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STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A09-607

District Court File Nos. 17-CV-05-213 & 17-CV-06-247

OFFICE OF
APPELLATE COURTS

MAR 29 2012

FILED

United Prairie Bank - Mountain Lake,

Respondent,

vs.

Haugen Nutrition & Equipment
LLC., Leland Haugen, Ilene
Haugen et al,

Appellants.

APPELLANTS' RESPONSE TO PETITION FOR REHEARING

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TO: The Supreme Court of the State of Minnesota:

The Appellants respectfully answer the Petition of United Prairie Bank for a Rehearing.

UPB argues:

> [b]ecause Appellants Haugen Nutrition & Equipment, LLC, Leland Haugen and Ilene Haugen (collectively, "Haugens") admitted and conceded their contractual responsibility under the subject loan documents to pay UPB's attorneys' fees and their liability was determined on summary judgment, the issue for this Court's review on appeal is more narrow - namely, whether the Haugens had a constitutional right to a jury trial with respect to the determination of the reasonable amount of attorney's fees to be included in UPB's damages award once the Haugen's liability was established.

(UPB Brief, p. 1)

But the Haugens never conceded any liability to pay attorneys fees. What they, or some of them, admitted, was that there were "reasonable attorneys fee" clauses in their notes and mortgages. And what the Haugens have always acknowledged is that "no one is disputing the right to the respondent to reasonable attorneys' fees under the note and mortgage here." But this only means that UPB has the right to seek attorneys fees under the note and mortgage and to obtain them if they prove them properly. It is hardly an admission that UPB is entitled to attorneys fees for any of the various actions it allegedly performed. Indeed, it is obvious that the right to - and not just the amount of - attorneys fees with respect to various "services" was heavily contested at the District Court level, at the Court of Appeals level, and at the Supreme Court level. Consider, as just one of

many examples, the Haugens' contention that fees were not awardable for work on the Meadowland lawsuit. To be sure, some relatively minor awards of attorneys' fees - the paperwork with respect to a sheriff's sale, for example - are traditional awarded in foreclosure cases, and if that were all that was at stake here, the Haugens probably would not have appealed in the first place. Such fees surely could not have exceeded $5,000, however, and probably not $2,000. Insofar as there are attorneys fees which are not really in dispute, the matter could be addressed at summary judgment upon remand. The important point for rehearing, however, is "does the recognition that a clause in a mortgage giving a mortgage the right to seek reasonable attorneys' fees concede a right to those fees?" The answer to that has to be "Of course not." The Supreme Court already addressed this issue in its original decision:

> In reaching the conclusion that a jury trial is required for UPB's claim for the recovery of attorney fees, we do not distinguish between the predicate determination of appellants' liability for attorney fees and the amount of the fees awarded as damages. As with any other legal claim subject to a jury trial, a jury determines both the liability for a breach of contract and the amount of damages to award for the breach, if any, assuming genuine issues of material fact exist with respect to both questions that warrant submission to a jury. (Footnote 9)

Where, as here, it is not clear what, if anything, the Haugens conceded but it I clear that there are lively disputes about the liability for most of the attorneys' fees sought, UPB

had a duty to do more than say that the Haugens had conceded a liability for some attorneys' fees - it had a duty to establish which claimed attorneys' fees the Haugens acknowledged liability for, and how much of that liability they agreed to. UPB did nothing of the sort.

Turning to UPB's claim that the Supreme Court ignored precedent on the issue of both the existence and the amount of attorneys' fees to be determined by court or jury, it cites *Schutz v. Interstate Contracting Col,* 265 N.W.2d 296 (Minn. 1936) and *Campbell v. Worman*, 60 N.W.2d 668 (Minn. 1894). If anything, *Schutz* makes several important points in the appellants' favor. First, it support the point appellants made below that UPB could not receive attorneys fees for any work in connection with the contract-for-deed/equitable mortgage issue, because UPB lost on that issue:

> But the question here arises whether the words quoted so read that as soon as the action is begun plaintiff becomes entitled to attorney's fees. The condition precedent to recovery of attorney's fees is that an action has been successfully maintained. It would be an unusual expression to speak of an action 'successfully commenced.' Any one can begin an action. To maintain an action successfully ordinarily means that plaintiff prevails on the trial. Successfully maintaining an action by a party who begins it would seem to imply that at its conclusion he is awarded a judgment therefor. The attorney's fees are not a part of the cause of action, but something the court is authorized to award after it has been determined that plaintiff is entitled to recover on his cause of action. *First State Bank of Grand Rapids v. Utman,* 136 Minn. 103, 161 N.W. 398.

(*Id.* at 296)

Second, the instant case before the Supreme Court does not involve UPB's right to foreclosure, which was determined in a hearing separate from the determination of attorneys' fees, just as the determination in Schutz was made in two separate actions. The question in the instant case is whether the second issue - attorneys' fees - be heard by court or by jury. Neither party even raised the issue of who was to determine that second issue in *Schutz*.

Campbell is basically a restatement of the *Schutz* principle (or perhaps, given the timeline, *Schutz* is a restatement of *Campbell*). *Campbell* said:

> The only remaining question is whether the complaint states a cause of action for the $310 attorneys' fees included in the judgment. The allegations of the pleading are that by the terms of the instrument the defendant further agreed, if the note was not paid at maturity, to pay 10 per cent additional, attorneys' fees for collecting said note; that it was not paid at maturity; that plaintiffs have been compelled to place it in the hands of attorneys for the purpose of suit and collection, and have agreed to pay said attorneys, for their services, 10 per cent. on the face of the note ($3,100). Stipulations in instruments for the payment of money for attorneys' fees or costs of collection in excess of taxable costs are so liable to abuse that **669 many courts hold them to be absolutely void on grounds of public policy. This court holds that they are not in themselves void; that they are valid as agreements to indemnify the payees for such liabilities as they may be necessarily and reasonably compelled to incur for attorneys' fees in case they are compelled, on default of the makers, to collect by suit. But we have held that the stipulated attorneys' fees are no part of the original debt; that the right to them does not accrue until the payee

> incurs the liability, and then only to the extent of the reasonable value of the attorneys' services actually performed *565 or to be performed, which must be proved.
>
> (*Id.* at 565)

Note especially the $310 award in *Campbell*. Otherwise, *Campbell* merely stands for the principle that a plaintiff must establish a right to the underlying relief before attorneys' fees may be awarded. But at the District Court level, UPB did establish its right to underlying relief, viz., foreclosure, before its attorneys' fee award was litigated.[1] And as in *Schutz*, neither party raised the "jury trial" issue in *Campbell*. And as to the argument that the Supreme Court "overlooked" these opinions, it should be noted that the Supreme Court explicitly cited *Campbell* and Campbell was the foundation of *Schutz*.

UPB cites various out-of-state cases which are contrary to the Minnesota Supreme Court's ultimate holding here. Appellants acknowledge that there are courts in foreign jurisdictions which have held to the contrary of *United Prairie Bank*. But of course such cases rely on rather different state constitutions and are only as persuasive as they logic. Moreover, there are a number of precedents which support the Haugens' position. See, e.g.,

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[1]None of which is meant that the Haugens mean to foreclosure their right to assert to the District Court that the foreclosure was improper, since the jury may decide that UPB is entitled to very little or nothing in attorneys' fees and thereupon the Haugens can argue that the amount of default was grossly misstated in the foreclosure papers.

Hobbes v. First National Bank of Jacksonville, 480 So.2d. 153 (Fla. App. 1985):

> Petitioners argue that their liability is predicated on their endorsement of the note, and is not related to the foreclosure of real property in which they had no interest. It follows, they urge, that the action against them is one at law, which entitles them to a jury trial. Cheek v. McGowan Electric Supply Co., 404 So.2d 834 (Fla. 1st DCA 1981). On the other hand, the bank contends the trial court did not depart from the essential requirements of law in denying the demand for jury trial because petitioners' request was untimely; and even if timely, petitioners are not entitled to a jury trial on the determination of the amount of deficiency when tried as a continuation of the foreclosure suit. *Cerrito v. Kovitch*, 457 So.2d 1021 (Fla.1984); and *Bradberry v. Atlantic Bank of St. Augustine*, 336 So.2d 1248 (Fla. 1st DCA 1976).
>
> We find agreement with petitioners. It is clear that an action on a promissory note is an action at law and that a defendant in an action on a promissory note is entitled to a jury trial. Cheek v. McGowan Electric Supply Co., 404 So.2d at 836. We recognize that the action on the promissory note here was brought in a foreclosure proceeding, an equitable proceeding for which trial by jury is not constitutionally guaranteed. Nevertheless, this court has held that the mixture of legal and equitable claims in the same case cannot deprive either of the parties of a right to a jury trial of issues traditionally triable by a jury as a matter of right. *Padgett v. First Federal Savings & Loan Association,* 378 So.2d 58 (Fla. 1st DCA 1979). Accordingly, even though some of the issues in the mortgage foreclosure proceeding were equitable, the issues to be tried in the deficiency proceeding against petitioners are legal ones and petitioners are entitled to a jury trial on these. See *Sundale Associates, Ltd. v. Southeast Bank*, 471 So.2d 100 (Fla. 3d DCA, 1985) (failure to disburse funds in accordance with a construction loan is a legal defense).

(*Id.* at 156)

See also, See, e.g., *Hobbes, supra; Duncan v. Jones,* 612

P.2d 1239 (Ut. 1980; superseded by statute); *Palys v. Jewett,* 32 N.J. Eq. 302 (N.J. 1880); *First Union Nat. Bank v. Moore,* 27 Conn. L. Rptr. 312 (Conn. App. 2000). See also a particularly persuasive dissent in *Lucas v. Moore,* ___ N.E.2d ___, 2011 WL 4104952 (Ind. 2011). No one disputes that what was at issue in *UPB* is a close case. But it is unfair to characterize the decision as "unprecedented."

Finally, little need be said to address UPB's "reasonableness" argument. This issue was at the very heart of the case and the Court addressed the issue in detail, even going to the unusual step of requesting supplemental briefing. Indeed, at least one of the arguments raised by UPB with respect to its rehearing request goes beyond what it has argued before, viz., "An award of attorneys fees would ... compensate UPB for the loss it incurred - i.e. the attorneys fees expended as a result of appellants' breach of the Loan Documents." But many of the claims for attorneys fees not only had nothing to do with the Haugens' breach of the loan documents - they occurred before any breach of the loan documents was declared (cf., for example, the Meadowlands lawsuit).

Finally, the "practical difficulties" argument raised by UPB deserves some comment. First, practical difficulties in enforcing constitutional rights is not a reason to overrule the constitution. Second, the argument that....

> [a]s a result of thee Opinion, in every civil case in which a litigant seeks an award of attorneys' fees under a contract, the litigants will be forced to submit lay and perhaps even expert testimony regarding the work performed and fees charged by the attorneys handling the case so the jury can determine the amount of attorneys' fees to be awarded.
>
> (UPB Brief, p. 14)

But litigants still have to do this in all "Direct" attorneys' fees cases, and in virtual all non-attorney fee professional services cases. Moreover, if mortgagees seriously want to limit expenses of recovery, they can either stipulate to the amount of attorneys' fees to be charged, as in Contract-for-Deed cases or as in *Schutz, supra*; or they can place an arbitration clause - or perhaps even a judge alone" clause - into their notes and mortgages. The second fear - that a jury will have to be empaneled after the underlying issue of foreclosure has been concluded in the mortgagee's favor, is likewise without merit. It will rarely be the case that a jury decides whether there has been a default or not - almost always the matter will be for summary judgment. But in those rare cases where there is a genuine issue of material fact, there is no good reason why a jury should not make the fact determination as to whether there has been a breach of the mortgage contract. This is no different from a *Blakely* proceeding, and such proceedings have hardly proved burdensome.

UPB's third worry is that an appeal will follow post-trial

submissions. This is curious. Appeals often follow post-trial submissions. But a case is unlikely to be ripe for appeal unless all the issues involved in the proceeding are resolved. To the extent that an appeal of a foreclosure action presents time limits, the District Court can always stay the effective date of the foreclosure until the attorneys' fees issue has been resolved.

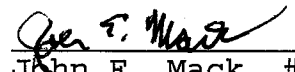
Finally, UPB argument that a new hearing would be required with respect to attorneys' fees on appeal is simply wrong. There is not now, nor has there ever been, a right to a jury trial in an appellate court. Hence, unlike the case of a District Court, the Court of Appeals (or the Supreme Court, if the matter reaches that level) has the sole right to determine attorneys' fees on appeal. It does so frequently (cf. Workers' Compensation cases). The claim that a ruling in favor of the mortgagee at the appellate level requires reversal for a jury trial to determine attorneys' fees on appeal has no merit.

CONCLUSION

The Supreme Court took extraordinary care to insure that it ruled correctly in this close and difficult case. Neither the Court nor the litigants overlooked any significant argument, and the matter should not be reopened now for issues which are minor, collateral, relate to dicta only, and were discussed many times before.

Dated: March 27th, 2012

MACK & DABY, P.A.



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