

2

No. A10-0299

STATE OF MINNESOTA
IN COURT OF APPEALS

Wendover Financial Services Corporation,

Appellant,

vs.

Somsen, Mueller, Lowther & Franta, PA,

Respondent.

APPELLANT'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).

TABLE OF CONTENTS

Table of Authorities.....	iii
Legal Issues on Appeal.....	v
Statement of the Case.....	1
Statement of the Facts.....	2
Argument.....	4
I. THE DISTRICT COURT ERRED WHEN IT GAVE RESPONDENT LIEN PRIORITY OVER APPELLANT.....	4
Conclusion.....	9
Index to Appendix.....	vi

TABLE OF AUTHORITIES

CASELAW

<u>Clafin v. Commercial State Bank of Two Harbors</u> , 487 N.W.2d 242 (Minn.Ct.App. 1992).....	6
<u>Clark v. Butts</u> , 73 Minn. 467 473, 76 N.W.2d 263 (1898).....	6
<u>Fabio v. Bellomo</u> , 504 N.W.2d 758 (Minn. 1993).....	4
<u>Frost-Benco Elec. Ass'n v. Minnesota Pub. Utilis. Comm'n</u> , 358 N.W.2d 639 (Minn. 1984).....	4
<u>Ford Consumer Finance Co. v. Breese</u> , 611 N.W.2d 75 (Minn.Ct.App. 2000).....	7
<u>Hersch Props., LLC v. McDonalds Corp.</u> , 588 N.W.2d 728 (Minn. 1999).....	5
<u>Home Lumber Co. v. Kopfmann Homes, Inc.</u> , 535 N.W.2d 302 (Minn.1995).....	6,9
<u>In re Ocwen Fin. Servc., Inc.</u> , 649 N.W.2d 854 (Minn.Ct.App. 2002).....	9
<u>In re Welfare of Clausen</u> , 289 N.W.2d 153 (Minn.1980).....	8
<u>Modrow v. JP Foodservice, Inc.</u> , 656 N.W.2d 389 (Minn. 2003).....	4
<u>Nussbaumer v. Fetrow</u> , 556 N.W.2d 595 (Minn.Ct.App. 1996).....	6
<u>State by Cooper v. French</u> , 460 N.W.2d 2 (Minn. 1990).....	4
<u>State v. Mauer</u> , 741 N.W.2d 107 (Minn. 2007).....	4
<u>Strong v. Lynn</u> , 38 Minn. 315, 37 N.W. 448 (Minn.1888).....	7
<u>Washington Mutual Bank, F.A. v. Elfelt</u> 756 N.W.2d 501 (Minn.Ct.App. 2008).....	6
<u>Weber v. Eisentrager</u> , 498 N.W.2d 460 (Minn. 1993).....	7

STATUTES

Minn.Stat. § 507.34.....6

Minn. Stat. §508.48.....5

Minn.Stat.§ 508.54.....5

Minn. Stat. § 524.2-402.....8

Minn.Stat. § 524.3-805.....6,8

Minn.Stat. § 524.3-814.....7

Minn.Stat. § 580.24.....9

Minn.Stat. § 582.30.....8

STATEMENT OF LEGAL ISSUES

1. Was summary judgment appropriate on Respondent's action to claim priority of its attorney's lien over Appellant's mortgage?

The district court held:

Yes.

Citations: Minn.Stat. § 524.3-805

STATEMENT OF THE CASE

Respondent commenced an action against Appellant and other Defendants with an undated complaint. [Respondent's Complaint; App.'s Appx. at A-1-9]. Appellant then filed and served an Answer dated June 9, 2009. [Appellant's Answer; App.'s Appx. at A-10-12]. Respondent then filed an Amended Complaint dated June 11, 2009 seeking a declaration that it held a valid attorney's lien and that the attorney's lien was prior and superior to the mortgage held by Appellant. [Respondent's Amended Complaint; App.'s Appx. at A-10-12]. Appellant then filed its Answer to the Amended Complaint of Respondent. [Appellant's Answer to Amended Complaint; App.'s Appx. at A-22-24].

Respondent then filed a motion for summary judgment with supporting affidavit and memorandum of law. [Respondent's Memorandum in Support of Plaintiff's Motion for Summary Judgment and Affidavit of Steven J. Franta; App.'s Appx. at A-25-32]. In response, Appellant filed an affidavit and memorandum in opposition to Respondent's motion. [Appellant's Memorandum of Law in Opposition to Plaintiff's Motion and Affidavit of Kristine M. Spiegelberg; App.'s Appx. at A-33-59]. The summary judgment motion hearing occurred on December 15, 2009 where the district court granted summary judgment for the Respondent. [Order Granting Summary Judgment to Plaintiff; App.'s Addendum pgs. 1-3]. Appellant now appeals the grant of summary judgment to the Respondent. [Appellant's Notice of Appeal to the Court of Appeals; App.'s Appx. at A-60-61].

STATEMENT OF FACTS

On November 9, 2000, Adlor C. Olsen and Phyllis C. Olsen (“Olsens”) mortgaged property to Richfield Bank & Trust Co. [Affidavit of Kristine M. Spiegelberg Ex. A; App.’s Appx. at A-42-49]. The Mortgage was registered to encumber the Property on December 19, 2000 on Certificate of Title No. 14,348 as Document No. 64754. [Affidavit of Kristine M. Spiegelberg Ex. A; App.’s Appx. at A-42]. The property was designated as homestead property by Blue Earth County Assessor since that time. [Application for Informal Probate of Will and for Informal Appointment of Personal representative; App.’s Appx. at A-62]. The property in question is also torrens property. [Appellant’s Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment Ex. A; App.’s Appx. at A-42]. Thereafter, the mortgage was assigned to Senior Homeowners Financial Services, and later to Appellant. [Affidavit of Kristine M. Spiegelberg Exs. B and C; App.’s Appx. at A-50-51].

The Mortgage contained a provision in paragraph 9 which provided that the death of the borrower constituted grounds for the acceleration of the debt. [Affidavit of Kristine M. Spiegelberg Ex. A; App.’s Appx. at A-43-44]. Adlor Olsen died on September 22, 2007 and his wife Phyllis Olsen died on October 1, 2007. [Respondent’s Amended Complaint; App.’s Appx. at A-18-19].

On June 6, 2008, Respondent filed its Notice of Intent to Claim an Attorney’s Lien upon the Certificate of Title. [Respondent’s Amended Complaint; App.’s Appx. at A-20]. Due to the death of the borrowers, Wendover commenced foreclosure of the

Mortgage by advertisement in December 2008. [Affidavit of Kristine M. Spiegelberg; App.'s Appx. at A-40]. A Sheriff's Sale was held on February 9, 2009. [Affidavit of Kristine M. Spiegelberg; App.'s Appx. at A-40]. In May 2009, Respondent commenced this action to assert the priority of its attorney's lien registered some seven years after the Wendover Mortgage. [Affidavit of Kristine M. Spiegelberg; App.'s Appx. at A-40]. The statutory six month redemption period expired on August 9, 2009 with no redemption by any lienholder. [Affidavit of Kristine M. Spiegelberg; App.'s Appx. at A-40].

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GAVE RESPONDENT LIEN PRIORITY OVER APPELLANT.

A. Standard of Review.

On appeal from summary judgment, this Court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate “when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). This Court examines the evidence in the light most favorable to the party against whom summary judgment was granted. Fabio, 54 N.W.2d at 761.

This Court is not bound by and need not give deference to a district court’s decision on a purely legal issue. Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003). Frost-Benco Elec. Ass’n v. Minnesota Pub. Utllis. Comm’n, 358 N.W.2d 639, 642 (Minn. 1984).

Application of a statute is an issue of law, not fact. State v. Mauer, 741 N.W.2d 107, 111 (Minn. 2007).

B. Applicable Law.

This case involves Torrens property and the Minnesota Torrens Act, codified under Minn. Stat. Chapter 508. Minn. Stat. §508.48(a) provides that:

Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded, or filed with the county recorder, shall, in like manner, affect the title to registered land if filed and registered with the registrar in the county where the real estate is situated, and shall be notice to all persons from the time of such registering or filing of the interests therein created. Neither the reference in a registered instrument to an unregistered instrument or interest nor the joinder in a registered instrument by a party or parties with no registered interest shall constitute notice, either actual or constructive, of an unregistered interest.

Minn.Stat. § 508.54 provides:

The owner of registered land may mortgage the same by deed or other instrument sufficient in law for that purpose and such mortgage or other instrument may be assigned, extended, discharged, or released, either in whole or in part, or otherwise dealt with by the mortgagee by any form of deed or instrument sufficient in law for the purpose. Such deed, mortgage, or other instrument, and all instruments assigning, extending, discharging, releasing, or otherwise dealing with the same, shall be registered and take effect upon the title only from the time of registration.

This is to ensure the priority of encumbrances, whether they be mortgages or attorneys liens, is clear as the status of title is immediately apparent upon review of the Certificate of Title. Hersch Props., LLC v. McDonalds Corp., 588 N.W.2d 728, 733 (Minn. 1999).

Likewise, Minnesota Recording Act establishes priority from the date of recording with the county recorder or the registrar of titles. Minn.Stat. § 507.34 (2008); see Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302, 304 (Minn.1995) (discussing mortgage priority). The interest first recorded has priority unless the party received their interest with notice of an existing interest in the land. Minn.Stat § 507.34.

Public policy dictates that persons must be able to rely on title shown in public records. Nussbaumer v. Fetrow, 556 N.W.2d 595, 599 (Minn.Ct.App. 1996). This is of particular importance given the relatively high costs of real estate disputes and the potential loss of the real estate itself. Nussbaumer, 556 N.W.2d at 599 (*citing* Clark v. Butts, 73 Minn. 467 473, 76 N.W.2d 263, 264 (1898)).

Both the Recording Act and the Torrens Act allow for purchasers (and lienors) to be able to rely on the record as the order of priority provided by the registry is “presumed to be certain” and will not be overridden by equivocal evidence of an unrecorded change. Nussbaumer at 599; Claflin v. Commercial State Bank of Two Harbors, 487 N.W.2d 242, 248 (Minn.Ct.App. 1992).

The purpose of the recording act serves as a shield to protect parties against claims to real estate of which they had no prior notice. Washington Mutual Bank, F.A. v. Elfelt 756 N.W.2d 501, 506 (Minn.Ct.App. 2008).

Minn.Stat. § 524.3-805(a) provides:

- (a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) costs and expenses of administration;
- (2) reasonable funeral expenses;
- (3) debts and taxes with preference under federal law;
- (4) reasonable and necessary medical, hospital, or nursing home expenses of the last illness of the decedent, including compensation of persons attending the decedent, a claim filed under section 256B.15 for recovery of expenditures for alternative care for nonmedical assistance recipients under section 256B.0913, and including a claim filed pursuant to section 256B.15;
- (5) reasonable and necessary medical, hospital, and nursing home expenses for the care of the decedent during the year immediately preceding death;
- (6) debts with preference under other laws of this state, and state taxes;
- (7) all other claims.

Where property in the estate is encumbered, the estate (and potentially any heirs or beneficiaries) takes those assets as such. Minn.Stat. § 524.3-814. To hold otherwise would mean that the decedent was able to pass on an asset that was greater than that held by the decedent. See Weber v. Eisentrager, 498 N.W.2d 460, 464 (Minn. 1993); Strong v. Lynn, 38 Minn. 315, 317, 37 N.W. 448, 449 (Minn.1888); Ford Consumer Finance Co. v. Breese, 611 N.W.2d 75, 78 (Minn.Ct.App. 2000)(party cannot pass title greater than that held by that party).

C. Application of the Law to the Facts.

First of all, Appellant doubts that its mortgage was a “claim” within the meaning of the Section 3-805(2)¹. A mortgage is a chose in action and is enforced against either the property (in rem) or the mortgagor (in personam) or both. Here, Appellant chose to proceed with foreclosure by advertisement, thereby giving up the right to obtain any money from the Estate on a deficiency judgment. Minn.Stat. § 582.30.

At no time did Appellant Wendover ask the Estate for any payment. Instead, the mortgage itself provided that the death of the mortgagor would trigger a power of sale by advertisement. [Affidavit of Kristine M. Spiegelberg; App.’s Appx. at A-43-44]. By proceeding through a sale by advertisement, there was no liability of the Estate at all because the foreclosure sale. Minn.Stat. § 582.30.

¹ There is a question as to whether Respondent’s lien could have even attached to the homestead of the decedent. The homestead passes by descent or will to the spouse or decedent’s descendants exempt from all debts which were not valid charges at the time of the decedent’s death. Minn. Stat. § 524.2-402 (c). The Application for Informal Probate in Blue Earth County Court File No. clearly states that Sandra Lee Baynes was the daughter of the decedent and lists the sole asset as the homestead. [Application for Informal Probate of Will and for Informal Appointment of Personal representative; App.’s Appx. at A-62]. The trial court may take judicial notice of court records and files. In re Welfare of Clausen, 289 N.W.2d 153, 156-57 (Minn.1980). As a descendant, Ms. Baynes is entitled to take the homestead exempt from Respondent’s lien as it was not a valid debt at the time of the decedent’s death. Minn. Stat. 524.2-402 (c) clearly states that only when the homestead passes to a third party upon the decedent’s death will the homestead pass subject to a claim for payments of expenses of the administration (Respondent’s Lien). Baynes took the homestead only subject to valid liens at the time of decedent’s death, such as Appellant’s mortgage.

Moreover, under both the Recording Act and the Torrens Act, Appellant's mortgage has priority over the attorney's lien as the mortgage was registered first, as evidenced by the lower registration number assigned to its mortgage. Home Lumber Co., 535 N.W.2d at 304; In re Ocwen Fin. Servc., Inc., 649 N.W.2d 854, 857 (Minn.Ct.App. 2002).

And there can be no question that Appellant's had no notice -- actual or otherwise -- of the Respondent's lien at the time of its mortgage was memorialized precisely because the attorney's lien did not exist at that time.

Finally, it must be noted that the lien the Respondent seeks to enforce was extinguished by the foreclosure of Appellant's mortgage. Like any lienholder, Respondent had a right to redeem under Minn.Stat. § 580.24 and chose not to do so.

CONCLUSION

To allow an attorney's lien claimant to have priority over a properly-registered mortgage on Torrens property, where that lien arose 7 years later, based upon a priority-of-payment probate statute will turn the real estate market on its head.

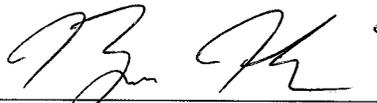
Certainty in the real estate market will be lost. Mortgagees such as Appellant will have their mortgages held hostage to the whims and fancies of defaulting personal representatives. Indeed, the result of this ruling is that all mortgagees who hold a mortgage on property in an estate have been transformed into the guarantors of personal representatives' legal bills because the attorney for the estate can file a lien which trumps

an earlier mortgage. Minnesota's mortgage market will dry up and its citizens will not be able to buy housing.

The district court must be reversed.

Dated: April 22, 2010

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