

No. A10-0299

STATE OF MINNESOTA
IN COURT OF APPEALS

Wendover Financial Services Corporation,

Appellant,

vs.

Somsen, Mueller, Lowther & Franta, PA,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

Shapiro & Zielke, LLC	Somsen, Mueller, Lowther & Franta, PA
f/k/a Shapiro, Nordmeyer & Zielke, LLP	Patrick A. Lowther, #125222
John Westrick, #206581 (<i>of Counsel</i>)	134 2 nd Avenue SE
Kristine M. Spiegelberg, #308845	P.O. Box 366
Ryan D. Krumrie, #387859	Sleepy Eye, MN 56085-0366
12550 West Frontage Road, Suite 200	(507) 794-5711
Burnsville, MN 55337	
(952) 831-4060	

Attorney for Appellant

Attorney for Respondent

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

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE LEGAL ISSUES	iii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
STANDARD OF REVIEW	4
LEGAL ARGUMENT.....	5
I. A PROBATE ATTORNEY’S LIEN TAKES PRIORITY OVER A SECURED MORTGAGE UNDER MINNESOTA’S PRIORITY- OF-PAYMENT PROBATE STATUTE.....	5
CONCLUSION.....	11
INDEX TO APPENDIX	12

TABLE OF AUTHORITIES

	Page
Minnesota State Cases	
<u>Fabio v. Bellomo</u> , 504 N.W.2d 758, 761 (Minn. 1993).....	4
<u>Frieler v. Carlson Mktg. Group, Inc.</u> , 751 N.W.2d 558, 564 (Minn. 2008).	4
<u>Molloy v. Meier</u> , 679 N.W.2d 711, 723 (Minn. 2004)	6
<u>Osborne v. Twin Town Bowl, Inc.</u> , 749 N.W.2d 367, 371 (Minn. 2008)	4
 Out-of-State Cases	
<u>Blanding v. Long Beach Mortg. Co.</u> , 665 S.E.2d 608 (S.C. App. 2008).....	8
<u>Dillman, Admx. v. Warner, Supt. of Bldg & Loan Assns.</u> , 54 Ohio App. 170, 175- 6 (Ohio App. 1935)	10
<u>In re Campbell</u> , 402 B.R. 453 (Bkrcty. D. Mass. 2009)	8
<u>In re Estate of Durr</u> , Not Reported in N.E.2d, 1992 WL 2674199 (Ohio App. 11 Dist. 1992)	9
<u>In re Henthorn</u> , 299 B.R. 351 (E.D. Pa. 2003).....	8
<u>In re Tudor</u> , 342 B.R. 540 (Bkrcty. S.D. Ohio 2005)	8
<u>Nolan, Exrx. v. Kroll</u> , 37 Ohio App. 350, 351 (Ohio App. 1930)	10
 Minnesota State Statutes	
Minnesota Statute § 524.201	7
Minnesota Statute § 524.3-805	5-7
 Out-of-State Statutes	
Ohio Revised Code 2127.38	9
Texas Probate Code § 322	10
 Minnesota Rules:	
Minn. R. Civ. P. 56.03	4

STATEMENT OF THE LEGAL ISSUE

- I. Does a probate attorney's lien take priority over a secured mortgage under Minnesota's priority-of-payment probate statute?

The district court found in the positive.

List of apposite cases:

Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004)

In re Estate of Durr, Not Reported in N.E.2d, 1992 WL 267419
(Ohio App. 11 Dist. 1992)

List of apposite statutes:

Minnesota Statute § 524.3-805

STATEMENT OF THE CASE

This matter arises out of the administration of the Estates of Adlor C. Olsen and Phyllis C. Olsen (collectively the “Olsen Estates”). Respondent, Somsen, Mueller, Lowther & Franta, PA incurred legal fees for probating the Olsen Estates and did not get paid. Respondent then filed an attorney’s lien for the probate administration fees and disbursements due in the amount of \$5,049.24, plus interest thereon from June 5, 2008. [Respondent’s Notice of Intent to Claim an Attorney’s Lien; Resp.’s Appx. at A-8]. Respondent brought an action to foreclose said lien and filed a motion for summary judgment with supporting affidavit and memorandum of law. [Respondent’s Amended Complaint; Resp.’s Appx at A-1]; Respondent’s Memorandum in Support of Plaintiff’s Motion for Summary Judgment and Affidavit of Steven J. Franta; Resp.’s Appx at A-10-]. 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; Resp.’s Appx. at A-18].

The summary judgment motion hearing occurred on December 15, 2009; the District Court granted summary judgment for the Respondent. [Order Granting Summary Judgment to Plaintiff; Resp.’s Appx. at A-45].

Appellant now appeals the grant of summary judgment to the Respondent.

STATEMENT OF THE FACTS

Adlor Olsen died on September 22, 2007 and his wife Phyllis Olsen died on October 1, 2007 (collectively “Olsen” or “Olsens”). [Resp.’s Amended Complaint; Resp.’s Appx. at A-6, A-7]. At the time of their deaths, the Olsens were the fee owners in joint tenancy of a home in Eagle Lake, Minnesota legally described in the Amended Complaint (“home”). [Affidavit of Steven J. Franta; Resp.’s Appx. at A-16].

On September 25, 2007, Respondent entered into an agreement with Sandra Lee Baynes, as Personal Representative of the Olsen Estates, for which Respondent performed legal services and incurred expenses to probate the estates between September 25, 2007 and March 3, 2008. [Affidavit of Steven J. Franta; Resp.’s Appx. at A-16].

On June 6, 2008, Respondent filed in the Office of the Blue Earth County Recorder its verified Notice of Intent to Claim an Attorney’s Lien, and on June 18, 2008, Respondent served this Notice on Sandra Lee Baynes. [Affidavit of Steven J. Franta; Resp.’s Appx. at A-8]. The fair and reasonable value of Respondent’s legal services and disbursements is \$5,049.24, plus interest from June 5, 2008. [Affidavit of Steven J. Franta; Resp.’s Appx. at A-16].

Olsen Estates breached the contract with Respondent by failing to pay said fees and costs. [Affidavit of Steven J. Franta; Resp.’s Appx. at A-16]. The only asset of the Olsen Estates is the Eagle Lake home. [Affidavit of Steven J. Franta; Resp.’s Appx. at A-16].

Appellant claims an interest in the Olsen home by virtue of a Mortgage dated November 9, 2000, and filed December 19, 2000. [Affidavit of Kristine M. Spiegelberg Ex. A; Resp.'s Appx. at A-27]. Without direct notice to Respondent, said Mortgage was foreclosed by Sheriff's Sale conducted February 9, 2009, with the home being purchased by Appellant. [Affidavit of Kristine M. Spiegelberg; Resp.'s Appx. at A-24].

STANDARD OF REVIEW

A district court must grant a motion for summary judgment “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); see also Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. Frieler v. Carlson Mktg. Group, Inc., 751 N.W.2d 558, 564 (Minn. 2008). This Court is to apply a *de novo* standard of review to the district court’s decision to grant summary judgment, viewing the evidence in the light most favorable to the non-moving party. Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367, 371 (Minn. 2008).

LEGAL ARGUMENT

I. A PROBATE ATTORNEY'S LIEN TAKES PRIORITY OVER A SECURED MORTGAGE UNDER MINNESOTA'S PRIORITY-OF-PAYMENT PROBATE STATUTE.

A. Applicable Law.

Minnesota Statute § 524.3-805 (a) provides as follows (emphasis supplied):

(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.**

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due, except that if claims for expenses of the last illness involve only claims filed under section 256B.15 for recovery of expenditures for alternative care for nonmedical assistance recipients under section 256B.0913, section 246.53 for costs of state hospital care and claims filed under section 256B.15, claims filed to recover expenditures for alternative care for nonmedical assistance recipients under section 256B.0913 shall have preference over claims filed under both sections 246.53 and other claims filed under section 256B.15, and claims filed under

section 246.53 have preference over claims filed under section 256B.15 for recovery of amounts other than those for expenditures for alternative care for nonmedical assistance recipients under section 256B.0913.

There is little or no case law on point, likely because this analysis is so obvious. Thus, this appears to be a case of first impression in Minnesota. However, if the meaning of a statute is unambiguous, a court is to interpret the statute's text according to its plain language. Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004).

In the instant case, the plain analysis is that the cost and expenses of administration of the Olsen Estates has priority over Wendover's debt (§ 524.3-805(a)(6)) and all other claims (Id. (a)(7)). This priority is mandatory (emphasis supplied):

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 (Id. (a)).

Although Appellant is correct when it asserts that lien priority is normally established by the order of registration or recording, it fails to mention the salient issue in this matter. Here, the issue of lien priority is controlled and trumped by the Uniform Probate Code. This is especially important when the one and only asset of the Estate is the encumbered homestead. If the costs of a probate administration were allowed to be inferior to that of a mortgage, no attorney would take on a likely insolvent estate consisting of only a mortgaged home. This, in turn, would surely result in more mortgage foreclosures.

Appellant further asserts that its Mortgage is not categorized as a “claim” within the meaning of Section 3-805(2). In making such an argument, Appellant maintains that it never sought payment from the Estate. However, a claim is defined by Minnesota statute as “liabilities of the decedent **whether arising in contract** or otherwise and liabilities of the estate which arise after the death of the decedent including funeral expenses and expenses of administration. The term does not include taxes, demands or disputes regarding title of a decedent to specific assets alleged to be included in the estate, tort claims, foreclosure of mechanic's liens, or to actions pursuant to section 573.02.” Minn. Stat. § 524.201 (6). (Emphasis supplied.)

In essence, Appellant argues that a probate of the Olsen home was not necessary because a foreclosure instead would serve to transfer title to the home (in other words, the death of the mortgagor triggers a power of sale by advertisement). Appellant somehow asserts that if the sole asset of an estate is an encumbered homestead, then a probate is not necessary. However, a probate of the Olsen home was necessary in order to 1) transfer title to the Olsen heirs via the probate process; 2) sell the home as part of the probate process; 3) payoff any encumbrance; and 4) collect any equity in the home. The difficulty that was posed in the instant case, however, was a troubled real estate market that produced no acceptable offers on the home. It was not until after the probate was commenced, however, that the Personal Representative realized that the home would not sell in time to prevent the mortgage foreclosure sale. The dire particulars of this case,

however, should not preclude Respondent from collecting the costs to administer the estate. The fact remains that the home was titled in the names of Mr. and Mrs. Olsen at the time of their deaths. Upon the death of the joint survivor, a probate of the home was necessary.

B. The Mortgage itself contemplates liens that may be superior.

The Mortgage executed by Mr. and Mrs. Olsen appears to contemplate that its lien may at some point become inferior to other liens. For example, paragraph 5 of the Mortgage reads, “[i]f . . . there is a legal proceeding that may significantly affect Lender’s right in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender’s rights in the property”

The inclusion of the language “such as” in paragraph 5 indicates the list of proceedings that may affect Appellant’s right in the home is not exhaustive. In fact, most mortgages include reference to such language and often include “probate” as a means of significantly affecting Lender’s right in the property. See, e.g., In re Campbell, 402 B.R. 453 (Bkrcty. D. Mass. 2009); Blanding v. Long Beach Mortg. Co., 665 S.E.2d 608 (S.C. App. 2008); In re Tudor, 342 B.R. 540 (Bkrcty. S.D. Ohio 2005); In re Henthorn, 299 B.R. 351 (E.D. Pa. 2003), all of which involve mortgages that include the almost identical following language: “a legal proceeding that may significantly affect Lender’s rights in the property (such as a proceeding in bankruptcy, **probate**, for condemnation or forfeiture or to

enforce laws or regulations)” (Emphasis supplied.) Again, like the instant Mortgage, these mortgages contemplate a proceeding such as a probate affecting their first-lien status in the property.

Further, paragraph 12 of the instant Mortgage provides that “[i]f state law limits the first lien status of this Security Instrument . . . or if state law otherwise prevents the Lender from making Loan Advances secured by the first lien” Again, the language of the instant Mortgage itself contemplates the possibility that Wendover’s lien could become inferior to a lien established by proceeding and/or state law.

C. Other Jurisdictions Allow Probate Costs of Administration to take Priority over Secured Mortgages.

As stated, because this appears to be a case of first impression in Minnesota, little or no case law is directly on point. However, other jurisdictions do hold that a probate attorney’s lien superior to that of a secured Mortgage. For example, In re Estate of Durr, Not Reported in N.E.2d, 1992 WL 267419 (Ohio App. 11 Dist. 1992), (a copy of which is attached; Resp.’s Appx. at A-48), illustrates this. Specifically, Ohio Revised Code 2127.38 provides as follows (Emphasis supplied):

The sale price of real estate sold following an action by an executor, administrator, or guardian shall be applied and distributed as follows:

“(A) To discharge the costs and expenses of the sale, including reasonable fees to be fixed by the **probate** court for services performed by attorneys for the fiduciary in connection with the sale,

and compensation, if any, to the fiduciary for his services in connection with the sale as the court may fix * * *

“(B) To the payment of taxes, interest, penalties, and assessments then due against the real estate, and to the payment of **mortgages** and judgments against the ward or deceased person, according to their respective priorities of lien, so far as they operated as a lien on the real estate of the deceased at the time of the sale * * *

Further, the Durr case held that “where an executor sells real estate for the payment of debts, judgment liens and mortgages against the decedent must be paid from the proceeds of the sale prior to the application of such proceeds to the payment of other claims and debts of the estate, **except for the payment of costs and expenses in the sale and administration.**” (Emphasis supplied.) See also Nolan, Exrx. v. Kroll, 37 Ohio App. 350, 351 (Ohio App. 1930); Dillman, Admx. v. Warner, Supt. of Bldg & Loan Assns., 54 Ohio App. 170, 175-6 (Ohio App. 1935).

Like Ohio, Texas also recognizes such priority of claims against an estate. Specifically, Texas’ Probate Code, § 322 provides as follows:

Claims against an estate of a decedent shall be classified and have priority of payment, as follows:

Class 1. Funeral expenses and expenses of last sickness * * *

Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, including fees and expenses awarded under Section 243 of this code, and unpaid expenses of administration awarded in a guardianship of the decedent.

Class 3. Secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property

subject to such mortgage or other lien, and when more than one mortgage, lien, or security interest shall exist upon the same property, they shall be paid in order of their priority * * *

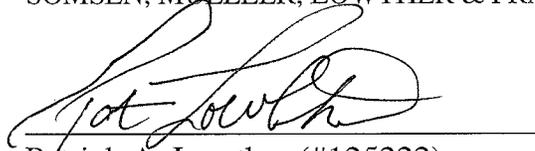
CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the District Court's Order. Minnesota's priority-of-payment probate statute requires priority of Respondent's lien over that of Appellant. This is especially important in potentially insolvent probates, where the need for competent probate administration is greatest.

Dated: May 13, 2010

Respectfully submitted,

SOMSEN, MUELLER, LOWTHER & FRANTA, PA



Patrick A. Lowther (#125222)
134 2nd Avenue SE, P.O. Box 366
Sleepy Eye, MN 56085-0366
(507) 794-5711

Attorney for Respondent