, seeking (1) a temporary injunction to toll the redemption period; (2) a declaratory judgment that the bank's foreclosure as to the torrens portions of the property was defective;¹ and (3) a declaratory judgment that the bank had breached its duty as senior mortgagee to disclose basic information about the first mortgage. On October 5, 2007, appellant asked the district

¹ The foreclosure lots were both torrens and abstract property; the bank failed to file the modified second mortgage with the registrar of titles.

court for a temporary restraining order tolling the redemption period, which for appellant would end on October 11, 2007. Concluding that appellant had not shown it was likely to suffer an irreparable injury or that the five *Dahlberg* factors weighed in favor of a TRO or other temporary relief, the district court denied the motion on October 5, 2007. The court relied in part on the fact that appellant still could redeem until October 11 but also confirmed that the bank was not obligated to release information to appellant.

The bank moved for summary judgment in the declaratory judgment action. The district court granted a partial summary judgment, entering judgment in favor of the bank on June 2, 2008, on two of the three counts, concluding that the bank had no duty to appellant to disclose information about the first mortgage.² This appeal followed.

DECISION

Summary Judgment

Summary judgment must be granted if, based on the entire record before the court, there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The facts here are undisputed and therefore the only issue for this court is whether the district court properly applied the law. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). We review a purely legal issue de novo. *Id.* The sole question before us is whether the bank had a duty to disclose information about the non-foreclosed first mortgage to appellant.

² The third count, which dealt with the defective foreclosure of the torrens portions of the property, was referred to the Hennepin County Examiner of Titles for determination, pursuant to Minn. Stat. § 508.20 (2008). This order has not been appealed.

Under the statute, a mortgagee foreclosing by advertisement must include in the notice of foreclosure the amount claimed to be due on the foreclosed mortgage as well as the original or maximum amount of principal. Minn. Stat. § 580.04 (2008). The statute does not require disclosure of other liens or encumbrances. Although the bank here held both the non-foreclosed first mortgage and the foreclosed second mortgage, it had no statutory obligation to disclose information about the first mortgage. Each lien stands alone regardless of whether it is held by the same or different creditors; if one party holds both the senior lien and the next junior lien, that party has no superior or different rights or obligations than any other creditor holding a junior lien. *Graybow-Daniels Co. v. Pinotti*, 255 N.W.2d 405, 406-07 (Minn. 1977). For all practical purposes, although the same party may hold two different liens, the party is treated as though it were two separate lienholders. *Id.* at 407. Thus, the bank had no duty under the foreclosure statute to disclose information about the non-foreclosed first mortgage.

Because Executive is still the obligor of the note secured by the first mortgage, the bank has a basis for refusing to disclose information because of confidentiality requirements. Generally, a bank is under a duty not to disclose information about its depositors to a third party, unless it has actual knowledge of fraudulent activities by the depositor. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 367, 244 N.W.2d 648, 651 (1976).

A bank may also be obligated to make disclosures in other circumstances: (1) one must disclose a relevant fact if one owes a duty to another to exercise reasonable care; (2) one must disclose matters known to someone to whom a fiduciary or similar duty is

owed; or (3) one must disclose relevant facts if one is aware that the other party is operating under a mistaken belief as to those facts and based on the relationship between them, has a reasonable expectation of disclosure of those facts. *Gerdein v. Princeton State Bank*, 371 N.W.2d 5, 8 (Minn. App. 1985), *aff'd on other grounds*, 384 N.W.2d 868 (Minn. 1986). None of these conditions apply here.

Appellants urge us to apply the Restatement (Third) of Property: Mortgages § 1.6 (1997), which requires a mortgagee to disclose information about a mortgage to, among others, a prospective bidder at a foreclosure sale of a lien subordinate to the mortgage and a holder of any interest in the mortgaged real estate. This section of the Restatement has not been adopted in Minnesota and does not reflect the current state of the law.

Because the bank had no duty to disclose information about the non-foreclosed first mortgage to appellant and because appellant's failure to exercise its right of redemption extinguished all of its interest in the property, we conclude that the bank was entitled to summary judgment as a matter of law.

Temporary Restraining Order

Appellant argues that the district court erred by denying its motion for a temporary restraining order to toll the running of the redemption period. This court reviews the district court's decision on a request for injunctive relief for an abuse of discretion and its findings for clear error. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 806-07 (Minn. App. 2001). We review the facts "in the light most favorable to the prevailing party." *Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002).

Because appellant sought both a TRO and a temporary injunction, the district court analyzed both types of relief. A TRO may be granted when a party will suffer immediate and irreparable injury. Minn. R. Civ. P. 65.01. The district court concluded on October 5, 2007, that appellant had not shown it would suffer an immediate and irreparable injury that would justify a TRO, because it retained the right to redeem until October 11, 2007, and was not prevented from redeeming. This decision is not an abuse of discretion.

A temporary injunction maintains the status quo pending adjudication on the merits. *Metro. Sports Facilities*, 638 N.W.2d at 220. This court's review of the district court's decision includes consideration of the five *Dahlberg* factors, which must be weighed by a court when considering injunctive relief. *See Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). These five factors include (1) the nature and relationship of the parties; (2) balancing of relative harms; (3) likelihood of success on the merits; (4) public policy; and (5) administrative burdens. *Id.*

(1) *Relationship of the Parties*

The district court found that the parties had “no direct relationship.” Appellant acknowledges that the parties have no direct relationship, except a common interest in the “financial health of the foreclosed property and the success of the Development.” A temporary injunction seeks to maintain the status quo; in general, relationships that support a temporary injunction are longstanding or formalized in some way. *See Dahlberg*, 272 Minn. at 276, 137 N.W.2d at 322 (40-year relationship); *Metro. Sports*

Facilities, 638 N.W.2d at 221 (existing contractual relationship). The district court's finding on this factor is supported by the evidence.

(2) *Relative Harm*

At the time the court made its findings on the request for temporary relief, the redemption period had not yet passed. The court therefore concluded that there was no irreparable harm because appellant could still redeem. The court characterized appellant's argument in support of relative harm as follows: if it did not redeem, it would lose its right to be the exclusive builder for the property. The court noted that appellant's lawsuit and the resulting default judgment against Executive were based on appellant's loss of these exclusive rights. The Hendel lots were not affected by the foreclosure, having already been released from the mortgages. Presumably, the bank had some interest in finalizing the foreclosure action and an injunction would delay that process. The district court's conclusion that the relative harms did not weigh heavily in appellant's favor is supported by the evidence.

(3) *Success on the Merits*

The district court noted that Minnesota law does not provide for release of the information that appellant sought in its complaint and therefore concluded that appellant could not "support its argument with legal authority, [and therefore] it has not shown a likelihood of prevailing on the merits of this claim." Again, the court's conclusion is supported by the evidence.

(4) and (5) Public Policy and Administrative Burden

The court concluded that neither of these factors was implicated. Appellant argues that senior lienholders should be encouraged to disclose information about outstanding encumbrances as a matter of public policy, but this is not the current state of the law. There is no issue of administrative burden.

We conclude that the district court's findings were not clearly erroneous and its decision to deny temporary relief was not an abuse of discretion.

Affirmed.