

NO. A08-458

State of Minnesota
In Court of Appeals

Crablex, Inc., a Minnesota corporation,

Appellant,

vs.

Minneapolis Community Development Agency,
Riverside Plaza Limited Partnership, Capmark Finance, Inc.,
The City of Minneapolis, Cedar Cultural Center, Inc., and
Associated Bank, National Association,

Respondents.

RESPONDENT CITY OF MINNEAPOLIS' BRIEF

HENSON & EFRON, P.A.
David Bradley Olsen (#197944)
220 South Sixth Street, Suite 1800
Minneapolis, MN 55402
(612) 339-2500

Attorneys for Appellant

LINDQUIST & VENNUM, P.L.L.P.
James M. Lockhart (#176476)
Christopher R. Grote (#267995)
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

*Attorneys for Respondents Minneapolis Community
Development Agency, Riverside Plaza Limited
Partnership and Capmark Finance, Inc.*

KENNEDY & GRAVEN, CHARTERED
John M. LeFevre (#61852)
Peter G. Mikhail (#249907)
200 South Sixth Street, Suite 470
Minneapolis, MN 55402
(612) 337-9300

Attorneys for Respondent City of Minneapolis

MEAGHER & GEER, PLLP
Robert Salmon (#123031)
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Attorneys for Respondent Cedar Cultural Center, Inc.

Paul C. Steffenson (#104784)
301 Fourth Avenue South
270 Grain Exchange North
Minneapolis, MN 55415
(612) 333-7888

*Attorneys for Respondent
Associated Bank National Association*

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STATEMENT OF THE ISSUES

- I. Did the district court correctly hold that the judicial foreclosure did not eliminate the easements of parties omitted from the action?**

The district court held that the City Easements survived the judicial foreclosure because the City was not a party to that action. (AA18.)

Northwestern Trust Co. v. Ryan, 132 N.W. 202 (Minn. 1911)

Bardwell v. Anderson, 46 N.W. 315 (Minn. 1890)

Harper v. East Side Syndicate, 42 N.W. 86 (Minn. 1889)

STATEMENT OF THE CASE

The Statement of the Case is set forth in Appellant's Brief, pp. 2-3.

STATEMENT OF THE FACTS

The City of Minneapolis ("City") has held of record public street and sidewalk easements on the subject Crablex, Inc. ("Crablex") property since the early-1970's. Cedar Riverside Land Company granted the City the following public easements in the subject property ("City Easements"), each of which was filed of record in the Office of the Hennepin County Registrar of Titles:

- a. Public street easement, filed of record on November 8, 1973, as Document No. 1091325;
- b. Public sidewalk easement, filed of record on January 2, 1974, as Document No. 1095591;
- c. Public sidewalk easement, filed of record on January 18, 1974, as Document No. 1097179; and,
- d. Pedestrian bridge and walkway easement, filed of record on April 24, 1974, as Document No. 1105085.

(See AA 238 (Certificate of Title).)

In 1994, First Trust assigned the First Trust Mortgage to Crablex. (See AA 239 (Certificate of Title).) In 1995, Crablex commenced a judicial foreclosure of the First Trust Mortgage in Hennepin County District Court. (AA 60 (Petition, ¶ 3).) It is undisputed that Crablex did not join the City as a party in the foreclosure action. On February 14, 2005, the district court issued its Order for Judgment and Judgment and Decree of Foreclosure in the foreclosure action, directing the sheriff to sell the foreclosure premises. (AA 505-10.) The

district court amended the judgment per stipulation of the parties on April 15, 2005. (AA 514.) Pursuant to the foreclosure judgment, the sheriff sold the foreclosure premises to Crablex on April 20, 2005. (AA 515-19 (Sheriff's Report of Sale in Foreclosure by Action).) The district court then entered its order confirming the sale in the foreclosure action on May 16, 2005. (AA 520-21 (Order Confirming Sheriff's Sale in Foreclosure by Action).)

Crablex commenced the instant proceedings subsequent, seeking a decree that the judicial foreclosure eliminated, *inter alia*, the City Easements. (AA 62 (Petition ¶ 12).) The City answered and counterclaimed, seeking a declaration that the City Easements remain and encumber the subject property. The City moved for summary judgment on the grounds that, as a matter of law, the City Easements were not eliminated by the 2005 foreclosure. (See AA 540-41; AA 773-85.) Crablex also moved for summary judgment. The district court reasoned:

Because they were not named as parties in the Foreclosure Action, Cedar, Associated, and the City are not bound to any orders, including the decree of foreclosure, entered in that action. Indeed, Minnesota Courts have long recognized that a foreclosure-by-action proceeding merely adjudicates the rights of the parties thereto.

(AA 18 (citations omitted).) Rejecting Crablex' argument that the foreclosure sale, rather than the judgment, extinguished the City Easements, the district court held: "Crablex does not have any greater rights against non-parties to the Foreclosure Action merely by virtue of its role as purchaser at the Sheriff's sale." (AA 19.) Accordingly, the district court granted the City's motion, and denied Crablex' motion. (AA 1-2.)

ARGUMENT

I. STANDARD OF REVIEW.

On appeal from summary judgment, appellate courts review the record to determine whether there is any genuine issue of material fact, and whether the district court erred in its application of the law. *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 544-45 (Minn. 2008).

II. A FORECLOSURE BY ACTION DOES NOT ELIMINATE THE INTERESTS OF THOSE NOT JOINED IN THE ACTION.

Crablex argues that the City Easements were extinguished by the earlier judicial foreclosure notwithstanding the fact that the City was not a party to that action. Because a foreclosure action is ineffective to eliminate the interests of parties omitted from that action, the City Easements remain valid. Further, Crablex' arguments to parse and avoid the application of this well established rule are meritless.

A. A Foreclosure By Action Does Not Eliminate the Interests of Parties Omitted From That Action.

Where the holder of a junior interest is not made a party to a foreclosure action, that interest is not affected by the foreclosure. *Whalley v. Eldridge*, 24 Minn. 358 (1877) (“An action to foreclose a mortgage, however, is never a proceeding *in rem*, because *the decree of foreclosure never binds any one who has not been made a party*, or who has not subsequently succeeded to the rights of one who was a party, . . .” (emphasis added)); *Bardwell v. Anderson*, 46 N.W. 315, 317 (Minn. 1890) (holding that in a foreclosure by action “the judgment binds only those who are parties to the suit, and those in privity with them.”);

Harper v. East Side Syndicate, 42 N.W. 86 (Minn. 1889); *Northwestern Trust Co. v. Ryan*, 132 N.W. 202, 203 (Minn. 1911); *see also Minnesota Debenture Co. v. Johnson*, 102 N.W.381, 381-82 (Minn. 1905). Consistent with Minnesota law, the Restatement (Third) of Property (Mortgages) § 7.1, Comment b, provides:

b. Omitted parties in a judicial foreclosure. In a foreclosure by judicial action the foreclosing mortgagee normally makes the mortgagor and all holders of junior interests in the mortgaged real estate parties-defendant. . . . Where the holder of a junior interest is not made a party in the foregoing fashion, that interest is neither terminated nor otherwise prejudiced by the foreclosure.

See also id., § 7.1 (providing that a valid foreclosure terminates all junior interests “*whose holders are properly joined or notified under applicable law.*” (emphasis added)); *accord, e.g., Diamond Benefits Life Ins. Co. v. Troll*, 66 Cal. App. 4th 1, 5-6, 77 Cal.Rptr.2d 581, 584 (1998) (“It is well settled that a conveyance under a foreclosure decree does not affect the title held by persons who are not made parties to the action of foreclosure if such title appears of record when the action is begun.”); *Patel v. Khan*, 970 P.2d 836, 839 (Wyo. 1998); *Camp Clearwater v. Plock*, 146 A.2d 527, 536-37 (N.J. Super. 1958); *Springer Corp. v. Kirkeby-Natus*, 453 P.2d 376, 378 (N.M. 1969) (“[T]he rights of one who is not a party to a mortgage foreclosure action are not affected by any judgment rendered therein nor by a foreclosure sale pursuant thereto.”); *Monese v. Struve*, 62 P.2d 822, 826 (Or. 1936) (holding that an easement was not affected by the judicial foreclosure of a prior mortgage on the servient premises where the owners of the easement were not parties to the foreclosure action).

In this case, it is undisputed that the City's public easements appeared of record and that the City was not joined in the foreclosure action. Therefore, as a matter of law, that action did not eliminate the City Easements.

B. Crablex' Arguments to Avoid the Omitted Interest Rule Are Meritless.

Recognizing the omitted interest rule, Crablex presents meritless arguments in an attempt to avoid its application. First, Crablex argues that the foreclosure sale, rather than the judgment, eliminated the City Easements. To the contrary, in the words of the district court, "This is a distinction without a difference." (*See* AA 18.) Second, Crablex argues the omitted interest rule preserves only redemption rights and argues that the City had no redemption rights. Wrong on both counts. The City did have redemption rights and the omitted interest rule preserves without limitation all rights in the City Easement, including possession and use, as though the foreclosure had never occurred.

1. The foreclosure sale did not alter the rights adjudicated in the foreclosure judgment.

Crablex argues that it was not the foreclosure action, but rather the foreclosure sale, that terminated the City's junior interests. Not so. Obviously, such parsing would render the established rule meaningless since all foreclosure actions end in sales. No, the omitted junior interest survives the foreclosure action *and* the resulting sale. *See Harper*, 42 N.W. 86 (omitted junior interest survived after foreclosure judgment and sale pursuant thereto); *Northwestern Trust Co.*, 132 N.W. at 203 (same). The sheriff's sale must be authorized by the foreclosure decree and the sale must be confirmed by the court in the foreclosure action.

Minn. Stat. §§ 581.03 and 581.08 (2006). The purchaser *a force* acquires no greater property interests than the court authorized the sheriff to sell in the foreclosure action. The respected Nelson & Whitman treatise – the same treatise Crablex cites – explains:

For example, if a first mortgage is judicially foreclosed and a second mortgagee is not made a party, the foreclosure will not affect or terminate the rights of the junior mortgagee. The latter's mortgage will remain on the land. *The sale purchaser will receive a title fundamentally different from the one the mortgagor had* when the foreclosed mortgage was executed. It should be emphasized, however, that the failure to join such a necessary party does not render the entire foreclosure proceeding invalid; rather it is deemed to be ineffective only as to those necessary parties who were not joined.

Grant S. Nelson & Dale A. Whitman, 1 REAL ESTATE FINANCE LAW 636-37 (4th ed. 2002) (emphasis added); *see also Springer Corp.*, 453 P.2d at 378 (“[T]he rights of one who is not a party to a mortgage foreclosure action are not affected by any judgment rendered therein *nor by a foreclosure sale pursuant thereto.*” (emphasis added)); *Diamond Benefits Life Ins. Co.*, 66 Cal. App. 4th at 5-6, 77 Cal.Rptr.2d at 584 (holding it “well established” that the “conveyance” does not affect the title held by the omitted party); *cf. Gerdin v. Princeton State Bank*, 384 N.W.2d 868, 872 (Minn. 1986) (“Failure to serve notice of foreclosure on the government results in the purchaser, at the foreclosure sale, taking subject to the formerly junior tax liens.”). The foreclosure sale does not eliminate interests that otherwise survived the foreclosure action.

As Crablex would have it, though it foreclosed by action, the effects of the sale are identical to the effects of a valid foreclosure by advertisement, eliminating all junior interests. (*See Transcript*, pp. 16-17.) For the reasons above, this argument falls flat. Further,

Minnesota law prohibits the use of foreclosure by advertisement once a foreclosure by action has been commenced. Minn. Stat. § 580.02(2) (2006). And even in a foreclosure by advertisement, the sale is ineffective to eliminate junior interests if the proper procedures are not followed. *See, e.g., Gerdin*, 384 N.W.2d at 872 (tax lien survived foreclosure sale where government not given requisite notice); *Morey v. City of Duluth*, 71 N.W. 694, 695 (Minn. 1897) (city's interest survived foreclosure and sale of mortgagor's interests where city not given requisite notice of sale).

In *Morey*, for example, the owner of a ten acre tract of land granted a mortgage to the plaintiff. 71 N.W. at 695. The owner later deeded to the City of Duluth a strip 60 feet wide over and across the tract to establish, open, and improve a street.¹ *Id.* The plaintiff foreclosed the mortgage under a power of sale and purchased the property at the foreclosure sale. *Id.* The city was in actual occupancy and possession of the land for street purposes at the time of the foreclosure. *Id.* The plaintiff failed to give the city the requisite statutory notice of the foreclosure sale. *Id.* The Supreme Court held that the foreclosure, although valid as to the mortgagor, “was invalid and ineffectual for any purpose” as to the city. *Id.* The respective rights of the mortgagee and the city “remained precisely as they were before” the foreclosure. *Id.*

Here, as in *Morey*, even if Crablex had foreclosed by advertisement, the sale would have been “invalid and ineffectual for any purpose” as to the City. It is undisputed that the

¹ The case does not explicitly state whether the owner deeded an easement or a fee interest to the City of Duluth. *See Morey*, 71 N.W. at 695. The most likely reading, given that the deed was for a 60 foot strip “over and across” the land to be used for street purposes, is that the

City was in possession of the street and sidewalk easements and that Crablex did not personally serve the City Clerk with notice of the foreclosure sale as required by Minnesota Statutes section 580.03 (2006). (*See* AA 515.) Crablex may note that the sheriff's sale procedures utilized for a judicial foreclosure (unlike the procedures for foreclosure by advertisement) did not require personal service of notice of the sale. This point highlights yet another reason why non-parties to a judicial foreclosure are not bound by the sale. Minnesota law requires personal service of notice of the sale upon parties in possession, and absent such personal notice, their interests are unaffected by the sale: in a judicial foreclosure, a summons must be served on the party in possession joining it in the action, Minn. Stat. § 581.01 (2006); in a foreclosure by advertisement, the notice of sale must be personally served in the manner of a summons. Minn. Stat. § 580.03. Crablex may not avoid this requirement by omitting the City from the foreclosure action and then eliminate the City's interest at sale without ever giving the City personal service of notice of the sale.

Crablex' arguments must be rejected; the foreclosure sale did not eliminate the City Easements. Rather, the foreclosure was "was invalid and ineffectual for any purpose" as to the City. *See Morey*, 71 N.W. at 695.

2. Easement holders have redemption rights and are not excluded from the omitted interest rule.

Next, Crablex argues that courts protect interests of omitted parties "only if" they have a right to redeem and that easement holders do not have redemption rights. *See* Appellant's Brief, pp. 44-45. First, Crablex failed to raise this new argument before the district court and

interest deeded was an easement. *See id.*

it is not properly before this Court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that generally a reviewing court may consider only those issues that were presented to and considered by the district court). A party may not obtain review by raising the same general issue litigated below but under a different theory.² *Id.* Second, the argument is meritless.

Easement holders most certainly do have the right to redeem to protect their interests. *See* Minn. Stat. § 581.10 (2006) (providing that “those claiming under the mortgagor” may redeem). Many ownership interests, claiming under the mortgagor, are held by persons who did not grant the mortgage, including easements, tenancies, life estates, reversions, and contracts for deed, to name a few. *See, e.g., Thielen v. Strong*, 238 N.W. 678, 679 (Minn. 1931) (“During the year allowed by statute for redemption by the owner, the life tenant and the remaindermen, or either of them, could have redeemed.”). All such ownership interest holders have a right of redemption to protect that interest:

To put it more succinctly, the law favors redemption by anyone who has an interest in the mortgaged premises who would be a loser by foreclosure. Among those who qualify, in addition to the mortgagor, are purchasers of the equity from the mortgagor, Likewise an owner of a limited interest such as a tenant for life or lessee, a remainderman or reversioner, one who has dower even though it be inchoate only, or *the holder of an easement*.

²The exception to the rule is not satisfied in this case. *See Watson v. United Services Auto Ass’n*, 566 N.W.2d 683, 688 (Minn. 1997) (“Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was “implicit in” or “closely akin to” the arguments below; and the issue is not dependent on any new or controverted facts.”) The issue is not novel in Minnesota law. Minn. Stat. §581.10 expressly provides that both the mortgagor and “those claiming under the mortgagor,” i.e., any of the mortgagor’s grantees, have redemption rights. Further, the issue was not implicit in or akin to the arguments Crablex raised below.

Nelson & Whitman, *supra*, 605-06 (internal quotations omitted) (emphasis added).

Crablex argues that only mortgagors and their creditors – to the absurd exclusion of all ownership interests held by others who did not sign the mortgage – have redemption rights. *See contra, e.g., Thielen*, 238 N.W. at 679 (holding that those other than the mortgagor (life tenant and remaindermen) had redemption rights). Crablex constructs this errant proposition by mis-citing the inapplicable statute governing creditor redemption after execution sales and by neglecting to direct the Court to the applicable authority. The statute Crablex cites, Minnesota Statutes section 550.24, does not govern redemption rights in a judicial foreclosure. Minnesota Statutes chapter 581 governs foreclosures by action. While section 581.03 borrows the sheriff’s sale procedures set forth in chapter 550, redemption rights are another matter. Section 581.10 governs redemption in the context of foreclosure by action and does not limit redemption rights to the mortgagor. Minn. Stat. § 581.10 (2006). Rather, it extends those rights to the “mortgagor, or those claiming under the mortgagor.” *Id.* As the grantee of easements from the mortgagor, the City claims its ownership interest under the mortgagor and has the right to redeem to protect that interest under the plain language of section 581.10.

Even the inapplicable execution sale redemption statute, which Crablex partially quotes, expressly provides that the judgment debtor and “the debtor’s heirs, successors, . . . or assigns” may redeem. Minn. Stat. § 550.24(b) (2006). If the statute applied at all, the City would be the successor or assign of the “debtor’s” rights to the use and possession of the City Easements and therefore would have a right to redeem. Thus, Minnesota law provides

redemption rights, regardless of the method of sale, thereby vindicating the important principle Nelson & Whitman identified, that is, “the law favors redemption by anyone who has an interest in the mortgaged premises who would be a loser by foreclosure.”

Neither authority Crablex cites, Nelson & Whitman and *Northwestern Trust Co.*, contradicts the foregoing analysis or otherwise supports the baseless argument that the omitted interest rule does not apply to easements. First, Crablex excerpts a portion of the Nelson & Whitman treatise that happens to be discussing a junior lienor’s redemption rights; it by no means suggests that the omitted interest rule does not apply to easement holders. See Appellant’s Brief, pp. 44-45. To the contrary, the very treatise explains that if a foreclosing mortgagee fails to join a person holding *any* subordinate interest, “the subordinate interest, regardless of whether it be *legal or equitable and one of ownership or lien*, is not subject to the decree.” Nelson & Whitman, *supra*, 641 (emphasis added)³; see also *Monese*, 62 P.2d at 826 (holding that the omitted subordinate *easement* was not affected by the judicial foreclosure of a prior mortgage); *Combs v. Stewart*, 150 B.Mon. 463 (Ky. Ct. App. 1850) (purchaser at foreclosure sale with knowledge of *easements* takes title subject to the easements held by non-parties to foreclosure action).

Nor can *Northwestern Trust Co.* be read to exclude easement holders from the omitted interest rule. See 132 N.W. at 203. The only right at issue in the case happened to be redemption rights – the omitted party was a spouse with the inchoate spousal interest. *Id.*

³ The exception for a bona fide purchaser who buys at the sale without notice of the interest (noted in the Nelson & Whitman passage cited) does not apply. The City Easements were of record on the Certificate of Title.

The case does not in any respect address easements or any other property interests. *See id.*

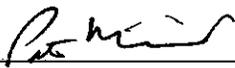
In sum, the omitted interest is “neither terminated nor otherwise prejudiced by” the judicial foreclosure. Restatement (Third) of Property (Mortgages) § 7.1, Comment b. The City was omitted from the judicial foreclosure and therefore its rights to the possession and use of the City Easements were not terminated or otherwise prejudiced. To borrow the language of *Morey*, the interests “remain precisely as they were” before the foreclosure. 71 N.W. at 695. The City Easements remain as a matter of law.

CONCLUSION

Respondent City of Minneapolis respectfully requests that this Court affirm the district court's grant of summary judgment in the City's favor.

Respectfully submitted this 20th day of May, 2008.

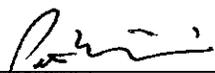
KENNEDY & GRAVEN, CHARTERED

By:  _____
John M. LeFevre, #61852
Peter G. Mikhail, #249097
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402
(612) 337-9300
*Attorneys for Respondent
City of Minneapolis*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. Pro. 132.01, subds. 1 and 3, and contains 3,422 words and was prepared using *Microsoft Word* Version 5.1.

Dated this 20th day of May, 2008



John M. LeFevre, #61852
Peter G. Mikhail, #249907
KENNEDY & GRAVEN, CHARTERED
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402
(612) 337-9300
*Attorneys for Respondent
City of Minneapolis*