

NO. A05-1979

State of Minnesota
In Court of Appeals

TCM PROPERTIES, L.L.C.,

Respondent,

vs.

LAWRENCE P. GUNDERSON, et al.,

Appellants,

and

TIMOTHY L. MENNE,

Appellant,

vs.

TCM PROPERTIES, L.L.C.,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT

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LEGAL ISSUES

I. Did the district court clearly abuse its discretion in denying Appellant's petition for equitable relief on the grounds that Appellants had "unclean hands" and that Gundersons had unreasonably failed to make the necessary steps within the time allowed by law for redemption from the subject mortgage foreclosure sale, thereby having "slumbered on their rights"?

Respondent respectfully asserts that the answer is "no".

II. Do the Court's Findings of Fact, none of which are disputed by Appellants, support the District Court's Conclusions of Law and Judgment as set forth in the Findings of Fact, Conclusions of Law and Order filed July 8, 2005 and ultimately entered on September 26, 2005 as a final Judgment in the consolidated eviction and declaratory judgment actions, which are the subject of this appeal?

Respondent respectfully asserts that the answer is "yes".

RESPONDENT'S STATEMENT OF FACTS

The post trial procedural history of this matter, is succinctly outlined in this court's Orders dated July 28, 2005 (File No. AO5-1424), September 14, 2005 (File No. AO5-1424) and December 2, 2005 (File Nos. AO5-1826 and AO5-1979, as consolidated). The underlying facts pertinent to this matter are set forth in Respondent's post trial memorandum originally submitted as "Defendants' Post Trial Memorandum" filed with the district court following the May 16, 2005 trial. A copy of said Defendants Post Trial Memorandum is set forth in the Respondent's Appendix (RAP 33-49). References to said appendix are noted as "RAP" for convenience of reference. The facts giving rise to the issues under consideration in this matter are relatively straight forward and are clearly set forth in the district court's Findings of Fact, Conclusions of Law, and Order filed July 8, 2005, as set forth in the Appendix to Appellant's Brief at APP 49-59 thereof. The Appendix to Appellant's Brief is hereinafter cited as "APP", for convenience of reference. Appellants do not dispute the trial court's findings of fact and concede that their appeal raises questions of law only (Appellants' Brief 10, 11). Respondent concurs that the Findings of Fact set forth by the District Court in its Amended Findings of Fact, Conclusions of Law, and Order filed July 8, 2005 (APP 51-54) are correct, and further asserts that the Conclusions of Law and Order therein set forth (APP 54-59), ultimately entered as the final judgment of the district court on September 26, 2005, from which Appellants make their appeal, are fully justified by the evidence, and are in all respects consistent with applicable law.

SCOPE OF REVIEW

This Appeal was taken directly from the final Judgment entered September 26, 2005 pursuant to the Amended Findings of Fact, Conclusions of Law and Order of the district court Filed July 8, 2005. No motion for a new trial was made by appellants prior to bringing this appeal. Ordinarily, where there is no new trial motion, the applicable scope of review would be whether the evidence supports the Findings and the Findings support the Conclusions of Law set forth in the trial court's Amended Order For Judgment filed July 8, 2005. *Sauter v. Wasemiller*, 389 NW2d 200 (Minn. 1986); *Alpha Real Estate Co. v. Delta Dental Plan of Minn*, 664 NW 2d 303 (Minn. 2003).

However, in the present case Appellants have conceded that the district court's Findings of Fact were correct (Appellants' Brief 10, 11). Accordingly, only questions of law noted in Appellants' Consolidated Amended Notice of Appeal dated October 3, 2005 and filed pursuant to the district courts Order dated September 26, 2005. (RAP 28-30), remain for consideration on review. *Alpha Real Estate Co.*, *id.* Thus, the scope of the court's review in this matter is simply: "Do the trial court's Findings of Fact support the Conclusions of Law"?

ARGUMENT

Appellants argue that the trial court improperly failed to grant them equitable relief in this matter, claiming that this Court's ruling in First National Bank of Glencoe/Minnetonka v. Pletsch, 543 NW2d 706 (Minn. App. 1996) stands as binding authority for their proposition that the method attempted herein by Appellants to extend, as a practical matter, the time permitted by law for defaulting mortgagors to redeem their equity in the real estate subject to foreclosure is legally acceptable. Said method involves the filing, by a "benefactor" of successive eleventh hour junior mortgages in nominal amounts, in order to create successive 7 day windows of redemption for each successive junior mortgage following expiration of the mortgagors' statutory redemption period under the mortgage being foreclosed. Appellants argue that this Court's recent holding in Timeline, LLC v. Williams Holding #3, LLC, 698 N.W. 2nd 181 (Minn. App. 2005) further confirms said practice, notwithstanding the enactment some three years following the decision in Pletsch, supra, of *Minnesota Statutes Chapter 58*, and in particular *Minn. Stat. Section, 58.⁰⁴~~20~~ and 58.13, Subd 1 (13)*. Appellants acknowledge in their argument (Appellants' Brief 13) that *Pletsch* was not cited in the *Timeline* decision as a basis for the holding in *Timeline*. Nevertheless, they argue that *Pletsch* is still good law as to the proposition that successive, eleventh hour minute \$100.00 mortgages are a legitimate way to preserve a mortgagor's equity beyond the statutory redemption period allowed to mortgagors pursuant to *Minnesota Statue Section 580.23*. Respondent strongly disagrees

and asserts that this court's decisions in both *Pletsch* and *Timeline* are clearly distinguishable, as to the issues herein pertinent, from the law applicable in this case.

The pertinent distinctions are as follows:

1. *Pletsch* was decided prior to enactment of Minnesota Statutes Chapter 58.
2. In *Timeline*, the district court declined to grant the Plaintiff therein equitable relief. The district court therein declined to set aside the Certificate of Redemption issued to a party exercising rights as a junior mortgagor under a similar scenarios of multiple junior mortgages, each for nominal consideration, finding that (a) *Minn. Stat. Section 8.31 subd. 3a (2002)*, commonly referred to as the "private attorney general statute" requires that enforcement of the provisions of *Minn. Stat. Section 58.13* must be through the Attorney General's Office, or be with the express permission of said office, (b) that a private party may not, except through implementation of the provisions of *Minn Stat. Section 8.31*, pursue a private cause of action for relief under *Minn. Stat. Section 58.13* and (c) that in any event, such rights of enforcement are only given "to those claimants who demonstrate that their cause of action benefits the public", concluding that because the transaction involved was a private one, *Timeline* was barred from pursuing a claim thereunder.

Nevertheless, this court in *Timeline*, considered as a wholly separate issue from the issue of private enforcement of violations of said statute, whether equitable relief should have been granted to the Appellant in *Timeline* based upon Appellant's argument that violation of the provisions of the *Minn Stat. Section 58.13, Sub 1 (13)* resulted in "unclean hands", in violation of the equitable maxims that "he who seeks equity must do equity and he who comes into equity must come with clean hands", citing *Johnson v. Freberg*, 178 Minn. 594, 597, 228 N.W. 159, 160 (1929). The court, in *Timeline* specifically held that "It is within the district court's discretion to grant equitable relief and '[o]nly a clear abuse of that discretion will result in reversal' ", citing *Nadeau v. County of Ramsey*, 277 NW2nd 520, 524 (Minn. 1979). A reading of this court's holding in *Pletsch* as to the application of equitable relief makes it clear that great deference will be given to the district court as to its decision to grant or deny equitable relief. Had this court concluded in *Pletsch*, that because of the Appellant's lack of standing to enforce, as a private cause of action, the provisions of *Minn. Stat. Section 58.13 Subd 1(13)* Appellant therein was without standing as to equitable relief on similar grounds it could have, and logically would have declined, to consider whether the district court had abused its discretion in denying Appellants plea for equitable relief, as such consideration would have been wholly unnecessary. Instead, the court in *Pletsch* considered, as an entirely separate issue, whether based upon the record before it, the district court had "clearly abused its discretion in denying Appellants request for equitable relief by failing to set aside the Certificate of Redemption issued to Respondent therein. The court then concluded that the

record did not establish any such clear abuse of such discretion by the district court.

In the present case, the district court also denied equitable relief, i.e. by denying Appellants' request that the Certificate of Redemption issued by the Sheriff to Respondent be set aside. Here, as opposed to the finding in *Timeline*, the district court clearly found and held that Appellants' actions violated the provisions of the law as set forth in *Minn. Stat. Section 58.13 subd. 1(13)*, resulting in "unclean hands" which precluded equitable relief and that "furthermore, although options to make redemption possible were available to them, the Gundersons unreasonably failed to make the necessary steps within the time allowed by law for redemption by mortgagors for mortgage foreclosure sales. Equity will not aid one who slumbers on their rights". (Amended Conclusions of Law, No. 1, page 8, App 56).

Accordingly, the district court's ruling in denying equitable relief is, ironically, wholly consistent with the ruling in *Timeline* to the extent that both the district court in *Timeline* and the district court in the subject case exercised discretion with regard to the facts and evidence of the particular cases before them, and denied equitable relief. The issue now before this court is, therefore, whether in the subject case the district court clearly abused its discretion in denying equitable relief as sought by Appellants.

Respondents assert that the record clearly establishes an appropriate basis for the district court's denial of Appellant's requested relief. At trial, during cross examination, Craig Beuning, who acted as legal counsel to both Gundersons and Menne with regard to the Gunderson-Menne mortgage transactions, admitted that he didn't care how much was recited on the mortgages, all he wanted to do was extend the redemption period. (5/16/05 transcript page 70, lines 19-24). Furthermore, the district court found, and Appellants do not dispute, that "The primary intent behind the mortgages was not to secure the debt. Rather, the primary intent was for Menne to obtain title through foreclosure (emphasis added) so he could transfer title back to the Gundersons in an effort to preserve their equity". (Finding of Facts No. 4, p. 4, App. 52) The grant or denial of equitable relief

can only be reversed in the event of a clear abuse of that discretion. No such abuse has occurred in this case. Timeline, supra.

Although the district court did not rule on the issue of whether or not strict compliance with the provisions of *Minn. Stat. Sections 580.24 and 580.25* applicable to redemption by junior creditors from mortgage foreclosure sales is required, Appellants contend that such strict compliance is not required, citing Sieve v. Rosar, 613 NW2nd 789, 792 (*Minn. App. 2000*) and citing Timeline, supra. The obvious distinction, as is specifically noted at footnote number 1 of the *Timeline* opinion is that the subject statutes applicable in the *Timeline* case have been amended. The amended statute, effective January 1, 2005, is applicable to the present case, and thus the cited decisions allowing, under the narrow facts of those particular cases, substantial compliance rather than strict compliance with the provisions of the redemption statutes are no longer applicable to cases decided under the amended statutes. The amended statute applies to foreclosures where the mortgagor(s)' period of redemption expires on or after the effective date, January 1, 2005. *Minn. Stat. Section 580.24 (a)(1), (2), and (3) (2004)* specifically requires delivery to the Sheriff who conducted the foreclosure sale or the Sheriff's successor in office a copy of each of the documents required to be filed with the County Recorder or Registrar of Titles in order to redeem, which in this case would include the mortgages pursuant to which Appellant Menne claims he is entitled to redeem. Although the district court found in its findings that because of Respondent's knowledge of the mortgages in question he was not prejudiced even if the mortgages were not filed, the statute now clearly requires strict compliance. Included with Respondent's appendix herein (RAP 22-25) is a copy of *Minnesota Session Laws – 2004, Chapter 234 – H.F.No.*

2419, containing the text of the statute as amended, as well as the text prior to adoption of the amendments applicable in the subject case. Also included in the appendix is the legislative history of said legislation (RAP 26-27). The legislature, through the 2004 legislation noted herein, clearly made compliance with said procedures a prerequisite to exercising a junior lien holder's right of redemption.

Based upon the evidence in this matter, the court found that it was not possible to determine whether or not the prerequisite of delivery to the Sheriff of the subject mortgages had been met (emphasis added). (Finding No. 6, page 4, App-52). The Court did, however, note on the record during the June 24, 2005 Motion hearing the conflicting testimony received as to whether or not said mortgages were delivered to the Sheriff as required pursuant to *Minn. Stat. Section 580.24*, and concern regarding the conflicting testimony and the lack of documentation available from the Sheriff's file to ascertain whether the copies of the mortgages were or were not provided to the Sheriff. The transcript clearly illustrates a situation where the Court had to consider relative credibility of the witnesses. The testimony of the Sheriff's civil process clerk, Lori Olson, who handled the receipt of the redemption documents is set forth in the transcript of the May 16, 2005 hearing at pages 83 – 89. Further, Ms. Olson submitted an Affidavit, which was received in evidence as Exhibit No. 4 clearly setting forth her position that the mortgages were never received. (RAP 19-21) Mark Kneer's testimony at the hearing confirmed that the sworn testimony contained in Lori Olson's Affidavit was consistent with his understanding and recollection of the process that took place at the time he redeemed and obtained the Sheriff's Certificate. (5-16-05 transcript 10-11)

Minnesota law is well settled that the burden of proof of any fact rests with the person asserting such fact. What a party is bound to plead he is bound to prove. Hughes v. Globe Indemnity Co. 139 Minn. 417, 166 NW 1075 (1918). Furthermore, where two opposing inferences can be drawn with equal justification from the same circumstantial evidence, it cannot be said that one preponderates over the other, in which event the party having the burden of proof must lose. Gerhardt v. Welch 267 Minn. 206, 125 NW 2nd 721 (1964) Yellow Mfg. Accept. Corp. v. Zimmerman, 265 Minn. 303, 121 NW 2nd 586 (1963). Here the burden of proving delivery of the copies of the mortgages to the sheriff as a statutory prerequisite to their claimed redemption right is on the Appellant and Appellant has failed to meet that burden.

Ironically, Pletsch, supra upon which Appellants rely for their proposition that multiple successive eleventh hour mortgages in nominal amounts provide a legitimate means for, in effect, extending redemption periods to salvage a mortgagor's equity, clearly sets forth a very different basic point of Minnesota mortgage foreclosure law, i.e. "that the redemption requirements of Minn. Stat. 580.24 must be strictly adhered to" Pletsch, supra, 543 NW2nd 706, 710.. Further, the Court in Pletsch also held that "[U]njust enrichment" claims do not lie simply because one party benefits from the efforts or obligations of others, instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully" id. at 710, citing First Nat'l Bank of St. Paul v. Ramier, 311 NW 2nd 502, 504 (Minn. 1981) and Iverson v. Fjoslien, 298 Minn. 168, 213 N.W. 2nd 627 (1973). In the present case, as in Pletsch, the district court found that the Sheriff properly issued the Certificate of Redemption to Respondent. Respondent properly sought to and did enforce his rights,

consistent with the provisions of *Minn. Stat. Section 580.24*, *Minn. Stat. Section 580.25* and *Minn. Stat. Section 580.26 (2004)*. Accordingly, Respondent was properly granted the Sheriff's Certificate of Redemption (Findings of Fact Nos. 9, 10, and 11, page 6, APP 54).

Minnesota law is well settled that a Certificate of Redemption provides prima facie evidence that a redemption occurred and that all facts recited in such Certificate relating to the act of redemption are true. In other words the Certificate of Redemption speaks for itself, unless the party contesting its validity clearly establishes a basis for setting it aside. (See *City of St. Paul by the Housing and Redevelopment Authority of the City of St. Paul v. St. Anthony Flats, Ltd. P'ship* 517 NW 2nd 58 (Minn. App. 1994). In the present case, the Sheriff followed the provisions of *Minnesota Statutes Section 580.24 and 580.25 (2004)* and determined that because of Menne's failure to comply with the statute, redemption by Respondent, who had complied with all legal requirements necessary to redeem, was proper. Therefore, the Sheriff issued the Certificate of Redemption to Respondent. (Trial Exhibit Nos. 1,2,3, and 4, RAP 1-21) To rule that strict compliance under these circumstances is not necessary would be to place the Sheriff in the untenable position of having to exercise judgment in each and every questionable case as to whether substantial compliance is sufficient, or whether strict compliance is necessary, and depending upon the facts, to ascertain what is sufficient as substantial compliance and what is not. No doubt the legislature intended, in its 2004 amendment to the provisions of the subject statutes, that the Sheriff have the benefit of certainty. To second guess the Sheriff's adherence to the clear provisions of the law would unnecessarily put the Sheriff into the position of having to "guess" as to what

constitutes sufficient "substantial compliance". Such a quandary would seem contrary to principals of sound public policy.

Appellant Menne originally asserted in his pleadings and initially argued (See Appellant Menne's Complaint and Motion, App. 3-5) that because, prior to expiration of Gunderson's statutory redemption period the subject real property had allegedly been Gundersons' homestead, that Plaintiff had no right, as junior creditor under the subject judgment, to redeem from the foreclosure after expiration of the mortgagor's redemption period even if the subject property had been Gunderson's homestead prior to expiration of the redemption period, which the record fails to establish. Said position is contrary to law and appears to have been now wholly abandoned by Appellants. Said argument was rejected by the District Court (Conclusions of Law No. 2, page 8, APP 56) and neither Appellants Amended Notice of Appeal (APP 111 – 118) nor Appellants appellate brief mention such theory. Accordingly Respondent will not here address such issue, as it is not before this court and in any event Appellants' previous position in this regard is wholly without merit under the law.

CONCLUSION

The district court thoroughly reviewed and considered the evidence and the law in this matter. (See 6/24/05 transcript, page 4, 56-57). The Court found that at the time of redemption by Respondent, Respondent was the only junior creditor entitled to redeem (Finding No. 10, page 6, APP 54). The Court properly concluded that under the facts and circumstances of this case, that the transactions entered into between Gundersons and Menne, resulting in the filing of five successive \$100.00 mortgages on the last day of Gunderson's statutory redemption period, was done in violation of the provisions of

Minnesota Statutes Section 58.13 subd. 1 (13) and that because of such conduct Appellant Menne entered the subject proceeding with unclean hands precluding him from seeking equitable relief. Menne therefore, lacks standing to challenge the validity of the Sheriff's Certificate of Redemption issued to Respondent on April 22, 2005 (Conclusions of Law No. 1 page 8, APP 56). Furthermore, the Court concluded that although options to make redemption possible were available to them, Appellants Gunderson unreasonably failed to make the necessary steps within the time allowed by law for redemption and therefore concluded that "equity will not aid one who slumbers on their rights" (Conclusion No. 1, page 8, APP 56). It is within the district court's sound discretion whether or not to grant equitable relief. Only a clear abuse of that discretion will result in reversal. *Timeline*, supra; *Nadeau*, supra. The record here establishes that the district court did not clearly abuse its discretion in refusing to grant the equitable relief requested by Appellants.

Furthermore, there was insufficient evidence submitted by Appellants to establish whether or not Appellant Menne's agent delivered copies of the subject mortgages to the Sheriff as required pursuant to the provisions of *Minn. Stat. Section 580.24 and Minn. Stat. Section 580.25 (2004)*. *Minn. Stat. Section 580.24 and Minn. Stat. Section 580.25 (2004)* as amended in 2004, effective January 1, 2005, apply to the subject redemption. These statutory revisions clearly set forth the prerequisites necessary for redemption, including specific provisions not previously contained under the prior version of said statutes pertaining to delivery of copies of the subject mortgages under which redemption rights are claimed, to the Sheriff in order to be entitled to exercise rights of redemption (RAP 22-25).

For the foregoing reasons Respondent respectfully requests that this Court affirm the judgment of the district court as set forth in the Amended Findings of Fact, Conclusions of Law and Order filed therein on July 8, 2005, pursuant to which final judgment was entered on September 26, 2005.

Dated: December 23, 2005

Respectfully submitted,

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A handwritten signature in cursive script that reads "Clark A. Joslin".

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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) (with amendments effective July 1, 2007).