NO. A11-1338

State of Minnesota

In Court of Appeals

Dennis M. Gallaher,

Appellant,

vs.

William Titler,

Respondent.

APPELLANT'S REPLY BRIEF AND ADDENDUM

Katherine Melander (#180464)
Stephen F. Buterin (#0248642)
COLEMAN, HULL
& VAN VLIET, PLLP
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001

Attorneys for Appellant

Mark Anfinson (#0002744)
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

Attorney for Respondent

2011 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE SIX-WEEK PUBLICATION PERIOD UNDER MINN. STAT. § 580.03 IS NOT COMPLETE UNTIL THE END OF THE WHOLE OF THE LAST DAY OF WEEK SIX. 1

A. THE PLAIN LANGUAGE OF MINN. STAT. § 645.15 DEFINES A "WEEK" AS A CALENDAR WEEK AND REQUIRES THE LAST DAY OF THE SIXTH WEEK PERIOD TO BE INCLUDED IN CALCULATING THE FULL AND COMPLETE SIX-WEEK PUBLICATION PERIOD UNDER MINN. STAT. § 580.03. 1

B. MINNESOTA CASELAW ESTABLISHES AN INDIVIDUAL IS ENTITLED TO THE WHOLE OF THE LAST DAY OF A DESIGNATED PERIOD TO MAKE PAYMENT OR PERFORM ANY REQUIRED OBLIGATION, ACT, OR DUTY. 3

II. PUBLIC POLICY DOES NOT FAVOR TITLER'S INTERPRETATION OF MINN. STAT. § 580.03. 6

III. THIS QUIET TITLE ACTION NOR THE CLAIMS RAISED IN SUPPORT OF THIS ACTION ARE TIME-BARRED BY MINN. STAT. § 582.25. 7

A. MINN. STAT. § 582.25 IS A CURATIVE STATUTE, NOT A STATUTE OF LIMITATION.. 7

B. THE FIVE-YEAR STATUTE OF LIMITATIONS CONTAINED IN MINN. STAT. § 580.20 APPLIES TO AND GOVERNS MR. GALLAHER'S QUIET TITLE ACTION. 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Am. Family Ins. Group. v. Schroedl,
616 N.W.2d 273 (Minn. 2000) 10

Arneson v. Integrity Mut. Ins. Co.,
344 N.W. 617 (Minn. 1984) 5

Demuth v. Maryknoll, LLC,
2008 WL 5136956 (Minn. App. Dec. 9, 2008) 5, 6

Jorgensen v. Knutson,
662 N.W.2d 893 (2003) 3, 5, 6

Mansfield v. Fleck,
23 Minn. 61, 1876 WL 4261 (1876) 3, 5, 6

Mogen v. Carter,
54 Minn. 141, 55 N.W. 1117 (18936) 9

Pratt v. Tinkcom,
21 Minn. 142, 1874 WL 3773 (1874) 3, 4, 5, 6

White v. Mazal,
192 Minn. 522, 257 N.W. 281 (1934) 3, 4, 5, 6

Worley v. Naylor,
6 Minn. 192, 1861 WL 1857 (1861) 4, 6

STATUTES AND RULES

Minn. Stat. § 340A.802, subd. 1 (2010) 10

Minn. Stat. § 466.05, subd. 1 (2010) 11

Minn. Stat. § 580.03 (2010) 1, 2, 3, 4, 6, 11

Minn. Stat. § 580.20 (2010) 6, 9, 10, 11, 12

Minn. Stat. § 582.25 (2010) 6, 7, 8, 9, 10, 11, 12

Minn. Stat. § 582.27, subd. 1(A) (2010) 8

Minn. Stat. § 645.13 (2010) 2

Minn. Stat. § 645.15 (2010) 1, 2, 3

Minn. Stat. § 645.16 (2010) 10

ARGUMENT

I. THE SIX-WEEK PUBLICATION PERIOD UNDER MINN. STAT. § 580.03 IS NOT COMPLETE UNTIL THE END OF THE WHOLE OF THE LAST DAY OF WEEK SIX.

It is undisputed that Minn. Stat. § 580.03 applies in this case and requires that notice of the sheriff's sale must be published for six weeks. And, the parties agree that the six-week publication period is calculated using the method for computing time set forth in Minn. Stat. § 645.15. The parties, however, disagree on how to correctly interpret and apply Minn. Stat. § 645.15 to calculate the full and complete six-week publication period required under Minn. Stat. § 580.03.

As he did below, respondent William Titler argues that Minn. Stat. § 645.15 allows a sheriff's sale to take place on the last day of the six-week publication period. This interpretation, which the district court adopted, is flawed because it allows the sheriff's sale to take place before the expiration of the full and complete six-week publication period required by Minn. Stat. § 580.03. This argument also is inconsistent with the language of Minn. Stat. § 645.15 and Minnesota caselaw, which holds that an individual who is given a specific time in which to satisfy a legal or contractual obligation or debt is entitled to the whole of the last day of the designated period to comply or perform the required act.

A. THE PLAIN LANGUAGE OF MINN. STAT. § 645.15 DEFINES A "WEEK" AS A CALENDAR WEEK AND REQUIRES THE LAST DAY OF THE SIXTH WEEK PERIOD TO BE INCLUDED IN CALCULATING THE FULL AND COMPLETE SIX-WEEK PUBLICATION PERIOD UNDER MINN. STAT. § 580.03.

The language of Minn. Stat. § 645.15 provides that where the performance or doing of an act or a payment is ordered or directed, and the period of time or duration is

prescribed and fixed by law, "the time, except as otherwise provided in sections 645.13 and 645.14, shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time." Minn. Stat. § 645.15 (2010). By its very language, Minn. Stat. § 645.15 calls for the last day of designated time period to be included in that time period. Unremarkably then, when calculating the six-week publication period under Minn. Stat. § 580.03, the last day of the six-week period is to be included in the calculating the six-week period. It therefore follows that the sheriff's sale cannot take place until the notice of sale has been published for a full and complete six weeks. The failure to include the last day in the six-week period results in a publication period that is less than a full and complete six weeks.

In setting forth how a period of time shall be computed, Minn. Stat. § 645.15 specifically references and incorporates Minn. Stat. § 645.13 (2010). This latter section defines a "week" as a calendar week, providing that the term "successive weeks" as used in any law providing for publication of notices "shall be construed as calendar weeks." Minn. Stat. § 645.13. It further provides that where a law requires the notice to be published for successive weeks, "[a]t least the number of weeks specified in 'successive weeks' shall elapse between the first publication and the day for the happening of the event for which the publication is made." Minn. Stat. § 645.13.

The statutory language and framework of Minn. Stat. § 645.15, as applied to Minn. Stat. § 580.03, requires that a full and complete six calendar weeks must elapse from the date of the first publication of the notice of sale before a foreclosure sale may take place. This necessarily requires that the last day of the sixth week be included as

part of the full six weeks. If the sale occurs before that time, then the sale, by definition, occurs before the statutorily required six-week publication period has expired.

B. MINNESOTA CASELAW ESTABLISHES AN INDIVIDUAL IS ENTITLED TO THE WHOLE OF THE LAST DAY OF A DESIGNATED PERIOD TO MAKE PAYMENT OR PERFORM ANY REQUIRED OBLIGATION, ACT, OR DUTY.

In a series of cases specifically addressing the computation of time under Minn. Stat. § 645.15, the Minnesota Supreme Court has established the rule that an individual is entitled to the whole of the last day of the designated period to make payment or perform the required act, duty, or thing ordered or directed. *See Pratt v. Tinkcom*, 21 Minn. 142, 1874 WL 3773 (1874); *Mansfield v. Fleck*, 23 Minn. 61, 1876 WL 4261 (1876); and *Jorgensen v. Knutson*, 662 N.W.2d 893 (2003). In his response, Titler summarily dismisses these decisions without any discussion beyond the claim they are unrelated to foreclosure actions. But contrary to Titler's assertion, these cases are relevant and controlling because they all involved the computation of time under Minn. Stat. § 645.15. And, in each case, the supreme court ruled that an individual was entitled to the whole of the last day of the full time period provided by law. These cases therefore are relevant and controlling of the issue in this case – whether, applying Minn. Stat. § 645.15, the sheriff's sale at issue in this case was invalid because it occurred on the last day of the six-week publication period required by Minn. Stat. § 580.03.

Also unavailing is Titler's attempt to distinguish the supreme court's decision in *White v. Mazal*, 192 Minn. 522, 257 N.W. 281 (1934). He contends that *White* has no relevance to the present case because, unlike the present case, the foreclosure sale there took place 41 days after publication of the first notice of the foreclosure sale. The

relevance of *White*, however, lies not in the timing of the sheriff's sale in that case, but rather, in the supreme court's reaffirmance of its statement in *Pratt* that a mortgagor has all of the last day "within which to make good on the obligations of his contract." *Id* at 526, 257 at 283.

In support of his argument that the sheriff's sale in this case was not premature, Titler relies on the supreme court's decision in *Worley v. Naylor*, 6 Minn. 192, 1861 WL 1857 (1861). He contends this case stands for the proposition that a sheriff's sale that occurs 42 days after the date the notice of sale was first published satisfies the six-week publication period required under Minn. Stat. § 580.03. But this reliance is misplaced because *Worley* is not factually nor legally controlling.

In his response, Titler does not dispute that the sheriff's sale in *Worley* occurred after a full six weeks consisting of seven 24-hour days had elapsed. Instead, he dismisses this fact simply as the supreme court's discussion on the "nuances of the timing related to the foreclosure publication * * * [and] plainly not the basis for [the court's] determination that the sale was proper. (Respondent's Brief at p. 6) He claims that the decision clearly established that a foreclosure sale occurring on the forty-second day following the first date of publication is valid and proper. This argument, however, ignores the fact that in reaching its decision upholding the sheriff's sale in that case, the supreme court specifically recognized and held that the six-week publication period is comprised of six full weeks, each consisting of seven 24-hour days. *Id.* at *5. This is not a trivial nuance, but a critical rule of law that the supreme court established regarding the proper computation of the six-week publication period under Minn. Stat. § 580.03. This rule

finds further support in the supreme court's later decisions in *Pratt*, *White*, *Mansfield*, and more recently *Jorgenson*.

As a fallback argument, Titler contends that even if this is the rule the *Worley* court established, he prevails because the district court determined that he demonstrated at the summary judgment hearing that Finance and Commerce, in which the notice of sale appeared, "is available before the 10:00 a.m. sale time and thus seven full days of 24 hours had also passed in this case." (Add. 5) This determination, however, is devoid of any factual support in the record properly before the district court on summary judgment. There is no evidence in the record establishing when Finance and Commerce is published or available to the public. The district court's determination appears to be based solely on the unsworn comments that Titler made during the hearing. Unsworn statements, even if unrebutted, may not be used to support a motion for summary judgment. *Arneson v. Integrity Mut. Ins. Co.,* 344 N.W.2d 617, 619 (Minn. 1984). And, at the very least, the question of when Finance and Commerce is published during the day and available to the public presents a question of fact that renders summary judgment inappropriate.

Titler urges this court to follow its recent unpublished decision in *DeMuth v. Maryknoll, LLC*, 2008 WL 5136956 (Minn. App. Dec. 9, 2008). As Titler concedes, as an unpublished decision, *DeMuth* has no precedential value and is not binding on this court. He argues, however, that this court should employ the reasoning of *DeMuth* because it is convincing. The decision in *DeMuth* is not convincing. It is in error because it fails to acknowledge or recognize the fact that in *Worley*, unlike this case, a full six weeks consisting of seven 24-hour days had elapsed before the sheriff's sale took

place. The decision in *DeMuth* is inconsistent with and contrary to the supreme court's decisions in *Pratt*, *White*, *Jorgensen*, *Mansfield*, and *Worley*. It therefore is not dispositive nor persuasive on the issue of how to compute the six-week publication period under Minn. Stat. § 580.03.

II. PUBLIC POLICY DOES NOT FAVOR TITLER'S INTERPRETATION OF MINN. STAT. § 580.03.

In his response, Titler argues that Gallaher's interpretation of Minn. Stat. § 580.03 "threaten[s] to place a cloud over the title to potentially scores of * * * properties" throughout Minnesota. To the contrary, the rule that Gallaher asks this court to apply is well settled and brings certainty and predictability to the foreclosure process in Minnesota.

Titler's public policy argument is premised on the assumption that most foreclosure sales occur on the forty-second day after the first publication of the foreclosure notice. To the contrary, the common practice in the real estate industry is to schedule foreclosure sales several weeks after the end of the sixth week of publication. This practice ensures that the sale does not run afoul of the six-week publication period required by Minn. Stat. § 580.03, and the chance that the sale will be challenged on the ground it was premature. For this reason, there is little risk that the validity of countless foreclosure actions will be under threat or that the real estate market in Minnesota will become destabilized.

In addition, the one-year notice-of-claim requirement set forth in Minn. Stat. § 582.25, and the five-year statute of limitation contained in 580.20, afford adequate

protection to property owners (and the larger real estate market) by requiring all objections to a sale to be made within one year of the last day of the redemption period and all actions to set aside a sale to be brought within five years of the sale. The operation of these statutes, along with the industry practice of scheduling foreclosure sales well after the expiration of six week publication period, necessarily mitigates against a flood of litigation to set aside foreclosure sales on timeliness grounds.

III. THIS QUIET TITLE ACTION NOR THE CLAIMS RAISED IN SUPPORT OF THIS ACTION ARE TIME-BARRED BY MINN. STAT. § 582.25.

In his response, Titler argues that this action is time-barred by operation of Minn. Stat. § 582.25. The district court did not address the merits of this argument after Titler withdrew it during the summary judgment hearing, and because the court concluded that he was entitled to summary judgment on the issue of the timing of the sheriff's sale. This court should reject this argument because it is not properly before the court on appeal. But even if this court were to accept review of this issue, Gallaher complied with the requirements of Minn. Stat. § 582.25 and brought his action to set aside the sale within the five-year statute of limitations set forth in Minn. Stat. § 580.20.

A. MINN. STAT. § 582.25 IS A CURATIVE STATUTE, NOT A STATUTE OF LIMITATION.

In support of his argument, Titler relies on Minn. Stat. § 582.25. This statute provides, in part, that:

> [e]very mortgage foreclosure sale by advertisement in this state under power of sale contained in any mortgage duly executed and recorded in . . . the proper county of this state, together with the record of such foreclosure sale, is, after expiration of the period specified in section 582.27, hereby

> legalized and made valid and effective to all intents and purposes, as against any or all of the following objections:
>
> * * * *
>
> (3) that the notice of sale:
>
> > (a) was published only three, four, or five times, or it was published six times but not for six weeks prior to the date of sale

Minn. Stat. § 582.25 (3)(a).

The time period specified in Minn. Stat. § 582.27, subd. 1 (A) is "one year after the last day of the redemption period of the mortgagor, the mortgagor's personal representatives or assigns."

As Titler properly concedes, Minn. Stat. § 582.25 is a curative statute that allows certain technical defects afflicting a foreclosure sale to be cured as a matter of law solely based on the passage of time if no objection is made within one year of the last day of the mortgage redemption period. If an objection to the sale is not made within this time, the statute validates the sale despite any defects in the sale. In this way, it relieves one who purchases property at a foreclosure sale from the burden and inconvenience of having to bring a judicial action to cure any technical defect in the sale. But, if an objection to the sale is made within the specified time period, it is preserved and the sale may be challenged based on the claimed technical defect.

There is nothing within the language of Minn. Stat. § 582.25 that addresses when an action challenging the validity of a foreclosure sale by advertisement must be commenced or raised as a defense to an action. The language of Minn. Stat. § 582.25

merely refers to an "objection." It does not define this term, nor does it specify the required form and manner of the objection. The statute is silent on whether the objection must be in writing or can be made verbally; the substantive requirements of the objection; who is entitled to raise an objection; who must receive the objection; and whether mere notice of the objection is sufficient.

B. THE FIVE-YEAR STATUTE OF LIMITATIONS CONTAINED IN MINN. STAT. § 580.20 APPLIES TO AND GOVERNS GALLAHER'S QUIET TITLE ACTION.

This action is subject to and governed by the five-year statute of limitations contained in Minn. Stat. § 580.20. Under the mortgage foreclosure by advertisement statute, a person or entity has five years from the date of the sale to commence an action challenging the validity of the sale and to have it set aside. The statute specifically provides:

> **Action To Set Aside For Certain Defects.**
> No such sale shall be held invalid or be set aside by reason of ***any defect*** in the notice thereof, or ***in the publication*** or service ***of such notice***, * * * unless the action in which the validity of such sale is called into question be commenced, or the defense alleging its invalidity be interposed, with reasonable diligence, and not later than five years the date of such sale * * *.

Minn. Stat. § 580.20 (2010) (emphasis added). The failure to bring suit to set aside an invalid sale within five years from the date of the sale deprives one of the right to have the sale declared invalid. *Mogan v. Carter*, 54 Minn. 141, 143-44, 55 N.W. 1117, 1117 (1893).

The goal of statutory interpretation is, whenever possible, to give effect to all of its provisions and no word, phrase, or sentence should be deemed superfluous, void, or

insignificant. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000); Minn. Stat. § 645.16 (2010) (requiring every law to be construed to give effect to all its provisions). Courts must also read and construe a statute as a whole and interpret each section in light of the surrounding sections to avoid conflicting interpretations. *Id.*

In his response, Titler fails to acknowledge or address the applicability of the five-year statute of limitation contained in Minn. Stat. § 580.20. If this court were to accept Titler's reading of Minn. Stat. § 582.25, it would render the five-year statute of limitations period set forth in Minn. Stat. § 580.20 meaningless and superfluous. The canons of statutory construction do not permit such an interpretation. *See Schroedl*, 616 N.W.2d at 277.

The requirements of Minn. Stat. § 582.25 are akin to the notice-of-claim provisions found in the Civil Damages Act and the municipal tort claims act. Under the Civil Damages Act, a person who claims damages from a licensed retailer of alcoholic beverages due to an injury within the scope of that Act must give written notice to the licensee within 240 days of the date of entering into an attorney-client relationship with regard to the claim. Minn. Stat. § 340A.802, subd. 1 (2010). This notice is a prerequisite to bringing suit, and if so provided, the person then has two years from the date of injury in which to bring suit. *Id.*, subd. 2. Similarly, under the municipal tort liability act, a person claiming damage from a political subdivision within the scope of the statute must provide the governing body of the municipality with a notice stating the general details surrounding the loss or injury within 180 days of when the loss or injury is discovered.

Minn. Stat. § 466.05, subd. 1 (2010). If the required notice is provided, the claim must be brought within the statute of limitations applicable to the type of claim being asserted.

The language of Minn. Stat. § 582.25 operates much like a notice-of-claim statute and works in conjunction with the statute of limitations period contained in Minn. Stat. § 580.20. If an objection to a foreclosure sale based on a defect in the sale is made within the time required under Minn. Stat. § 582.25, then it is preserved and any action to invalidate and set aside the sale must then be brought within the time allowed under Minn. Stat. § 580.20.

In this case, the requirements of both statutes have been satisfied. The sheriff's sale at which Titler bid the subject property took place on January 29, 2009. The last day of the redemption period was July 29, 2010. The trial on Titler's eviction action took place on January 27, 2010. In paragraph 11 of his Answer, Titler admits that Gallaher "prosecuted the eviction defense and appeal." There is no dispute that during the eviction trial, Titler's claim of title to the subject property was challenged on the ground that the foreclosure sale was invalid and of no effect because the notice of sale was not published for a full six weeks as required under Minn. Stat. § 580.03. This challenge constitutes an "objection" to the foreclosure sale that satisfied the requirements of Minn. Stat. § 582.25.

The undisputed evidence establishes that an objection to the adequacy of the publication of the notice of sale was made and presented to Titler within one year of the last day of the redemption period. The requirements of Minn. Stat. § 582.25, therefore, were satisfied. There is also no dispute Gallaher commenced suit to set aside the sale within five years of the sale date. Because the requirements of both Minn. Stat. § 582.25

and Minn. Stat. § 580.20 have been met, Gallaher's action to set aside the foreclosure sale at which Titler attempted to purchase the property is not time-barred.

CONCLUSION

Six weeks is six weeks. The sheriff's sale at issue in this case took place before the full and complete six-week publication and cure period required under Minn. Stat. § 580.03 had expired. It therefore is invalid and of no effect. Appellant Dennis Gallaher therefore respectfully requests that this court reverse the district court decision and rule that he is the fee owner of the Property and respondent William Titler has no right, title, or interest in the Property.

Respectfully submitted,

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 11/28/11

By Stephen Buterin

Katherine Melander, #180464
Stephen F. Buterin, #0248642
Coleman, Hull and van Vliet, PLLP
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001
Attorneys for Appellant

Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 3,421 words. This brief was prepared using Microsoft Word 2007.

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 11/28/11

By Stephen Buterin

Katherine Melander, #180464
Stephen F. Buterin, #0248642
Coleman, Hull and van Vliet, PLLP
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001
Attorneys for Appellants