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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1538**

Harris, N. A., successor by merger to Community Bank Group, Lincoln State Bank, and  
Fortress Bank, N. A.,  
Respondent,

vs.

Evanson & Evanson, et al.,  
Appellants,

Smith, Schaefer and Associates, Ltd., et al.,  
Defendants.

**Filed June 4, 2012  
Affirmed  
Collins, Judge\***

Winona County District Court  
File No. 85-CV-09--2022

Daniel J. McGarry, Hirschboeck Dudek S.C., Madison, Wisconsin (for respondent)

Karl W. Sonneman, Sonneman & Sonneman, Winona, Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and  
Collins, Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**COLLINS**, Judge

In this dispute resulting from a mortgage foreclosure by action, appellant property owners argue that any deficiency calculation must be based on the debt recited in the judgment of foreclosure and, therefore, the district court erred in awarding respondent attorney fees and costs not stated in that judgment. We affirm.

### FACTS

Respondent Harris, N.A., held two promissory notes from appellant Evanson & Evanson that were secured by mortgages on two properties, known as the Iowa Street and Middle Valley Road properties. Respondent brought this action against appellants seeking a money judgment and foreclosure of the mortgages. The district court granted summary judgment for respondent for the principal amounts due on the notes, \$366,939.47 and \$177,805.55 plus interest. The court ordered that respondent was entitled to foreclose on the properties and to recover collection and foreclosure costs, including attorney fees. Respondent bought both properties at a sheriff's sale but mistakenly bid \$166,324 on the Iowa Street property, which had a judgment against it of \$366,939.47, and \$335,462 on the Middle Valley Road property, which had a judgment against it of \$177,805.55.

Before realizing the bidding mistake, respondent moved to confirm the sale and to amend the judgment to add attorney fees and costs through the date of the sheriff's sale. After discovering the mistake, respondent withdrew the motion to confirm the sale but

proceeded with the motion to amend the judgment. The district court awarded respondent \$53,987 for attorney fees and \$18,029.07 for costs and disbursements.

Because the parties were unable to resolve the issue of the bidding mistake, a second sheriff's sale was conducted, at which respondent bought the Iowa Street property for \$217,042. The district court confirmed the sale and awarded respondent a deficiency judgment of \$209,778.02, which included one-half of the attorney fees and costs previously awarded to respondent. This appeal followed.<sup>1</sup>

### DECISION

As a general rule, attorney fees may be recovered only if specifically authorized by a contract or statute. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). We review a district court's decision to award or deny attorney fees for an abuse of discretion. *In re Estate of Van Den Boom*, 590 N.W.2d 350, 354 (Minn. App. 1999), *review denied* (Minn. May 26, 1999).

The affidavit of costs for a foreclosure by action may include "reasonable attorney fees incurred after the foreclosure sale." Minn. Stat. § 582.03, subds. 1, 2 (2010). The statutes governing foreclosure by action do not specifically provide for attorney fees incurred before the foreclosure sale but acknowledge that a mortgage may contain a "covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure" and, under those circumstances, the district court shall establish the amount of such attorney fees when there has been a foreclosure by action. Minn. Stat. § 582.01,

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<sup>1</sup> While this appeal was pending, appellant notified this court that an issue regarding respondent's authority to conduct a second sale to correct the erroneous bids had become moot, and we dismissed the issue.

subds. 1-2 (2010). Here, the foreclosure was by action, and the promissory note required appellants to pay expenses incurred in collecting on the note, including attorney fees and costs.

Appellants rely on *People's State Bank of Jordan v. Ruppert*, 189 Minn. 348, 353, 249 N.W. 325, 327 (1933), to support the contention that the amount of attorney fees and costs must be limited to the amount stated in the judgment directing sale. But *Ruppert* is not on point. The issue there involved the misappropriation by a bank officer of funds tendered for payment on a mortgage and whether the bank officer's acts could be attributed to the bank. 189 Minn. at 351-52, 249 N.W. at 326-327. The supreme court rejected the argument that the bank officer's interest in the mortgaged property should be segregated and a separate sale had for his interest and stated that there can only be one judgment, not multiple judgments, in a foreclosure action. *Id.* at 353, 249 N.W. at 327. And *Fiman v. Hagedorn*, 185 Minn. 582, 586, 242 N.W. 292, 294 (1932), also cited by appellants, addressed whether a bankruptcy discharge applied to a deficiency judgment, is likewise not on point.

Appellants argue that by proceeding with the foreclosure sale, respondent waived any claim, including attorney fees and costs, exceeding sale proceeds. Appellants cite *Cox v. Selover*, 177 Minn. 369, 372, 225 N.W. 282, 283 (1929), in which the supreme court stated that acceptance of payment of a judgment "would appear to be a waiver of any further claim, even for costs." *Cox*, however, did not involve a foreclosure sale. Moreover, the court did not decide the waiver issue but rather held that the motion to

reopen a judgment to add costs was untimely because it was not made within the statutory time limit for moving to reopen a judgment. *Id.*

Here, the promissory note allowed respondent to collect attorney fees and costs. The summary-judgment order, which was attached to the notices of sale, stated that respondent was entitled to attorney fees and costs and disbursements. In appellants' reply brief, they argue that respondent's request for the amount of attorney fees and costs was untimely because it was not made until after the judgment authorizing foreclosure was delivered to the sheriff. We agree with the district court's analysis in its order denying appellants' request to reconsider the award of attorney fees and costs:

[Appellants'] argument regarding Minn. Stat. § 581.03 is that the "certified judgment" is the May 26, 2010 Judgment, which did not state a specific figure for costs and fees, must be the basis for any deficiency calculation. This is essentially yet another challenge to the Court granting [respondent's] motion to amend the Judgment to include the specific amounts of costs and fees. [Appellants'] liability for costs and fees has been well established throughout this case. It was established in the notes [appellants] signed and the Order for Summary Judgment. Neither [respondent] nor the Court would have been prescient enough on May 26, 2010 to know the exact amount of costs and fees [respondent] would incur in foreclosing on the properties and collecting on its Judgment, particularly considering the voluminous motions and challenges that have, and continue to, take place since summary judgment was granted.

The district court's award of attorney fees and costs and disbursements to respondent, which was specifically provided for in the promissory note and in the summary-judgment order, was consistent with Minn. Stat. §§ 582.01, subs. 1, 2, .03, subs. 1, 2, and the authority relied on by appellants does not show that the district court

erred. The party seeking reversal has the burden of showing error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). Accordingly, we affirm the district court's award of attorney fees and costs and disbursements to respondent.

**Affirmed.**