MINNESOTA STATE LAW LIBRARY

No. A09-962

STATE OF MINNESOTA

IN COURT OF APPEALS

State Bank of Delano,

Respondent,

v

CenterPoint Energy Resources Corp.,
d/b/a CenterPoint Energy,

Appellant,

and

Swartz Brothers Associates, Inc., as
Receiver of real estate of Kensington Equity Partners, Inc.
in Starbuck, Minnesota

Respondent,

and

Kensington Equity Partners, Inc.

Defendant,

and

Glacial Hills Elementary School,

Intervenor.

JOINT BRIEF OF RESPONDENTS STATE BANK OF DELANO AND SWARTZ BROTHERS ASSOCIATES, INC., AS RECEIVER OF REAL ESTATE OF KENSINGTON EQUITY PARTNERS, INC. IN STARBUCK, MINNESOTA

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STATEMENT OF LEGAL ISSUES

I. Whether the Bank or the Receiver owes CenterPoint for invoices incurred before the Receiver was appointed?

The District Court ruled that the Bank and the Receiver do not owe CenterPoint for invoices incurred before the Receiver was appointed.

Relevant Authority:

Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 221 (1936)

Title Guarantee & Trust Co. v. 457 Schenectady Avenue, Inc., 183 N.E. 198, 200 (N. Y. 1932)

Kane v. Roxy Theatres Corp., 63 F.2d 754, 756 (2nd Cir. 1933)

Keith County Bank & Trust Co. v. Wheat Belt Power District, 415 N.W.2d 459, 462 (Neb. 1987).

II. Whether the Receiver had a contract with CenterPoint before the Receiver was appointed?

The District Court ruled that the Receiver did not have a contract with CenterPoint before the Receiver was appointed.

Relevant Authority:

Commercial Associates, Inc. v. Work Connection, Inc., 712 N.W.2d 772, 782 (Minn. Ct. App. 2006)

Keith County Bank & Trust Co. v. Wheat Belt Power District, 415 N.W.2d 459, 461 (Neb. 1987).

III. Whether the Receiver was unjustly enriched by natural gas service provided to Kensington Equity Partners, Inc. before the Receiver was appointed?

The District Court ruled that the Receiver was not unjustly enriched by natural gas service provided to Kensington Equity Partners, Inc. before the Receiver was appointed.

Relevant Authority:

Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. Ct. App. 1990)

U.S. Fire Ins. Co. v. Minnesota State Zoological Bd., 307 N.W.2d 490, 497 (Minn. 1981).

IV. Whether CenterPoint can disconnect gas service to the Property or whether the issue is moot?

Respondents will establish that CenterPoint's ability to disconnect natural gas service to the Property is moot because the redemption period has expired, the Receiver has been discharged, and the Bank is now in possession of, and holds title to, the Property. The District Court held that CenterPoint could not disconnect the service to the Property.

Relevant Authority:

Chaney v. Community Development Agency, 641 N.W.2d 328, 331 (Minn. Ct. App. 2002)

Cascade Motor Hotel, Inc. v. City of Duluth, 348 N.W.2d 84, 85-86 (Minn. 1984).

STATEMENT OF THE CASE

Appellant CenterPoint Energy Resources Corp. d/b/a CenterPoint Energy ("CenterPoint") provided natural gas service to Kensington Equity Partners, Inc. ("Kensington") in Starbuck, Minnesota in 2006 and 2007. Kensington held title to the real estate to which the service ran and granted a mortgage to the State Bank of Delano ("Bank") on that property in Starbuck ("the Property"). The Property housed two tenants, an elementary school and a small business. The tenants paid rent to Kensington. Kensington failed to pay CenterPoint for the gas service provided to it. While Kensington held title to the Property and possessed it, the CenterPoint account became delinquent.

On or about October 2007, the Bank initiated foreclosure proceedings with respect to its mortgage on the Property, and petitioned for appointment of a Receiver for the Property during the mortgage foreclosure proceedings. Respondent Swartz Brothers Associates, Inc. ("Swartz Brothers") was appointed as Receiver for the Property by the Court on December 27, 2007. No receiver was ever appointed for Kensington the corporation.

The Receiver took possession of the Property in January 2008. After the Receiver was appointed, CenterPoint demanded payment from the Receiver for past due amounts owed by Kensington for natural gas services provided before the Receiver was appointed. The Receiver refused to pay the past due amounts owed by Kensington, but paid all invoices from CenterPoint that were incurred after the Receiver's appointment over the

Property. The Receiver collected no money from the tenants of the property until after it was appointed.

CenterPoint threatened to disconnect natural gas service to the property if the Receiver and Bank did not pay Kensington's past due invoices. The Bank sued CenterPoint in District Court for a declaration that the Bank and the Receiver did not owe Centerpoint for the bills of Kensington incurred prior to the Receiver being appointed for the Property. CenterPoint cross claimed against the Receiver and Kensington for breach of contract and unjust enrichment related to Kensington's past due bills. CenterPoint also filed a cross claim against Kensington for the past due utility bills.

The Bank brought an application for temporary injunction asking the Court to restrain CenterPoint from disconnecting natural gas service. The Court granted the temporary injunction. CenterPoint did not appeal this order.

On motions for summary judgment, the Bank and the Receiver argued that they did not owe CenterPoint for invoices incurred before the Receiver was appointed for the Property. First, the Receiver was appointed for the Property, not for Kensington the corporation. Second, secured creditors are entitled to priority over general, unsecured creditors in the distribution of receivership assets. Third, nothing in the Order appointing the Receiver requires the Receiver to back pay invoices for months in which the Receiver was not appointed. Fourth, the Receiver is a new customer and is not required to pay invoices of the previous customer, Kensington. Further, the Receiver had no contract with CenterPoint to provide natural gas to the Property before it was appointed Receiver

for the Property. Additionally, the Receiver was not unjustly enriched by CenterPoint providing natural gas to the Property before the Receiver was appointed for the Property.

The District Court held that the Bank and the Receiver were not obligated to pay CenterPoint for amounts due CenterPoint from Kensington before the Receiver was appointed, and that CenterPoint was precluded from disconnecting service for non-payment. The District Court also held that the Bank and the Receiver had not breached a contract with CenterPoint and were not unjustly enriched by CenterPoint for natural gas services provided before the Receiver was appointed.

Thereafter, CenterPoint applied for default judgment against Kensington for the amount due from Kensington, and judgment was entered against Kensington for $19,394.11. This amount was the debt owed to CenterPoint by Kensington for gas services provided to Kensington prior to appointment of the Receiver for the Property. The judgment against Kensington is not appealed here.

The redemption period has expired. The Bank is now the owner of the Property. The Receiver for the Property was discharged by the Court on November 6, 2008, after the redemption period on the sale of the Property expired.

STATEMENT OF FACTS

The following statement of facts is undisputed from the record below. These facts support the District Court's entry of summary judgment, which should be affirmed here.

THE PARTIES[1]

Respondent State Bank of Delano ("Bank") is a Minnesota banking corporation with offices located at 1300 Babcock Blvd East, Delano, Minnesota 55328. (RA. 204, ¶ 1.1; AA. 053, ¶ 1).

Appellant CenterPoint Energy ("CenterPoint") is a utility company with a registered agent located at CT Corporation, 100 South 5th Street, Suite 1075, Minneapolis, Minnesota, 55402. CenterPoint provided natural gas services to the Property described below. (RA. 204, ¶ 1.2; AA. 053, ¶ 2).

Respondent Swartz Brothers Associates, Inc., as receiver of the real estate of Kensington Equity Partners, Inc. in Starbuck, Minnesota ("Swartz Brothers" or the "Receiver"), is a Minnesota real estate sales, leasing and management company with offices located at 210 Main Street, Starbuck, Minnesota 56381 and 2 South Franklin Street, Glenwood, Minnesota 56334. (RA. 204, ¶ 1.3; AA. 053, ¶ 3).

Defendant Kensington Equity Partners, Inc. ("Kensington") is a Minnesota corporation with offices located at 11974 Portland Ave., Burnsville, Minnesota 55337. (RA. 205, ¶ 1.4; AA. 053, ¶ 4).

The Property at issue is commonly known as 610 West 6th Street, Starbuck, Minnesota 56381, and legally described in Schedule A to the Mortgage. (RA. 046, 050-051).

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[1] The claims involving Glacial Hills Elementary School settled and were dismissed, and are not on appeal here. (RA. 379; AA. 041, ¶3). The judgment against Kensington is also not on appeal here. (See Appellant's Brief generally).

MORTGAGE AND ASSIGNMENT OF RENTS

On or about December 27, 2005, Kensington executed a mortgage to the Bank in the amount of $800,000.00 (the "Mortgage"), which was recorded on the Property on December 30, 2005 as Document Number 234595 in the Office of the Pope County Recorder. (RA. 046-051).

On or about December 27, 2005, Kensington executed a Promissory Note ("Promissory Note") to the Bank in the amount of $800,000.00. (RA. 052-053).

On or about December 27, 2005, Kensington executed an Assignment of Rents ("Assignment of Rents") in favor of the Bank, which was recorded on December 30, 2005 as Document Number 234596. (RA. 054-058). The Assignment of Rents assigned to the Bank the right to receive rents to satisfy the debt owed to the Bank, and provided for the appointment of a receiver to collect the rents on the Property. (Id.).

Under the terms of the Promissory Note and Mortgage, Kensington agreed to pay the Bank one principal payment of $800,000.00 plus interest on June 27, 2007. (RA. 046-051, RA. 052-053). In addition, Kensington agreed to pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning January 27, 2006, with all subsequent interest payments due thereafter on the same day of each month. (RA. 046-051, RA. 052-053).

Under the terms of the Promissory Note and Mortgage, if Kensington failed to make any payment when due, the Bank could declare the entire unpaid principal balance and accrued interest thereon immediately due. (RA. 046-051, RA. 052-053).

Despite due demand, Kensington failed and refused to pay the amount owing on the Promissory Note and Mortgage to the Bank. (RA. 265, ¶17-18).

KENSINGTON FAILS TO PAY CENTERPOINT

From January 2006 to the time the Receiver was appointed, Kensington was delinquent on the CenterPoint invoices. (RA. 356-358). Kensington sporadically made payments to CenterPoint throughout 2006, but was never caught up on its payments to CenterPoint. (RA. 356-358). Kensington was approximately $8,500 behind on its payments to CenterPoint at the end of 2006. (RA. 356-358). The past due amount owed to CenterPoint continued to grow through 2007, and by the end of 2007, Kensington was approximately $19,000 behind on its payments to CenterPoint. (RA. 356-358). CenterPoint and Kensington attempted to work out a payment plan in October 2007, thereby acknowledging that Kensington is the party that owes CenterPoint for the past due invoices. (RA. 359-360).

Glacial Hills Elementary School, a tenant at the Property, made every rent payment to Kensington from the time it entered the lease with Kensington. (RA. 039, ¶ 3).

COURT ORDERS

On October 5, 2007, the Bank served a Complaint on Kensington and Gary D. Gangstee ("Gangstee"), alleging breach of promissory note, mortgage foreclosure, breach of guaranty, and appointment of Receiver for real estate under the Assignment of Rents. (RA. 059-073).

On December 27, 2007, the Court issued an Order adjudging that $933,754.59, plus interest, late fees, disbursements, costs and attorneys' fees through the Confirmation of Sale is due and owing to the Bank from Kensington and Gangstee. (RA. 074-089, RA. 085, ¶ 1). In the same Order, the Court ordered the Sheriff of Pope County to sell the Property, make a report of the sale to the Court, and pay the proceeds of the sale of the Property, after payment of costs, to the Bank, to be applied to the debt adjudged due under the Order. (RA. 074-089, RA. 085-086, ¶ 2).

On December 27, 2007, the Court also issued an Order appointing Swartz Brothers as the Receiver of the Property during foreclosure ("Receivership Action"). (RA. 090-127). The Court granted the request for the appointment of a Receiver because the Assignment of Rents provides for the appointment of a Receiver upon default under the Assignment of Rents. (RA. 096-097, ¶ 4). Kensington defaulted under the Assignment of Rents, Promissory Note, and Mortgage by failing to make the mortgage payments when they became due. (Id.).

Swartz Brothers was not appointed to be the Receiver for Kensington the corporation. (RA. 099, ¶ 1). Kensington is an active Minnesota corporation. (RA. 349, ¶ 4). While this case was in district court, Kensington owned personal property. (RA. 349, ¶ 4).

Prior to the appointment of the Receiver, Kensington was CenterPoint's customer at the Property. (RA. 128).

PROPERTY SOLD TO PLAINTIFF

On February 26, 2008, the Pope County Sheriff sold the Property to the Bank

because it was the highest bidder at the sale. (RA. 130-131). The Court issued an Order confirming the Sheriff's sale on April 1, 2008. (R.A. 380-384). A deficiency judgment for $97,893.16 was then entered against Kensington on April 1, 2008. (R.A. 382-383).

RECEIVER TAKES POSSESSION OF PROPERTY

On or about the first week in January 2008, the Receiver took possession of the Property. (RA. 141, ¶ 5). The Property has two natural gas meters. (RA. 141, ¶ 4). One meter is for the former Minnewaska Hospital, which now is rented by the Glacial Hills Elementary School ("School"). (RA. 141, ¶ 4). The other meter was for the former clinic of the Minnewaska Hospital, which, during the time the case was in district court, was rented by AgCode, Inc. ("AgCode"). (RA. 141, ¶ 4). Both locations use natural gas to heat the rented real estate. (RA. 141, ¶ 4).

On or about January 2, 2008, the Receiver called CenterPoint to request a meter reading for both meters and a change of account for both meters with the new account to be set up for the Receiver. (RA. 141, ¶ 5). Further, the Receiver requested CenterPoint to send the natural gas invoices for both meters from January 2008 forward to the Receiver's attention and provided its address. (RA. 141, ¶ 5). The CenterPoint representative the Receiver spoke to said the meters would be changed to the new account as of January 1, 2008, and that CenterPoint would send the invoices to the Receiver. (RA. 141, ¶ 5).

On or about January 17, 2008, the Receiver called CenterPoint because it had not received invoices for either meter. (RA. 141, ¶ 6). The CenterPoint representative the Receiver spoke to said the Receiver had not received any invoices because it was a short

billing cycle and the Receiver would receive the invoices for the January use with the following invoice. (RA. 141, ¶ 6). The CenterPoint representative also told the Receiver that the new accounts had been set up. (RA. 141, ¶ 6).

On or about February 5, 2008, the Receiver still had not received any bills from CenterPoint so the Receiver called again. (RA. 141, ¶ 7). The Receiver was transferred to the credit department and the CenterPoint representative the Receiver spoke to said he would transfer the accounts to the "Kensington Receiver Account" and send the invoices for both meters. (RA. 141, ¶ 7).

About one or two days later, the Receiver called CenterPoint again requesting copies of the invoices for January and February 2008, and the Receiver was told that they would be faxed and mailed to it. (RA. 141, ¶ 8). The invoices were not faxed or mailed to the Receiver. (RA. 141, ¶ 8).

On March 4, 2008, the Receiver called CenterPoint again and spoke to Dave in the credit department. (RA. 142, ¶ 9). Again, the Receiver asked for the invoices for both meters. (RA. 142, ¶ 9). Dave told the Receiver that he would fax the invoices to it, but also told the Receiver that it needed to talk to Keith Moheban ("Moheban"), counsel for CenterPoint, regarding the accounts. (RA. 142, ¶ 9). The Receiver left a message for Moheban. (RA. 142, ¶ 9). The Receiver did not receive copies of the invoices. (RA. 142, ¶ 9).

On or about March 5, 2008, Moheban called the Receiver back and asked it to fax him a copy of the Court Order dated December 27, 2008, which the Receiver did. (RA.

142, ¶ 10). The Receiver asked Moheban for the January and February invoices for both accounts. (RA. 142, ¶ 10).

On March 5, 2008, the Receiver received a letter from Moheban. (RA. 142, ¶ 11). In the letter, Moheban stated that he would have CenterPoint direct the bills for the School account to the Receiver's attention and that the current balanced owed was $23,636.98. (RA. 142, ¶ 11). Moheban also stated that the amount of the January 2008 bill was $2,388.52, and the amount of the February bill was $2,644.41. (RA. 142, ¶ 11). That was the first letter the Receiver received regarding the January and February 2008 invoices, even though the Receiver had requested from CenterPoint at least four times that the meter be switched and the invoices be sent to it. (RA. 142, ¶ 11; RA. 185-186).

On March 7, 2008, the Receiver sent a check to CenterPoint, and a copy of the check and a letter to Moheban, in the amount of $5,032.93, representing $2,388.52 for January's invoice and $2,644.41 for February's invoice. (RA. 142, ¶ 12). The Receiver asked that Moheban send it the January and February 2008 invoices for the School. (RA. 142, ¶ 12; RA. 187-188).

On March 10, 2008, the Bank sent a letter to Moheban in response to the March 5, 2008 letter that Moheban sent to the Receiver. (RA. 134-137).

On March 14, 2008, Moheban responded to the Bank's March 10, 2008 letter, stating that "in the absence of an arrangement between the Receiver and CenterPoint to resolve the past due invoices, your client should anticipate discontinuance of service at this location." (RA. 128-129).

On March 18, 2008, the Bank sent a letter to Moheban in response to his March 14, 2008 letter, stating that based on the reasons stated in the letter, "the Receiver does not anticipate a discontinuance of service at the Property." (RA. 138-139). Moheban never responded to the Bank's March 18, 2008 letter.

On or about March 19, 2008, the Receiver received a phone message to call CenterPoint regarding the accounts. (RA. 142-143, ¶ 13). The Receiver did so, and talked to Mark. (RA. 142-143, ¶ 13). The Receiver asked for the January and February 2008 invoices for both accounts. Mark told the Receiver that he would fax them to it. (RA. 142-143, ¶ 13). The Receiver did not receive the invoices. (RA. 142-143, ¶ 13).

On or about March 20, 2008, the Receiver called CenterPoint again asking for the January, February, and March 2008 invoices for each account. (RA. 143, ¶ 14; RA. 325-326). A woman named Marie faxed the Receiver copies of the current invoices only. (RA. 143, ¶ 14; RA. 325. On the same day, the Receiver sent a fax to Marie at CenterPoint and Moheban regarding the January, February, and March 2008 invoices. (RA. 143, ¶ 15; RA. 189; RA. 329-330).

In letters dated March 20, 2008, but received March 24, 2008, CenterPoint sent the Receiver two notices of proposed disconnection. (RA. 143, ¶ 16; RA. 190-193). For the School, CenterPoint sent an invoice stating that $2,648.74 is due for the month of March, but $21,531.85 is the total amount claimed due (but, the invoice does not break the total due down by month). (RA. 143, ¶ 17). For AgCode, CenterPoint sent an invoice stating that $678.16 is due for the month of March, but $2,819.38 is the total amount claimed due (but, the invoice does not break the total due down by month). (RA. 143, ¶ 18).

On March 24, 2008, after the Receiver received the disconnect notices, it called CenterPoint and talked to Alan. (RA. 143, ¶ 19; RA. 327-328). The Receiver requested invoices for January, February, and March 2008 for the School and Agcode meters, and Alan faxed the Receiver the invoices. (RA. 143, ¶ 19; RA. 327-328). CenterPoint told the Receiver that it was leaving all "delinquencies" in place and the Receiver needed to talk to Moheban. (RA. 143, ¶ 19; RA. 327-328).

On March 24, 2008, the Receiver mailed a check in the amount of $2,648.74 for the March 2008 invoice for the School meter to Moheban. (RA. 144, ¶ 20; RA. 194-198).

On March 24, 2008, the Receiver mailed a check in the amount of $2,142.49 for the January, February, and March 2008 invoices for the AgCode meter to Moheban. (RA. 144, ¶ 21; RA. 199). The Receiver also noted that the receivership should not be charged late fees, because the invoices it received on March 24, 2008, were the first invoices it received for the AgCode meter, even though it had requested a meter change on January 2, 2008, and on numerous other occasions in January, February, and March 2008. (RA. 144, ¶ 21; RA. 199-203).

On March 27, 2008, Erik from CenterPoint called the Receiver regarding the School invoices to discuss payment. (RA. 144, ¶ 22). Erik noticed that it was a commercial account and said he would transfer the Receiver to commercial accounts. (RA. 144, ¶ 22). The Receiver told him that it had talked to commercial accounts numerous times. (RA. 144, ¶ 22). Erik then said "thanks" and hung up. (RA. 144, ¶ 22).

CenterPoint claims that $18,883.11 is owed on the 612 W. 6th Street account for services provided prior to January 2008, and $676.89 is owed on the 610 W. 6th Street account for services provided prior to January 2008, for a total of $19,560. (RA. 323, ¶¶ 5, 8). CenterPoint did not limit its claim to the funds the Receiver had in its account, but sought to have the Bank, a secured creditor of Kensington, pay money out of its pocket for amounts due from Kensington to CenterPoint. (Id.).

The parties cross-moved for summary judgment. (AA. 001-002). The Court denied CenterPoint's Motion for Summary Judgment. (AA. 001, ¶ 1). The Court granted the Bank's and the Receiver's Motions for Summary Judgment and found that the Bank and Receiver were not liable for the debts of Kensington to Centerpoint. (AA. 002, ¶ 3. AA. 032, ¶ 1).

On February 20, 2009, the District Court granted a default judgment against Kensington in favor of CenterPoint for $19,394.11. (RA. 373-378).[2] This judgment against Kensington is not on appeal here.

STANDARD OF REVIEW

The District Court properly applied the law to the undisputed facts on summary judgment and this Court should affirm the District Court's judgment. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Appellant did not argue

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[2] CenterPoint failed to mention in its opening brief that it has a judgment against Kensington for $ 19,394.11. (See Appellant's Brief Generally).

below that there were disputed issues of fact. (AA. 009). As a result, the only question on appeal is whether the lower court erred in its application of the law.

Minnesota Rule of Civil Procedure 56.03 states that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

On motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and any doubts and factual inferences must be resolved against the moving party. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

Accordingly, "[s]ummary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Heidbreder v. Carton, 645 N.W.2d 355, 363 (Minn. 2002). However, summary judgment on a claim is mandatory against a party who fails to establish an essential element of that claim, if that party has the burden of proof, because this failure renders all other facts immaterial. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

The District Court properly granted summary judgment in favor of the Bank and the Receiver based on the undisputed facts and the law related to the case. This Court should affirm that judgment.

ARGUMENT

The District Court properly granted summary judgment as a matter of law in favor of Respondents. First, the Bank and the Receiver do not owe CenterPoint for invoices Kensington incurred before the Receiver was appointed. Second, the Receiver had no contract with CenterPoint before it was appointed for the real estate. Third, the Receiver was not unjustly enriched by CenterPoint providing natural gas to Kensington before the Receiver was appointed. Fourth, the issue of whether CenterPoint is entitled to disconnect natural gas service to the Property is moot. The Bank's and Receiver's motions for summary judgment were properly granted by the District Court and should be affirmed.

I. THE BANK AND THE RECEIVER DO NOT OWE CENTERPOINT FOR INVOICES INCURRED BEFORE THE RECEIVER WAS APPOINTED.

The Bank and the Receiver do not owe CenterPoint for invoices Kensington incurred before the Receiver was appointed. First, the Receiver was appointed for the real estate, not for Kensington. Second, secured creditors are entitled to priority over general, unsecured creditors in the distribution of receivership assets. Third, nothing in the Order appointing the Receiver requires the Receiver to back pay invoices for months in which the Receiver was not appointed. As a result, the District Court properly granted summary judgment to the Respondents.

A. The Receiver was appointed for the real estate, not for Kensington.

The Receiver was appointed to prevent waste of a piece of Kensington's foreclosed real estate, which Kensington held the right to redeem during the redemption

period, not to run the entire business of Kensington. This is an important distinction because the Receiver in this case is a rent receiver in a foreclosure action, not an equity receiver where a receiver takes over the day-to-day business and all personal property for a corporation. The United States Supreme Court has detailed the differences between the two types of receivers, and stated the following regarding rent receivers:

> A receivership in a foreclosure suit is limited and special. The rents and profits are impounded for the benefit of a particular mortgagee, to be applied upon the debt in the event of a deficiency. The corporation retains its other property, if it has any, unaffected in its power of disposition by the decree of sequestration. The creditors retain their remedies except as against the income subjected to the lien. There is neither winding up of the business nor attempt to reorganize it and set it going anew.

Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 221 (1936)(citations omitted). The court explained that, unlike a rent receiver, an equity or general receiver takes possession of all of a debtor's assets and attempts to satisfy all creditors out of those assets. Id. at 220. The court further explained the differences between a rent receiver and an equity receiver, as follows:

> But the situation is very different if the receivership in view is one for the foreclosure of a mortgage. In its normal operation such a receivership does not connote possession of all the property of the debtor or even all the property within the appointing jurisdiction. The mortgage may be a lien upon one parcel or a few, leaving other property of abundant value for payment of the debts. Indeed, the cases must be many where the owner of a mortgaged building, not personally liable for the payment of the mortgage debt, will hold in the part of prudence, whether he is solvent or insolvent, to let the building go.

Duparquet, 297 U.S. at 223.

The Receiver was appointed to care for the Property, not for Kensington the corporation.[3] (RA. 099). Contrary to CenterPoint's argument (Appellant's Brief, at 17), this fact makes a difference because case law holds that a mortgage foreclosure receiver is not obligated to pay the past due bills of a foreclosed owner to maintain utility service. Title Guarantee & Trust Co. v. 457 Schenectady Avenue, Inc., 183 N.E. 198, 200 (N. Y. 1932); Kane v. Roxy Theatres Corp., 63 F.2d 754, 756 (2nd Cir. 1933); Keith County Bank & Trust Co. v. Wheat Belt Power District, 415 N.W.2d 459, 462 (Neb. 1987); see Lend Lease Asset Management, L.P. v. Cobra Security, Inc., 912 So.2d 471, 476 (Miss. 2005).

In 457 Schenectady, a title company foreclosed a mortgage on two apartment buildings. Id. at 199. The mortgage secured the title company's loan by a lien on the real estate and by the right to take the rents during the foreclosure process. Id. After the owner of the apartment buildings recorded the mortgages, but before the foreclosure, the owner of the apartment buildings applied to a utility for water service. Id. By December 18, 1931, the owner had incurred a water bill of $677. Id. "On December 16, 1931, a receiver of the rents and profits was appointed in this foreclosure action and the water company sought to shut off the supply of water to the tenants in the apartments until and unless the receiver paid this past-due bill of the owner." Id. The question presented to

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[3] CenterPoint suggests that it is "unknown whether the real property in fact constitutes substantially all of the assets of Kensington, such that the Receiver effectively is controlling the entire business." (Appellant's Brief, at 17). The facts in the record show that Kensington is an ongoing business. (RA. 349, ¶ 4). Further, the record reflects that the Bank seized via a Sheriff's execution some equipment from Kensington, and that Kensington is not bankrupt and it has assets. (RA. 368, at 8).

the court was "Must the receiver . . . pay all charges due at the time of his appointment before he can get water for the apartment?" Id. The Court held that the receiver did not have to pay the debtor's past due utility bill. Id. In answering the question put to the court, the court stated as follows:

> The answer to the question submitted is not dependent upon the passing of title; rather, it depends upon possession under a prior right reserved in the mortgage, giving the rents and income as security for the mortgage debt. To give effect and value to this security, the debt of the owner for past water service cannot be treated as a charge on the property or the water supply shut off until it be paid by the receiver appointed for the benefit of the mortgagee.

Id. at 200. The court provided the following analysis for why the receiver was not obligated to pay the past due invoices of the utility company:

> Whatever charges and expenses were to be necessarily incurred in running and keeping up the property during his possession were naturally to be deducted from the rents and income, but he was under no duty or obligation to pay the debts of the owner which were not liens or charges upon the property. He was appointed to collect the money due the plaintiff, not money due the water company. To force him to pay the latter's claim by shutting off the water supply would in effect give a lien on the property for the amount due which it is conceded the water company does not have.

Id. at 199-200. The court reasoned that the use of water was necessary for the receiver to ably discharge the duties the court imposed upon him because without water, the apartments could not be rented and the security of the rents given to the mortgagee would be valueless unless it consented to and did pay the owner's debt to the water company. Id. at 200. The court concluded that such a result would give the utility a grasp on the realty which has been refused by statute, and would render meaningless the right to

collect the rents. Id. Further, a mortgagee could not control the growing indebtedness or compel the company to press the owner for payment. Id.

Here, just as in 457 Schenectady, the Receiver was appointed in a foreclosure action for real property to collect rents. (RA. 095, ¶ 1). The Receiver is obligated to pay charges and expenses that are necessarily incurred in running and keeping up the property during its possession, which it has done, but the Receiver is under no obligation to pay the debts of Kensington, as the court held in 457 Schenectady.[4]

The Receiver never stood in the shoes of Kensington, and it did not accept the utility account in the condition the account was in when the Receiver was appointed.[5] The Receiver had no idea what the condition of the utility account was when it was appointed and, as in 457 Schenectady, requiring the Receiver to pay the past due bill from the rents in which the Bank holds a security interest would allow the utility a grasp on the realty which it is not entitled to, and would render the Bank's right to collect the rents meaningless.

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[4] CenterPoint states that "The Receiver is entitled to accept rent payments, including delinquent rent payments for rental periods prior to the appointment of the Receiver." (Appellant's Brief, at 18)(emphasis in original). Contrary to CenterPoint's statement, there were no delinquent rent payments for the Receiver to collect. (See RA. 039, ¶ 3)("The School has made its lease payment every month since entering into the lease with Kensington."). This fact undercuts CenterPoint's argument on this point (mainly page 18 of Appellant's Brief) and the Court should disregard it.

[5] CenterPoint argues that the name change of the account requested by the Receiver makes a difference to its "stands in the shoes" analysis. (Appellant's Brief, at 17). CenterPoint's argument is misplaced. The fact that the account was renamed the "Kensington Receivership Account" is meaningless and does not establish that the Receiver stands in the shoes of Kensington. What matters under the law is that the Receiver's possession of the Property is hostile to that of Kensington's possession.

The Receiver was appointed in a foreclosure action. (RA. 095, ¶ 1). The rents from the Property were collected to offset a deficiency on the mortgage. (RA. 371; 382). CenterPoint retained its remedies against Kensington for past due invoices for natural gas service provided to Kensington. In fact, CenterPoint sued Kensington in this action and a default judgment was issued in CenterPoint's favor. (RA. 374). It is Kensington that owes CenterPoint for the past due amounts, as the judgment against Kensington shows, not the Receiver. In this regard, CenterPoint entered into an agreement to provide utilities to Kensington, not to the Receiver, for the months prior to the Receiver's appointment. Kensington is an ongoing business. (RA. 349, ¶ 4). Further, the Receiver does not have access to the rent money that Kensington collected before the Receiver was appointed. (RA. 349, ¶ 5). Kensington has those funds. (RA. 349, ¶ 5). As such, the Receiver does not owe past due amounts that were incurred by Kensington prior to it being appointed as the receiver for the Property.

The cases cited by CenterPoint for the proposition that the Receiver stands in the shoes of Kensington are not on point with this case, because in all the cases CenterPoint cites, the receiver was appointed for the entire business, not as a rent receiver on foreclosed real estate. See Geroy v. Upper, 187 P.2d 662, 663 (Or. 1947)(appointing receiver over all partnership property); Newcomer v. Miller, 172 A. 242, 242 (Md. 1934)(appointing receiver over all corporation assets); O'Neal v. General Motors Corp., 841 F. Supp. 391, 394-95 (M.D. Fla. 1993)(appointing receiver over dealership); Marshall v. People of State of New York, 254 U.S. 380, 381 (1920)(appointing receiver over all corporation property); Downey v. Humphreys, 227 P.2d 484, 489 n.1 (Cal. Dist.

Ct. App. 1951)(placing corporation in hands of receivers); KeyBank Nat. Ass'n. v. Michael, 737 N.E.2d 834, 839-40 (Ind. Ct. App. 2000)(appointing receiver to liquidate the business); Martin v. General Am. Cas. Co., 76 So. 2d 537, 539 (La. 1954)(placing company in receivership); Ivy Hill Ass'n Inc. v. Kluckhuhn, 472 A.2d 77, 78 (Md. 1984)(appointing receiver of company); State ex rel. Ashcroft v. St. Louis No. 2, Inc., 618 S.W.2d 686, 687 (Mo. Ct. App. 1981)(appointing receiver to continue operations of private health care facilities); Kuntsman v. Guaranteed Equities, Inc., 728 P.2d 459, 460 (N.M. 1986)(appointing receiver over company); Wellbro Bldg. Co. v. McConnico, 421 P.2d 837, 840 (Okla. 1966)(appointing receiver for company); Abedon v. Providence Redevelopment Agency, 348 A.2d 720, 721 (R.I. 1975)(receiver appointed over company); Jeffcoat v. Morris, 389 S.E. 2d 159, 159 (S.C. Ct. App. 1989)(receiver appointed over all assets of a Martha Mims); D & S Farms v. Producers Cotton Oil Co., 492 P.2d 429 (Ariz. Ct. App. 1972)(no receiver appointed); Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 446, 451-52 (1935)(receiver appointed over company); Maxl Sales Co. v. Critiques, Inc., 796 F.2d 1293, 1295 (10th Cir. 1986)(receiver appointed to operate the debtor's business).

This case is similar to Wheat Belt, 415 N.W.2d 459 (Neb. 1987). In Wheat Belt, a foreclosure receiver was appointed to "among other things, preserve, protect, and manage the real estate, and to conserve and nurture it in a husbandlike manner." 415 N.W.2d at 461. Wheat Belt, the utility company, informed the receiver that if the receiver did not pay the bills that Neal Batterman, one owner of the foreclosed property, incurred before the receivership was established, Wheat Belt would discontinue service to

the receiver. Id. The receiver filed a declaratory judgment action against Wheat Belt seeking a declaration that the receiver was not obligated to pay Neal Batterman's bills and an injunction stopping Wheat Belt from disconnecting electricity to the wells. Id. Wheat Belt argued that the receiver accepted the benefits of the electric service and adopted Neal Batterman's prior contracts with Wheat Belt and "so came to stand in his shoes with respect to the delinquencies arising under those contracts." Id. at 462. The court **rejected** Wheat Belt's arguments and held that the receiver did not adopt Neal Batterman's contract with Wheat Belt because the "Neal Batterman contracts concerned themselves with the service provided before the receivership came into existence; the receiver obtained no benefits under them whatsoever." Id.

The same is true here. Plaintiff foreclosed the Property, and the foreclosure resulted in a deficiency of $97,893.16, which was secured by an Assignment of Rents. (RA. 054-058; RA. 382). The Court appointed the Receiver to collect the rents on the Property and to maintain and prevent waste to the Property. (RA. 090-127). CenterPoint has pointed to no evidence to establish that failure to pay it for past-due invoices is waste of the Property. Further, CenterPoint pursued Kensington for the amount owing for pre-receivership services that Kensington failed to pay, and received a default judgment against Kensington. (RA. 373-378). It is undisputed that the Receiver has paid CenterPoint from the time it was appointed Receiver. (RA. 349, ¶6).

For all these reasons, the Receiver does not stand in the shoes of Kensington and does not have any obligation to pay CenterPoint for Kensington's past due invoices for natural gas service.

B. The State Bank of Delano is Entitled to Priority over CenterPoint in the Distribution of Receivership Assets.

The Bank is entitled to priority over CenterPoint in the distribution of receivership assets. An assignment of rents creates a security interest in property and is perfected by recording the assignment of rents with the appropriate authority. New York Life Insurance Co. v. Bremer Towers, 714 F.Supp. 414, 418 (D. Minn. 1989). Secured creditors are entitled to priority over general, unsecured creditors in the distribution of receivership assets. Duparquet, 297 U.S. at 221; Ticonic Nat. Bank v. Sprague, 90 F.2d 641, 644 (1st Cir. 1937); 16 Fletcher Cyc. Corp. § 7945 (2007); see also Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 46 N.W. 301 (1890). Priority is relevant because CenterPoint is attempting to be paid before the Bank, the secured creditor. See Kane v. Roxy Theatres Corp., 63 F.2d 754, 756 (2nd Cir. 1933)("The expense of operation by a creditors' receiver, or a receiver for a junior incumbrance, cannot be made a lien superior to that of the prior mortgagee who has not acquiesced."); Minn. Stat. § 559.17, subd. 2 (2007); see also New York Life Insurance Co. v. Bremer Towers, 714 F.Supp. 414, 418 (D. Minn. 1989)(stating that an assignment of rents creates a security interest in property and is perfected by recording the assignment of rents with the appropriate authority, referencing Minn. Stat. § 559.17); Prudential Ins. Co. of America v. Eden Square Shopping Center of America, 524 N.W.2d 513, 516 (Minn. Ct. App. 1994)(holding that Minn. Stat. § 559.17 "allows a mortgagee to look to both the real estate and to any assigned rents or profits to satisfy a debt if necessary.").

The Bank's Assignment of Rents created a security interest in the rents on the Property, which entitles the Bank to priority over CenterPoint. (RA. 054-055; 096-097). CenterPoint is nothing more than a general, unsecured creditor of Kensington as evidenced by its account statements. (RA. 356-358, 359-360). As a general creditor, CenterPoint does not have priority over the Bank to the rents received on the Property. As a result, CenterPoint is not entitled to payment of Kensington's debt to CenterPoint from the rents held by the Receiver.

CenterPoint's reliance on Manchester for the proposition that a receiver is obligated to pay delinquent operating expenses is misplaced for three reasons. First, Manchester involves a receivership over a corporation, not a rent receivership. Thus, the Manchester receiver stood in a different position from the rent Receiver in this case. See Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 221-23 (1936)(explaining the difference between a rent receiver and an equity receiver). Second, Manchester defines operating expenses as "under some circumstances, necessary equipment and repairs, not including debts of original construction and the demands of general creditors of the corporation." Id. at 119. Utility invoices do not fall under the definition of "operating expenses" as defined in Manchester, and Manchester in no way suggests that natural gas utility bills incurred by the corporation can be construed as operating expenses. Third, past due natural gas bills are past bills of a general creditor.

CenterPoint suggests that without natural gas, a landlord cannot lease space and earn rents, and therefore a utility is not a general creditor. Whether CenterPoint is a general creditor or not does not depend on whether a landlord can lease and earn rents

without its service. Black's Law dictionary defines "general creditor" the same as an "unsecured creditor," which is defined as "A creditor who, upon giving credit, takes no rights against specific property of the debtor." Blacks Law Dictionary 397 (8th ed. 2004). Here, CenterPoint never took any lien rights against the Property in receivership so it is nothing more than a general creditor.

Additionally, contrary to CenterPoint's contention that it is losing a "right" to disconnect service, CenterPoint has no right to disconnect utility service to the Receiver. Wheat Belt, 415 N.W.2d at 463; see 457 Schenectady., 183 N.E. at 200(holding utility not entitled to disconnect service because receiver appointed for the benefit of the mortgagee did not pay past service bills incurred before receiver was appointed); Kane, 63 F.2d at 756; Cascade Motor Hotel, Inc. v. City of Duluth, 348 N.W.2d 84, 85-86 (Minn. 1984)(holding that imposing "as a condition for delivery of utility services to a new applicant the obligation to pay an indebtedness incurred by a former owner of the premises to be served is arbitrary and unreasonable."); see also Minn. Admin. R. 7820.1300.[6] Thus, CenterPoint's contention is unsupported by the law, and directly contrary to it.

Further, CenterPoint does not have an equitable lien[7] under Minnesota Rule 7820.1000(A). Centerpoint cites no case law supporting its interpretation and the plain language of the rule does not support its argument. The Rule provides as follows:

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[6] See infra at IV.B.

[7] CenterPoint did not claim before the District Court that it had an equitable lien. As a result, this argument should not be considered by the Court. Thiel v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

> With notice a utility may disconnect service to any customer for any reason stated below. Notice must comply with the requirements of part 7820.2400:
>
> A. for failure of the customer to pay a bill for utility service, but only when the amount of the customer's outstanding bill equals or exceeds the amount of the customer's deposit.

Minn. R. 7820.1000(A). First, nothing in this Rule provides that CenterPoint is entitled to an equitable lien[8] on the Property. Second, as fully briefed below, the Receiver was a new customer. Third, the Receiver paid every invoice from CenterPoint from the time it was appointed for the natural gas used during the time it was the receiver. (R.A. 145). Fourth, assuming for the sake of argument that CenterPoint had followed proper procedure and sought a judgment against Kensington for the amount of its invoices prior to the foreclosure[9] and then docketed and filed the judgment against Kensington—i.e., on the Property—that lien still would have been extinguished in the foreclosure action, unless CenterPoint redeemed and paid off all secured creditors above it. Minn. Stat. § 581.10. Equitable lien or not, there is no situation in which CenterPoint elevates itself above the Bank's Mortgage and Assignment of Rents. The bottom line is that

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[8] An equitable lien is defined as "A right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property." Black's Law Dictionary 942 (8th ed. 2004). "The equitable lien or mortgage may be created when all circumstances indicate that the real nature of the transaction is that of a loan advanced on security of realty." Trondson v. Janikula, 458 N.W.2d 679, 682 (Minn. 1990). CenterPoint can point to no lien right that allows it to have its debt satisfied from the real estate.

[9] Of course, CenterPoint did not obtain a judgment against Kensington until after the redemption period expired on the Bank's foreclosure of the Property. (RA. 373-378).

CenterPoint's invoices are not liens on the Property and the Receiver has no obligation to pay them.

For all these reasons, the Bank is entitled to priority over CenterPoint in the collection of rents.

C. Nothing in the Order Appointing the Receiver or in the Receivership Statute Requires the Receiver to Back Pay Invoices for Months Prior to the Appointment of the Receiver.

Nothing in the Order appointing the Receiver requires the Receiver to back pay invoices for months prior to the appointment of the Receiver. In this regard, the Court's December 27, 2007 Order states that the "Receiver shall collect the rents . . . and shall apply the rents . . ." to make "payment of all expenses for normal maintenance of the Property." (RA. 158 ¶ 2(e)). The context of the Order presumes that the Receiver will collect the rents and then apply the rents to current invoices. (RA. 149-184). The District Court Judge who issued the receivership Order was the same Judge who entered summary judgment against CenterPoint, and he agreed with this reading of the Order. (AA. 014-015).

Further, this provision applies to normal maintenance from the time the receiver is appointed, not before. Again, the District Court Judge who issued the Order agreed with this interpretation. (AA. 014-015). Nothing in this provision of the receivership Order requires the Receiver to back pay invoices for months in which the Receiver was not

appointed. (RA. 090-127). Those are debts of Kensington.[10] Normal maintenance refers to maintenance costs incurred **after** the receiver is appointed to maintain the property. The District Court agreed with this interpretation of the Order. (AA. 001-017). To this end, the Receiver has paid all invoices incurred from the time he was appointed the Receiver of the Property. (RA. 349, ¶6). Any other interpretation would again lead to an absurd result. If normal maintenance meant all invoices incurred prior to the appointment of the Receiver, there would be no value in recording an assignment of rents and appointing a receiver over a property because any number of unsecured creditors would sue the receiver to have its debts paid and leave no funds to pay for the care of the property to prevent waste, let alone any funds for the secured creditor. As such, the Receiver is not required to pay past due bills of Kensington.[11]

Additionally, the Minnesota receivership statute does not require the Receiver to pay past due obligations of Kensington out of the rents collected by the Receiver. The receiver statute regarding appointment of a receiver related to mortgages provides as follows:

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[10] In fact, CenterPoint obtained a judgment against Kensington for the amount owed to CenterPoint. (RA. 373-378). That judgment is not on appeal here. (See Appellant's Brief generally).

[11] The Order states that "the Receiver may request that Plaintiff advance funds necessary to pay expenses of the Property." (RA. 159 ¶ 3). Expenses of the Property do not include previously incurred debts of Kensington. Kensington owes CenterPoint for the months of unpaid invoices prior to January 2008. The Receiver and the Bank are not responsible for the debts of Kensington and nothing in the receivership Order requires them to pay the debts of Kensington. To find otherwise would be to impose the debt of a debtor on a creditor. That is contrary to common sense and the law.

> The receiver shall collect the rents, profits and all other income of any kind, manage the mortgaged premises so to prevent waste, execute leases within or beyond the period of the receivership if approved by the court, pay the expenses listed in clauses (1), (2), and (3) in the priority as numbered, pay all expenses for normal maintenance of the mortgaged premises and perform the terms of any assignment of rents which complies with section 559.17, subdivision 2. Reasonable fees to the receiver shall be paid prior thereto.

Minn. Stat. § 576.01 subd. 2 (2007). The expenses listed in clauses 1, 2, and 3 are as follows:

> (1) application of tenant security deposits as required by section 504B.178;
> (2) payment when due of prior or current real estate taxes or special assessments with respect to the mortgaged premises, or the periodic escrow for the payment of the taxes or special assessments;
> (3) payment when due of premiums for insurance of the type required by the mortgage, or the periodic escrow for the payment of the premiums.

Minn. Stat. § 576.01 subd. 2 (2007). Pursuant to this statute and the Court's Receiver Order, the Receiver is to pay itself first, then pay items 1-3 of the statute. Nothing in the statutes requires the Receiver to pay CenterPoint for Kensington's debts. The fact that the statute requires the payment of prior real estate taxes or special assessments does not mean that the Receiver has to pay all prior debts of Kensington.[12] Such a result would be absurd. Real estate taxes create a lien on the Property that is not extinguished by foreclosure; unsecured creditor's debts do not. No bank, or other secured creditor, would ever implement an assignment of rents and appoint a rent receiver if it had to pay all the

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[12] Likewise, the statute requires a receiver to maintain tenant security deposits under Minn. Stat. § 504B.178, not 504B.161, subd.(a)(1). Nothing in section 504B.178 intimates that a receiver is required to pay for past due natural gas invoices.

debts of the debtor. If the legislature intended to require a rent receiver to pay all prior debts of a debtor, it would have stated so. The legislature did not state as such.

For all these reasons, the Minnesota receivership statutes do not require the Receiver to pay Kensington's debts.

II. THE RECEIVER HAD NO CONTRACT WITH CENTERPOINT TO PROVIDE NATURAL GAS TO THE PROPERTY BEFORE IT WAS APPOINTED RECEIVER FOR THE PROPERTY.

The Receiver had no contract with CenterPoint to provide natural gas to the Property before it was appointed Receiver for the Property. "To establish a breach-of-contract claim, a plaintiff must show that (1) a contract was formed; (2) the plaintiff performed any conditions precedent; and (3) the defendant breached the contract." Commercial Associates, Inc. v. Work Connection, Inc., 712 N.W.2d 772, 782 (Minn. Ct. App. 2006). "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." Id. In a case nearly identical to this one, the court held the receiver did not owe a utility company for past due bills of the owner. Keith County Bank & Trust Co. v. Wheat Belt Power District, 415 N.W.2d 459, 461 (Neb. 1987); see also Cobra, 912 So.2d at 476; 457 Schenectady, 183 N.E. at 200; Kane, 63 F.2d at 756.

This case is similar to Lend Lease Asset Management, L.P. v. Cobra Security, Inc., 912 So.2d 471, 476 (Miss. 2005), where the receiver was not obligated to pay a creditor for services rendered to a mall prior to receivership.[13] In Cobra, the court

[13] CenterPoint argues that Cobra is distinguishable because "Unlike the security business, in the case of utility service, the Receiver would not have a different option for

appointed a receiver for the Oxford Mall, which was owned by Aegis Oxford, L.L.C. Id. at 472. The mall property was foreclosed, and the foreclosure resulted in a deficiency of $2,649,704.49, which was secured by a security interest in the rents. Id. The receiver refused to pay amounts due to Cobra Security, Inc. for services rendered prior to the establishment of the receivership. Id. The court found "nothing in the Receiver's obligations which arguably required her to pay debts incurred by Aegis prior to the establishment of the Receivership. The record is void of any evidence which arguably established that failure to pay Cobra's past-due bill would result in lack of maintenance or waste of the mall property." Id. at 475. The court also found that "Cobra's claim for pre-receivership services must be pursued against Aegis, the entity contracting therefore; while the responsibility for payment for Cobra's post-receivership services was upon the Receiver. It is uncontradicted that Cobra was compensated for all such post-receivership services." Id. at 476.

Here, CenterPoint cannot show that it formed a contract with the Receiver to supply natural gas to the Property before the Receiver was even appointed in this case. In

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obtaining service, and consequently the Receiver would practically have been required to pay for those services or face disconnection of service." (Appellant's Brief, at 20). In other places throughout its brief, CenterPoint shamelessly claims that it is entitled to use such extortion tactics. (Appellant's Brief, at 7-8, 22, 23, 24). The practical effect of CenterPoint's position is that the Receiver and the Bank have to pay CenterPoint not because the legislature has expressly provided that utilities have superior lien rights to secured creditors and not because there is case law that dictates a receiver must pay a utility provider for all past due invoices incurred before the receiver was appointed, but because the Bank and Receiver have no other option for utility service so they must pay the utility for the natural gas that Kensington used and did not pay for (even though CenterPoint has a judgment against Kensington) or face disconnection of service. Such extortion tactics should not be countenanced by this Court.

this regard, CenterPoint seeks payment from the Receiver for invoices dating back to at least December 2006. (RA. 333, 334). The Receiver was not appointed until December 27, 2007. (RA. 090-127). As such, CenterPoint cannot show that it had a contract with the Receiver to supply natural gas services and for the Receiver to pay for those services until at least January 2008 when the Receiver took possession of the Property and called CenterPoint to switch the meters. (See RA. 141, ¶ 5). The Receiver paid all of CenterPoint's invoices for natural gas service provided during its appointment. (RA. 349, ¶ 6). As such, summary judgment was properly granted in favor of the Receiver on CenterPoint's breach of contract cross claim. The District Court should be affirmed.

III. THE RECEIVER WAS NOT UNJUSTLY ENRICHED BY CENTERPOINT PROVIDING NATURAL GAS TO THE PROPERTY BEFORE THE RECEIVER WAS APPOINTED FOR THE PROPERTY.

The Receiver was not unjustly enriched by CenterPoint providing natural gas to the Property before the Receiver was appointed for the Property. A claim for unjust enrichment arises when a party gains a benefit illegally or unlawfully. Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. Ct. App. 1990). Thus, an unjust enrichment claim may be founded upon failure of consideration, fraud or mistake, or "situations where it would be morally wrong for one party to enrich himself at the expense of another." Id. citing Anderson v. DeLisle, 352 N.W.2d 794, 796 (Minn. Ct. App. 1984). Further, "equitable relief cannot be granted where the rights of the parties are governed by a valid contract." U.S. Fire Ins. Co. v. Minnesota State Zoological Bd., 307 N.W.2d 490, 497 (Minn. 1981).

Here, the Receiver did not gain a benefit illegally or unlawfully by not paying

CenterPoint for natural gas it provided to Kensington before the Receiver was appointed. In this regard, CenterPoint is owed amounts from Kensington[14] from before December 2006—approximately one year before the Receiver was appointed.[15] (See RA. 333, 334). The Receiver cannot be unjustly enriched by natural gas service provided to Kensington before Receiver was appointed. Further, it is undisputed that the Receiver has paid for natural gas services received throughout its appointment. (RA. 349, ¶6). As such, summary judgment was properly granted in favor of the Receiver on CenterPoint's unjust enrichment crossclaim.

CenterPoint does not even attempt to establish the elements of an unjust enrichment claim and, on that basis alone, the District Court must be affirmed.

IV. CENTERPOINT IS NOT ENTITLED TO DISCONNECT THE GAS SERVICE.

CenterPoint is not entitled to disconnect the gas service to the Property. First, the issue is moot. Second, even if the issue is not moot, the Receiver is a new customer. As a result, the judgment of the District Court should be affirmed.

A. The issue of whether CenterPoint can disconnect the service is moot.

The issue of whether CenterPoint could disconnect the natural gas service to the

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[14] Kensington did not answer Centerpoint's cross claims, and Centerpoint obtained judgment against Kensington for the "amount due." (RA. 375-378). That judgment is not on appeal here. (See Appellant's Brief generally).

[15] It is interesting that CenterPoint would provide natural gas service to Kensington for one year without payment and without disconnecting the natural gas service, but threaten to disconnect the service to the Receiver for nonpayment of Kensington's past due invoices, even though the Receiver has paid every invoice from CenterPoint from January 2008 until its discharge.

Property is moot. The doctrine of mootness dictates that an appellate court will hear only live controversies and will not pass on the merits of a particular question merely for the purpose of setting precedent. Chaney v. Cmty. Dev. Agency, 641 N.W.2d 328, 331 (Minn. Ct. App. 2002)(dismissing as moot an appeal of a discharged notice of lis pendens when the property had been transferred to a bona-fide purchaser). If an appellate court is unable to grant effectual relief, the issue is moot. Id.

The issue of whether CenterPoint can disconnect the gas service is moot. The Receiver of the Property was only in place until the expiration of the redemption period. (RA. 371, ¶3). The redemption period expired, and the District Court in the Receivership Action issued an Order discharging the Receiver. (RA. 370-372). Thus, the Receiver is no longer in possession of the Property. (RA. 370-372). Instead, the holder of the Sheriff's Certificate of Sale is now in possession and holds title to the Property.[16] (RA. 130-131). The holder of the Sheriff's Certificate of Sale is a new customer, and CenterPoint does not, nor could it, make a good faith argument that the holder of the Sheriff's Certificate of Sale "stands in the shoes of" of Kensington. Thus, the Court could not order the disconnection of the utility services, Cascade Motor Hotel, Inc.v. City of Duluth, 348 N.W.2d 84, 85-86 (Minn. 1984); Minn.R. 7820.1300, and the request to be able to disconnect that gas service is now moot. As such, the Court of Appeals should affirm the District Court.

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[16] The Bank is the holder of the Sheriff's Certificate of Sale. (R.A. 130-131).

B. Even if the issue is not moot, the Receiver was a new customer.

The Receiver was a new customer of CenterPoint. Minnesota Administrate Rule 7820.1300 states that "A utility may not disconnect service to any customer for services rendered to a previous customer who occupied the premises unless the customer continues to occupy the premises." Minn. Admin. R. 7820.1300. "Customer" is defined as "any person, firm, association or corporation, or any agency of the federal, state, or local government, being supplied with service by a utility, subject to the jurisdiction of this commission." Minn. Admin. R. 7820.0700. The Receiver was a new customer of CenterPoint. In Minnesota, a new customer does not have to pay the bills of the previous customer on property. See Minn. Admin. R. 7820.1300; Cascade Motor Hotel, Inc. v. City of Duluth, 348 N.W.2d 84, 85-86 (Minn. 1984)(holding that imposing "as a condition for delivery of utility services to a new applicant the obligation to pay an indebtedness incurred by a former owner of the premises to be served is arbitrary and unreasonable."). The case law establishes that the Receiver was a new customer here.

In Kane v. Roxy Theatres Corp., 63 F.2d 754, 755 (2nd Cir. 1933), a receiver was appointed for Roxy Theatre Corporation. Shortly thereafter, the Continental Bank & Trust Company filed to foreclose its mortgage, and the receivership was extended to the foreclosure proceedings. Id. The receiver was directed to hold all rents and profits for the benefit of the mortgagee. Id. Prior to the foreclosure, the receiver incurred a bill of nearly $5,000 from an electric utility. Id. When the receiver applied for a continuation of electric service as the foreclosure receiver, the electric utility threatened to discontinue service unless the receiver paid the prior bill. Id. The issue presented to the court was

whether "the extension of the receivership to the foreclosure suit created a change in the 'occupant' of the premises, or in the 'person supplied,' within the meaning" of the statutes. Id. at 756. The Court held the receiver is a different occupant. Id. In reaching a decision in the matter, the court reasoned as follows:

> The expense of operation by a creditors' receiver, or a receiver for a junior incumbrance, cannot be made a lien superior to that of the prior mortgagee who has not acquiesced. By analogy it would seem that the expenses incurred by a creditors' receiver should not impair the possession which the mortgagee is entitled to take through a foreclosure receiver, nor burden it with debts created for the benefit of junior interests. In Title Guarantee & Trust Co. v. 457 Schenectady Ave., Inc., 260 N. Y. 119, 183 N. E. 198, it was held that a water company was not privileged to shut off service from premises in possession of a foreclosure receiver unless the latter would pay water bills incurred by the mortgagor. That is, the receiver under the mortgage was treated as a different "occupant" from the mortgagor. We think that case determinative of the present controversy. There is equal reason to treat the foreclosure receiver as a different occupant from the creditors' receiver. His claim to possession as a lienor is as hostile to the prior possession of the creditors' receiver as it was to the prior possession of the mortgagor in the case cited above.

Id. (citations omitted). The court held that the utility had no right to enter upon the premises in possession of the foreclosure receiver. Id.

As in Kane and 457 Schenectady (discussed above), the Receiver's right to possession of the Property is hostile to that of Kensington's possession. The fact that Kensington continued to hold the right of redemption on the Property is irrelevant, because the Receiver's possession of the Property and right to control it is what matters.

Further, the Receiver does not stand in the shoes of Kensington. (Appellant's Brief, at 25). The Receiver is a rent receiver appointed in a foreclosure action. See Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 220-23 (1936); Lend Lease Asset Management, L.P. v. Cobra Security, Inc., 912 So.2d 471, 476 (Miss. 2005). Such a receiver does not stand in the shoes of a corporation that continues to exist and operate, but rather is a new customer. Keith County Bank & Trust Co. v. Wheat Belt Power District, 415 N.W.2d 459, 461 (Neb. 1987).

CenterPoint also argues that because Kensington continued to "occupy" the Property after the Receiver was appointed, it was permissible to disconnect service under Minnesota Rule 7820.1300, even if the Receiver were a new customer. (Appellant's Brief, at 26). Kensington did not continue to "occupy" the Property. See Kane, 63 F.2d at 756 . Once the Receiver was appointed, it changed the locks on the Property, and took possession of the Property. (RA. 101, ¶ 4(a); RA. 104). Kensington no longer had possession as it was required to surrender that possession to the Receiver. (RA.104). Contrary to CenterPoint's assertion, Kensington did not collect rent from the tenants of the Property after the appointment of the Receiver, the Receiver collected the rents. (RA. 054-055; RA. 099; RA. 104; RA. 349). As such, Kensington did not "occupy" the Property, and CenterPoint's arguments to the contrary are meritless.

By its own admission, CenterPoint's "customer" before January 2008 was Kensington. (RA. 128). From January 2008 until the Receiver was discharged, CenterPoint's "customer" was the Receiver. The Receiver was a different customer from

Kensington and CenterPoint was appropriately barred from disconnecting service to the Receiver based on Kensington's delinquent account.

Now, after the redemption period has expired, the Bank owns the Property. (RA. 130-131). The Bank is a new customer. Even if the Court found that the Receiver was not a new customer, the Bank is, and as a result CenterPoint is currently not entitled to disconnect service to the Property.

CONCLUSION

The District Court Judge presided over both the Receivership Action and the action against CenterPoint. The District Court properly determined that a receiver of real estate does not have to pay the debts of the Bank's debtor that were incurred prior to the appointment of the receiver. As such, the District Court properly granted summary judgment and should be affirmed.

Dated: 7/31/09

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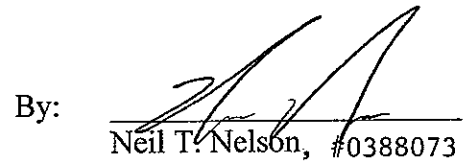
By: 

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STATE OF MINNESOTA
IN THE COURT OF APPEALS

State Bank of Delano,

Respondent,

vs.

CenterPoint Energy,

Appellant,

and

Swartz Brothers Associates, Inc. and
Kensington Equity Partners, Inc.

Respondents,

and

Glacial Hills Elementary School,

Respondent.

CERTIFICATE AS TO BRIEF LENGTH

Trial Court File No. 61-CV-08-235
Appellate Court Case Nos.: A09-962
Date of Order: September 21, 2006

I hereby certify that the brief served in the above-entitled matter on July 31, 2009, conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a Times New Roman font with 13 point type. The length of this brief is 894 lines and 10,745 words. This brief was prepared using Microsoft 2003 word processing software.

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