

NO. A11-1338

State of Minnesota
In Court of Appeals

Dennis M. Gallaher,

Appellant,

vs.

William Titler,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF THE CASE AND FACTS

For the most part, Appellant's Statement of the Case and Facts adequately presents the factual and procedural setting from which this appeal arises. Respondent would offer only a few clarifications:

a. At the March 10, 2011 district court hearing on the parties' cross motions for summary judgment, Respondent never "withdrew the defense raised in his summary judgment motion during the hearing" relating to "whether Minn. Stat. §582.25 operated as a statute of limitations that barred Mr. Gallaher from challenging the validity of the sheriff's sale," as Appellant contends. See Appellant's Brief, 4.¹ According to the transcript of the hearing, Mr. Titler did not waive or withdraw the statute of limitations defense, but simply expressed hope that the district court would "find the ability to decide this matter . . . not just on the statute of limitations." See Respondent's Appendix (cited in this brief as "R. A."), at 29 (transcript of hearing).

b. The occupants of the condominium unit that is the subject of this action were not really Mr. Gallaher's tenants, as stated by Appellant (App. Br., 2), but rather were contract for deed vendees, as acknowledged by Appellant's counsel during the summary judgment hearing in district court: "But he [Mr. Gallaher] did take possession, and then . . . reconvey the property to others, albeit under contract for deed, and that the property is

¹Mr. Titler acted *pro se* during the proceedings in district court.

currently possessed by his tenants under contract for deed right now.” See R. A., 18-19. Thus Mr. Gallaher did not lease the property, but rather had sold it to the occupants by means of contracts for deed. It is also undisputed that Mr. Gallaher has never occupied the premises as his residence, but instead purchased it as investment property. *Id.*, at 9.

ARGUMENT

A. Introduction.

Accepting the premise of Appellant's argument about the operation of Minn. Stat. §580.03 requires ignoring both Minn. Stat. §645.15, the statute that governs computation when a period of time or duration is fixed by law, and the precedent that governs computation in the context of §580.03. If this legal authority did not exist, reasonable minds might differ as to how exactly the six weeks publication period of §580.03 should be determined. But there can be no disagreement about the existence of the legal authority, nor about its clarity, as the district court recognized.

Section 645.15 appears in the chapter of the statutes dealing with statutory interpretation, and by its express terms, applies in cases where a statute is not specific as to how a particular period of time should be computed. Yet Appellant urges that this rule be disregarded in preference to inferences that he contends can be drawn from §580.03. By itself, that argument is hardly persuasive. When combined with the Supreme Court's decision in *Worley v. Naylor*, 6 Minn. 192 (Minn. 1861)—which dealt with the same legal claim that Appellant relies on here—Appellant's argument fails entirely, because the Court in *Worley* squarely rejected it.

In addition, accepting Appellant's interpretation would result in a cloud being placed over what could be a large number of real estate titles around the state, in cases where foreclosure sales had been conducted on the forty-second day after publication of

the first notice in reliance on §645.15 and *Worley*. Appellant offers nothing that would warrant this kind of result in an area of the law where reliable legal rules are especially important. Finally, even if Appellant's argument were credible and the foreclosure sale was defective, he could not prevail anyway. That is because Minn. Stat. §582.25 requires that a person claiming certain defects in a foreclosure proceeding—including the objection that the publication of notice occurred six times but did not cover a full six weeks—must pursue a challenge to the proceeding within one year of expiration of the mortgage redemption period. Because Appellant did not do so, his claim to title is barred regardless.

B. The Sheriff's Sale was Valid and Proper, no Matter How §580.03 is Construed.

The parties agree that foreclosure of a lien for unpaid condominium assessments proceeds in the same manner as does the foreclosure of a mortgage, and thus that the provisions of Minn. Stat. §580.03 apply when the foreclosure occurs by advertisement. Section 580.03 prescribes that “[s]ix weeks published notice shall be given” that the mortgage will be foreclosed by sale. However, it is silent as to exactly how this time period should be calculated. The district court therefore relied on Minn. Stat. §645.15 in resolving the issue, noting the “plain language of the statutes.” *Add.*, at 5.

Appellant contends that application of this provision was improper, but fails to plausibly explain why it should not be used. Section 645.15, which appears in a chapter of the statutes titled “Interpretation of Statutes and Rules,” provides that:

Where the performance or doing of any act, duty, matter, payment, or thing is ordered or directed, and the period of time or duration for the performance or doing thereof 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.

In the context of a foreclosure by advertisement, §645.15 could not be clearer in directing that the last day of the time period prescribed by §580.03 is to be counted in computing whether the requisite time has passed.

Rather than acknowledging this, Appellant seeks to obscure the statute's operation by pointing to a miscellany of appellate decisions unrelated to foreclosure actions which address the application of time periods in "other contexts." App. Br., 8. But those decisions are not even persuasive, to say nothing of controlling, given the specific provisions of §645.15.

Appellant also cites a handful of precedents that do address publication of foreclosure notices, in particular, *White v. Mazal*, 257 N.W. 281 (Minn. 1934). As the district court recognized, however, *White* is clearly distinguishable. The issue in *White* was the validity of a foreclosure sale that occurred 41 days, not 42 days, after publication of the first notice. *Id.*, at 282. The party seeking to foreclose the mortgage in that case attempted to persuade the district court that the newspaper in which the foreclosure notice had appeared was actually distributed a day earlier than its stated publication day (Friday instead of Saturday). *Id.* On this basis, the foreclosing party sought to claim that the period of publication had indeed comprised the requisite 42 days. But in its findings, the

trial court held otherwise, and thus the Supreme Court summarily rejected the appeal. Because the foreclosure sale in *White* occurred on the forty-first day, not the forty-second, and because that was the principal issue addressed in the appeal, the Court's opinion simply has no relevance to the present action.

Appellant Gallaher goes on to claim that his argument is not upended by *Worley v. Naylor*, 6 Minn. 192 (Minn. 1861), even though the sheriff's sale—as in the present case—occurred on the forty-second day after the first publication of the notice. According to Appellant, because the Court in *Worley* noted that the newspaper in which the foreclosure notice appeared was typically printed at around noon and was mailed to subscribers not long after that, while the sheriff's sale in that instance was not held until 3:00 p.m., seven full days (measured as separate 24 hour periods) had passed since the date of the final publication by the time of the sale, and therefore that *Worley* does not conflict with his interpretation of the statute. This argument is unavailing, however, because while the Court in *Worley* did discuss these nuances of the timing related to the foreclosure publication, they plainly were not the basis for its determination that the sale was proper.

Furthermore, even if that had been the Court's rationale, Respondent would prevail in the present action anyway, since—according to the district court's Order granting summary judgment—“as Titler demonstrated at the [summary judgment] hearing, Finance and Commerce is available before the 10:00 a.m. sale time and thus seven full days of 24

hours had also passed in this case.” See Add., 5.²

In reality though, *Worley* does not rest on subtleties of timing, but instead squarely supports Respondent Titler’s argument as to how §580.03 should be interpreted. Just as in the present case, the main issue in *Worley* was whether the full six weeks published notice had been provided, since the foreclosure sale occurred on the forty-second day after the first publication of the notice. The Supreme Court’s conclusion was that the sale was proper, holding specifically that the notice period is to be measured by excluding the day on which the first publication occurs, and including the day of sale. The Court relied on a statute in effect at that time, which contained computation language that is virtually identical to the language currently found in §645.15.

In attempting to evade the holding of *Worley*, Appellant disparages the relevance of a recent unpublished decision of this Court, *DeMuth v. Maryknoll, LLC*, 2008 WL 5136956 (Minn. App. Dec. 9, 2008), arguing that it is not controlling, has no precedential value, and is not binding. See App. Br., 12. While those characterizations may indeed be true as a matter of appellate procedure, they do not diminish the persuasive value of the decision, given the remarkable similarity of its facts to those of the present action, and the relative paucity of precedent addressing the legal issue before the Court.

Respondent fully appreciates that, pursuant to Minn.Stat. § 480A.08, subd. 3(c),

²The undisputed facts show that publication of the foreclosure notice at issue in this case was made in Finance and Commerce, and that the foreclosure sale conducted by the Hennepin County sheriff occurred at approximately 10:00 a.m. on January 29, 2009. See district court’s Findings of Fact, numbers 4. and 5., Add., 3.

unpublished decisions may not be treated as precedent and are not binding authority (“although unpublished cases may have persuasive value,” *City of St. Paul v. Eldredge*, 788 N.W.2d 522, 527 (Minn. App. 2010)). Respondent, however, does not cite the analysis found in *DeMuth* because it is controlling, but rather because it is convincing. Appellant Gallaher has simply identified no credible basis for concluding that the reasoning employed by this Court in *DeMuth* is defective—which should be the test for its application, regardless of whether it is binding.

In *DeMuth*, the appellant also contended that she was still the rightful owner of a condominium which had been foreclosed by advertisement, “because the foreclosure sale occurred one day before statutorily allowed.” 2008 WL at * 1. As in the present case, the foreclosure had been prompted by the failure to pay association dues owed to a condominium association. Appellant did not seek to redeem the unit from foreclosure, but instead filed a lawsuit claiming that “that the sale [was] invalid because it occurred exactly six weeks after the first notice of sale was published.” *Id.* Thus her legal argument was that Minn. Stat. §580.03 requires that six weeks--before and exclusive of the day of the foreclosure sale--must elapse between the first published notice and the day the sale occurs, which of course is exactly the position taken by Appellant Gallaher in the present proceeding.

This Court, however, categorically dismissed the argument, holding that “[s]ection 645.15 directs how to compute the six-week period of published notice required by

[section] 580.03.” *Id.*, at 2. “[T]he foreclosure sale occurred exactly 42 days—six calendar weeks—after the initial publication. If the statute contemplates the day of sale to be included in the six-week notice period, the district court correctly held that the sale was valid.” *Id.*

In so deciding, the Court rejected appellant’s contention “that the district court erred in this computation because it relied primarily on *Worley v. Naylor*, 6 Minn. 192 (1861),” responding succinctly: “*Worley* is old, but not dead. *Worley’s* facts mirror ours.” *Id.* The Court acknowledged that in *Worley*, the foreclosure sale also occurred exactly 42 days after the initial publication of notice, and that the *Worley* court expressly rebuffed the claim that the six weeks of published notice preceding the sale is exclusive of the day of sale. *Id.*

The *DeMuth* Court further observed that “the relevant notice requirements in 1859 are substantively the same today, since both require that notice be published for six consecutive weeks before a foreclosure sale.”³ *Id.* “*Worley’s* holding remains intact.” *Id.* “*Worley* resolved the issue directly almost 150 years ago by determining that the day of sale may be counted in the six-week notice period. The foreclosure sale here, which occurred exactly six weeks after the initial publication, was, under *Worley* and section 645.15, valid.” *Id.*, at 3.

³The Court compared Minn. Pub. Stat. ch. 75, § 4 (1858) (“Notice that such mortgage will be foreclosed by sale ... shall be given by publishing the same for six successive weeks”), with Minn.Stat. § 580.03 (“Six weeks’ published notice shall be given that such mortgage will be foreclosed by sale.”).

When all is said and done, Appellant asks this Court to ignore precedent, the express language in §645.15, and long-standing legal practice, on the basis of a single premise, which if examined, actually turns out to be faulty. According to Appellant, permitting the foreclosure sale on the forty-second day after publication supposedly does not allow the full six weeks in which to reinstate the mortgage as required by §580.03. But throughout this litigation, Appellant has refused to recognize that, given the way in which the computation provided in §645.15 operates, a full six weeks is provided, and sometimes more. That is because the statute entirely excludes the day of publication from being counted in the calculation. Yet in practical terms, the notice will be available on that day (and since most newspapers are distributed early on the day of publication, this will often mean that it is available for a large part of the day).

It seems clear that §645.15 was designed to take such circumstances into account. By not counting the first day at all, but by including the last day, on a net basis the full period of time specified in the statute would nearly always be substantially provided. For this reason, there is ultimately no factual basis for Appellant's argument. Again, however, §645.15 governs regardless.

C. Accepting Appellant's Interpretation of Section 580.03 would Risk Destabilizing Real Property Titles across the State.

It is common knowledge that hundreds if not thousands of mortgage foreclosure actions have occurred in Minnesota over the past several years. Accepting Appellant's

argument as to how §580.03 should be construed would threaten to place a cloud over the title to potentially scores of those properties.

Respondent does not know how many foreclosure sales occur on the forty-second day after the first publication of the foreclosure notice. However, it may be assumed that this kind of timing is not uncommon, given the number of court decisions over the years in which this issue has been raised, and that the sale at issue in the present action was scheduled on the forty-second day and conducted by the Hennepin County sheriff, which presumably handles as many foreclosure sales as any sheriff's department in the state. It is therefore reasonable to conclude that many foreclosure sales may occur on the forty-second day after publication.

Accepting Appellant's argument here could place the title to every property in Minnesota that has been sold under such circumstances in question, at least to the extent that a claim of improper sale would not be cut off by some applicable limitation period. That could represent a significant number of properties.

There are few areas of the law where consistency and certainty are more important than with respect to real property titles (*cf. White v. Mazal, supra*, 257 N.W.2d at 283: "Very many titles depend for their validity upon the regularity of statutory foreclosure proceedings of mortgages by advertisement. Such records are important and should not be lightly treated"). For more than a century, the law in Minnesota on the issue of the timing of a foreclosure sale where foreclosure occurs by advertisement has been

settled—and relied on—by all of the parties involved. None of the arguments offered by Appellant could conceivably warrant the dramatic and destabilizing change in practice and law that accepting his interpretation would entail.

D. Even if Appellant’s Computation Argument were Sound, his Action would Nonetheless be Barred by Minn. Stat. §582.25.

As described in Appellant’s Statement of the Case and Facts, App. Br., 4, when Appellant submitted his motion for summary judgment, Respondent Titler brought a cross-motion for summary judgment, which was scheduled to be heard at the same time as was Appellant’s motion. The legal basis for Respondent’s motion was distinct from Appellant’s, however. Respondent contended that under Minn. Stat. §582.25, Appellant was barred from pursuing an action to challenge the validity of the sheriff’s sale, regardless of how §580.03 might be interpreted.

Appellant in his Statement of the Case and Facts asserts that Respondent “withdrew this defense” during the summary judgment hearing. App. Br., 4. That is not correct, however. Instead, based on the exchanges that occurred during the hearing, Respondent simply expressed his hope that the district court would “find the ability to decide this matter . . . not just on the statute of limitations,” R. A., 29, since a decision against Appellant focusing on the issue of the validity of the notice publication and timing of the sale would effectively mean that Respondent was entitled to summary judgment for that reason alone. The basis for claiming that Respondent withdrew his defense is merely

a speculation offered during the hearing by Appellant's counsel (see R. A., 30), something that Respondent did not concede.

Respondent's motion relying on §582.25 was fully briefed and argued to the district court. See App., 79-83 (Motion, Memorandum, and Affidavit of William Titler requesting summary judgment); *id.*, at 90 (Plaintiff Gallaher's Memorandum Opposing Defendant's Motion for Summary Judgment). While it is true that an appellate court does not generally address issues that were not reached and decided by the district court, there are exceptions where considering the issue on appeal would promote judicial efficiency and economy.

"Appellate review ideally occurs after issues are presented to and decided by a district court." *Remodeling Dimensions, Inc. v. Integrity Mutual Ins. Co.*, ___ N.W.2d ___ 2011 WL 2519203, slip op. at 10, n.2 (Minn. App. 2011), citing *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn.1988). "But in some circumstances, appellate review may occur in the absence of a decision by a district court if an issue was fully presented to the district court by the party pursuing it on appeal." *Remodeling Dimensions, id.*, citing *Day Masonry v. Independent Sch. Dist. No. 347*, 781 N.W.2d 321, 330–32 (Minn. 2010). "Considering issues presented to but not decided by a district court may be appropriate if the issue does not require fact-finding or discretionary decisionmaking by the district court and is subject to de novo review by this court." *Id.*⁴ That is the case here. Thus in

⁴In *Remodeling Dimensions*, as in the present case, "[b]oth [parties] briefed the issues . . . in the district court," but the "district court did not reach those issues because it resolved the parties'

the event this Court concludes that Appellant's argument about the foreclosure notice publication period is meritorious, it should also address the §582.25 defense raised below by Respondent, since the facts relevant to the defense are already before the Court and are undisputed.

Section 582.25 is basically a curative statute relating to foreclosure proceedings. It provides that no challenge may be made to the validity of a sheriff's sale on the basis of several different grounds specified in the statute, unless commenced within one year after the last day of the mortgage redemption period. One of these grounds appears in §582.25(3)(a), which bars a challenge if premised solely on the argument "that the notice of sale . . . was published six times but not for six weeks prior to the date of sale." This is precisely the argument—and the only argument—relied on by Appellant in the present action.

As the undisputed facts show, the sheriff's sale was held on January 29, 2009. The six month redemption period therefore ended on July 29, 2009, and consequently, the one year limitation period imposed by §582.25 expired as of July 29, 2010.

In the district court, Appellant Gallaher asserted that §525.25 was "not a statute of limitation, but a curative statute," as if the two types of laws must necessarily be mutually exclusive. App., 92. Appellant also argued that the operation of §582.25 in cutting off "objections" to certain defects in mortgage foreclosure proceedings is suspended merely

cross-motions on the basis of [another issue]." *Id.*

if any sort of objection is made within one year. *Id.*, at 94.

These claims are simply not consistent with the provisions of §582.25, however. Nowhere does the statute provide support for Appellant’s interpretation that any sort of objection, no matter how made or documented, voids the operation of the statute (Appellant concedes that nothing in §582.25 “specif[ies] the required form and manner of the objection,” *id.*). Indeed, contrary to Appellant’s suggestion, §582.25 does not mention raising an “objection” as a procedural step called for by the statute, but instead states simply that a “foreclosure sale, is, after expiration of the period specified in section 582.27 [one year], hereby legalized and made valid and effective . . . as against any or all of the following objections.”

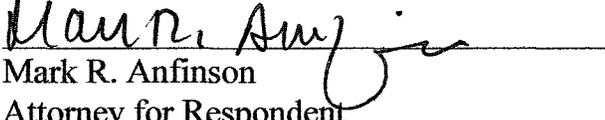
Plainly the statute contemplates that some sort of legal action or proceeding would need to be brought within the one year period, raising one or more of the objections listed. Indeed, §582.27, which is the source of the one year limitation incorporated into §582.25, expressly states that the adoption of and amendments to the statute “shall not affect any action or proceeding” pending or commenced prior to certain dates included in the statute (emphasis added).⁵ Since Appellant Gallaher brought no action challenging the validity of the sheriff’s sale within one year, his claim to title is barred by the operation of §582.25.

⁵Respondent’s interpretation is consistent with a recent unpublished decision of this Court, *Weavewood, Inc. v. S & P Home Investments, LLC*, 2011 WL 4345904 (Minn. App. Sept. 19, 2011), where the Court, in referring to section 582.25, stated that “It is curative, operating as a statute of repose to validate a foreclosure sale unless it is challenged within specified time frames.” (Emphasis added.)

CONCLUSION

For the reasons described, Respondent respectfully requests that the decision of the district court be affirmed.

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