

NO. A10-257

State of Minnesota
In Court of Appeals

The Minneapolis Grand, LLC, Benjamin Reed,
Benjamin Miller, Paul Maeker, and Erik Anderson,
Respondents,

vs.

Galt Funding LLC,

Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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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 ISSUES

1. DID THE DISTRICT COURT, BY CONVERTING WHAT MINN. STAT. § 515B.3-117 DESCRIBES AS A PERMISSIVE OPTION OF A UNIT OWNER INTO AN AFFIRMATIVE OBLIGATION OF A LIENHOLDER WHEN FORECLOSING A BLANKET LIEN, ERR IN ITS APPLICATION OF THE MINNESOTA COMMON INTEREST OWNERSHIP ACT AND THEREBY IMPERMISSIBLY SET ASIDE VALID FORECLOSURE SALES?

How Issue Was Raised Below: The parties brought cross motions for partial summary judgment.

Result below: The district court granted Plaintiff / Respondents' motion for partial summary judgment and denied Defendant / Appellant's motion.

Most Apposite Cases: *State v. Zacher* 504 N.W. 2d 468 (Minn. 1993) and *Youngdahl v. HBC Enterprises* 2008 W.L. 2106855, (Minn. Ct. App. 2008)

2. IN A FORECLOSURE OF A MORTGAGE COVERING MULTIPLE CONDOMINIUM UNITS, IS A NOTICE OF FORECLOSURE WHICH SETS OUT THE CORRECT TOTAL BALANCE OF THE LENDERS MORTGAGE DEBT OVERSTATED AS A MATTER OF LAW?

How Issue Was Raised Below: The parties' cross motions for summary judgment did not address the validity of Galt's foreclosure; the district court essentially decided this issue sua sponte.

Result below: The district court said that Appellant overstated the value of its lien when it foreclosed its mortgage.

Most Apposite Cases: *Hargreaves v. Federal Deposit Ins. Corp.*, 1990 WL 77060 (Minn. Ct. App. June 12, 1990).

STATEMENT OF THE CASE

This lawsuit arises out of the financing of a failed real estate development located in Minneapolis, Minnesota. The matter is venued in Hennepin County district court and the Honorable Denise D. Reilly presided.

In 2005, Appellant Galt Funding provided a loan to the project developer, Chicago Commons Corporation (“CCC”), and recorded a second mortgage on the project real property. Within a few months of the recording of Appellant’s mortgage, the developer defaulted on its obligations to both the primary lender and to Appellant. The primary lender foreclosed its mortgage on the portion of the project covered by its mortgage lien and Appellant later foreclosed its mortgage.

Respondents, who each purchased their respective property subject to Appellant’s mortgage lien, brought the instant action just before the redemption period on Appellant’s foreclosure sales expired. Respondents sought, among other things, a declaration that even after the sheriff’s sales for Appellant’s foreclosure, they were entitled to tender a small portion of the amounts bid by Appellant at the respective sales to receive a release of Appellant’s lien. Respondents further asserted causes of action for equitable estoppel, unjust enrichment, intended third party beneficiary, and slander of title. Finally, Respondents brought a motion for a temporary restraining order to suspend the running of the redemption period.

The district court issued a temporary injunction on October 8, 2008. Thereafter, the parties brought cross motions for partial summary judgment on the declaratory judgment cause of action. Respondents asserted that Minn. Stat. § 515B.3-117 allowed

their respective properties to be released from Appellant's lien on payment of a small proportional amount. Appellant asserted that following the foreclosure of its mortgage, there was no longer a blanket lien that could be satisfied by paying only a proportional amount. Rather, as a result of the sales, it now held individual lien on each property that secured the respective bid amount from the sheriffs' sales. Appellant further asserted that Minnesota's foreclosure statute (Minn Stat § 580.23 Subd. 1) required Respondents to pay the amount for which the property was sold at the sheriff's sale in order to redeem.

The district court granted Respondents' motion for partial summary judgment and denied Appellant's motion. The court decided that Respondents were entitled to tender proportional amounts to Appellant and that Appellant must accept those amounts and release "any valid lien held by Galt on the Units. .." The district court agreed that Appellant's foreclosure sales created new liens on the individual units "for the full amount of Appellant's bid at the sale". But, in order to give Respondents an additional opportunity to make a proportional payment, the district court "set aside" Appellant's mortgage foreclosure and sheriff's sale – even though Respondents had not asserted in their pleadings that Appellant's foreclosure was in any way defective or invalid. This order was stayed pending trial of Respondents' remaining causes of action.

Shortly before trial of the remaining causes of action, Respondents dismissed them with prejudice and the court therefore issued an order for judgment dated December 7, 2009. Because the district court fundamentally erred in its application of the law to agreed upon facts, Appellant brought this appeal.

STATEMENT OF FACTS

The Project. The Chicago Commons development, located at 2401 Chicago Avenue South, Minneapolis, was intended to include 81 residential condominiums along with retail and commercial space. The project developer was Chicago Commons Corporation (“CCC”). CCC obtained financing for the project from Marshall Bank, which held a first mortgage interest. (Appx – 086).

The Parties. Respondent Minneapolis Grand, LLC is the present fee owner of the project. It came into title through Marshall Bank (“Marshall”) after Marshall foreclosed its mortgage. Respondents Benjamin Reed, Benjamin Miller, Paul Maeker, and Erik Anderson are former condominium unit owners. They purchased condominium units (#210, 305, 411, and 412 respectively, hereinafter “the units”) subject to Appellant’s mortgage. Appellant Funding, LLC provided secondary financing to CCC to complete the project. (Appdx 086-087, 176-207).

Chronology of Events and Transactions. CCC obtained primary financing from Marshall in 2004. Marshall provided an \$11,900,000 construction loan for the project, which loan was secured by a first mortgage that was recorded on June 22, 2004. (Appdx 211). Construction started in early 2005.

In the summer of 2005, Chicago Commons needed additional funding to complete the project. Appellant loaned Chicago Commons \$1,500,000 for completion of the project in a transaction which closed on September 1, 2005. (Appdx 405). Appellant’s loan was secured by a mortgage on the project, which was filed of record on September 7, 2005. (Appdx-086-087, 176-207).

Mr. Reed's purchase of unit 201 closed on October 21, 2005. Mr. Anderson closed on the purchase of unit 305 on November 4, 2005. Mr. Maeker closed on the purchase of unit 411 on November 15, 2005. And, Mr. Miller closed on the purchase of unit 412 on November 16, 2005. (Appdx 145-176). Appellant's mortgage was of record at the time of each sale. Marshall received the proceeds of the sale and provided a partial release of its mortgage at the time of closing on each of the units. (Appdx 100). No funds were paid to Appellant, and no one requested that Appellant release its lien.¹

In December, 2005, Marshall Bank sent a default notice and notice of acceleration to CCC. Marshall and CCC then entered into a voluntary foreclosure agreement and Marshall thereafter foreclosed its mortgage on the entire project except the four units sold to Anderson, Maeker, Miller and Reed, because Marshall had previously released its mortgage lien as to the Units. The sheriff's sale took place on August 22, 2006. (Appdx 211-221).

Marshall bid the balance of its loan (\$12,339,138.30) at the foreclosure sale, and neither Appellant nor any other person redeemed from that sale. Marshall therefore obtained fee title on the project (other than the Units). (Appdx 087). Marshall sold its interest to Tria Properties LLC, which later assigned its interest to Minneapolis Grand. Minneapolis Grand thereafter purchased the Units from Anderson, Maeker, Miller and

1. This fact was disputed by the parties. Appellant asserted that "On information and belief at the time of their property purchases, neither Reed, Miller, Maeker, Anderson, nor the title companies issuing their title insurance policies requested partial releases of the Galt mortgage and Galt was not obligated by the loan documents to provide such releases." (Appellant's Memorandum, proposed fact 7B, Appdx 100). Respondents disputed this in their responsive memorandum (Appdx 114). The district court determined that this potential factual dispute was not material to its decision. (Footnote 1, Addendum at p 4).

Reed in May, 2007. (Appdx 148-149, 156-157, 163-164, 175). The title commitment dated May 17, 2007 for Minneapolis Grand's purchase clearly noted the Appellant Mortgage of record as to the Units ². (Appdx 450).

In the spring 2008, Appellant began proceedings to foreclose its mortgage, which was now in first position on the Units, by advertisement. Appellant served notice of the foreclosure on all Respondents. At the sheriff's sales, Appellant bid the entire outstanding balance of its debt, \$1,979,161.04, divided among the Units. (*Id*) None of the Respondents objected to or otherwise responded to the notice of foreclosure or bid at the sheriff's sales. (Appdx 102, 249-263).

The sheriff auctioned each of the Units separately. On the auction for Unit 210, Appellant was the successful bidder at \$415,623.82. On the auction for Unit 305, Appellant was the successful bidder at \$415,623.82. On the auction for Unit 411, Appellant was the successful bidder at \$653,623.14. On the auction for Unit 412, Appellant was the successful bidder at \$494,790.26. (Appdx 249-263).

2. Under Schedule B. Section 2, Exceptions:

26. Mortgage, Security Agreement, Assignment of Leases and Rents, and Fixture Financing Statement executed by Chicago Commons Corporation, a Minnesota corporation, dated September 1; 2005, recorded September 7, 2005, as Document No. 4158283, in the Original amount of \$11,900,000.00, in favor of Galt Funding, LLC;

Request for Notice of Foreclosure, dated August 25, 2005, recorded September 7, 2005, as Document No. 4158284;

Correction Notice recorded January 17; 2006 to show that the amount of the mortgage has been changed to \$1,500,000.00.

On September 15, 2008, Respondents' counsel tendered the collective sum of \$94,148.96 to Appellant "in full satisfaction of all obligations as to each unit" and said that "Appellant should immediately send me appropriate documents releasing all of Appellant's interest in these Units." Respondents' counsel calculated the amount by reference to the sheriff's certificate and foreclosure record. (Appdx 264-265). Appellant refused the tender and demanded payment of \$1,979,161.04, i.e., the collective amounts of its successful bids at the four foreclosure sales. (Appdx 266-267). The redemption period after the sheriff's sale was set to expire on October 10, 2008. Respondents then brought this action.

STANDARD OF REVIEW

The appellate court reviews an order granting summary judgment to determine whether there are any genuine issues of material fact and whether the lower court erred in applying the law. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999). In doing so, the appellate court "views the evidence in the light most favorable to the party against whom summary judgment was granted." *Ciardelli v. Rindal*, 582 N.W.2d 910, 912 (Minn. 1998).

ARGUMENT

I. ALL RESPONDENTS PURCHASED THEIR RESPECTIVE INTERESTS IN THE UNITS WITH KNOWLEDGE OF AND THEREFOR *SUBJECT TO* APPELLANT'S MORTGAGE

When Appellant recorded its mortgage in the Hennepin County real property records on September 7, 2005, it put the world on notice of its interest in the property. The American Law of Property states “[It is a] well known doctrine of equity that a purchaser of a legal title for value without notice takes free of prior equities attaching to it. [...] Payment of value before transfer, provided both occur before notice of a prior unrecorded deed, does not affect the security of the position of the subsequent purchaser. Nor is payment of value after transfer and before notice a detriment to him. But if the consideration is given after the purchaser has become aware of prior rights, he takes subject to them.” (§17.10, Little, Brown & Co., 1952). *See also*, Minnesota Recording Act, Minn. Stat. §507.34.

Each of the purchases by Reed, Miller, Maeker, and Anderson from CCC in October and November, 2005 were made with notice of Appellants' mortgage. Minneapolis Grand's subsequent purchases of the Units from Reed, Miller, Maeker, and Anderson were likewise made with notice of Appellant's mortgage. The Minnesota Supreme Court states: “A purchaser who has either actual, implied, or constructive notice of such outstanding rights is not a bona fide purchaser entitled to the protection of the Recording Act.” (*Anderson v. Graham Investment Co.*, 263 N.W.2d 382, 384 (Minn. 1978)). Because Respondents each purchased with notice of Appellant's mortgage, the

Respondents purchased *subject* to Appellant's rights under the mortgage (including the right to foreclose for non-payment of the loan).

II. APPELLANT FORECLOSED ITS MORTGAGE IN STRICT COMPLIANCE WITH THE PROVISIONS OF MINN. STAT. 580, *et. seq.* AND AFTER THE SHERIFF'S SALES APPELLANT HOLDS A LIEN AGAINST EACH UNIT IN THE AMOUNT OF ITS SHERIFF SALE BID.

Minnesota Statutes Chapter 580.01, *et seq.* governs foreclosure by advertisement.

“Any mortgage of real estate containing a power of sale, upon default being made in any condition thereof, may be foreclosed by advertisement.” Minn. Stat. §580.01. The lender must prepare a notice of mortgage foreclosure sale to initiate foreclosure by advertisement. That notice specifies the name of the mortgagor and the mortgagee, the original principal amount secured by the mortgage, the date of the mortgage, when and where it was recorded, the amount claimed to be due under the mortgage including taxes paid by the mortgagee, a description of the mortgaged premises, the time and place of sale, and the time allowed by law for redemption by the mortgagor. Minn. Stat. §580.04. The foreclosure notice must then be published in a qualified newspaper in the county where the mortgaged property is located for a period of six weeks prior to the sale. Minn. Stat. §580.03. The notice must be personally served upon the person in possession of the mortgaged premises at least four weeks before the sale. *Id.*

Following publication and service of the required notice of mortgage foreclosure sale, the sheriff of the county in which the mortgaged premises are located conducts the foreclosure sale. Minn. Stat. §580.06. The sheriff's sale is conducted as an auction, and

if the mortgaged premises consist of separate and distinct parcels, each parcel is sold separately. *Id.* and *see also* Minn. Stat. §580.08. The mortgage holder is the seller, the sheriff acts as the auctioneer, and any person may bid at the foreclosure sale, with the sale going to the highest bidder. *Id.* Upon completion of the sale, the sheriff prepares a certificate of sale. *See* Minn. Stat. §580.12.

Appellant complied with all of these requirements. It's notice (Appdx at 252-254) included:

- 1) the name of the mortgagor, the mortgagee, each assignee of the mortgage, if any, and the original or maximum principal amount secured by the mortgage;
- (2) the date of the mortgage and recording data;
- (3) the amount claimed to be due on the mortgage on the date of the notice;³
- (4) a description of the mortgaged premises;
- (5) the time and place of sale; and,
- (6) the time allowed by law for redemption by the mortgagor, the mortgagor's personal representatives or assigns.

In summary, Appellant strictly complied with the requirements of the mortgage foreclosure statute.

3. The notice said: "That the original principal amount secured by said mortgage was \$1,500,000.00; that there has been compliance with any condition precedent to acceleration of the debt secured by said mortgage and foreclosure of said mortgage required by said mortgage, any note secured thereby, or any statute; that no action or proceeding has been instituted at law to recover the debt remaining secured by said mortgage, or any part thereof; that there is claimed to be due upon said mortgage and is due thereon at the date of this notice, the sum of \$1,949,104.16 in principal and interest. (Appdx at 254)

The right of redemption expires six months after the sale. Minn. Stat. §580.23 and §580.24 To redeem from the sale, the mortgagor / creditor must pay to the successful bidder by paying the “sum of money for which the same were sold,” with interest from the sale date, plus additional amounts advanced for expenses, including insurance, taxes, and assessments. Minn. Stat. §580.23. Upon redeeming, the mortgagor must produce to the person or officer receiving the redemption payment a copy of the docket of the deed or mortgage, a copy of the assignment necessary to evidence the person’s ownership of the lien, and an affidavit of the person or the person’s agent showing the amount then actually claimed due on the person’s lien and required to be paid in order to redeem. Minn. Stat. §580.25. Within twenty four (24) hours after the redemption is made, the person redeeming must file the required documents with the county recorder. *Id.*

Minnesota case law states that the mortgage is not extinguished by a foreclosure sale, but the lien is different after the foreclosure. The court squarely addressed this issue in *State v. Zacher*, 504 N.W. 2d 468 (Minn 1993). There, an individual was criminally charged with defeating a security interest in real property when he removed fixtures following a foreclosure sale. Mr. Zacher argued that when the mortgagee purchased the mortgaged property at the foreclosure sale for the full amount of the debt, that the mortgage no longer existed as a security interest and that he therefore could not be convicted of defeating a security interest.

The Supreme Court said : “[W]hen the mortgagee is the purchaser at a foreclosure sale, neither his mortgage as a muniment of title nor his interest in the mortgaged premises is discharged or extinguished; and that *he has a lien on the premises and holds*

them for the security of his bid until the time to redeem expires.” (504 N.W.2d at 471) (emphasis added).

The Zacher court further noted that the remedy upon a mortgage as security is exhausted by the foreclosure (citing *Pioneer Savings & Loan v. Farnham*, 52 N.W. 897 (Minn 1897)). It said that if the mortgagee is the purchaser at the foreclosure sale, and if the debt is paid:

‘it is not true that either his mortgage, as a muniment of title, or his interest in the mortgaged premises, is discharged or extinguished. Where the mortgagee is the purchaser at the foreclosure sale, he simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have *a lien on the premises for the amount of the purchase price*, which was applied in payment of his debt. His interest in the premises is practically the same after the sale as before, except the purchase price must be repaid to him by the mortgagor, with interest, within the year, or his title under his mortgage becomes absolute. *Until the time to redeem expires, he has a lien on the premises, and holds them for the security of his bid*”

(Citing *Carlson v. Presbyterian Bd. of Relief*, 70 N.W. 3, (Minn. 1897) *emphasis added*).

Because *Zacher* involved a single stand-alone piece of property, a single foreclosure sale (rather than four in the instant case) resulted in the bid amount equaling the amount of the outstanding debt. As such, the Court was not required to distinguish between multiple liens securing bids at the foreclosure sales of multiple units and their collective relationship, if any, to the original mortgage interest.

In *Youngdahl v. HBC Enterprises*, 2008 W.L. 2106855, (Minn. Ct. App. 2008)⁴, the Minnesota Court of Appeals discussed the lien question at greater length in a case that involved liens for unpaid association dues and the Minnesota Common Interest Ownership Act (“MCIOA”), Minn. Stat. 515B.1-100 et seq. The Court held that MCIOA provisions dictating the relative priority of different lienholders did not apply because the foreclosure sale was completed and changed the mortgage lien into a lien securing the bid at the foreclosure sale. 2008 W.L. 2106855, (Minn. Ct. App. 2008). In *Youngdahl*, the bank recorded its mortgage after the foreclosure of an association lien. The bank argued that the mortgage was superior to the association lien and thus survived the foreclosure of the association lien because Minn. Stat. §515B.3-116 provides that mortgages have priority over association liens.

The court in *Youngdahl* wrote:

“Appellant insists that the assessment lien continued to exist after the foreclosure sale and that the holder of the sheriff’s certificate purchased and held this lien after the sale. We disagree. The assessments secured by the association’s lien were satisfied in full with the proceeds from the sheriff’s sale. Therefore, any lien existing in favor of the holder of the sheriff’s certificate after the foreclosure sale was not a lien securing the association’s assessments, but a *lien securing the bid at the foreclosure sale*, and as such is not governed by the provisions of Minn. Stat. §515B.3-116(b)(ii)”

(2008 WL 2106855, 2) (*emphasis added*).

4. This opinion is unpublished and a copy of the unpublished decision was submitted to the district court pursuant to Minn. Stat. §480A.08, Subd. 3. See also Appendix at page 457.

Youngdahl interprets *Zacher* with respect to defining the nature of the post-foreclosure lien in the context of condominium units. As a result of its foreclosure sale bids, Appellant currently holds a lien against Unit 210 in the amount of \$415,623.82, against Unit 305 in the amount of \$415,623.82, against Unit 411 in the amount of \$653,623.14, and finally against Unit 412 in the amount of \$494,790.26.

Because the four foreclosure sales converted Appellant's blanket mortgage lien into four individual liens securing the Appellant bids at the foreclosure sales, the payment provisions contained in Minn. Stat. §515B.3-117 ("portion of the amount which the lien secures that is *attributable* to the unit" (emphasis added)) require payment of 100% of each bid, because the only lien then existing on each unit was the bid lien is *attributable* to that single Unit. Requiring Plaintiffs to redeem in accordance with the provisions of Minn. Stat. §580.23 is in no way inconsistent with Minn. Stat. §515B.3-117. Indeed, such a reading construes MCIOA and the foreclosure statutes together and gives full effect to both.

III. THE DISTRICT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF MINN. STAT. §515B.3-117 AS MANDATORY AND AUTOMATIC. MINN. STAT. §515B.3-117 IS PERMISSIVE; IF EXERCISED IT ALLOWS UNIT OWNERS THE OPTION OF A PROPORTIONATE PAYOFF OF A BLANKET LIEN.

Minn. Stat. §515B.3-117 provides a mechanism whereby an individual unit owner is able to pay a proportionate amount of a blanket lien and thereby obtain marketable title to their individual unit. The plain language of Minn. Stat. §515B.3-117 provides that the proportionate payoff is an *option* to be invoked or exercised by the owner of the unit:

“Except in a cooperative and except as otherwise provided in this chapter or in a security instrument, an individual unit owner *may* have the unit owner’s unit released from a lien *if* the unit owner pays the lienholder the portion of the amount which the lien secures that is attributable to the unit.” (*emphasis added*). The proportionate payoff mechanism must be expressly invoked by one seeking its benefits – by making payment in accordance with the calculation in the statute - as to an existing lien on the unit. The district court accurately quotes Minn. Stat. §515B.3-117 in its opinion, but completely ignores the phrase “an individual unit owner may” in its reasoning. Instead, the district court treats the proportionate payoff mechanism as automatic and mandatory. The court said Appellant was a statutorily required to proportionally divide its lien among units in a common interest community. (Addendum at 10).

The district court makes two errors here. The first is that no language in Minn. Stat. §515B.3-117 automatically converts a blanket lien into individual liens encumbering individual units in a common interest community. The district court’s analysis relies on that part of Minn. Stat. §515B.3-117 describing the amount a person exercising the proportionate payment option must pay: “Reviewing the plain language of the statute, the Court concludes that Plaintiffs can discharge any lien claimed by Appellant on the Units by tending a proportional amount under the Act. As currently written, the Act provides that any lien upon multiple units in a common-interest ownership building is apportioned among the units.” (Order, Pg. 8, Addendum at Pg .8) But no part of the section which outlines the method by which the proportionate amount is calculated

addresses or overrules the permissive language in the beginning of the section – no language in Minn. Stat. §515B.3-117 makes the process automatic.

The district court took the statutory language completely out of context. The language “*The portion of the amount which a lien secures that is attributable to the unit shall be equal to the total amount which the lien secures multiplied by a percentage calculated by dividing the common expense liability attributable to the unit by the common expense liability attributable to all units against which the lien has been recorded ...*” defines the amount a unit owner must pay if the owner opts to invoke the statute. Note the earlier language which says: “Except in a cooperative and except as otherwise provided in this chapter or in a security instrument, an individual unit owner may have the unit owner's unit released from a lien *if the unit owner pays the lienholder the portion of the amount which the lien secures that is attributable to the unit.*” Minn. Stat. §515B.3-117.

The district court’s interpretation raises the following issue: if the legislature intended mandatory proportionality on the filing of a Common Interest Community, why wasn’t Minn. Stat. §515B.3-117 drafted accordingly? Further, what did the legislature intend by the phrase “an individual unit owner may” if the proportionate payment mechanism was invoked automatically against any and all blanket liens?⁵

5. The district court judge stated that “an amendment to a statute is normally presumed to change the law unless it appears that the legislature only intended to clarify the law,” (Order, Pg. 9, quoting *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 556 (Minn. 2008)), finding that the amendment to Minn. Stat. §515B.3-117 was intended to signify a substantive change in the law. However, the opening statement to Minn. Laws 1994 c. 388, art. 4 § 12 notes that it is

The second mistake is that the district court confuses a lien with a loan balance, referring to “the entire balance of the lien”. (*Id.*) The lien doesn’t have its own balance, the lien *secures* a loan balance. The validity of a lien is not affected by the value or quantity of the secured property (be it real property or personal). The balance due on Appellant’s loan was unaffected by the Marshall foreclosure and Appellant still held a valid lien securing the entire unpaid balance due, even though the lien secured less property and, as a practical matter, the remaining property was almost certainly worth less than the secured debt.

The court’s interpretation of Minn. Stat. §515B.3-117 leaves the permissive language superfluous. No “individual unit owner may” would need to exercise its options under Minn. Stat. §515B.3-117 because such election has already been statutorily imposed. Such interpretation runs counter to the long-standing and established rules of statutory interpretation. As stated by the Minnesota Supreme Court in *Baker v. Ploetz*, “[a] statute should be interpreted, whenever possible, to give effect to all of its provisions, and “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.”” (616 N.W.2d 263, 269 (2000), citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn.1999))

“AN ACT relating to real property; *clarifying and making technical corrections* to statutory provisions relating to real property;” (emphasis added)

IV. APPELLANT DID NOT OVERSTATE ITS LIEN WHEN IT SET OUT THE AMOUNT OF ITS UNPAID DEBT IN THE FORECLOSURE NOTICE, AS REQUIRED BY MINN. STAT. §580.04.

The district court made a fundamental error when it ruled, as a matter of law, that Appellant's foreclosure and sale must be set aside based on a claimed overstatement of its lien: "By claiming and foreclosing a lien on the Units in the full amount due under the Appellant Loan, Appellant vastly overstated any lien it could legitimately claim on the Units; such overstatement requires this Court to set aside the sheriff's sale as void." (Order, Addendum at Pg. 10). The district court states that "Section 515B.3-117(a) specifically provides that "[t]he portion of the amount which a lien secures that is attributable to [a] unit shall be equal ..." (Order, Addendum at Pg. 10, emphasis omitted). The district court states "specifically provides", yet those provisions which relate to the "portion of the amount which a lien secures" *only apply* in the event that a unit owner exercises the option. And, as noted above, the quoted language does not automatically proportion a blanket lien, it only defines the amount to be paid by one exercising the optional provision.

Minn. Stat. §580.04 (3) sets out the requirement for stating the amount of the debt in a foreclosure notice: "the amount claimed to be due on the mortgage on the date of the notice". Appellant's notice did precisely that – stating the correct and total balance of its mortgage debt on that date. Appellant simply did not overstate its mortgage debt at all.

The district court could conclude that Appellant "overstated its debt" only by first finding that Appellant's debt and the lien had been automatically proportioned pursuant to Minn. Stat. §515B.3-117, at some unknown point, and without action on the party of

any unit owner. The district court cites *Hargreaves v. Federal Deposit Ins. Corp.*, 1990 WL 77060 (Minn. Ct. App. June 12, 1990) as authority for setting aside the foreclosure and sale. But unlike the instant case, *Hargreaves* involved alleged “material errors committed by the bank” where both a CPA and a bookkeeper “submitted affidavits on appellants’ behalf, stating that the bank may have overstated appellants’ debt by \$25,000 or more.” *Id.* at *1. The district court also relied on *Semlek v. Nat’l Bank of Alaska*, 458 p.2d 1003, 1006 (Alaska 1969), but that case requires a gross overstatement of the debt.

The undisputed facts are that Appellant correctly stated its debt. The court made a fundamental error of law when it set aside, as a matter of law, Appellant’s foreclosure sale.

V. THE DISTRICT COURT’S APPLICATION OF MINN. STAT. §515B.3-117 IMPROPERLY CREATES NEW DUTIES FOR FORECLOSING LENDERS.

Additionally, and significantly, the district court’s interpretation and application of Minn. Stat. §515B.3-117 creates new affirmative duties for lenders. Despite Appellant’s compliance with Minn. Stat. §580, *et. seq.*, the district court set aside the foreclosure as a matter of law. The district court’s ruling is not based on Appellant refusal to accept partial payment after the sheriff’s sale but on the claimed overstatement of the lien. According to the district court’s logic, Appellant should have proactively assumed that the proportionate payment option was mandatory and automatic and that it had a statutory duty to proportion its debt.

Under the district court's analysis, prudent lenders must now (in addition to complying with Minn. Stat. §580, *et. seq.*) perform the following analysis to ensure their foreclosures will not also be deemed invalid as a matter of law:

(1) Is the secured property part of a common interest community?

(2) Does the mortgage secure a blanket lien or relate to more than one unit in the common interest community?

(3) If so, what is the proportional amount attributable to the secured property that is to be foreclosed?

To be clear, no language in Minn. Stat. §515B.3-117 or in the foreclosure statutes, Minn. Stat. 580.01 *et seq.* mentions duties of this nature. If the legislature intended to establish new affirmative duties for lenders foreclosing on units in a common interest community, it would not impose the duty through a permissive prepayment option of unit owners in MCIOA rather than be drafted with mandatory language and included (or at least referenced) with the other foreclosure provisions in Minn. Stat. §580, *et. seq.*?

VI. THE PURPOSE OF MINN. STAT. §515B.3-117 IS TO PRESERVE MARKETABILITY OF TITLE.

The clear purpose of Minn. Stat. §515B.3-117 is to preserve marketability of individual condominium units with respect to blanket liens. Individual liens filed against individual units would not qualify for Minn. Stat. §515B.3-117's proportionate payment structure because such liens would be "attributable" only to that unit. An example of where Minn. Stat. §515B.3-117 applies would be a roof replacement in a high-rise

condominium building where the roofing contractor filed a lien over the entire condominium project and all the units. Such a blanket lien would effectively render individual condominium units unmarketable because *prudent* buyers won't close subject to a recorded lien. Residential lenders likewise will not close on loans/purchases if their mortgage liens will be subordinate to filed liens. But a unit owner seeking the benefits of Minn. Stat. §515B.3-117 is required to act – while the blanket lien exists.

Instead of acknowledging that the Respondents purchased subject to a validly recorded mortgage, the district court misinterpreted and misapplied Minn. Stat. §515B.3-117 – essentially as a consumer protection statute: “Sanctioning Galt’s conduct in this case would gut the proportional-tender protections provided to unit-holders...” (Order, Addendum at Pg. 10) But Minn. Stat. §515B.3-117 is designed to allow condo units to be made marketable in the event of blanket liens. It’s a statute that must be exercised by the unit owners. And far from behaving in a manner unfair to the Respondents, Appellant foreclosed on the property secured by its mortgage – just as any lender would have done in similar circumstances would have done.

Powell on Real Property prefaces its analysis of mortgages with the following paragraph:

“Land provides an excellent subject matter for security. Unlike personal property, it is incapable of physical concealment from creditor claimants. The recording systems of the various states provide a machinery for notice to those who might otherwise deal with land titles in ignorance of existing obligations. No unexpected hardship is created by insisting that a potential transferee search the records before taking an interest in the land. Thus,

security interests in land provide a device available for indefinite expansion whenever it is found socially or economically useful to subject the land to a new type of lien. Any recorded claim against the land attaches to the interests obtained by subsequent takers.” (Powell on Real Property, ¶ 434)

Among the bedrock principles of real property law that allow our system of secured lending to operate efficiently is the rule that where a mortgage is properly recorded, subsequent purchasers take their interests subject to that mortgage (whether they also assume the debt depends on the circumstances of the sale).

The district court avoided the undisputed fact that each purchase of the Units was made with full knowledge and notice of Appellant’s mortgage. As such, as stated succinctly in Powell on Real Property, each Plaintiff purchased his/its interest *subject to* that mortgage.

CONCLUSION

Appellant foreclosed its mortgage in strict compliance with Minnesota’s statutory requirements and obtained individual liens on the four condominium units. In order to either redeem from the sale or to comply with Minn. Stat. 515B.3-117, Respondents are required to pay the full amount of the sheriff sale bids. For these reasons, Appellant respectfully asks this court to reverse the trial court’s grant of partial summary judgment to Respondents and the trial court’s denial of Appellant’s motion for partial summary judgment.

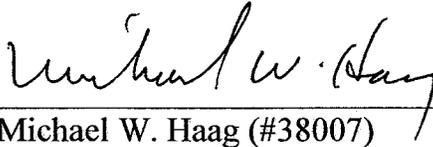
Respectfully Submitted,

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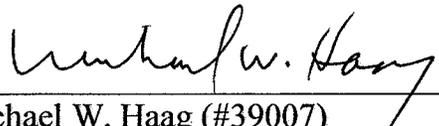
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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellant Galt Funding, LLC conforms to the requirements of Minn.R.Civ.P. 132.02, Subds. 1 and 3. The length of this brief is 5824 words. This brief complies with the typeface requirement of the above rule. This brief was prepared using Microsoft Office Word 2003.

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