

CASE NO. A06-1830

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Lisa Peterson,

Plaintiff/Respondent,

vs.

Philip Johnson,

Defendant/Appellant.

BRIEF OF RESPONDENT LISA PETERSON

**ANDERSON LARSON
HANSON SAUNDERS, P.L.L.P.**
Gregory R. Anderson (#18651X)
331 S.W. Third Street
Post Office Box 130
Willmar, Minnesota 56201
(320) 235-4313

Attorneys for Appellant

**O'LEARY & MORITZ
CHARTERED**
J. Brian O'Leary (#81413)
102 North Marshall
Post Office Box 76
Springfield, Minnesota 56087-0076
(507) 723-6272

Attorneys for Respondent

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LEGAL ISSUES

1. Whether service of a Summons and Complaint commencing a lawsuit alleging claims under the Minnesota Home Warranty Statute (Chapter 327A), without any other written notice, satisfies the notice requirement of M.S.A. § 327A.03(a).

Held: Service of a Complaint satisfies the notice requirements of M.S.A. § 327A.03(a).

2. Whether Respondent lacks standing to claim remedies under the Minnesota Home Warranty Statute (Chapter 327A) because her interest as a vendee expired following a sheriff's sale of her home.

Held: Respondent is a vendee as defined under chapter 327A. Therefore, Respondent has standing to pursue available remedies under chapter 327A.

STATEMENT OF THE CASE AND FACTS¹

The Respondent agrees with the accuracy of the Appellant's Statement of the Case and Facts.

¹ Rule 129.03 Certification: J. Brian O'Leary, Respondent's Attorney, authored the entire brief in its entirety. To date, no one, including the Respondent, has paid for the preparation or submission of the brief.

ARGUMENT

- I. Whether service of a Summon and Complaint commencing a lawsuit alleging claims under the Minnesota Home Warranty Statute (Chapter 327A), without any other written notice, satisfies the notice requirement of M.S.A. § 327A.03(a).

The statute involved as stated by the Appellant is M.S.A. § 327A.03(a), which states in part:

“Loss of damage to be reported to the home improvement contractor in writing within six (6) months after the vendee or the owner discover or should have discovered the loss or damage.”

Here a summons and complaint was served upon the Defendant specifying the claims and putting the Defendant on notice. The complaint specifically contained a copy of the report of the building inspector, Steve Carson, which listed the defects in the property. The Appellant argues that serving a complaint without serving a separate written notice does not meet the statutory requirement. The Appellant goes on to state that public policy would bless the opportunity to remedy defects and cure damage before going to court.

He goes on to state that:

“Once the war begins, the contractor loses any opportunity to cure defects and satisfy the homeowner.”

Both of these statements are inaccurate. Serving a summons and complaint is not **going to court**. Also, **once the war begins**, the parties can still certainly remedy the defects if they are in fact able to be remedied.

As the Appellant states:

“The sixth month notice rule may not rise to the level of a *jurisdictional* prerequisite to suit, but it otherwise has no purpose unless viewed as a condition precedent to litigation.”

The Respondent disagrees with this statement. The purpose of the notice is just that – notice. Had the Legislature intended this to be a prerequisite to commencing a suit, it

could have so stated. The real issue here is notice to the contractor. A case that seems to be very important on that point is *Roger T. Collins, M.D. et al vs. Terrance Buus*, 2006 WL 1985431, (Minn. App. July 18, 2006). The issue in that case was also whether the notice to the contractor was sufficient. That case concerned oral statements made by the homeowner to the contractor's adjuster and whether that constituted sufficient notice pursuant to the statute. In that case, the Court of Appeals on a 2-1 decision determined that was not sufficient notice. That decision centered not around when the notice was given, but rather the fact that it was an oral notice rather than in writing. The court held that an oral statement was not sufficient and notice had to be set out in writing. Interestingly, even in that circumstance, dissenting Judge Minge held that the notice was sufficient even though it was oral and not in writing. In the instant case, the notice was in writing and in detailed writing. The complaint not only set forth the areas of inadequacy in the construction, but had a copy of the building inspector's report which specified exactly what the problems were the home and why the construction was substandard.

The statement by the Appellant that M.S.A. § 327A.03 requires written notice prior to commencement of a suit is misleading. The statute does not so state. The statute merely requires that written notice be given to the contractor within six months of discovery. Obviously, that provision is, in effect, a statute of limitations that would prevent a homeowner from bringing a suit under that statute. It is agreed that the statutory requirement for written notice is plain. It plainly states that written notice must be given to the contractor within six months of discovery. This section contains exclusion to the right to pursue claims and is not a condition precedent to bringing an action. The Appellant cites other statutory notice requirements such as

M.S.A. § 219.761. This is a notice requirement given to a railroad when their engines cause a fire. The obvious purpose of this is to give the railroad timely notice so they can discover whether in fact they did cause the fire. This statute does not state that it is a condition precedent to bringing an action.

M.S.A. § 605.15 is a 30 day notice requirement for non-payment of fuel. The purpose of a 30 day notice in that case is to give an opportunity for payment to be made without penalty. The 30 days merely applies to whether penalties can be enforced and therefore, require a 30 day notice to allow the person to make payment.

M.S.A. § 348.802 is a dram shop case. That statute clearly states that this is a notice of injury that is required before an action. The language of M.S.A. § 327A.03 does not state that notice has to be given before an action can be brought. Rather that statute is a statute of limitations and excludes the right of a homeowner to bring an action unless notice is given to a contractor within six months of discovery. There is nothing in the statute that states that six month notice must be given prior to an action being commenced, but only that notice must be given "in writing" within six months of discovery.

II. Whether Respondent lacks standing to claim remedies under the Minnesota Home Warranty Statute (Chapter 327A) because of her interest as a vendee expired following a sheriff's sale of her home.

The issue here clearly is the Plaintiff has standing to continue an action because of a foreclosure on the home. The question here is whether the Plaintiff remains an owner of the home after the sheriff's sale, but prior to redemption. The Appellant argues that the Plaintiff no longer owns the home. The issue here really is one of strict legal vs. equitable interest. During the redemption period, the Plaintiff has a right to occupy the

home and in fact, has possession of the home in all respects and can redeem the home from the sale at any time. In the instant case, it is undisputed that the mortgage foreclosure was by advertisement and pursuant to statute notice, the Plaintiff has six months to occupy and be on the property. (See M.S.A. § 580.03)

It should be important here to note that at the time that the lawsuit was commenced, the Respondent had full property rights in the property – meaning the foreclosure had not even been commenced. It is because the case dragged on for more than two years, mainly because of the Defendant’s action while pro se, that the foreclosure took place.

The statute at issue clearly was an act to protect the homeowners. The fact of the foreclosure on the Respondent does not make her no longer a homeowner. She has the right to sell the home, to go out and re-mortgage it, to occupy the home and has all incidents of ownership subject to losing those rights after the redemption period expires. The Appellant cites the case of *Bradley v. Bradley, 554 N.W.2d (Minn. App. 1996)* holding that:

“a purchaser of property at a foreclosure sale take title subject to an *equitable right of redemption* in the previous owners of the property.”

Consequently, clearly the owners in this case, the Respondent, have at a minimum, equitable right of redemption and therefore, an equitable right of ownership in the property. The Appellant argues that this right is in no way a property interest. Clearly, it is a property interest. To hold that a sheriff’s sale takes place that the homeowner (in this case, the Respondent), loses all rights in the property would be contrary to public policy. The mortgage statute allows the homeowner to retain all its interest in the property including possession until the six month time expires. In short, title doesn’t clearly

change from the homeowner to the party foreclosing until after the redemption time expires. This being the case, the Respondent still has enough sufficient property right in the home to continue on with the suit.

CONCLUSION

In denying summary judgment, the trial court did not error in either holding that the written complaint with attached statement from the building inspector satisfied the written notice of M.S.A. § 327A.03(a) and that the Respondent can proceed with claims under Chapter 327 during the period of the redemption. *

Respectfully submitted,



J. Brian O'Leary
Attorney for Respondent
P.O. Box 76
Springfield, MN 56087
Phone: (507) 723-6272
Attorney Reg. No. 81413

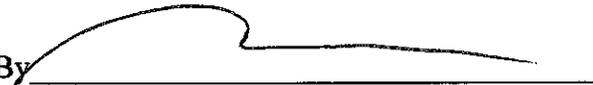
* The parties had a trial date in September within the redemption period. The parties stipulated in open court that the Appellant would not raise the timeliness issue if in fact the case was delayed until after the redemption period had expired.

CERTIFICATION – RULE 132.01

I certify that Respondent's brief complies with the word count or line count limitation. The brief was prepared using Microsoft Word 97. The total number of words in the brief is 1851.

Dated: November 30, 2006

O'LEARY & MORITZ, CHARTERED

By 

J. Brian O'Leary
Attorney for Respondent
P.O. Box 76
Springfield, MN 56087
Phone: (507) 723-6272
Attorney Reg. No. 81413