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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1417**

Wells Fargo Bank, N.A.,
Respondent,

vs.

Tony Badrawi,
Defendant,

Mary J. Badrawi,
Appellant.

**Filed May 5, 2014
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CV-HC-12-494

Rebecca F. Schiller, Schiller & Adam, P.A., St. Paul, Minnesota (for respondent)

Jonathan L. R. Drewes, Drewes Law, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and
Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant previously appealed a judgment in favor of respondent, evicting her from a home on which the mortgage was foreclosed after her default. To obtain a stay of the issuance of a writ of recovery of the premises pending her appeal, appellant posted an appeal bond with the district court. Appellant now challenges the district court's postappeal order releasing that appeal bond to respondent. We affirm.

FACTS

After Tony Badrawi and appellant Mary J. Badrawi defaulted on their mortgage, respondent Wells Fargo Bank, N.A. foreclosed the mortgage on the property, purchased the property at a sheriff's sale, and sought to evict appellant from the property.¹ The district court denied appellant's motion to stay the eviction proceeding pending resolution of related litigation, and granted summary judgment to respondent in the eviction action.

Appellant appealed the eviction judgment to this court, *Wells Fargo Bank N.A. v. Badrawi*, No. A12-0567, 2012 WL 5990292 (Minn. App. Dec. 3, 2012), *review denied* (Minn. Feb. 19, 2013), and sought to stay issuance of the writ of recovery of the premises pending that appeal. At the hearing on appellant's motion for a stay, and on the record, the parties engaged in a discussion during which appellant stated that she "would be

¹ Respondent filed its eviction action against both Mary and Tony Badrawi. But Tony Badrawi was dismissed from the case at the first hearing because he was no longer living in the subject property.

willing to” post an appeal bond of \$2,000 per month to obtain a stay.² See Minn. Stat. § 504B.371, subd. 3 (2012) (allowing stays pending appeal in eviction cases if the appealing party posts the “[a]ppeal bond” described in that statute). The district court conditioned a stay of the issuance of a writ of recovery on appellant posting \$2,000 per month with the court, noting that “[t]he \$2000 per month figure is appropriate in all respects.” Appellant made 11 monthly installments to the court during the pendency of her appeal, for a total of \$22,000.

We affirmed the district court’s grant of summary judgment to respondent in the eviction proceeding. *Badrawi*, 2012 WL 5990292, at *3. After the supreme court denied appellant’s petition for further review, the district court issued a writ of recovery of the premises and ordered appellant to vacate the property. Appellant vacated the property, and the district court ordered that the \$22,000 deposited by appellant be released to respondent unless appellant filed a motion to dispute the release. Appellant moved the district court for return of the \$22,000 to her.

Following a hearing, the district court ordered release of the \$22,000 appeal bond to respondent. It determined that the housing court referee had previously “made a clear finding of fact that \$22,000.00 currently on deposit with the [c]ourt is, actually, the

² Respondent originally requested that the appeal bond be set at a lump sum, and appellant originally requested no bond or a bond of \$1,500 per month. Respondent then requested an appeal bond of \$2,469.21 per month. In discussions on the record concerning a proper bond amount, respondent stated that appellant’s mortgage payments had decreased from \$2,041.72 to \$1,957.00 per month due to appellant’s adjustable mortgage rate. And respondent stated that it was paying \$250.00 per month in taxes and \$219.21 per month in insurance. In reaching the \$2,469.21-per-month figure, respondent appears to have assumed a monthly mortgage payment of \$2,000 ($\$2,000 + \$250 + \$219.21 = \$2,469.21$).

amount that ‘will preserve the value of the judgment or order to [respondent] during the pendency of appeal.’” And the district court stated that there was “nothing in the record” that convinced it to “upset” the previous referee’s finding “that the value of the judgment to respondent . . . was the full \$22,000.00[.]” This appeal followed.

D E C I S I O N

Appellant argues that, in releasing the appeal bond, the district court improperly deferred to the earlier estimate of anticipated damages made by the district court before the prior appeal when it set the appeal bond under Minn. Stat. § 504B.371, subd. 3, rather than determining the actual amount of damages respondent incurred as a result of the appeal. In essence, appellant challenges what she asserts to be the district court’s adoption of the preappeal estimate that respondent’s damages would equal \$2,000 per month during the prior appeal. Even though appellant suggested the \$2,000-per-month amount and respondent apparently agreed to it, we will, for purposes of this appeal, assume that appellant can challenge the \$2,000 figure. *See* Minn. R. Civ. App. P. 103.04 (allowing an appellate court to address questions in the interest of justice).

Unless “otherwise provided by rule or statute,” a party seeking a stay pending appeal must follow rule 108.02. Minn. R. Civ. App. P. 108.02, subd. 2. The eviction statute provides otherwise. *See* Minn. Stat. § 504B.371 (2012) (addressing appeals and stays pending appeal in eviction proceedings). A party seeking a stay pending appeal in an eviction proceeding must give an appeal bond “that provides that: (1) all costs of the appeal will be paid; (2) the party will comply with the court’s order; and (3) all rent and

other damages due to the party excluded from possession during the pendency of the appeal will be paid.” *Id.*, subd. 3.

Neither the Minnesota Rules of Civil Appellate Procedure nor the eviction statute discusses the mechanics of enforcing a bond after an unsuccessful appeal. *O’Leary v. Carefree Living of Am. (Minnetonka), Inc.*, 655 N.W.2d 639, 642 (Minn. App. 2003); see Minn. Stat. § 504B.371. But caselaw explains that respondents to an appeal for which a supersedeas bond was posted can recover their actual damages when those damages exceed the amount of the supersedeas bond. *See, e.g., O’Leary*, 655 N.W.2d at 643 (“[A] court that approves a supersedeas bond to stay enforcement of a judgment during an appeal has the inherent power to later assess actual damages incurred as a result of the stay and may assess those damages on the motion of a party.”). In this appeal, the parties draw no distinction between a supersedeas bond under rule 108 and an appeal bond under section 504B.371. They assume that the procedures for a supersedeas bond are applicable to appeal bonds in eviction actions. For purposes of this appeal, we will make a similar assumption.

In a proceeding to enforce a supersedeas bond, the determination of the amount of actual damages incurred as a result of a prior appeal is a factual determination reviewed for clear error. *See Cnty. of Blue Earth v. Wingen*, 684 N.W.2d 919, 923 (Minn. App. 2004). Appellant argues that respondent could not have suffered \$22,000 in damages during the pendency of her prior appeal because she maintained the property during her occupancy and because she had recorded a notice of lis pendens, which prevented respondent from selling the property regardless of the appeal. Appellant also suggests

that respondent would have made tax and insurance payments regardless of her occupancy of the property during her prior appeal.

Appellant argues that, under *Eide v. Bierbaum*, 472 N.W.2d 193 (Minn. App. 1991), respondent should have been required to prove its actual damages during the pendency of her prior appeal because an appeal bond amount is merely prospective. In *Eide*, we explained that the amount of an injunction bond “represents a prospective view of damages and not a determination of actual damages.” 472 N.W.2d at 194. But *Eide* does not address release of a bond posted to secure an injunction; it only addresses amounts that can be properly included in the bond posted to secure an injunction. *Id.* at 194-95.

In *Wingen*, a party who prevailed in an appeal from orders in a condemnation proceeding sought damages exceeding the supersedeas bond posted by the appellants to stay the proceedings during the appeal. 684 N.W.2d at 921. We allowed the district court to award damages in excess of the amount of the supersedeas bond posted under rule 108, noting that “[t]he bond is a prospective assessment of the anticipated amount of damages caused by the stay, not an actual determination of these damages.” *Id.* at 922-23. In a postappeal attempt to establish the damages suffered as a consequence of the appeal, “[t]he harmed party has the burden to demonstrate such damages with a reasonable degree of certainty and exactness.” *Id.* at 924 (quotation omitted). Unlike in *Wingen*, where the respondent argued that the amount of the bond underestimated its actual damages, appellant here argues that the bond amount, which was set at an amount that she proposed, overestimated respondent’s damages. Because respondent is not

challenging the amount of the bond, nothing in *Wingen* requires respondent to prove its damages under the circumstances presented here. *See id.* And appellant cites no other authority requiring the party not challenging the amount of security to prove its actual damages.

Moreover, the record does not support appellant's argument that "[t]here has been no calculation of [respondent's] damages." At the May 2012 hearing addressing the setting of the appeal bond for the prior appeal, respondent provided evidence of the monthly payments appellant had been making on the mortgage and the taxes and insurance that respondent was paying on the property, which totaled more than \$2,400 per month. The district court, however, set the appeal bond at the \$2,000-per-month amount agreed upon by the parties. Following appellant's unsuccessful eviction appeal, the district court reviewed the record (including an audio recording of the 2012 hearing), the parties' arguments at the June 2013 hearing regarding release of the appeal bond, and the parties' briefs before ordering the release of the appeal bond to respondent. The district court concluded that "there may be circumstances where revisiting the bond amount before disbursal would be appropriate," but there was "nothing in the record" that convinced it to "upset" the prior finding. Thus, in ordering the release of the bond funds to respondent, the district court did not simply defer to the earlier order setting the bond amount; it concluded that the record supported a finding that respondent actually suffered (at least) \$2,000 per month in damages. And, as discussed, the parties agreed to the monthly bond amount to permit appellant to stay in possession during the appeal.

The parties' agreed-upon monthly bond payments were nearly identical to the payments appellant had been making on her mortgage and amounted to a prospective determination of respondent's damages should it prevail on appeal. *See* Minn. Stat. § 504B.371, subd. 3(3) (noting that the appeal bond must cover "other damages due to the party excluded from possession during the pendency of the appeal"). Appellant's mortgage payments had decreased from \$2,041.72 to \$1,957.00 per month (as the mortgage was of the adjustable-rate variety) and she proposed and agreed to pay \$2,000 per month as a condition of the stay. Respondent was also paying \$250.00 per month in taxes and \$219.21 per month in insurance but agreed to a monthly security payment that did not encompass those additional amounts. And we note that appellant's failure to pay any interest on her mortgage, in addition to her failure to make mortgage payments, could be classified as waste. *See O'Leary*, 655 N.W.2d at 645. Given the evidence introduced by respondent in 2012 and the record generated in the June 2013 proceeding addressing release of the appeal bond, we cannot agree with appellant that the \$2,000-per-month amount was "speculative." On this record, the district court's determination that respondent sustained \$2,000 per month in damages during appellant's earlier unsuccessful appeal is "supported by reasonable evidence." *See Wingen*, 684 N.W.2d at 923.

Affirmed.