

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1969**

Bank of America, N. A.,
successor by Merger to Merrill Lynch Credit Corporation,
Respondent,

vs.

Horace D. Allen,
Appellant.

**Filed June 25, 2012
Reversed; motion granted in part and denied in part
Kalitowski, Judge**

Scott County District Court
File No. 70-CV-11-16569

D. Charles Macdonald, Evan A. Fetters, Faegre Baker Daniels LLP, Minneapolis,
Minnesota (for respondent)

Horace D. Allen, Matthews, North Carolina (pro se appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this mortgage-foreclosure dispute in which the district court reduced appellant-
mortgagor Horace Allen's redemption period from six months to five weeks, appellant
argues that the district court (1) abused its discretion when it concluded that appellant

abandoned the property in question; (2) was biased against him; and (3) admitted perjured evidence. Respondent Bank of America N.A. moves to strike parts of appellant's brief and appendix as outside the record on appeal. Because the evidence does not support the conclusion that appellant abandoned his property, we vacate the district court's order and order respondent to return possession of the property to appellant for the remainder of the statutory redemption period.

D E C I S I O N

Respondent commenced this action on August 2, 2011, to reduce the post-sale redemption period on a home owned by appellant from six months to five weeks under Minn. Stat. § 582.032, subd. 7 (2010). A hearing was held on August 31, 2011, to determine if the property was abandoned. At the hearing, respondent introduced a certificate of vacancy executed by a Scott County deputy sheriff, along with an attestation by the deputy that the property was vacant and not occupied, water service to the property had been terminated in 2009, weeds and vegetation were overgrown, and the property appeared abandoned. Respondent also produced documents indicating that the water had been turned off at the property on November 19, 2009, per appellant's request.

Appellant appeared at the hearing and offered rebuttal evidence showing that he had made payments of \$22.25 to the City of Prior Lake for water service in March, April, and June 2011. Appellant also introduced gas bills for the period of June through August 2011 and electric bills for the period of May through July 2011. Appellant also introduced photographs of the property, purportedly sent to him on August 29, 2011, by an employee of a lawn-service company showing the property to be well maintained, an

invoice, dated August 29, 2011, from the same company for trimming the bushes, and an invoice from a second company, dated August 1, 2011, for mowing the lawn.

During the hearing, the district court questioned appellant about his use of the property. The court asked appellant if he had been paying the mortgage and appellant responded that he had not. Appellant's answers suggested that his refusal to pay related, at least in part, to litigation he had initiated against respondent in federal court regarding the mortgage securing the property. In addition, appellant informed the district court that the home was vacant because it was uninhabitable due to mold infestation. The district court responded, "If you are living there, you can have your six months; but you are not living there." The court then asked appellant, "So, it's abandoned?" Appellant said, "It is abandoned, yes, ma'am."

Under the terms of the mortgage, the property was sold at a sheriff's foreclosure sale on September 13, 2011. On September 28, 2011, the district court issued an order concluding that the property was abandoned and reducing appellant's redemption period to five weeks from the date the order was filed.

I.

Appellant contends that the district court's order must be vacated because the evidence does not support the district court's abandonment findings. We agree.

An abandonment determination is a mixed question of law and fact. *See In re Estate of Riggle*, 654 N.W.2d 710, 713 (Minn. App. 2002) (stating that whether a homestead is abandoned for purposes of determining whether it is to be included in the decedent's augmented estate is a "legal conclusion[]" based upon the district court's

findings of fact”). “When reviewing mixed questions of law and fact, this court corrects erroneous applications of the law, but accords the district court discretion in its findings of fact and ultimate conclusions.” *Id.* at 714 (citing *Rehn v. Fischley*, 557 N.W.2d 328, 333-34 (Minn. 1997) and *Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990)).

Under Minnesota law, a mortgagor’s redemption period as to certain abandoned properties may be reduced from six months to five weeks. Minn. Stat. § 582.032 (2010); Minn. Stat. § 580.23, subd. 1 (2010). An action to reduce a redemption period may be initiated by summons and complaint by the party foreclosing the mortgage, the party holding the sheriff’s certificate, or the political subdivision in which the property is located. Minn. Stat. § 582.032, subd. 4. The complaint must allege that the mortgaged premises are: (1) ten acres or less in size; (2) improved with a residential dwelling consisting of less than five units, which is not a model home or a dwelling under construction; (3) not property used in agricultural production; and (4) “abandoned.” *Id.*

The statute does not define “abandoned,” but does provide that a prima facie case of abandonment may be made under the statute by submitting a sheriff’s affidavit stating that “the mortgaged premises are not actually occupied” and further setting forth any of the following facts:

(1) windows or entrances to the premises are boarded up or closed off, or multiple window panes are broken and unrepaired;

(2) doors to the premises are smashed through, broken off, unhinged, or continuously unlocked;

(3) gas, electric, or water service to the premises has been terminated;

(4) rubbish, trash, or debris has accumulated on the mortgaged premises;

(5) the police or sheriff's office has received at least two reports of trespassers on the premises, or of vandalism or other illegal acts being committed on the premises; or

(6) the premises are deteriorating and are either below or are in imminent danger of falling below minimum community standards for public safety and sanitation.

Id., subd. 7. A defendant in a redemption-reduction action may offer rebuttal evidence in the form of “any competent evidence, including oral testimony, concerning any allegation in the complaint or motion.” *Id.*

In its order, the district court acknowledged that appellant rebutted respondent's evidence “with regards to the water service,” but found the property to be abandoned on the basis of appellant's testimony that he “does not occupy the property” and “has no intention to make the mortgage payments.”

Appellant first challenges the district court's finding that he had no intention to make mortgage payments, arguing that he merely testified that he had not made *past* mortgage payments, not that he did not intend to make *future* payments. But regardless of whether the evidence supports this finding, a homeowner's intent not to make mortgage payments is not relevant to an abandonment determination. Section 582.032, subdivision 7, lists a number of facts that, if shown, establish a prima facie case of abandonment. None of them pertains to the homeowner's mortgage-payment status because a foreclosed home is not abandoned if the homeowner continues to reside in or

maintain the home for the duration of the redemption period regardless of whether the homeowner makes mortgage payments.

The sole remaining finding on which the district court based its abandonment determination is that the house is vacant. Section 582.032 does not define “abandonment,” but the text of subdivision 7 establishes that vacancy is a necessary, but not sufficient, condition to meet the abandonment standard. To make a prima facie case of abandonment, the petitioning party must present evidence establishing that the property is vacant *in addition to* showing some fact from the list mentioned above. *Id.* Vacancy may be shown by submitting an affidavit of a local official that the “mortgaged premises are not actually occupied” or an affidavit by the party foreclosing the mortgage that the party “changed locks on the mortgaged premises” and no person with a legal possessory interest requested entrance within ten days. *Id.* The list of additional facts to be established includes broken or boarded windows or doors, terminated utilities, accumulated trash, reports of trespassers, vandalism or safety violations. *Id.* The listed facts suggest that this provision is intended to empower communities to remediate nuisance properties and assist lenders in preventing unnecessary waste. The property at issue here does not implicate these concerns, because appellant provided evidence that he maintained utility service to the property and made efforts to maintain the exterior appearance of the home.

The statute also provides additional avenues for a petitioning party to obtain a redemption-period reduction. A property is conclusively deemed abandoned if the mortgagor fails to appear at the redemption-period-reduction hearing or gives a written

statement indicating “a clear intent to abandon the premises.” *Id.* Such action, or inaction, demonstrates the mortgagor’s intent to relinquish his or her rights to the property. Here, to the contrary, appellant’s actions demonstrate a clear intent to exercise his rights to the property. Appellant appeared at the redemption-reduction hearing, testified that he did not intend to abandon the property, and requested his full six-month redemption period. He also sought a short sale from the mortgagee and initiated separate litigation against the mortgagee.

Respondent contends that appellant’s statement at the hearing that the property is “abandoned” is conclusive evidence he abandoned the property. But as noted above, a mortgagor’s *written* statement indicating a clear intent to abandon the premises is conclusive evidence of abandonment. *Id.* Appellant’s oral statement in response to the district court’s questioning does not have the same conclusive effect. *Id.* (providing that “[i]n the absence of affidavits or written statements, or if rebuttal evidence is offered by the defendant,” oral testimony is “competent evidence . . . concerning any allegation in the complaint or motion”). And in context, it is apparent that appellant simply meant to convey that the house was vacant, not that it was “abandoned” under the statute. Throughout appellant’s dialogue with the district court, he freely conceded that the property was vacant, but strenuously argued that respondent had not met its burden to prove abandonment. Therefore, we reject respondent’s argument that appellant intended to convey “a clear intent to abandon the premises.”

Nor are we convinced that appellant failed to offer sufficient evidence to rebut respondent’s *prima facie* case of abandonment. The low utility charges appellant

incurred with respect to the property may support a finding that the property is vacant, but do not establish that appellant intended to abandon it. Moreover, the district court implicitly found that appellant rebutted the prima facie case when it found that appellant “offered rebuttal evidence with regards to the water service” and relied solely on appellant’s testimony for its abandonment finding.

Because the evidence does not support the district court’s determination that appellant abandoned the property, we conclude that the district court abused its discretion when it granted respondent’s petition to reduce appellant’s redemption period. We therefore vacate the redemption-period-reduction order and reinstate the time remaining on appellant’s statutory redemption period as explained below.

Because we vacate the district court’s order, we need not address appellant’s unfounded argument that the district court was biased against him and his contention that respondent introduced fraudulent or perjured testimony.

II.

We next address the duration of appellant’s reinstated redemption period. Respondent contends that if the redemption period is reinstated, it should run from the foreclosure sale date of September 13, 2011, meaning that it would have expired on March 13, 2012. Respondent argues that any redemption period we reinstate should be just long enough for appellant to effectuate a redemption. We disagree.

Respondent took possession of appellant’s home shortly after the five-week redemption period had run. Appellant was, therefore, deprived of four months and three weeks of his six-month statutory redemption period. *See* Minn. Stat. § 580.23, subd. 1

(providing that debtor has six months from foreclosure sale to redeem property). Appellant is entitled to a redemption period of four months and three weeks from the day respondent restores possession of the property to appellant.

III.

Respondent moves to strike parts of appellant's principal brief and appendix, contending that it includes documents that are not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.").

The motion covers exhibits 123 (letter from PHH Mortgage Services), 413 (photographs of appellant's throat), 713 (water stoppage order), 715 (payroll statement), and 716 (e-mail). We grant the motion as to exhibits 715 and 716 because appellant concedes these exhibits constitute new evidence. We also grant the motion as to exhibits 123 and 413 because these exhibits do not appear in the district court file and are therefore not part of the record on appeal. But because appellant submitted exhibit 713 to the district court in advance of the redemption-reduction hearing, we deny respondent's motion to strike exhibit 713.

Reversed; motion granted in part and denied in part.