

NO. A09 - 0489

State of Minnesota
In Court of Appeals

Palladium Holdings, LLC,

Respondent-Plaintiff

v.

Zuni Mortgage Loan Trust 2006-OA1,

Appellant-Defendant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES ON APPEAL

1. Whether the District Court abused its discretion vacating a default judgment supported by conclusive evidence of abandonment when presented with conjectural evidence that the property may not have been abandoned?

The District Court held: The default judgment should be vacated.

2. Whether the District Court abused its discretion in allowing untimely affidavits to be entered into the record?

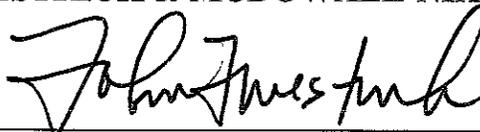
The District Court held: The affidavits should be entered into the record.

CERTIFICATION AS TO BRIEF LENGTH

I, John G. Westrick, hereby certify that this brief, served on 30 Apr, 2009, conforms to the requirements of Minn.R.Civ.App.P., Rule 132.01, subd. 3(a)(1)-(2). This brief was produced using Times New Roman font with 13 point type. This brief contains 7,164 words including footnotes. This brief contains 611 lines with footnotes. This brief was prepared using WordPerfect 11 word processing software.

Dated: April 30, 2000

WESTRICK & MCDOWALL-NIX, PLLP



John G. Westrick #206581

STATEMENT OF THE CASE

This is an action pursuant to Minnesota Statute § 582.032 to shorten the redemption period on a piece of vacant real property from six weeks to five weeks. The Plaintiff/Appellant Palladium Holdings, LLC filed this action with the Hennepin County District Court on August 25, 2008., as court file number 27-CV-08-20949.

A hearing was held before the Hennepin County Examiner of Titles, at which no party appeared for the Defendant/Respondent Zuni Mortgage Loan Trust 2006-OA1. Default judgment was entered in favor of the Appellant on September 25, 2008.

In November of 2008 the Plaintiff brought an action for an adverse claim to real estate (colloquially known as a “quiet title” action) on the property in Hennepin County District Court, 27-CV-08-27795. The Respondent replied in that action.

On February 12, 2009, the Respondent brought a motion in this action to vacate the order issued on September 25, 2008 and reinstate the six-month redemption period. The Respondent also brought a motion to companion this action with the quiet title action. The Appellant opposed these motions.

On March 3, 2009, the Honorable Tony N. Leung, Judge of the Hennepin County District Court, granted the Respondent’s motions in two separate orders. This order effectively ended both the five-week redemption action and the quiet title action, as it allowed the Respondent to redeem the property and remove the basis for the Appellant’s claim of right.

This appeal followed.

STATEMENT OF THE FACTS

This action was brought to shorten the redemption period for six months to five weeks for a piece of property legally described as:

UNIT NO. 304, CIC NO. 0826, LOWERY RIDGE TOWNHOMES, HENNEPIN COUNTY

(hereinafter "the property").

On October 25, 2008, Respondent Zuni foreclosed a mortgage it had on the property and took possession of the property by virtue of a Sheriff's certificate of sale. The redemption period expired on April 26, 2008; upon information and belief no party redeemed the property from Respondent. On all documents related to this foreclosure, Zuni listed its address as being in the town of Plano, Texas. [Appellant's Appendix A-07] (hereinafter "App.")

The property is part of the Lowry Ridge Townhomes Association (hereinafter "the Association"), which was formed to manage and maintain the property and surrounding condominiums. Respondent did not pay fees to the Association, which it was required to do, for any time when it owned the property. In July 2008 the Association assigned its lien rights regarding the property to Plaintiff Palladium Holdings, LLC. This assignment was recorded with the Hennepin County Recorder as Document No. 9157985.

The Appellant then foreclosed on the property by advertisement. The Sheriff's

sale was held on September 4, 2008, and the certificate of sale recorded on September 5, 2008 as Document No. 9179319. That foreclosure has not been appealed and is now final. At the time notice of foreclosure was posted at the property, a neutral third-party found the property to be vacant. [App. at 52].

The Appellant then brought an action to shorten the redemption period from six months to five weeks. Service was made on the Respondent by United States mail and certified mail to its listed address in Plano, Texas and by posting notice on the property.[App. at A-50-1]. This was the address of the Respondent indicated on the documents recorded with the Hennepin County Recorder's office was in Plano, Texas. A return receipt was received from the certified mail delivery, and based on the service and affidavits of vacancy the Hennepin County Examiner of Titles issued judgment in favor of the Appellant. [App. at 53-55].

The Respondent did not appear at the five-week redemption period hearing and judgment was entered against them on September 25, 2008 by the Honorable Patricia Belois, Judge of the District Court of Hennepin County. The order was recorded on September 25, 2008 as Document No. 9186861 with the Hennepin County Recorder. [App. at 53-55]. The five-week redemption period expired on October 30, 2008.

It is unclear if the Respondent ever leased the property or had anyone occupying it, but at the time the Appellant foreclosed the property on, there was no one residing in the property. [App. at 52]. Furthermore, the property had no water hook-up and had signs

posted indicated the property had been winterized. [App. at 57-58]. Appellant has since occupied the property.

The Respondent filed a motion to vacate the September 25, 2008 judgment under Minnesota Rule of Civile Procedure 60.02. The Respondent's argument for vacating the judgment was based heavily on competing factual arguments against the facts found in the September 25, 2008 order.

The Respondent argued that it had been in continuous possession of the property during the time the Appellant's pleadings claimed it was vacant. [App. at A- 6]. To support this, they provided an affidavit of a real estate agent who did not reside at the property, who had only occasionally visited the property, and who reported hearsay statements from other realtors. [App. at A- 15-7]. The Respondent also alleged that service was improper, and that it did not have notice of the proceedings. [App. at A- 6-7].

Finally, the Respondent alleged fraud, arguing that the Appellant had purposefully misrepresented the property's vacancy. [App. at A-10-14]. The Respondent relied solely on evidence presented in a single affidavit for factual basis for these allegations. Again, this affidavit was based on hearsay and not on personal knowledge for much of its factual allegations; nor did not directly controvert any affidavits filed earlier by the Appellant. [App. at A-15-7].

The Appellant responded to these allegations and provided affidavits with evidence of proper service and of vacancy. [App. at A-48-58]. The Appellant argued that

the Respondent did not meet the necessary standards of Minnesota Rule of Civil Procedure 60.02, and because of that vacating the judgment was improper. [App. at A-36-45]. The Appellant also argued that the Respondent's claims of fraud were improperly pleaded and irrelevant to the arguments at hand. [App. at A-45-7].

The Respondent filed a reply memorandum, which was served on the Appellant on February 26, 2009. [App. at A-56-63].

On February 27, 2009, the Friday evening prior to the Monday hearing, the Respondent served by facsimile at 6:06 p.m. two additional affidavits: One was from a third-party attorney named Kevin Dunlevy, which discussed Mr. Dunlevy's recollections from the legislative proceedings surrounding Minnesota Statute § 580.032. [App. at A-87-89]. The other was from Kristen Braithwaite, a person who was involved in managing the property from the Plano, Texas branch of Countrywide Home Loans, Inc. [App. at A-95-6].

On Monday, March 2, 2009, the Appellant faxed a letter to the Court and opposing counsel asking these affidavits to be stricken for being untimely. [App. at A-99-100]. Specifically the Appellant pointed out that because the affidavits were faxed over an hour after close of business, there was no meaningful way to respond to them as they were found the day of the hearing. [App. at A-99].

The Court heard oral arguments on March 2, 2009. At arguments, the Appellant renewed its objection to the late affidavits, both on the grounds of timeliness and that Mr.

Dunlevy's affidavit was inadmissible [Transcript of proceedings dated March 2, 2009 pg. 13] (hereinafter "T.").

In a Findings of Fact, Conclusions of Law and Order dated March 3, 2009, the District Court granted the Respondent's motions. The Court found that the hearing before the Examiner of Titles, no party appeared on behalf of the Respondent. [App. at A-103]. The Court then found that the Respondent met the four factors laid out in Minn.R.Civ.Pro. Rule 60.02, and vacated the five-week redemption order. [App. at A-104-5]. In making these findings, the Court held that there were unresolved questions of fact, but made no specific findings as to how the Respondent met these factors. [App. at A-104-5]. While the Court's order did not address the late affidavits submitted by the Respondent, it did consider facts from the untimely affidavit of Kristen Braithwaite.

This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN VACATING THE FIVE-WEEK REDEMPTION ORDER DATED SEPTEMBER 25, 2008, BECAUSE THE RESPONDENT DID NOT MEET THE NECESSARY STANDARDS UNDER MINNESOTA RULE OF CIVIL PROCEDURE 60.02.

A. Standard of Review.

"The decision to vacate a judgment is within the district court's discretion and that decision will not be reversed on appeal absent a clear abuse of discretion." Safeco Ins. Co. of Am. v. Dan Bosworth, Inc., 531 N.W.2d 867, 873 (Minn.Ct.App. 1995), *review*

denied (Minn. July 20, 1995).

B. Applicable Law

A court may vacate a judgment under Rule 60.02 of the Minnesota Rules of Civil Procedure, which provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;
- (c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) Any other reason justifying relief from the operation of the judgment.

A party seeking relief under Minn.R.Civ.Pro. 60.02 must establish: 1) a reasonable case on the merits, 2) a reasonable excuse for failure to act, 3) action with due diligence after entry of judgment, and 4) a lack of prejudice to the opposing party. Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 30, 53 N.W.2d 454, 455-6 (1952), Finden v. Klass, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). All four of these elements must be proven, and a weak showing on one factor can only be offset by a strong showing on the others. Valley View, Inc., v. Schutte, 299 N.W.2d 182, 185-186 (Minn.Ct.App. 1987).

The party seeking relief has the burden to show that vacating the judgment is appropriate. Nelson v. Siebert, 428 N.W.2d 394, 395 (Minn. 1988); Finden v. Klaas, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964); Peterson v. Texas Terrace Convalescent Center, 408 N.W.2d 924, 926 (Minn.Ct.App. 1987).

It is an abuse of discretion for a Court to make findings not supported by the record and affidavits of the parties. See Thompson v. Barnes, 200 N.W.2d 921, 925-7, 294 Minn. 528, 533-6 (Minn., 1972).

Minnesota Statute § 515B.3-102 gives homeowner associations the power to charge fees and assessments against property owners for the upkeep and maintenance of its property. Minnesota Statutes §§ 515B.3-116, 117 give homeowners associations the right to place a lien against the property. The listed owner of that property is under an obligation to pay fees and assessments. The Respondent, as the listed owner of the property prior to the Appellant's foreclosure, failed to pay those fees and obligations. The Homeowner's Association placed a lien on the property, the Appellant was then assigned that lien and foreclosed.¹

C. It Was An Abuse Of Discretion To Vacate The September 25, 2008 Order.

1. The Respondent Did Not Have Reasonable Defense On The Merits.

The Respondent did not have a reasonable defense on the merits to the Plaintiff's five-week redemption period action, and as such it was an abuse of discretion to vacate

¹The Respondent has not challenged the validity of the lien or the foreclosure.

the September 25, 2008 judgment.

The relevant statute provides:

At the hearing on the summons and complaint or order to show cause, the court shall enter an order reducing the mortgagor's redemption period as provided in subdivision 2 or 3, as applicable, if evidence is presented supporting the allegations in the complaint or motion and no appearance is made to oppose the relief sought. An affidavit * * * stating that the mortgaged premises are not actually occupied and further setting forth any of the following supporting facts, is prima facie evidence of abandonment:

- (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.

An affidavit of the party foreclosing the mortgage or holding the sheriff's certificate, or one of their agents or contractors, stating any of the above supporting facts, and that the affiant has changed locks on the mortgaged premises under section 582.031 and that for a period of ten days no party having a legal possessory right has requested entrance to the premises, is also prima facie evidence of abandonment. Either affidavit described above, or an affidavit from any other person having knowledge, may state facts supporting any other allegations in the complaint or motion and is prima facie evidence of the same. * * * A defendant's failure to appear at the hearing after service of process in compliance with subdivision 6 is conclusive evidence of abandonment by the defendant. An order entered under this section must contain a legal description of the mortgaged premises.

Minn.Stat. § 582.032, subd. 7 (emphasis added).

The Respondent argued in the District Court that the affidavits provided by the

Plaintiff in support of its action were insufficient to create a *prima facie* case of abandonment. [App. at 6-7; 10-13; 60-62], [T. at 22-24]. Because of this, the Respondent argued, it has a reasonable defense on the merits to the five-week redemption action. The District Court agreed. [App. at 104].

This argument is not only incorrect, it is also unavailing.

The crucial factor ignored by the District Court is that the Respondent failed to appear at the hearing after proper service under Minn.Stat. § 582.032, subd. 6. The propriety of this service will be discussed at more length below, but the Respondent has not contested that neither it nor any of its agents appeared at the hearing before the Hennepin County Examiner of Titles.

The statute is very clear that the Respondent's failure to appear created conclusive evidence of abandonment. Minn.Stat. § 582.032, subd. 7. This is regardless of the sufficiency of the evidence of the *prima facie* case. This conclusive evidence of abandonment is all that is required for the Appellant's action to succeed; accordingly the Respondent cannot bring a reasonable defense on the merits.

The District Court was required to give effect to the statutory language; to do otherwise would ignore the plain language of the statute. The goal of statutory construction is "to ascertain and effectuate the intention of the legislature." Minn.Stat. § 645.16 (2008); In re Estate of Jotham, 722 N.W.2d 447, 450 (Minn. 2006). A court must construe the words of a statute according to their plain meaning. Jotham, 722 N.W.2d at

450; River Valley Truck Ctr., Inc. v. Interstate Cos., 704 N.W.2d 154, 161 (Minn. 2005).

The plain meaning of Minn.Stat. § 582.032, subd. 7 is in the text: “A defendant's failure to appear at the hearing after service of process in compliance with subdivision 6 is conclusive evidence of abandonment by the defendant.” Minn.Stat. § 582.032, subd. 7.

The District Court must construe this statute by its plain meaning. Jotham, 722 N.W.2d at 450; River Valley Truck Ctr., 704 N.W.2d at 161.

The District Court ignored the conclusive evidence in favor of the Appellant when it determined that the Respondent had a reasonable defense on the merits; how can there be a reasonable defense against conclusive evidence? It is an abuse of discretion by the District Court to hold otherwise. Jotham, 722 N.W.2d at 450; River Valley Truck Ctr., 704 N.W.2d at 161.

Even if the District Court were to examine the *prima facie* evidence, the Respondent failed to raise a reasonable defense on the merits. The only evidence supporting the Respondent's motion to vacate was the affidavit of Jim Angle, a real estate agent who was involved selling the property for the Respondent. [App. at 15- 7].

Importantly, the evidence provided in the Affidavit of Jim Angle is that the property was vacant, and that no one had been living there for at least five months. [App. at 15-17].

4. At all times from June 6, 2008 to October 10, 2008, Affiant and/or his agents were in exclusive control of the Property on behalf of Zuni. Although the Property stood vacant, it was never abandoned - Affiant managed, inspected and marketed the property on behalf of Zuni.

(App. at 16).

The Respondent has never argued otherwise. Mr. Angle visited the property infrequently at best, and often relied on other persons to visit it for him. [App. at 16, 17]. Mr. Angle's affidavit contained no statements that the property contained any personal effects, had its water or telephone connected, or had any other signs that a person was living there.

The Respondent asserted that Mr. Angle's infrequent visits to the property were enough to alert a person that the property was not abandoned. But that is not how the statute reads. There is no statement as to how long these visits were. Mr. Angle admits that they were only semi-weekly, and that over a five-month period the property was only shown by his agents twenty-one times. [App. at 16, 17].

The Respondent also asserted in the District Court that the utilities were connected. Mr. Angle's affidavit, however, only discusses power. [App. at 16, 24-28]. The Respondent offered no evidence regarding a working telephone connection, water-hookup, or gas-hookup. Indeed, evidence at the District Court showed that the property had its water disconnected and had been winterized. [App. at 56-8].

A water connection is a utility; its termination from the premises meets the statutory requirements for abandonment. Minn.Stat. § 582.032, subd. 7.

The Respondent bore the burden of proving that it has a reasonable defense on the merits. River Valley Truck Ctr., 704 N.W.2d at 161; Nelson, 428 N.W.2d at 395; Finden,

268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926. The only evidence it offered to refute the Appellant's *prima facie* evidence were assertions of infrequent visits by a realtor, a sign posted in the front yard for several months, and one connected utility. Even if true, under the statute, this evidence is insufficient to defeat a claim of abandonment. Minn.Stat. § 582.032, subd. 7.

Accordingly, it was an abuse of discretion by the District Court to find that the Respondent did meet their burden of showing a reasonable defense on the merits. Nelson, 428 N.W.2d at 395; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926.

2. The Respondent Did Not Have A Reasonable Excuse For Failure To Answer.

The Respondent did not have a reasonable excuse for failure to answer the complaint in the action to shorten the redemption period and it was an abuse of discretion to therefore vacate the order. Minnesota Statute § 582.032, subd. 6 states that in an action to reduce the redemption period:

The summons or order to show cause may be served by any person not named a party to the action. The summons or order to show cause must be served at least seven days before the appearance date, in the manner provided for service of a summons in a civil action in the district court. If the defendant cannot be found in the county, the summons or order to show cause may be served by sending a copy by certified mail to the defendant's last known address, if any, at least ten days before the appearance date. The summons or order to show cause must be posted in a conspicuous place on the mortgaged premises not less than seven days before the appearance date. If personal or certified mail service cannot be made on a defendant, then the plaintiff or plaintiff's attorney may file an affidavit to that effect with the court and service by posting the summons or order to show cause

on the mortgaged premises is sufficient as to that defendant.

Again, the Respondent bore the burden of showing that they have a reasonable excuse for failure to answer. Nelson, 428 N.W.2d at 395; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926.

The Appellant sent via certified mail a copy of the summons and complaint addressed to Zuni Mortgage Company c/o Countrywide Home Loans, Inc. Ptxc35 7105 Corporate Dri., Plano, TX. 75024 and received a receipt from this mailing. [App. at 51]. On the tax documents and the warranty deed which purported to give Respondent ownership of the property, this is the address listed. The Appellant also sent a copy of the summons and complaint via regular mail. [App. at 51].

The Respondent first alleged, without evidence, affidavit, or support, that this certified mail was never sent. [App. at 7-8]. It then alleged that attempts to send it were faulty because the address was redacted. [App. at 7-8].

But the Appellant offered evidence, uncontradicted, that the statute has been complied with. [App. at 51]. Thus the Respondent's failure to appear is totally inexcusable.

The Respondent's mere allegations were insufficient to meet its burden of proof. A party cannot submit mere averments, speculation and conjecture to meet a burden of proof. See Hagsten v. Simberg, 232 Minn. 160, 165-6, 44 N.W.2d 611, 614 (Minn.1950) Sauer By and Through Hall v. State Farm Mut. Auto. Ins. Co., 379 N.W.2d 213, 215

(Minn.Ct.App. 1985); J.I. Case Credit Corp. v. Foster, 384 N.W.2d 610, 612

(Minn.Ct.App. 1986).

The Respondent also failed to raise any factual basis to doubt the Appellant's affidavit of posting. Again, the Respondent's primary argument that posting did not happen relied heavily on affidavit of a real-estate agent, Jim Angle, who was charged with showing the property.

Mr. Angle's affidavit states only that his agent who showed the property on September 10 did not say anything to him about a notice posted on the property. [App. at 16-7]. That does not state there was no posting. And it is hardly sufficient to contradict the affidavit of posting on September 1. [App. at 50]. The Respondent argued to the District Court that it should assume that because an agent for Mr. Angle did not say anything to Mr. Angle that the affidavit of posting is false.² This is quite a stretch of logic and insufficient to meet the Respondent's burden. River Valley Truck Ctr., 704 N.W.2d at 161; Nelson, 428 N.W.2d at 395; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926. .

The statute does not require that the notice be viewed by anyone. All that is required is that notice be placed in a conspicuous place. Minn.Stat. § 582.32, subd. 6. It is

²The hearsay rule prohibits the spoken word of another from being offered for the truth of the matter asserted. Minn.R.Evid., Rule 802. Should there be a rule prohibiting the use of unspoken words from one who is not testifying to raise an inference to contradict a clear statement? There is such a rule. Minn.R.Evid. Rule 602. Nearly all of Mr. Angle's affidavit is speculation.

entirely possible this agent (from whom no affidavit has been submitted) saw the materials and did not inspect them, did not see the materials, or arrived after the postings had been removed by a third-party. Indeed, the Respondent acknowledges in its memorandum that even if the material were posted, something might have occurred in the interim to remove them. [App. at 8-9].

Furthermore, The Hennepin County District Court held in its order shortening the redemption period that the Appellant had complied with Minn. Stat. § 582.032. [App. at 53-5]. This court order found that all the statutory requirements had been complied with.

The Respondent also had constructive notice the property was in foreclosure. A third party professional process server attached the notice of foreclosure. [App. at 52]. The notice of foreclosure was printed in a local paper and sent to the Respondent's registered address. [App. at 53-5]. The Respondent had notice of the foreclosure proceedings, and has never challenged them. It did nothing to prevent the foreclosure. Afterwards, it was on notice that the redemption period had begun. It continued to do nothing.

Nonetheless, the District Court stated that it was unclear whether or not the Respondent had been served, and thus vacated the September 25, 2008 judgment. [App. at 105]. This was a clear abuse of discretion.

First, the District Court failed to make adequate findings. The District Court held only that there was a question of fact as to whether the Respondent had been served.

[App. at 105]. This is not the standard for a motion to vacate. Nelson, 428 N.W.2d at 395; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926. This is the standard for a motion for summary judgment, which is not at issue here.

Minn.R.Civ.Pro., Rule 56.05.

Secondly, the Respondent held the burden to prove that it had a reasonable failure to answer the complaint, and any uncertainty must be resolved in favor of the Appellant. Hinz, 237 Minn. at 30, 53 N.W.2d at 455-6; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Valley View, Inc., 299 N.W.2d at 185-186. Third, insofar as the District Court may have thought the issue of service was unclear, it relied on mere averments and allegations in the face of the Appellant's affidavits and court order confirming service. Hagsten, 232 Minn. at 165-6, 44 N.W.2d at 614; Sauer, 379 N.W.2d at 215; J.I. Case Credit Corp., 384 N.W.2d at 612. It ignored the prior order holding service was proper. [App. at 53-5].

The evidence provided by the Respondent shows only that it was not paying attention to the maintenance and legal status of the property, which supports Appellant's claim of abandonment. Accordingly, it was an abuse of discretion by the District Court to hold that the Respondent had a reasonable excuse for failure to answer.

3. The Respondent Did Not Act Diligently After Notice Of The Judgment

The Respondent did not act diligently after it had notice of judgment, and was therefore not entitled to have the September 25, 2008 judgment vacated. What constitutes due diligence depends on all the facts and circumstances involved in the individual case.

Simons v. Schiek's, Inc., 275 Minn. 132, 138, 145 N.W.2d 548, 552 (1966); Hovelson v. U.S. Swim & Fitness, Inc., 450 N.W.2d 137, 142 (Minn.Ct.App. 1990)

The District Court's order states simply that "Zuni acted with reasonable diligence after notice of entry of the judgment. Zuni alerted counsel shortly after it learned of the September 25, 2008 Order. By this time, Plaintiff had also filed a separate action in Hennepin County District Court to quiet title to the Property following foreclosure of the HOA lien. Zuni acted diligently to address both issues." [App. at 105].

This finding is an abuse of discretion because the Respondent, as a matter of law, had notice of the judgment after it was recorded and did nothing. A document, once recorded, gives notice to all interested parties of its existence and effect. Minn. Stat. § 507.32 (2008).

The Appellant obtained title to the property by virtue of the Sheriff's certificate of sale dated September 4, 2008 and recorded with the Hennepin County Recorder's Office as Document Number 9179319. This was sufficient to give notice to the Respondent, and indeed all the world, that the Appellant now owned the property.

The Appellant also recorded the five-week redemption period order of the Honorable Patricia Belois, Judge of the Hennepin County District Court, on September 25, 2008, as document number 9186861. This gave notice to all interested parties that a five-week redemption period had begun. Minn. Stat. § 507.32.

The Respondent admits that it took no action until December 3, 2008. [App. at 9].

This is over three months from the recording of the judgment, and well after the expiration of the shortened redemption period. The Respondent offered no evidence that it made any inquiries into the legal status of the property, even after it had notice of the foreclosure (which, again, it has not challenged). Given the circumstances of the case, this is not diligence. Simons v. Schiek's, Inc., 275 Minn. at 138, 145 N.W.2d at 552 Hovelson, 450 N.W.2d at 142.

The Respondent bore the burden of showing that it acted diligently after entry of the judgment. Hinz, 237 Minn. at 30, 53 N.W.2d at 455-6; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Valley View, Inc., 299 N.W.2d at 185-186. It offered no evidence to justify its failure to follow up on the legal status of its property after the foreclosure, nor did it offer any evidence as to why it did not request any notice from the Hennepin County Recorder's office. Nonetheless, the Respondent as a matter of law had notice of the foreclosure and the five-week redemption action. Minn. Stat. § 507.32. It did nothing for nearly five months.

To hold otehrwise and allow a motion to vacate after the five-week redemption period has run is tantamount to extending the redemption period, which courts may not do. See Graybow-Daniels Co. v. Pinotti, 255 N.W.2d 405, 407 (Minn. 1977). Redemption rights are purely statutory, and the statute controls redemption proceedings. Petition of Nelson, 495 N.W.2d 200, 202 (Minn. 1993); State ex rel. Anderson v. Kerr, 51 Minn. 417, 420, 53 N.W. 719, 719 (1892). To have acted diligently, the Respondent must

have brought its motion within the five-week period.

As such, it was an abuse of discretion for the District Court to hold that the Respondent acted diligently after notice of the judgment.

4. The Respondent Made No Showing of A Lack Of Prejudice.

It was an abuse of discretion by the District Court to vacate the judgment, as the Respondent no showing of any sort that the Appellant would not suffer prejudice were the order to be vacated.

As with all the other elements, the Respondent bore the burden of proof to show the Appellant would not be substantially prejudiced by the order being vacated. Swanson v. Herbes, 524 N.W.2d 523, 523 (Minn.Ct. App. 1994). Without such a showing, a motion to vacate should fail. Hinz, 237 Minn. at 30, 53 N.W.2d at 455-6; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Valley View, Inc., 299 N.W.2d at 185-186.

The District Court's order found only that "Plaintiff will not suffer prejudice if the Order is vacated. If Zuni is allowed to redeem the Property from Plaintiff's foreclosure sale, Plaintiff will receive all amounts to which it is entitled under Minnesota law." [App. at 105]. Requiring a party to use further lawsuits to pursue its legal rights is prejudicial. See, e.g. Lynch Corp. v. Omaha Nat. Bank, 666 F.2d 1208, 1212 (8th Cir. 1981).

At the District Court, the Respondent argued that the Appellant would not suffer prejudice because it has already brought a quiet title action where it will address the same issues. [App. at 9-10]. This argument is wrong.

The Appellant obtained title to the property by virtue of the Sheriff's certificate of sale recorded with the Hennepin County Recorder's Office as Document Number 9179319. After the five-week redemption period expired, it brought a quiet title action to ensure that its possession and/or sale of the property would not be hindered by further actions by the Respondents or others. The Appellant had already placed a third party in the premises. [App. at 103]; [T. at 5, 7].

Simply put, the Appellant relied on a valid and recorded Sheriff's certificate and a valid order from the Hennepin County District Court. The Respondent's only response was to claim that the Appellant's enforcement of its rights pursuant to that Court order is reason enough to find it will not suffer prejudice by vacating that very order. It does not cite any authority for this claim. [App. at 9-10].

It is counter-intuitive to assert that a plaintiff having to litigate the same defenses twice is not prejudicial; indeed, having to repeat the matter at the quiet title action would cost the Appellant additional fees and time.

Respondent's brief assertion that the Plaintiff will not suffer prejudice is contrary to logic and insufficient to meet its burden of proof. Swanson, 524 N.W.2d at 523. Such a meager showing is insufficient to meet the standards necessary vacate the judgment. Hinz, 237 Minn. at 30, 53 N.W.2d at 455-6; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Valley View, Inc., 299 N.W.2d at 185-186.

Accordingly, it was an abuse of discretion for the District Court to vacate the

judgment.

D. Conclusion

The Respondent bore the burden of showing it was entitled to relief on all the elements of a motion to vacate. Nelson, 428 N.W.2d at 395; Finden, 268 Minn. at 271, 128 N.W.2d at 750; Peterson, 408 N.W.2d at 926. Each of the four elements were necessary. Hinz, 237 Minn. at 30, 53 N.W.2d at 455-6, Finden, 268 Minn. at 271, 128 N.W.2d at 750.

The Respondent's weak showing on several elements and failure to show any lack of prejudice should have been fatal to its motion. Valley View, Inc., 299 N.W.2d at 185-186. It was an abuse of discretion by the District Court to grant the Respondent's motion when the Respondent failed to make the necessary showing.

As such, this Court should reverse the judgment of the District Court and remand to the District Court to order that the September 25, 2008 judgment be reinstated.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING THE AFFIDAVITS SERVED BY FACSIMILE THE WEEKEND PRIOR TO THE HEARING, AS THEY WERE UNTIMELY AND CONTAINED INADMISSIBLE MATERIAL.

The District Court abused its discretion in admitting the affidavits of Kristen Braithwaite and Kevin Dunlevy, as they were untimely. The Court also should have stricken Mr. Dunlevy's affidavit, as it was inadmissible testimony on the matter of the legislative intent.

A. Standard of Review

Procedural and evidentiary rulings are within the district court's discretion and are reviewed for an abuse of that discretion. Braith v. Fischer, 632 N.W.2d 716, 721 (Minn.Ct.App. 2001), review denied (Minn. Oct. 24, 2001).

B. Applicable Law

The Minnesota Rules of General Practice, Rule 115.03 and Rule 115.04, require that reply memorandum be filed at least three days prior to the hearing. Rule 115.06 allows a Court to cancel a motion hearing if papers are not filed in a timely fashion.

Minnesota Rule of Civil Procedure 6.05 states:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. If service is made by any means other than mail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed period.

The times stated by the Rules of General Practice and the Rules of Civil procedure are mandatory, absent a "clear waiver by the adversary." Wikert v. N. Sands & Gravel, Inc., 402 N.W.2d 178, 182 (Minn.Ct.App. 1987). Trial by ambush has not been the practice of this State for quite some time. American Standard Ins. Co. V. Le, 551 N.W.2d 923, 925, n.3 (Minn. 1996).

C. Timeliness of the Affidavits.

The Affidavits of Kristen Braithwaite and Kevin Dunlevy were received after the close of business on the last weekday prior to the hearing, having been faxed to the office

of the Appellant's attorney after 6:00 p.m. on Friday, February 27. [App. at 87]. They did not accompany the Respondent's reply memorandum, which was faxed a day earlier with an additional affidavit. [App. at 59].

February 27 was three days prior to the hearing, and so any reply memorandum and affidavits needed to be served by then. Minn.R.Gen.Prac. Rule 115.03, Rule 115.04. Because service was made after 5:00 p.m., the minimum time for service prior to the hearing became four days. Minn.R.Civ.Pro. 6.05. The Respondent's service was not within this time frame.

This failure is exacerbated by the fact that because it was served late on Friday night, the documents were not seen until the morning of the hearing date. [App. at 99]. Kristen Braithwaite's affidavit was fact intensive affidavit which was offered to refute the Appellant's arguments regarding the sufficiency of the Respondent's evidence. [App. At 95-96]. It had factual matters that, to properly address at the hearing, the Appellant would need to prepare factual responses. The Appellant did not have such time.

Kevin Dunlevy's affidavit, as will be addressed in greater detail below, contained allegations and purported evidence not raised in any pleading. This evidence was not only inadmissible as to its content, but would require hours of analysis of legislative history to properly respond to. The Appellant did not have this time.

The Appellant, via letter to the judge, objected to admission of these affidavits. [App. at 99-100]. The Appellant renewed these objections at the hearing. [T. at 13].

The District Court did not explicitly deny the Appellant's motion to strike, but this is not a moot point. The affidavits were filed, they are now part of the record, and it can be presumed that they were considered by the Court. The District Court did not specify in its order what evidence it was relying on when it granted the Respondent's motion. The Court, however, specifically ruled in favor of the Respondent on the same issue on which Kristen Braithwaite's affidavit offered evidence.

The Court, by not striking these affidavits, essentially allowed the Respondent to conduct trial by ambush. American Standard Ins. Co., 551 N.W.2d at 925, n.3. There had been no clear consent to an extended time frame. Wikert, 402 N.W.2d at 182. The Appellant was forced to respond to lengthy factual allegations with almost no time to prepare. This was, therefore, an abuse of discretion that substantially prejudiced the Appellant.

D. Mr. Dunlevy's Affidavit is Inadmissible and Should Have Been Stricken.

The Affidavit of Kevin Dunlevy offered extensive statements as to Mr. Dunlevy's interpretation of the meaning of Minn.Stat. § 582.032, and his view that the Appellant was not using it properly. [App. at 87-9]. This evidence is inadmissible as a matter of law and it was an abuse of discretion not to strike it from the record.

The affidavit first runs afoul of Minn.R.Gen.Prac. Rule 115.03(c) and Rule 115.04(c), as it raises an issue of law not raised in any prior pleading. Indeed, the Respondent did not even argue in its reply memorandum that the statute was unclear.

This affidavit was the first mention of this issue.

The Respondent argued to the Court, relying on Mr. Dunlevy's affidavit, that the statute was not meant for use by the Appellants. But, the law applies to everyone!

Courts first analyze the plain text of a statute to determine its meaning. Jotham, 722 N.W.2d at 450; River Valley Truck Ctr., 704 N.W.2d at 161. Only in the rarest circumstances does a court turn to extrinsic evidence, such as the legislative history of a bill, to determine its meaning. Washington County v. AFSCME, 262 N.W.2d 163, 167 (Minn. 1978).

Traditionally, statements made by individual legislators are inadmissible as aids in construing the meaning of a statute. Bragg v. Chicago, Milwaukee & St. Paul Railway Co., 81 Minn. 130, 133, 83 N.W. 511, 512 (1900); In re State Farm Mut. Ins. Co., 392 N.W.2d 558, 569 (Minn.Ct.App. 1986). Courts may, however, look to statements made by individual legislators in committee or debate as part of the legislative history. In re State Farm Mut. Ins. Co., 392 N.W.2d at 569. Nonetheless, subsequent testimony by individual legislators regarding legislative intent is inadmissible in construing a statute. Washington County, 262 N.W.2d at 167; In re State Farm Mut. Ins. Co., 392 N.W.2d at 569.

Mr. Dunlevy states that he testified before the legislature regarding the bill and that he drafted the legislation. [App. at 87-88]. This, he seems to believe, allows him to speak authoritatively on the meaning of Minn.Stat. § 582.032. It does not.

Even a legislator (which Mr. Dunlevy was not) could not testify to the meaning of the statute. In re State Farm Mut. Ins. Co., 392 N.W.2d at 569. Only statements made in committee or on the floor, as part of the legislative history, are admissible. In re State Farm Mut. Ins. Co., 392 N.W.2d at 569. Mr. Dunlevy's affidavit contains none of these statements; rather it is all his recollection of the process. And it is unequivocally held that later statements by a legislator as to intent or meaning are strictly inadmissible when construing a statute. Washington County, 262 N.W.2d at 167; In re State Farm Mut. Ins. Co., 392 N.W.2d at 569.

If a legislator, with the ability to draft, amend, and vote on legislation, could not testify as to the meaning of a statute, Mr. Dunlevy's mere advisory role does not afford him any greater stature.

Mr. Dunlevy is a respected attorney with a great deal of experience in real estate matters; this does not, however, allow him to declare, *ipse dixit*, the meaning of otherwise plain words within the Minnesota statutes. Judicial interpretation is the remedy available to clarify laws.

The Appellant argued this before the Court, but was not permitted to fully brief a reply to Mr. Dunlevy's inadmissible testimony. Again, this amounts to trial by ambush and prejudices the Appellant. American Standard Ins. Co., 551 N.W.2d at 925, n.3. The proper remedy was to strike it from the record.

The District Court abused its discretion by permitting Mr. Dunlevy's affidavit to

become part of the record.

E. Conclusion

It was an abuse of discretion by the District Court to permit the Respondent to conduct a trial by ambush with regards to the issues raised by the affidavits of Kristen Braithwaite and Kevin Dunlevy. This Court should reverse the District Court's order for insufficient evidence to support its findings and remand the matter for further proceedings.

CONCLUSION

For the above reasons, the Appellant respectfully requests that this Court reverse the order of the District Court and order the September 25, 2008 five-week redemption order reinstated.

WESTRICK & MCDOWALL-NIX, P.L.L.P.

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