

NO. A-09-1708

State of Minnesota
In Court of Appeals

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

Appellant,

vs

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

Respondents

**BRIEF OF RESPONDENTS OVERBY DEVELOPMENT, INC.,
AND WAYNE OVERBY**

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Table of Contents

Table of Authorities	ii
Cases	ii
Statutes	ii
Rules	2
Statement of the Case – Omitted Items.....	1
Statement of the Facts	2
Argument	3
Standard of Review	3
Legal Analysis	4
I. Appellant’s Appeal is Untimely.	4
II. Appellant Claims Entitlement for Amounts Due It for Which No Determination Has Been Made by the Trial Court.	6
III. The Trial Court Judgment in this Action was Final; Matters Not Included in this Action are Properly Addressed by a Separate Action.	8
IV. Appellant Seeks to Have This Court Reconsider Its March 24, 2009 Opinion without Having Taken Appeal.	9
V. Minnesota Statute Section 581.06 Requires Appellant Pay the Surplus to the Trial Court to be Paid to Overby Development, Inc.	11
VI. Appellant Already Reduced to Judgment Amounts Due it Under the Loan Contract.	16
VII. Appellant Erroneously Supports Its Claim to Equitable Relief Based in Mistake Where No Such Mistake Exists.	17
Conclusion	19

Table of Authorities

Cases

Cases

<i>Am. Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000).....	3
<i>Amaral v. St. Cloud Hosp.</i> , 598 N.W.2d 379 (Minn. 1999)	3
<i>Anderson v. Peterson’s North Branch Mill, Inc.</i> , 503 N.W.2d 517 (Minn. Ct. App. 1993).....	18
<i>Babcock v. American Savings & Loan Ass’n</i> , 69 N.W. 718 (Minn. 1897).....	11
<i>Brown v. Crookston Agricultural Association</i> , 26 N.W. 907 (Minn. 1886)	15
<i>Madson v. Minnesota Mining and Manufacturing Company</i> , 612 N.W.2d 168 (Minn. 2000)	5
<i>Mattson v. Underwriters at Lloyds of London</i> , 414 N.W.2d 717 (Minn. 1987).....	9, 10
<i>Ness v. Davidson</i> , 52 N.W. 46 (Minn. 1892).....	15
<i>Perkins v. Stewart</i> , 77 N.W. 434 (Minn. 1898)	15
<i>Peterson v. First National Bank of Ceylon</i> , 203 N.W. 53 (Minn. 1925)	17
<i>Romkey v. Saumweber</i> , 212 N.W. 816 (Minn. 1927)	18
<i>Thiele v. Stich</i> , 425 N.W. 580 (Minn. 1988).....	8, 9, 18
<i>Twenty Assocs. v. First Nat’l Bank & Trust Co.</i> , 273 N.W.696 (Minn. 1937).....	17

Statutes

Statutes

Minn Stat § 580.02 (2007).....	14
Minn. Stat. § 580.02(2) (2009)	13
Minn. Stat. § 581.03 (2007)	13, 14
Minn. Stat. § 581.06 (2007)	11, 13, 14, 15, 16, 17
Minn. Stat. § 581.06 (2009)	12
Minn. Stat. § 582.30 (2007)	14
Minn. Stat. Ch. 580 (2007)	14
Minn. Stat. Ch. 581 (2007)	14
Minn. Stat. Ch. 581 (2009)	13, 14
Minn. Stat. Ch. 582 (2009)	14
Minn. Stat. Ch. 81 (1866)	13
Minn. Stat. Chpt. 81, § 18 (1866)	13
Minn. Stat. Chpt. 81, § 2, 2 nd (1866).....	13
Minn. Stat. Chpt. 81, § 34 (1866)	12

Rules

Rules

Minn. R. Civ. App. P. 104 (2009).....	4, 5
---------------------------------------	------

Minn R. Civ App. P. 104.01, Subd. 1 (2009)	4
Minn R. Civ. App. P. 104.01, Subd. 2 (2009)	4, 5
Minn. R. Civ. App. P. 126.02 (2009).....	6
Minn. R. Civ. App. P. 130.01(2009).....	1
Minn. R. Civ. P. 11.01 (2009)	5
Minn. R. Civ. P. 52.02 (2009)	6

Statement of the Case – Omitted Items

Appellant omitted certain documents of record from its Appendix which items are to be included under rule 130.01 of the Rules of Civil Appellant Procedure. Minn. R. Civ. App. P. 130.01 (2009). These documents are included in Respondent's Appendix accompanying this brief.

Respondent's Appendix includes a transcript of the oral arguments of the parties at the summary judgment motion hearing on August 22, 2007. (R. 1-15.)

Respondent's Appendix includes a letter dated June 22, 2009 by Respondent's counsel, C. Alden Pearson, served on Appellant's counsel, Thomas G. Wallrich, with the Notice of Filing of Order and Order of the Trial Court dated, respectively, June 18, 2009 and June 16, 2009. (R. 16-20.)

Respondent's Appendix includes Respondent's response to Appellant's letter to the Trial Court dated June 24, 2009 requesting a motion to reconsider the June 16, 2009 Order. (R. 21-22.) That response is Respondent's letter dated June 30, 2009 requesting that the motion to reconsider be denied. *Id.* The letter was also served by first-class mail upon Appellant's attorney, Thomas G. Wallrich. *Id.*

Respondent's Appendix includes the letter from the Trial Court dated July 13, 2009 whereby the Trial Court denied Appellant's request for reconsideration. (R. 23.)

Finally, pursuant to an Order of the Trial Court dated September 16, 2009, Appellant has commenced a separate action¹ against Respondents relating to recovery of the additional amounts Appellant claims due on the note, mortgage and loan indentified in Appellant's brief and at issue in this appeal. (R. 24-42.)

¹ State of Minnesota, County of Cass, District Court File No. 11-CV-09-2280.

Statement of the Facts

Appellant makes several misidentifications in both its Statement of the Case and Statement of Facts requiring correction.

Appellant mistakenly identified seven lots where only three lots² were stipulated to be excepted from the lots identified in Appellant's proposed summary judgment order at the summary judgment hearing on August 22, 2007. *Compare* (A. 14.) *with* (A. 264). The alleged additional four lots were never included in the Complaint or Appellant's summary judgment motion. (A. 4, 14.)

Appellant also identifies the September 6, 2007 Order of the Trial Court for summary judgment as a partial judgment where no such determination has been made by the Trial Court. (A. 263-72.)

Appellant identifies a claim of a debt owing from Respondents after foreclosure sales in excess of Four Hundred Forty Thousand and 00/100 Dollars (\$440,000 00); however, no finding of fact by the Trial Court identifies any such debt as due. (A. 378-81, 382-85, 487-92, 496-501, 543-46, 554-57.)

Appellant, in a footnote to its Statement of the Case and in its final paragraph to its Statement of Facts, appears to indicate that the Trial Court issued its July 14, 2009 Order in response to Appellant's request for reconsideration but neglects to include the fact that the Trial Court denied Appellant's request for reconsideration. (R. 23.)

Finally, in a separate action commenced against Respondents for recovery of the same amounts it claims due in the action on appeal before the Court, Appellant seeks to foreclose its

² Legally described as: Lots 11, 12, and 23, Block 1, Overby's Girl Lake Circle, Cass County.

mortgages on one of the three lots excluded by the parties' agreement from the September 6, 2007 summary judgment order in this action³ and two properties never made part of this action⁴. Compare (A. 4, 14, 264.) with (R. 28).

Argument

Standard of Review

Respondents acknowledge Appellant set forth the proper standard of review in its Appellant Brief relating to a trial court's conclusions of law.

In addition to that standard, the standard regarding statutory interpretation follows.

“When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Am. Family Ins. Group v Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

“A statute should be interpreted, whenever possible, to give effect to all of its provisions; 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'” *Id.* (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). And “[w]e are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Id.*

³ Legally described as: Lot 11, Block 1, Overby's Girl Lake Circle, Cass County, Minnesota.

⁴ Legally described as: Lot 12, Block 1, Water's Edge, Cass County, Minnesota and Outlot A, Water's Edge, Cass County, Minnesota.

Legal Analysis

I. Appellant's Appeal is Untimely.

Rule 104.01 of the Rules of Civil Appellate Procedure provides that an appeal must be taken within 60 days after entry of judgment or, if an appealable order, "within 60 days after service by any party of a written notice of its filing." Minn. R. Civ. App. P. 104.01, Subd. 1 (2009).

The actual Order appealed in this case was dated June 16, 2009 not the July 14, 2009 Order referenced by Appellant. The July 14, 2009 Order was a corrective Order issued by the Court solely correcting a typographical error⁵. (R. 23.) Respondents served Appellant with the June 16, 2009 Order by facsimile and first class mail on June 22, 2009. (R. 16-20.) Counting sixty days from June 22, 2009, Appellant's appeal in this case was required to be taken by August 21, 2009. Appellant undertook its appeal in this case on September 18, 2009; therefore, Appellant's appeal is untimely and should be rejected by the Court.

Appellant's June 24, 2009 letter request for a motion for reconsideration does not extend its time period for appeal. (A. 547-52.) In that request, Appellant attempts to have the request subject to the extension of time to appeal provided in Rule 104.01, subd. 2. *Id*

The Advisory Committee Comments-2008 Amendments to Rule 104 make it clear that Appellant's letter request of June 24, 2009 fails to extend the time period for appeal. Minn. R. Civ. App. P. 104 (2009) Advisory Committee Comment—2008 Amendments (2009). The commentary provides that:

⁵ A corrective Order was issued on July 14, 2009, and filed July 15, 2009, solely correcting a typographical error referencing a prior order dated May 2, 2008 which was misidentified as May 2, 2009.

the absence of motions for reconsideration or rehearing in the list of motions given tolling effect in rule 104.01, subd. 2, is intentional. Neither requesting leave to file such a motion (as contemplated by MINN. GEN. R. PRACT. 115.11, the granting of that request so the motion can be filed, or the actual filing of the motion will pull or extend the time to appeal. A party seeking to proceed with a motion for reconsideration should pay attention to the appellate calendar and must perfect the appeal regardless of what progress has occurred with the reconsideration motion.

Id.

Rule 104.01 requires, for the appeal time to be extended, that a motion of the types set forth in Rule 104.01, Subdivision 2, be served and filed and be proper and timely. Minn. R. Civ. App. P. 104.01 (2009). Appellant met none of these requirements in its letter requesting a motion to reconsider. (A. 547-52.)

The Minnesota Supreme Court in *Madson v Minnesota Mining and Manufacturing Company* discusses what it means to have a proper motion. At a minimum, that motion must state the grounds for the motion with particularity, set forth the relief sought, provide required supporting documentation and be served and filed with appropriate signatures in place. 612 N.W.2d 168, 172-73 (Minn. 2000). In addition, the motion must comply with the Minnesota Rules of Civil Procedure. *Id.*

First, Appellant's letter to the Trial Court was not a motion but a letter requesting leave to bring a motion. (A. 547-52.) That being the case no motion was served or filed, proper or timely. Even if the letter could be considered "served" on Respondent, it was not filed with the Court Administrator as a motion, no motion fee was paid, and no notice of motion was included specifying the motion basis and hearing date. *Id.* The letter also failed to comply with the signature requirements of Rule 11 of the Minnesota Rules of Civil Procedure regarding a proper signature to include the attorney's registration number. *Id.*; Minn. R. Civ. P. 11.01 (2009).

Second, this Court may not, on its own, extend this sixty (60) day period for appeal. Minn. R. Civ.App. P. 126.02 (2009)

Appellant had other options it did not pursue which would have made its appeal timely. Appellant could have served and filed a proper and timely motion under Rule 52.02 of the Minnesota Rules of Civil Procedure. Appellant could have timely noticed its appeal and requested that the appellate court stay the appeal pending further action by the Trial Court. Rather, Appellant submitted a reconsideration request letter to the Trial Court and failed to timely appeal. By its actions, Appellant failed to timely appeal and this appeal should be dismissed.

II. Appellant Claims Entitlement for Amounts Due It for Which No Determination Has Been Made by the Trial Court.

Appellant continues to argue that it has an increasing amount due it relating to debt on the notes and mortgages for the properties not subject to this action and uses this unsubstantiated debt as the basis for its claim to the surplus in this action. *Compare* (A. 427-31.) *with* (A. 549-50.). Instead of evidencing amounts granted by the Trial Court's September 6, 2007 Order such as judgment interest, Appellant argues for additional principal and interest allegedly due under the mortgages, unquantified property maintenance costs arising after foreclosure purchase and unquantified payments made to a first mortgage holder behind which Appellant's security interest always lay. (A. 549-50.)

As argued throughout this brief, these alleged amounts due relate to properties not subject to this action. Additionally, despite Appellant's claim that "it cannot be disputed" that Respondents continue to owe Appellant under the notes and mortgages, it can be and is disputed.

As previously argued to the Court in Respondents' brief on the prior appeal in this action, Appellant appears to have bid more at the foreclosure sales than would have been originally due Appellant if the excluded properties were included. Appellant slightly reduced its summary judgment claim as signed by the Trial Court in its September 6, 2007 Order to a total of \$3,396,051.37 which consisted of \$3,150,643.71 principal, \$127,066.85 interest, \$2,999.97 late fees and attorneys' fees and costs of \$25,340.84. *Compare* (A. 17-18, 21-22) *with* (A. 263-64). This reduction was done to remove the principal and interest associated with Lots 11, 12 and 23, Block 1, Overby's Girl Lake Circle as the three lots were removed from the judgment request and summary judgment. (R. 9-14.)

That being said, the original amount requested by Appellant for summary judgment including those excluded lots was more than a quarter million dollars *less* than the amount paid by Appellant for the property at foreclosure sale: \$3,461,539.29 (original claim) vs. \$3,719,946.19 (paid at sale less publishing and Sheriff's fees). *Compare* (A. 17-18, 21-22) *with* (A. 274, 284, 381, 385). That means Appellant now claims, relating to the excluded lots, that Appellant is owed not only this differential of \$258,406.90 but an *additional* amount in excess of \$440,000.00. That means Appellant actually claims that the alleged debt associated with the three remaining lots⁶ exceeds \$700,000.00.

Respondents dispute Appellant's claim to these additional amounts; such amounts have not been determined as a matter of fact or law to exist; and such amounts are subject to determination by a separate action presently before the Trial Court⁷. Appellant's claim to the surplus relating to these additional amounts allegedly due is not ripe for appeal as it has not been

⁶ The action originally included three lots that were excluded for summary judgment and the separate action recently commenced by Appellant includes three lots that include one of the original action excluded lots and two not originally included.

⁷ State of Minnesota, County of Cass, District Court File No. 11-CV-09-2280.

adjudicated by the Trial Court. *Thiele v. Stich*, 425 N.W. 580, 582 (Minn. 1988).

III. The Trial Court Judgment in this Action was Final; Matters Not Included in this Action are Properly Addressed by a Separate Action.

Appellant's entire argument relating to an alleged entitlement to the surplus in this action rests on its claim that the judgment issued by the Trial Court was only a partial judgment. Nothing in the trial court record indicates the judgment was other than a full and final judgment. In fact, the Trial Court Order dated May 2, 2008 states definitively that "the terms of the stipulation entered into by the parties excluded those lots from this action." (A. 500.)

There were only three lots that were originally part of this action that were excluded by agreement of the parties from the judgment⁸. (R. 9-14.); (A. 264.) Appellant never requested at the time it sought summary judgment that the Trial Court enter partial judgment and retain jurisdiction in the action relating to the amounts due on these three lots pending their expected sale. *Id.* Appellant excluded those three lots and sought full and final judgment on the remaining property. *Id.* Any alleged mortgage debt relating to those excluded lots, or the lots never made a part of the action originally, are not at issue in this case.

By its March 24, 2009 Opinion in this case, this Court agreed that the judgment in this action formed the entire basis of this action and was fully satisfied. (A. 506.) This Court opined that the amounts owing on the excepted lots were not relevant to the disposition of the issues in the prior appeal. *Id.* As this appeal arises directly from the action of the Trial Court on remand of the prior appeal, this appeal remains within the scope of the issues that were before this Court on the prior appeal. *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 719-20

⁸ Legally described as: Lots 11, 12, and 23, Block 1, Overby's Girl Lake Circle, Cass County.

(Minn. 1987).

The amounts claimed due by Appellant are not within the scope of the issues in the case before this Court; therefore, Appellant's request that this Court award it the surplus on the basis of these alleged additional amounts due relating to properties not at issue in this case must not form the basis of this Court's opinion in this appeal. *Thiele*, 425 N.W.2d 580, 582-83 (Minn. 1988) (*holding* appellate court may not base its decision on matters outside of the record on appeal and may not consider matters not produced and received into evidence by the trial court).

Moreover, Appellant has initiated a separate action relating to recovery of those alleged amounts due and foreclosure on the three lots identified in that action⁹. (R. 24-42.) The Trial Court in that action will determine whether those amounts are actually due.

As to the surplus in this action, Appellant can request that the Trial Court in the other action temporarily enjoin disbursement of the surplus by the Sheriff of Cass County to Respondents pending the outcome of that action. The Trial Court in this action already identified this approach in its Order of May 2, 2008 wherein it stated:

if [Appellant] wishes to pursue a separate action to recover those amounts, nothing would event [Appellant] from taking temporary relief which might solve its current dilemma. However, in the absence of such action, it is necessary for [Appellant] to pay the amount that it bid to the Sheriff of Cass County and for [Appellant] to satisfy the current judgment in this action.

(A. 500.)

IV. Appellant Seeks to Have This Court Reconsider Its March 24, 2009 Opinion without Having Taken Appeal.

This Court remanded this matter in its March 24, 2009 Opinion solely to determine to

⁹ Legally described as: Lot 11, Block 1, Overby's Girl Lake Circle, Cass County, Minnesota and Lot 12, Block 1, Water's Edge, Cass County, Minnesota and Outlot A, Water's Edge, Cass County, Minnesota.

whom the surplus overbid by Appellant belongs. (A. 508.) This Court cited to the provisions in Minnesota Statutes Section 581.08 relating to justice being done when confirming a foreclosure sale and having the option to order a resale. *Id.* The Trial Court in its June 16, 2009 Order considered these issues and confirmed its prior Order that the surplus belong to Overby Development, Inc. (A. 544-46)

Without appealing this Court's prior Opinion, Appellant now argues that the Trial Court erred in applying these provisions from Section 581.08 in reconsidering its prior Order. The Trial Court considered these provisions in direct response to the March 24, 2009 Opinion of this Court.

The Trial Court merely applied the law of this action as directed by this Court. As Appellant failed to appeal this Court's March 24, 2009 Opinion, that Opinion forms part of the law in this action. *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 719-20 (Minn. 1987). Appellant cannot now collaterally attack that Opinion by arguing the Trial Court erred in considering the exact law as directed by that Opinion. *Id.* Appellant can only appeal whether the Trial Court erred in failing to properly apply that law as directed by this Court.

In Section II.B.3. of Appellant's brief, Appellant directly attacks the determination of this Court in its March 24, 2009 Opinion that a surplus existed. Appellant performs this attack by citing a series of cases that make the proposition that a surplus only arises after satisfaction of the mortgage debt, argues that the mortgage debt has not been satisfied in this action and concludes that the "surplus", therefore, belongs to Appellant. App. Brief P. 25-26. Appellant ignores the fact that this Court has already determined in its March 24, 2009 Opinion that a surplus exists. (A. 507.) Appellant ignores the fact that this Court has already determined in its March 24, 2009 Opinion that the judgment debt in this action was satisfied. (A. 506.) Because a surplus exists in

this action, the cases supporting how a surplus existence is to be determined are inapposite.

V. Minnesota Statute Section 581.06 Requires Appellant Pay the Surplus to the Trial Court to be Paid to Overby Development, Inc.

Minnesota Statutes Section 581.06 provides the standard in this case for payment of any surplus arising from the foreclosure sale over to Respondent Overby Development, Inc. That statute provides that:

“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 (2007).

For over one hundred years, the law in Minnesota provides that the mortgagor is entitled to the excess proceeds from sale, even when the successful bidder was the mortgagee. As succinctly stated by the Minnesota Supreme Court:

The mortgagee or party bidding does so at his peril. If he bids more than the amount due, including expense of sale, he must answer for the surplus, whether the property is really worth more or less than the amount due or the sum bid. The test is, not the value of the property, but the amount bid. If the purchaser bids the exact amount due and expenses, that is the end of the matter, except the right of redemption in accordance with the provisions of the statute. The amount bid is not compulsory, but optional, and the purchaser bids the amount at his own risk. If, each time a bid is made in excess of the actual amount due, a defense can be successfully interposed against recovering the surplus, upon the ground that the property was of less value than the amount due or the amount bid, there might be endless and vexatious litigation upon the question of the value of the property. A mortgagee ought to know the amount legally due on his mortgage, and if, on foreclosure, he bids in excess of this amount, he must abide the consequences.

Babcock v. American Savings & Loan Ass'n, 69 N.W. 718 (Minn. 1897).

Appellant argues in its brief that the Trial Court erred in application of Minnesota

Statutes Section 581.06 relating to the provision “after satisfying the mortgage debt” and the provision a surplus be brought into court “for the benefit of the person entitled thereto”. The Trial Court made no such errors.

1. Under Minn. Stat. § 581.06, Mortgage Debt is Synonymous with Judgment Debt.

As agreed by both Appellant and Respondents, the use of the term “mortgage debt” has remained unchanged in Minnesota Statutes Section 581.06 and its predecessor statutes for more than 143 years. Using this fact, Appellant tries to persuade this Court that the reason the legislature has not modified the language is because the legislature intends it to refer to the mortgage debt and not judgment debt. Appellant cites no other factual basis for this interpretation of legislative intent. Appellant explores no other plausible alternative conclusions which may be reached from application of this factual basis.

The predecessor statute to Minnesota Statutes Section 581.06 codified in the 1866 Laws of the State of Minnesota reads as follows:

Whenever there is a sale for cash under the provisions of this title, and 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. Chpt. 81, § 34 (1866).

That language remains almost exactly as written more than 143 years ago in the current statute¹⁰. Compare Minn. Stat. Chpt. 81, § 34 with Minn. Stat. § 581.06 (2009).

The companion statute from 1866 relating to foreclosures by advertisement reads as follows:

¹⁰ “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 (2009) .

!!If after sale of any real estate, made as herein prescribed, there remains in the hands of the officer making the sale, any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the taxes and costs of sale, the surplus shall be paid over by such officer, on demand, to the mortgagor, his legal representative or assigns.

Minn. Stat. Chpt. 81, § 18 (1866).

The two 1866 surplus provisions differ in that the provision relating to foreclosure by action indicates “mortgage debt” and the provision relating to foreclosure by advertisement references “mortgage”.

Considering that then, as now, foreclosure by advertisement cannot occur if a foreclosure by action had been commenced to recover the “the debt then remaining secured by such mortgage, or any part thereof¹¹”, the reason behind the use of the term “mortgage debt” becomes clear. There was no reason to identify a judgment debt as opposed to a mortgage debt as any foreclosure of the mortgage would be by action and reduced to a judgment debt. Any action would be pursuant to the foreclosure by action provisions where the end result would be a judgment debt. Further, a review of the entire statutory sections relating to foreclosure by action as codified in 1866¹² or today¹³ will reveal that nowhere is the term “debt” used except in the surplus statute.

The Trial Court in its Order of June 16, 2009 considered the issue of the term “mortgage debt” in Minnesota Statutes Section 581.06 and concluded it to be synonymous with “judgment debt”. (A. 545-46.) The Trial Court based its conclusion on the direction from Minnesota Statutes Section 581.03 that sale of the mortgage premises is done to satisfy the judgment amount due. *Id.*

¹¹ Compare Minn. Stat. Chpt. 81, § 2, 2nd (1866) with Minn. Stat. § 580.02(2) (2009).

¹² Minn. Stat. Ch. 81 (1866).

¹³ Minn. Stat. Ch. 581 (2009)

Appellant argues that other provisions in Minnesota laws, such as Minnesota Statutes Section 582.30, distinguish between “mortgage” and “judgment” Such a distinction must be made in Chapter 582 as the Chapter contains general provision that concern both foreclosures by action and by advertisement. *See generally*, Minn. Stat. Ch. 582 (2009). Chapter 581 concerns only foreclosures by action and no such distinction is needed. *See generally*, Minn. Stat. Ch. 581 (2009)

Appellant erroneously supports its statutory interpretation with a foreclosure by advertisement case and simplistic definitional citation to various dictionaries. App Brief P. 19-20. That interpretation fails to distinguish the nature of foreclosure by action, as in the present action, requiring a judgment being foreclosed upon and not a mortgage being foreclosed upon as in foreclosure by advertisement. *Compare* Minn. Stat. § 580.02 (2007) *with* Minn. Stat. § 581.03 (2007); *Compare generally* Minn. Stat. Ch. 580 (2007) *with* Minn. Stat. Ch. 581 (2007).

For the matters in this action, the mortgage debt was reduced to a judgment debt by the action and was satisfied through Appellant’s overbid at the foreclosure sales to generate a surplus. The debt and the judgment were satisfied according to the May 2, 2008 Order of the Trial Court and this Court’s Order of March 24, 2009. (A. 498-501, 506.) Any alleged debts between the parties outside the matters in this action are not relevant to the determination of this action.

2. Minn. Stat. § 581.06 Contemplates Payment of the Surplus to Other Creditors of Record and the Mortgagor but Not the Mortgagee.

Conceding the existence of a surplus, Appellant continues to argue in its brief Section II.B.2 an unsubstantiated claim to additional mortgage debt as its basis for inclusion in the group of persons entitled to a surplus under Minnesota Statutes Section 581.06. App. Brief. P. 23, 27.

Appellant convolutes the statute to argue it gets a second bite at the apple in the Section 581.06 provision relating to payment of the surplus to the “person entitled thereto”. App. Brief P. 20-24. Appellant attempts this feat by identifying cases relating to foreclosure by advertisement as supporting its claim that the surplus must be first used to satisfy other liens after satisfying the mortgage debt before its payment to the mortgagor. App. Brief P 23. Such an argument defies basic logic.

Respondents disagree with Appellant’s convoluted application of this law to entitle Appellant to the surplus. First, the case law cited by Appellant concerns foreclosure by advertisement and not foreclosure by action. *Brown v. Crookston Agr. Ass’n*, 26 N.W. 907, 907 (Minn. 1886); *Ness v. Davidson*, 52 N.W. 46, 47 (Minn. 1892); *Perkins v. Stewart*, 52 N.W. 907, 907 (Minn. 1886). Second, this case law reaches conclusions consistent with Respondent’s interpretation of the priority requirements of Minnesota Statutes Section 581.06. *Id.*

In *Brown v. Crookston Agricultural Association*, a foreclosure by advertisement case cited by Appellant, the Minnesota Supreme Court held that the relevant surplus statute contemplates that junior mortgagee claims are paid before payment to the mortgagor. 26 N.W. 907, 907 (Minn. 1886). It did not hold that the senior foreclosing mortgagee was entitled to any of the surplus. *Id.* The same conclusions were reached in two other foreclosure by advertisement cases cited by Appellant, *Ness v. Davidson* and *Perkins v. Stewart*. 52 N.W. 46, 47 (Minn. 1892) and 77 N.W. 434, 435 (Minn. 1898).

A specific priority order is contemplated by Minnesota Statutes Section 581.06: first, the mortgage debt in the action is satisfied; second, any amounts left over constitute a surplus; third, from the surplus other lien holders’ claims must be satisfied; and fourth, the remaining funds are paid to the mortgagor. Minn. Stat. § 581.06 (2007).

According to its plain language, there exists no surplus under Minnesota Statutes Section 581.06 unless the mortgage debt with costs and expenses is satisfied. *Id.* In this action, both the Trial Court and this Court determined that a surplus exists. (A.498-501, 507.) Therefore, the mortgage debt with costs and expenses has been satisfied. With the debt being satisfied, Appellant has no entitlement to any of the surplus and is not a person contemplated to benefit from the surplus. This deductive logic works consistently in all cases relating to priority under the statute.

To interpret application of Minnesota Statutes Section 581.06 as Appellant does makes nonsense out of the statute's requirement that the mortgage debt first be satisfied before paying persons entitled to the surplus.

To interpret application of Minnesota Statutes Section 581.06 as Appellant does permits an unscrupulous mortgagee to argue some unsubstantiated amount due on a mortgage, provided not all the mortgage collateral has been foreclosed, and prevent a surplus from rightfully satisfying junior lien holders and returning excess equity to the mortgagor. This interpretation also makes a mockery of the finality of judgments and permits protracted litigation that does no justice and wastes scarce resources of the judicial system.

VI. Appellant Already Reduced to Judgment Amounts Due it Under the Loan Contract.

Appellant argues in Section II.C.2. of its brief that its loan contract can supersede Minnesota law and survive judgment obtained on it. Appellant accomplishes this trick by tautologically arguing the loan documents provide it all interest relating to the loan property; that the loan property by foreclosure was converted into money; and that the money, being the

equivalent to loan property, by the loan documents belongs to Appellant.

Appellant ignores the facts that it reduced its contract claim to a judgment; that the loan property was sold to satisfy that judgment; that a surplus was generated from that sale; and that Minnesota Statutes 581.06 requires that surplus be paid to other lien holders or Overby Development, Inc. Appellant ignores the law under the merger rule that the judgment extinguishes the contract cause of action. *Twenty Assocs. v. First Nat'l Bank & Trust Co*, 273 N.W.696, 700 (Minn. 1937).

If this Court were to adopt Appellant's logic on this point, every mortgagee could construct their loan documents as legally entitling them to the entire return from sale of foreclosed property. Such reasoning would unjustly enrich mortgagees to the detriment of both mortgagors and other lien holders whenever a surplus from sale arises. Such reasoning would render powerless the surplus payment priority requirements of Minnesota Statutes Section 581.06.

VII. Appellant Erroneously Supports Its Claim to Equitable Relief Based in Mistake Where No Such Mistake Exists.

In its final section of its brief, Section II C 3, Appellant claims it is entitled to equitable relief based on an entire body of case law based on mistake. This claim is made despite the fact that Appellant has consistently represented to both the Trial Court and this Court that it made no mistake and intentionally bid the amounts at foreclosure sales. (A. 508.) Without a mistake, Appellant is not within the class of persons benefited by the cited law. That law is inapposite to proper determination of this action.

In *Peterson v. First National Bank of Ceylon*, the attorney for the foreclosing mortgagee grossly underbid by mistake at foreclosure by advertisement sale thus placing the mortgagee's

security at risk. 203 N.W. 53, 53 (Minn. 1925). In *Romkey v. Saumweber*, the attorney for the foreclosing mortgagee mistakenly misidentified the lots being foreclosed by advertisement by leaving certain lots out of foreclosure. 212 N.W. 816, 816 (Minn. 1927). Finally, in *Anderson v Peterson's North Branch Mill, Inc.*, the attorney for a foreclosing junior mortgagee mistakenly bid at foreclosure by advertisement an amount inclusive of the senior mortgage before the senior mortgagee foreclosed. 503 N.W.2d 517, 518 (Minn. Ct. App. 1993)

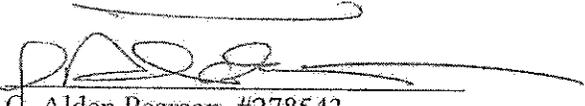
Appellant has never admitted it made a mistake in bidding at the foreclosure sales in this action. As previously stated by this Court, Appellant intimates that its bids were intentional. Moreover, the Trial Court has made no determination that Appellant made a mistake. Without such a determination, this Court has no basis to provide the relief requested by Appellant based on a theory of unilateral mistake. *Thiele*, 425 N.W.2d 580, 582-83 (Minn. 1988). Appellant fails to satisfy the element in the above cases that a unilateral mistake was made. *Romkey v. Saumweber*, 212 N.W. 816, 816 (Minn. 1927); *Peterson v. First Nat'l Bank of Ceylon*, 203 N.W. 53, 56-57 (Minn. 1925); *Anderson v. Peterson's North Branch Mill, Inc.*, 503 N.W.2d 517, 519 (Minn. Ct. App. 1993).

Conclusion

Respondents respectfully request this Court either dismiss this appeal as untimely or affirm the judgment of the Trial Court set forth in its May 2, 2008 Order as affirmed by the Trial Court in its June 16, 2009 Order (and July 14, 2009 Order) that Respondent Overby Development, Inc., is entitled to the surplus.

Dated: November 17, 2009

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