

STATE OF MINNESOTA
IN THE COURT OF APPEALS

A-09-1708

First Minnesota Bank, a Minnesota bank,
f/k/a First Minnesota Bank, N.A.,

Plaintiff/Appellant,

vs.

Overby Development, Inc., a Minnesota corporation, and
Wayne Overby, an individual,

Defendants/Respondents.

REPLY BRIEF OF APPELLANT FIRST MINNESOTA BANK

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INTRODUCTION

Appellant's appeal is procedurally proper in all respects, and this Court should not be persuaded by Respondents' misguided attempts to convince this Court otherwise. In their opposition, Respondents spend nearly half their time firing misaimed procedural shots at Appellant's appeal. To do so, Respondents submit a brief that is filled with contradictions and fails to provide any sound argument as to why Respondents are the proper recipient of the surplus - an issue this Court did not address in its March 24, 2009 Appellate Order and, instead, reserved for remand.

Given the foregoing, this Court should not be persuaded by Respondents' "kitchen sink" brief. Instead, this Court should reverse the trial court's July 14, 2009 Amended Order and remand with instructions that the trial court enter judgment in favor of Appellant for the full amount of the surplus, because the underlying mortgage is not satisfied and principles of law, equity and contract demand that Appellant receive the established surplus.

LEGAL ARGUMENT

I. APPELLANT'S APPEAL PROPERLY AND TIMELY CHALLENGES THE TRIAL COURT'S MISAPPLICATION OF MINNESOTA'S FORECLOSURE LAWS.

Despite Respondents' assertions, Appellant's appeal complies in all respects with Minnesota law. As such, this Court should disregard Respondents' allegations, which are presented only to distract the Court, and should instead focus on the merits of this appeal. In doing so, it will become clear to this Court that Appellant is the proper recipient of the surplus.

A. Appellant's Appeal is Timely.

Respondents' first argument that Appellant's appeal is untimely is wholly unfounded. The July 14, 2009, Amended Order is the proper measuring device for determining the time to file an appeal, not the June 18, 2009 Order. Nowhere in their brief do Respondents suggest or argue that the July 18, 2009, Amended Order does not "restart" the clock for filing this appeal. (Resp. Br. 4-6.). Instead, Respondents focus their timeliness argument squarely on alleged imperfections in Appellant's Motion for Reconsideration, which is a collateral issue not affecting the proper time to file an appeal. (Resp. Br. 4-6.).

Respondents' allegations are wholly irrelevant because the trial court issued the July 14, 2009, Amended Order, which clearly started the time to file this appeal under Minnesota Rule of Civil Appellate Procedure 104.01. (A. 555-557.) "The general rule in Minnesota is that after amendment or modification of an order, the time within which an appeal must be taken begins to run from the date of the amendment or modification." *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984) (citing *Krug v. Ind. School Dist. No. 16*, 293 N.W.2d 26, 29 (Minn. 1980)), *see also E.C.I. Corp. v. G.G.C. Co.*, 237 N.W.2d 627 (Minn. 1976) (holding "[t]he correct application of Rule 104.01 is that the time to appeal an issue begins to run anew from a modification of judgment when the issue was for some reason not appealable before the modification.").

Applying the rule, Respondents served the Amended Order upon Appellants on July 20, 2009 via facsimile and first class mail. (A. 553-557.) The date of service of the Amended Order clearly marks the first day in the time Appellant has to appeal under

Minnesota Rule of Civil Appellate Procedure 104.01 because the June 18, 2009 Order referenced a non-existent order and lacked clear reasoning and application of the substantive law, giving Appellant reason to believe that the trial court issued an outstanding order that Appellant did not receive and was not aware of. (A. 547.) Counting sixty days from the July 20, 2009 service of the Amended Order, Appellant had until September 18, 2009 to file its appeal. Minn. R. Civ. App. P. 104.1 (providing the time to file an appeal of a “judgment” is “60 days after service by any party of written notice of its filing.”). (A. 553-557.) Appellant filed its Notice of Appeal on September 18, 2009, clearly within the 60 day time limit to file an appeal under Minnesota Rule of Civil Appellate Procedure 104.1. Finally, Respondents do not cite any authority that establishes that the trial court’s July 14, 2009 Amended Order is not the measuring date for this appeal, which it clearly is. Respondents’ lack of authority for this proposition may explain why they served a Notice of Filing of Order for an Order which Respondents now assert is not an appealable order. (A. 553.)

Instead, Respondents attempt to distract this court in focusing their misguided attack on the allegation that Appellant’s June 24, 2009 motion was not a “proper motion” but a “letter requesting leave to bring a motion.” (Resp. Br. 4-6). Unfortunately, for Respondents, their argument is in direct contradiction with their prior pleadings and

Minnesota law.¹ See Minn. R. App. P. 104.01, subd. 2; subd. 2(c) (providing “if any party serves and files a proper and timely motion of a type specified immediately below [including a motion for reconsideration under Minn. R. Civ. P. 52.02], the *time for appeal of the order or judgment* that is the subject of such motion runs for *all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding.*”) (emphasis supplied). (Res. A. 21-22.) Specifically, in defense of Appellant’s motion for reconsideration, Respondents submitted a letter brief to the trial court in which Respondents state that Appellant brought a “motion to reconsider.”² (Res. A. 21-22.)

Even if this Court finds that Appellant’s appeal was untimely (which it clearly is not), this Court may still properly hear this appeal in the interests of justice. *Krug*, 293 N.W.2d at 29 (allowing untimely appeal to proceed because “[t]he rules of this court are designed to effectuate the orderly administration of justice and do not control its

¹ In fact, Respondents’ June 30, 2009 pleading is likely a judicial admission that Appellant filed a Motion for Reconsideration. See *Lines v. Ryan*, 272 N.W.2d 896, 902, n. 4 (Minn. 1978) (articulating that “pleadings are generally admissible into evidence, as admissions or for impeachment purposes, even though they are completed and signed by a party’s attorney” because attorney’s have implied authority to make judicial admissions.). (Res. A. 21-22.)

² On June 30, 2009 Respondents submitted a pleading to the trial court wherein Respondents referred to Appellant’s request as a “motion to reconsider.” (Res. A. 21) (stating “The *motion to reconsider* appears to raise no new issue that was not already previously argued to the court”) (emphasis supplied). Furthermore, Respondents’ same pleading attempted to defend against the motion to reconsider. (Res. A. 22) (stating “Defendant respectfully requests that your honor deny First Minnesota Bank’s *motion to reconsider*”) (emphasis supplied). (*Id.*)

jurisdiction, for it retains the constitutional power to hear and determine, as a matter of discretion, any appeal in the interest of justice.”).

Given the foregoing, this Court should not give heed to Respondents’ procedural arguments. The true fact of the matter is that Appellant filed a proper request for reconsideration, which was granted in part by the trial court when the trial court issued its responsive amendment. (A. 547-548; 554-557.) The problem is that the trial court’s Amended Order did not remedy all of the problems Appellant highlighted, and this appeal must then follow as a matter of course. There were simply two wrong Orders issued by the trial court, and after attempting to remedy the errors directly with the trial court, Appellant has now timely sought relief from the second (Amended) Order. Instead of ducking the issues as Respondents suggest, this Court should focus on the merits of this appeal, which clearly command that Appellant is the proper recipient of the surplus.

B. Appellant Properly Asks this Court to Review the Trial Court’s Application of Minnesota Law on Remand.

When the Court examines the substance of this appeal, it becomes clear that Appellant seeks a proper appellate review of the trial court’s application of Minnesota law to the facts at hand, and does not seek to collaterally attack this Court’s March 24, 2009 Appellate Order. Respondents and Appellant alike agree that this Court remanded the trial court’s May 2, 2008 Order with instructions for the trial court to distribute the surplus. (Resp. Br. 9-10.) However, through their convoluted argument, Respondents attempt to twist Appellant’s assertions to convince this Court that Appellant is now somehow collaterally attacking the March 24, 2009 Appellate Order – which Appellant is

clearly not. (Resp. Br. 9-11.) Instead, Appellant's appeal is founded solely in Appellant's request that this Court review the trial court's clear misapplication of the law. (App. Br. 1.)

The argument that Appellant is collaterally attacking the March 24, 2009 Appellate Order can be swiftly dismissed. It is true that under Minnesota law, "a judgment which is valid upon its face is not subject to collateral attack" and, instead, must be directly attacked. *See Fidelity & Deposit Co. of Md. v. Riopelle*, 216 N.W.2d 674, 677 (Minn. 1974); *see also* Black's Law Dictionary, *Collateral Attack* (8th ed. 2004) (defining "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal"). However, Appellant is in no way challenging the March 24, 2009 Appellate Order. Instead, Appellant is directly attacking the trial court's July 14, 2009 Amended Order through this appeal.

Upon an examination of the procedural history of this matter, it is undeniably clear that Appellant is not collaterally attacking this Court's March 24, 2009 Appellate Order. In 2008, Appellant filed its first appeal challenge to the trial court's May 2, 2008 Order. (App. Br. 3.) This Court heard the appeal, and issued the March 24, 2009, Appellate Order, in which this Court affirmed in part, reversed in part, and specifically remanded the issue of distribution of the surplus. (App. Br. 4-5.)

On remand, the trial court made at least three clear errors that require reversal. First, the trial court misapplied Minnesota's foreclosure statutes by using the incorrect statutory standard for distributing the surplus. (A. 555.) Second, despite this Court's clear direction in its March 24, 2009, Appellate Order, the trial court (again) "erred in its

strict application” of the surplus statute. (A. 555.) Third, the trial court erred when it failed (or refused) to analyze principles of contract and equity in determining which party is the proper recipient of the surplus. (A. 555.) Subsequently, Appellant properly initiated this, the second, appeal. (App. Br. 5.) It is clear from this case’s procedural history that the basis of Appellant’s appeal *in no way challenges* the March 24, 2009 Appellate Order, but instead, is founded solely on the clear errors in the trial court’s July 14, 2009 Amended Order.

Quite simply, Respondents have no factual foundation or legal basis on which to support their collateral attack argument. First, there is no factual foundation for Respondents’ argument. Nowhere in its brief does Appellant challenge any aspect of the March 24, 2009 Appellate Order.³ Despite this clarity, Respondents assert that “Appellant directly attacks the determination of this Court in its March 24, 2009 Opinion that a surplus existed.”⁴ (Resp. Br. 10.) In fact, Appellant makes no such attack and Respondents’ own brief later directly contradicts its own argument in this regard. Four

³ In fact, Appellant’s brief is proof that, despite Respondents’ contentions to the opposite, Appellant views the March 24, 2009, Appellate Order as “part of the law in this action.” (Resp. Br. 10.; App. Br. 10-11, 14.)

⁴ As a point of clarification, Appellant does not challenge that a surplus exists in this appeal. To the contrary, this appeal presents the question of which party is entitled to the surplus under Minnesota Statutes § 581.06. Instead, the disagreement between Appellant and Respondents is two-fold. First, whether the priority rules in § 581.06 trigger upon satisfaction of the underlying mortgage; whether the underlying mortgage in this case is satisfied; and whether the phrase “mortgage debt” in § 581.06 is synonymous with “judgment.” Second, whether a mortgagee may be the “person entitled” to the surplus under § 581.06.

pages after they allege an improper collateral attack, Respondents highlight that Appellant “[c]onced[ed] the existence of a surplus.” (Resp. Br. 14.)

Furthermore, Respondents have no legal basis for their argument that Appellant’s appeal is a collateral attack on the Court’s March 24, 2009, Appellate Order, because in their brief Respondents rely exclusively upon clearly inapposite authority. (Resp. Br. 10.) In their attempt to derail this appeal, Respondents rely solely upon *Mattson v. Underwriters at Lloyds of London*, which is clearly distinguishable and not even relevant to the foundation of this appeal. 414 N.W.2d 717, 719-20 (Minn. 1987). Respondents cite *Mattson* for the proposition that “Appellant cannot now collaterally attack [this Court’s March 24, 2009] Opinion by arguing the Trial Court erred in considering the exact law as directed by [this Court’s March 24, 2009] Opinion.” (Resp. Br. 10.)

However, the second appeal in *Mattson* and the second appeal in this case are fundamentally different, because in *Mattson* the initial order from the Minnesota Court of Appeals “reversed [an order for] money judgment for the plaintiffs” and did not “remand for any further proceedings.” *Id.* at 720. Unlike *Mattson*, in this case, this Court ordered a remand as part of its ruling in the first appeal. *See id.* (holding “[t]he scope of the finality of an appellate decision depends on what the court intends to be final, and this is determined by what the court’s decision says.”). (A. 503, 508.) Therefore, an appeal of the trial court’s order in this case is permissible (and necessary) because Appellant was proper in continuing litigation on remand; whereas, in *Mattson*, the appellate court order was a complete resolution of all issues that could only be directly appealed to the Minnesota Supreme Court. *Mattson*, 414 N.W.2d at 720.

Finally, a careful examination of *Mattson* establishes that Appellant is proper in pursuing a second appeal because “issues not determined in the first appeal may, on remand, be litigated.” 414 N.W.2d at 720 (citing *Brezinka v. Bystrom Brothers, Inc.*, 403 N.W.2d 841, 843 (Minn. 1987)). This is because “[t]he reconsideration of a case on remand (and a subsequent appeal) is a continuation of the original proceeding,” and not a collateral attack on the first appeal. *Id.* (citing *Maher v. Maher*, 393 N.W.2d 190, 193 (Minn. Ct. App. 1986)). As such, Respondents’ argument that Appellant is collaterally attacking the March 24, 2009 Appellate Order is clearly meritless, distinguishable in fact and law from Respondents’ one citation, and should be properly disregarded.

C. Appellant Does Not Ask This Court to Adjudicate Matters Not Before the Court.

In its final procedural attempt to cloak this Court’s eyes from the staggering amount⁵ of outstanding debt Respondents owe Appellant, Respondents commit two sections of their brief to attempting to minimize the importance of Respondents’ outstanding debt in this Appeal, when that debt is both relevant and central to proper remand analysis. In these sections of their argument, Respondents assert that the outstanding amount due under the mortgage is not relevant in this appeal, and, moreover, that Appellant’s reference to the three remaining lots is also not relevant because the lots have not yet been addressed by the trial court.

⁵ Despite Respondents’ baseless assertions that their outstanding debt is exaggerated and exorbitant compared to the trial court’s September 6, 2007 Order, Respondents neglect to consider the fact that more than two years have passed since entry of that September 6, 2007, Order. (App. Br. 8.)

However much Respondents wish to avoid the discussion, it is plain that the amount due under the underlying mortgage is a relevant issue in this appeal. As Appellant outlines more thoroughly in its main brief, Minnesota Statutes § 581.06's priority rules trigger only *after* the underlying mortgage debt is satisfied. See Minn. Stat. § 581.06.⁶ (App. Br. 17-26.) Clearly under the plain language of the statute, in order to establish entitlement to the surplus, Appellant must prove that its underlying mortgage is not satisfied. As such, this Court should not disregard the fact that Respondents are delinquent debtors who still owe Appellant in excess of \$440,000.00.⁷

Second, the three outstanding parcels subject to Appellant's mortgage are equally relevant to this appeal. As all of the parcels Respondents attempted to develop were financed under a single, undivided mortgage, the fact that three of these mortgaged parcels remain outstanding and encumbered by Appellant's mortgage confirms that debt

⁶ In relevant part, Minnesota Statutes § 581.06 provides:

When the sale is for cash, *if, after satisfying the mortgage debt, with costs and expenses*, there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court.

Minn. Stat. § 581.06 (emphasis supplied).

⁷ As a point of clarification, Respondents' mathematical computations on page 7 of their brief are clearly in error and intended only to raise this Court's eyebrow. Despite Respondents' allegation, Appellant does not claim that the remaining debt on the three lots is more than \$700,000.00, as Respondents contend. This assertion ignores the evidence Appellant submitted and its principle brief, which refer to an affidavit establishing Respondents' outstanding debt at approximately \$440,000.00 (not \$700,000.00). (App. Br. 17; A. 428, 549-51.) Respondents' assertion shows an improper attempt to skew the facts in a manner inconsistent with Minnesota law and the established record in this case.

on the underlying loan obligation remains outstanding, which again is relevant to the surplus statute analysis. (App. Br. 6-8.) Therefore, this Court should not disregard these key facts, which establish that the underlying mortgage is not satisfied, as the facts are clearly relevant to analysis under and application of the surplus statute.

II. PROPER ANALYSIS OF LAW AND FACT CONFIRM THAT APPELLANT IS THE PROPER RECIPIENT OF THE SURPLUS.

In this appeal, the substance of Appellant's request to the Court is simple. Appellant asks this Court to apply Minnesota Statutes § 581.06 as written and in accordance with its plain meaning. As discussed in detail in Appellant's principle brief, when analyzing § 581.06 according to the statute's plain meaning, it is clear that Appellant is the proper recipient of the surplus. (App. Br. 17-20.)

Minnesota law establishes that when a foreclosure sale is for cash, § 581.06's priority rules trigger only *after* the underlying mortgage debt is satisfied. *See* Minn. Stat. § 581.06. Here, the underlying mortgage debt is not satisfied. (App. Br. 17; A. 428, 549-51.) As such, the priority rules do not trigger, and the underlying mortgage debt *must* be first satisfied before the surplus is distributed in accordance with § 581.06's priority rules. Even if this Court determines that the underlying mortgage debt is satisfied and that § 581.06's priority rules are triggered,⁸ Appellant is still the proper recipient of the

⁸ In its March 24, 2009, Appellate Order, this Court held only that "the judgment [was] necessarily satisfied." (A. 5.) As this Court is aware, the judgment is distinct from the amount of the underlying mortgage. Therefore, this Court has not yet determined whether the underlying mortgage debt itself has been satisfied.

surplus under principles of law, contract and equity. As such, this Court should reverse the trial court's Amended Order and award the surplus to Appellant.

A. The Underlying Mortgage is Not Satisfied; As Such, Minnesota Statutes § 581.06's Priority Rules Are Not Triggered.

By its plain language, Minnesota Statutes § 581.06 is triggered only upon satisfaction of the underlying mortgage debt. In relevant part, Minnesota Statutes § 581.06 provides:

When the sale is for cash, *if, after satisfying the mortgage debt*, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court....

Minn. Stat. § 581.06 (emphasis supplied). Clearly, under the plain language of § 581.06, the statute's priority rules do not apply until *after* the underlying mortgage debt is satisfied. Critical to this appeal is the undisputable fact that the "if" in the first sentence of § 581.06 creates a trigger that applies only "*after*" the underlying mortgage is satisfied. As such, because the underlying mortgage in this case is not yet satisfied, § 581.06's priority rules are not yet applicable, and the surplus previously determined by this Court must first be applied to satisfaction of the underlying mortgage before any part of the surplus may be distributed under § 581.06's priority rules.

Appellant's interpretation of § 581.06 is both logical and equitable. In demanding that the underlying mortgage debt is satisfied before any surplus is distributed under the statute's priority rules, the legislature did two key things. First, the legislature safeguarded the preservation of any equity (the value of the real property over and above the mortgage debt) in favor of the debtor. In turn, the language also provides protection

to the mortgagee, because § 581.06 ensures that no mortgagor without equity takes the surplus by requiring the mortgagor to pay-off the mortgage debt before the mortgagor is eligible to take from the surplus. Any contrary reading of § 581.06 would create a false presence of “equity” in foreclosed property and would allow mortgagors to unfairly profit from the foreclosure sale by taking funds before the mortgagor satisfies its debts, which is antithetical to principles of fundamental fairness and justice: a result specifically avoided by the plain language included in the controlling statute

Despite Respondent’s assertions that the mortgage debt is synonymous with the judgment amount – the phrases are clearly distinguishable and also requires that Respondents satisfy their outstanding debt obligations prior to making any claim to the surplus. Upon analyzing the use of the phrase “mortgage debt” in other Minnesota statutes dealing with real property, it is clear that, despite Respondents’ contention, the legislature clearly did *not* intend for the phrase “mortgage debt” to be synonymous with “judgment.” Under § 581.06, a mortgage may remain unsatisfied even after a foreclosure sale. To demonstrate this point, Appellant directs this Court’s attention to three statutes.

First, Minnesota Statutes § 580.225 presents the most direct evidence that the legislature intended to use the “mortgage debt” as the measuring device in § 581.06, not the amount of the “judgment.” Minnesota Statutes § 580.225, entitled ‘Satisfaction of Judgment,’ is part of the foreclosure by advertisement chapter and provides:

The amount received from foreclosure sale under this [the foreclosure by advertisement] chapter is full satisfaction of the mortgage debt, except as provided in section 582.30 [the deficiency judgment statute].

Minn. Stat. § 580.225 (emphasis supplied). The above statute clearly provides that the amount obtained at the foreclosure sale necessarily satisfies the mortgage debt. It is paramount to emphasize that the foreclosure by action chapter contains no similar provision. *See generally* Minn. Stat. Chap. 581. Had the legislature intended for a foreclosure sale to satisfy the mortgage debt in all instances, the legislature would have included a similar provision in the foreclosure by action chapter or the general mortgage foreclosure chapter. *See generally* Minn. Stat. Chaps. 581 and 582. As such, this Court should heed the legislature's implied direction and not read a similar provision into the foreclosure by action chapter when the legislature intentionally did not include such a provision.

Second, Minnesota Statutes § 580.13 (also in the foreclosure by advertisement chapter) and § 589.17 (in the adverse claims to real estate chapter) provide that the mortgage debt can be partially extinguished in a foreclosure sale. Specifically, Minnesota Statutes § 580.13, entitled 'Premises in More than One County; Record,' provides:

If any mortgage covering real estate in more than one county be foreclosed by proceedings had in one county, and the mortgage debt be thereby paid, in whole or in part, there may be recorded by the county recorder of the other county a certified copy of the certificate of sale and other foreclosure proceedings of record in the county in which the foreclosure proceedings were had.

Minn. Stat. § 580.13 (emphasis supplied). Furthermore, in relevant part, Minnesota Statutes § 589.17, entitled 'Enforcement of Rent Assignment' provides:

A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure, except as permitted in subdivision 2. The enforcement of an assignment of rents of the type described in subdivision 2 shall not be deemed prohibited by this subdivision, nor because a foreclosure sale under the mortgage has extinguished all or part of the mortgage debt.

Minn. Stat. § 589.17 (emphasis supplied).

Given the foregoing, it is clear that the legislature anticipated and intended that a foreclosure sale might result in only a partial satisfaction of the underlying mortgage debt. First, unlike the foreclosure by advertisement chapter, the foreclosure by action chapter contains no provision that foreclosure of the underlying mortgage necessarily satisfies the entire amount due under the mortgage. Second, the legislature was careful to include two statutes that anticipate that a foreclosure sale may result in only a partial satisfaction of the underlying mortgage. Consequently, this Court should give heed to the legislature's careful choice of words in § 581.06 and hold that the mortgage debt and the amount of the judgment are not synonymous.

As such, because Respondents' mortgage debt is not satisfied in this appeal, the Court should hold that § 581.06's priority rules are not triggered and Order that the surplus be applied first to satisfaction of the underlying and outstanding mortgage debt.

B. Even if the Court Determines that the Priority Rules Do Apply, Respondents Are Still Not the Proper Recipient of the Surplus, Because Respondents Are Not the “Person Entitled” to the Surplus Under Minnesota Statutes § 581.06.

1. Applying the Priority Rules, Respondents Are Not the Proper Recipients of the Surplus.

Even if the language regarding the triggering event is ignored and § 581.06’s priority rules are applied, it becomes clear that Respondents are not the proper recipients of the surplus and that Appellant is. In its entirety, Minnesota Statutes § 581.06 provides:

When the sale is for cash, if, after satisfying the mortgage debt, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court. If such surplus remains in court for three months without being applied for, the judge may direct it to be put out at interest, subject to the order of the court, for the benefit of the persons entitled thereto, to be paid to them upon order of the court.

Minn. Stat. § 581.06 (emphasis supplied). Noticeably, Minnesota statutes § 581.06 uses the phrase “person(s) entitled thereto” twice. *See id.* The first use of the phrase “the person entitled thereto” is used in a sentence detailing when a party is the proper recipient of the surplus following application for the surplus. *See id.* The first use of to the phrase is singular (“the person entitled thereto”), and the phrase is used give the trial court discretion to properly distribute the surplus after analysis of principles of law, equity, and contract.⁹ Minn. Stat. § 581.06. Under the statute, the court has the option to distribute

⁹ When reading the phrase “the person entitled thereto” with the language “after satisfying the mortgage debt,” it is further confirmed that the legislature did not intend for the mortgagor to take prior to satisfying its outstanding debt.

the surplus either to the mortgagor or to the “person entitled thereto.” *Id.* Notably, the statute does not define who the person entitled thereto is. *See id.*

The second use of the phrase “the persons entitled thereto” directs what the trial court should do with a surplus when no application for the surplus has been made for three months after the surplus is deposited with the court. *See id.* Importantly, the second use of the phrase is plural (“the persons entitled thereto”), and the second sentence does not include an option to distribute the surplus to the mortgagor. *See id.*

As a result, the examination of the actual language used in § 581.06 shatters Respondents’ argument that the phrase the “person entitled thereto” only references the junior lien holder. (Resp. Br. 14-16.) This key distinction undeniably negates Respondents’ argument for three reasons. First, and quite simply, not all foreclosed properties are encumbered by outstanding junior liens. As such, clearly, the phrase “the person entitled thereto” in the first sentence cannot possibly only refer to junior lien holders, because junior lien holders do not always hold an interest in the real property. Therefore, because the phrase the “person entitled thereto” must be read consistently in both sentences, the phrase “the person entitled thereto” cannot *only* refer to the junior lien holder or the court would (in some instances) have no one to award the surplus when no application to the court is made.

Second, the phrase “the persons entitled thereto” as used in the second sentence is plural. *See* Minn. Stat. § 581.06. By making the phrase plural, the legislature demonstrates that the phrase “the person entitled thereto” is not necessarily the junior lien

holder, and (instead) might be another party or more than one party, such as the mortgagor or the mortgagee.

Finally, in the second sentence, the legislature conspicuously excludes the option of distributing the surplus to the mortgagor, which option is expressly contained in the first sentence. *See id.* Therefore, the phrase “the person entitled thereto” as used in the first sentence clearly includes more than just junior lien holders, as Respondents would have this Court believe. Certainly, the plain language of the surplus statute refers inclusively to a class of individuals who were not made whole by the foreclosure sale proceeds, including the first mortgagee. It is plain here that Respondents’ reading of the statute is mistaken and that the trial court’s decision to award Respondents the surplus is also an error of law that should now be reversed.

2. Public Policy and Principles of Law and Equity Dictate that Appellant Should Properly Receive the Surplus.

In addition to the language of the surplus statute, public policy and principles of law and equity also dictate that this Court should reverse the trial court Amended Order awarding the surplus to Respondents, particularly when Respondents are delinquent debtors who still owe a substantial sum of money to Appellant and have not satisfied the outstanding liens on the real property at issue.

As this Court instructed in its March 24, 2009 Appellate Order, this Court may “presume the ‘legislature does not intend a result that is absurd, impossible of execution or unreasonable.’” ((A. 507) (citing Minn. Stat. § 645.17(1).) Clearly, the legislature did not intend for a debtor to forfeit its equity in real property to its mortgagee after satisfying

its outstanding debts. However, it would be equally contrary to logic and absurd to reason that the legislature intended for the surplus statute to permit a delinquent debtor to take nearly a quarter of a million dollars from its mortgagee when the debtor still owes the mortgagee almost a half a million dollars. This Court should not accept Respondents' strained application of Minnesota law, which cuts sharply against public policy and creates an absurd result; instead, this Court should rule in a manner that would preserve the integrity of Minnesota's foreclosure statutes.

Respondents assert that, by seeking the surplus, Appellant tries to "get[] a second bite at the apple." (Resp. Br. 15.) This argument is simply unfounded. The "apple" Respondents speak of is Appellant/mortgagee's own funds, credit bid in at a foreclosure sale to protect Appellant's security in the real property after Respondents defaulted on their obligations in the underlying loan agreement. In exchange for Appellant's credit bid, Appellant took title to certain foreclosed properties. How Appellant/mortgagee is taking a "second bite" of the apple by seeking an order that funds bid in at the foreclosure sale be applied to the outstanding mortgage debt defies all sense of logic. In fact, if any party seeks an unfair advantage through this litigation, it is clearly Respondents, who ask this Court to place nearly a quarter of a million dollars in Respondents' unclean hands when Respondents still owe Appellant almost a half a million dollars on the underlying mortgage.

Respondents' request for an illogical end is best highlighted when Respondents claim that Appellant's argument that "the surplus must be first used to satisfy other liens after satisfying the mortgage debt before its payment to the mortgagor ... defies basic

logic.” (Resp. Br. 15.) Quite simply, Respondents’ summary at that moment in its briefing accurately summarizes the rule codified in § 581.06. Moreover, the phrase is supported by Respondents’ assertion that the “person entitled thereto” referenced in the first sentence of § 581.06 is the junior lien holder. The latter assertion makes Appellant wonder just what end Respondents seek. Clearly, Respondents seek an unfair gain after irresponsibly walking away from their multi-million dollar obligation, leaving Appellant to pick up the pieces and the expenses of Respondents’ failed endeavor.

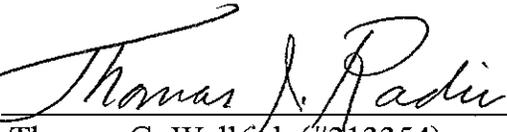
Especially in this turbulent economic time, this Court should be careful not to set the precedent Respondents demand. In a time of rampant foreclosures, this Court should not set precedent that a delinquent debtor need not satisfy its mortgage debt prior to taking a surplus. Accordingly, and as the plain language of the statute and the principles of contract and equity all dictate that Appellant should be awarded the surplus established by this Court’s prior decision, Appellant requests the Court reject Respondents’ argument and the unfounded trial court decision in regard thereto.

CONCLUSION

For these reasons, Appellant First Minnesota Bank respectfully requests that this Court vacate the trial court judgment, reverse the trial court's Amended Finding of Fact, Conclusions of Law and Order, and remand the matter for entry of an Order awarding First Minnesota Bank the surplus established by this Court’s prior opinion.

Date: November 30, 2009

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