STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2217

Alan Blat, et al.,
Respondents,

vs.

Machiko Takita, et al.,
Appellants,

Daniel Gruenberg, et al.,
Defendants.

Filed July 5, 2011
Affirmed in part, reversed in part, and remanded
Minge, Judge

Hennepin County District Court
File No. 27-CV-07-26710

Madge S. Thorsen, Law Offices of Madge S. Thorsen, Minneapolis, Minnesota (for respondents)

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Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the district court's decision in this property dispute arising out of a cotenancy relationship. Because (1) the record supports the district court's

determination that the junior mortgage that appellant used to redeem the property after a foreclosure sale was a sham; (2) equitable principles support reinstatement of the cotenancy; (3) appellant waived any objection to lack of proper service; and (4) the district court did not abuse its discretion in admitting unanswered requests for admissions into evidence and excluding the testimony, we affirm. But because the district court erred in calculating the amount owed by respondents, we reverse in part and remand for a determination of the amount due.

FACTS

The history of this controversy has the makings of a real-estate-finance mystery novel. Respondents Alan and Jean Blat owned an undivided one-half interest in commercial property in St. Louis Park as cotenants with the Rosemary Gruenberg Trust (Trust). Defendant Daniel Gruenberg (Gruenberg) is the nephew of Rosemary Gruenberg and a beneficiary of the Trust. Appellant Machiko Takita,[1] a resident of Japan, is a friend of Gruenberg and claims to own the St. Louis Park property as a result of holding a junior mortgagee's interest in the property and redeeming from a mortgage foreclosure orchestrated by the Blats. Commercial Mortgage Fund, LLC (CMF) and MinnWest Bank Metro-Eagan (MinnWest) claim mortgage interests in the property incident to financing Takita's redemption from the foreclosure. Kenneth Sorteberg is an officer of CMF, who assisted Takita in her dealings with the property and joined with her in loaning money to Gruenberg.

[1] The notice of appeal and briefs list Takita, CMF, Sorteberg, and MinnWest as all being appellants. However, because there is no indication that CMF, Sorteberg, or MinnWest are participating in the appeal, we refer to Takita as the appellant in our opinion.

On December 14, 1995, the Blats and the Trust granted a mortgage on the property to Security Bank and Trust Company (Security Bank) to secure a note maturing December 15, 2000. Alan Blat is the sole shareholder, officer and director of IDI Financial Corporation (IDI). On July 13, 1998, IDI purchased from Security Bank a 50% participation in the note and mortgage on the disputed property. As a result, the Blats not only had a 50% ownership interest in the property but had the beneficial interest in 50% of the Security Bank loan as well as a 50% interest in any property Security Bank received as a result of a foreclosure of that bank mortgage. But the Blats did not disclose their IDI interest to the Gruenberg Trust. The maturity date of the Security Bank loan was extended to December 2005 by mutual agreement.

On June 17, 2003, the Trust deeded its interest in the property to Gruenberg, but the deed was not recorded until October 8, 2007. Alan Blat and Gruenberg have a strained relationship arising out of previous business dealings and have rarely spoken since 1991. As a result, all communication over the years regarding the property had been through the former manager of the property.

In February 2006, unbeknownst to Gruenberg or the Trust, Security Bank agreed to sell its remaining one-half interest in the loan to IDI. Also in February, Security Bank sent letters to the Blats and Gruenberg informing them that the entire remaining amount of its note had come due in full in December 2005 and had not been paid. In March 2006, Security Bank sent a notice of default to the Blats, the Trust, and Gruenberg. The notice of default did not indicate the existence of the Blats' or IDI's interest in the loan.

In April 2006, IDI closed on the purchase of the remaining one-half interest in the Security Bank loan and obtained an assignment of the Security Bank mortgage.

In May 2006, attorneys for IDI advised the Trust and Gruenberg that IDI had purchased the loan and mortgage from Security Bank, that the loan was in default, and that unless Gruenberg or the Trust paid IDI the full remaining balance on the Security Bank loan without any contribution from the Blats, IDI reserved its rights to pursue legal remedies, including foreclosure. In late August 2006, IDI commenced foreclosure proceedings. A foreclosure sale was held on October 6, 2006, and IDI was the highest bidder, bidding the balance owing on what had been the Security Bank loan. The sheriff issued IDI a certificate of sale dated October 6, 2006. The redemption period was 12 months, the last business day of which was October 8, 2007.

The record suggests that for several years prior to the foreclosure, Gruenberg had been living in Japan and Thailand. Just prior to the foreclosure sale, Gruenberg asked his long-time friend, Machiko Takita, for a $5,000 loan for real estate in Minneapolis and offered Takita "some form of security" in return. Takita understood she would get "the right for the mortgage" and that Daniel Gruenberg would pay her back.

On October 8, 2007, the last day for redemption, the 2003 deed that transferred the Trust's interest in the property to Gruenberg was recorded. That same day, the record indicates that Kenneth Sorteberg, the chief operating officer of CMF, recorded a mortgage securing a $5,000 loan and another mortgage securing a $100 loan. Both mortgages named Takita and Sorteberg as the mortgagees. At the same time, Takita recorded notices of intent to redeem from the foreclosure. On October 22, 2007, Takita

borrowed necessary funds from CMF, paid the Hennepin County sheriff $226,874.84 to redeem from the IDI sale, and received a certificate of redemption from the sheriff. Takita's redemption paid off the foreclosed Security Bank mortgage held by IDI. As a result of the redemption, Takita owned the St. Louis Park commercial property subject to the CMF mortgage, which CMF sold to MinnWest. The record indicates the property was valued at $1.2 million.

The litigation now on appeal was commenced by Blats, requesting that they be restored to their 50% position on the property. Takita claims that she is the fee owner of the property and that the interests previously held by Gruenberg and the Blats have been extinguished. The Blats argued at trial that Takita, Gruenberg, CMF, and Sorteberg collectively agreed to set up Takita as a sham junior creditor to redeem on behalf of Daniel Gruenberg, thereby allowing Gruenberg to evade the law of cotenant redemption that would have left the Blats' one-half interest intact.

After trial, in an order filed on July 9, 2010, the district court concluded that it was "not convinced that the Blats were merely engaged in some everyday real estate transactions relative to the Property when [IDI] first purchased" the Security Bank loan. The district court concluded that the Blats "saw their opportunity in 2006 to wrest the entire [p]roperty for themselves" and observed that the Blats' subsequent malpractice claim against their attorney when they lost their interest in the property was further evidence that the Blats acted with "unclean hands."

But the district court further concluded that Gruenberg had devised a "side agreement" to which Takita, at a minimum, had acted as the unwitting accomplice,

stating that it was "simply incredible that Gruenberg would mortgage his interest in this valuable [p]roperty for $5,000 without further consideration or anticipated benefit" and let Takita redeem for her own account. Sorteberg admitted that Gruenberg could have redeemed and that it is "generally correct" that CMF would have loaned funds to Gruenberg as easily as it did to Takita. The district court stated that "the only reasonable conclusion one can reach is that Gruenberg obtained the $5,000 loan from Takita, then put the [p]roperty up for security so [Takita could redeem and] he could avoid an obligation to his Blat co-tenants."

In its July 9 order, the district court found that the Trust and Gruenberg as defendants were in default because they never filed responsive pleadings to the summons and complaint that were served upon them or otherwise responded to the action. The district court concluded that the Trust and Gruenberg admitted the allegations in the initial complaint, which included: (1) "[t]hat the $5,000 [and other smaller] mortgages of Takita and Sorteberg were purely nominal and did not represent security for legitimate debt"; (2) that Gruenberg had "deliberately avoided a personal redemption and, instead, used others, with whom he was in cooperation, to enable him to wipe out the Blats' one-half interest while retaining an equity interest for himself"; and (3) that the $5,000 loan from and mortgage to Takita was a sham intended to strip the Blats of their equity in the property.

But the district court also concluded that the Blats did not show by a preponderance of the evidence that Takita was a party to the Gruenberg sham or had knowledge of Gruenberg's true motives. Accordingly, the district court ordered the entry

of judgment in favor of Takita, awarding her 100% of the property, and explained that the Blats had made no attempt to redeem and protect their interest in the property but instead chose to rely on the mortgage foreclosure sale to preserve their interest, and that they cannot now be protected from their failure to act. Finally, the July 9 order concluded that there was no basis on which to strip Takita of her interest in the property because Takita's actions were legal and of public record. Pursuant to this July 9 order, judgment was entered.

The Blats moved to amend the conclusions of law but did not contest the findings of fact. On October 11, 2010, the district court amended the original order, finding that Takita and the Blats are cotenants. The district court also determined that the Blats did not have to pay any interest on the loan Takita had incurred with CMF to finance redemption of the property. As a result, determinative parts of the initial July judgment were vacated and a second judgment was entered on October 13, 2010. Appellants challenge the October judgment.[2]

[2] The record indicates that the July and October judgments were based on orders made by two different district court judges. Upon proper motion by a party, the district court has discretion to provide relief from its own judgment. *See Stroh v. Stroh*, 383 N.W.2d 402, 407 (Minn. App. 1986) (stating that "the purpose of a motion to amend conclusions is to permit the [district] court a review of its own exercise of discretion"). We treat the district court as a single entity, and whether the same or a different judge reviews the initial order is immaterial to that discretion. Takita now appeals from the amended judgment and does not assert that the district court lacked authority to amend its decision.

D E C I S I O N

I. COTENANCY

The first issue is whether the district court improperly concluded that the Blats have a cotenancy interest in the property. Takita argues that the district court erred in amending its original judgment to restore the Blats' cotenancy interest in the property. Because the facts of this case are essentially undisputed, we are dealing with legal issues. We review questions of law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). However, we note that the administration of equitable relief calls for the exercise of judicial discretion. *See Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979) (stating that "[g]ranting equitable relief is within the sound discretion of the [district] court"). We review the administering of equitable relief for abuse of discretion. *Id.*

Cotenancy is a relationship "confidential in its nature, raising an obligation on the party of each cotenant to sustain, or at any rate not to assail, the common interest." *Oliver v. Hedderly*, 32 Minn. 455, 456, 21 N.W. 478, 478 (1884). If a cotenant pays a mortgage, or redeems property from foreclosure, the law directs that the cotenant redeems on behalf of the other cotenant(s), who may then have "the benefit of the payment or redemption, upon making contribution according to their interest to the cost." *Id*. at 457, 21 N.W. at 479. A cotenant cannot avoid his obligations by redeeming "directly or indirectly through the medium of a sham creditor, without having the redemption considered one by owners rather than a creditor." *Hall v. Hall*, 173 Minn. 128, 131, 216 N.W. 798, 799 (1927).

We conclude that the October 13 judgment did not err in determining that Gruenberg created an "improper side agreement" with Takita to avoid his cotenancy obligation to the Blats. The district court found that this tactic was a redemption through a sham creditor and that the law protected the Blats against such a tactic. The record indicates that Gruenberg mortgaged his interest to Takita for the nominal sum of $5,000 and then arranged for her to redeem the property as a junior creditor, with the intended effect of extinguishing the Blats' interest in the property. Takita argues that there is no improper side agreement because, as found in the July 9 order, Takita was an "unwilling accomplice." But even if a creditor is an "innocent" third party, relief may be available as long as that creditor is participating in a sham scheme with a devious cotenant and an improper result is obtained. *See Hall*, 173 Minn. at 130-32, 216 N.W.2d at 798-99 (concluding that the redemption scheme among remaindermen was improper because it eliminated interest of life tenant, not because of the state of mind of the redemptioner who was given the sham note and mortgage in order to redeem the property). Here, had Gruenberg redeemed the property directly, he would have also redeemed on behalf of the Blats as his cotenants. Gruenberg avoided this by redeeming through Takita instead.

Takita relies on *First Nat'l Bank of Glencoe/Minnetonka v. Pletsch*, 543 N.W.2d 706 (Minn. App. 1996), *review denied* (Minn. Apr. 16, 1996), to support her argument that she is the lawful owner of the property. In *Pletsch*, after a bank foreclosed two mortgages that it held on a home, the homeowners located a benefactor to lend them $100 in exchange for a mortgage so the homeowners could extinguish the bank's second mortgage with the intervening, unredeemed lien. 543 N.W.2d at 707-08. On appeal, this

court rejected the bank's suggestion that the Pletschs acted fraudulently, stating that the Pletschs' transaction "was not a 'sham' but a lawful means for satisfying the mortgage demands on the pertinent property while extending the Pletschs' opportunity for successful redemption." *Id*. at 710. A significant distinction between Takita's situation and *Pletsch* is the nature of the relationships in play. The relationship in *Pletsch* was between a mortgagee and mortgagor and does not involve the same duties that exist in the relationship between cotenants. *See id.* at 707.

Takita further argues that the Blats "neglected their rights in failing to redeem the [p]roperty in accordance with Minnesota [f]oreclosure statutes," and they "cannot now resurrect a claim to a share of the [p]roperty simply due to their previous status as a co-tenant." We disagree. Cotenants are entitled to share in the benefit of a purchase, "unless they in some way renounce, or unreasonably neglect to assert, their right in that behalf." *Oliver*, 32 Minn. at 456-57, 21 N.W. at 479. Here, the district court viewed the conduct of both Gruenberg (and by implication Takita) and the Blats as exploitative: All acted with "unclean hands." Takita, as Gruenberg's accomplice, ended up with property with an equity value of more than $1.2 million ($1.5 million, less $226,874.44 redemption cost) for the investment of the nominal sum of $5,000, and the Blats were stripped of all ownership and equity. Earlier, the Blats tried to engineer a strategy to freeze out Gruenberg as a cotenant. The effort backfired. They all violated their cotenancy obligation "to sustain, or at any rate not to assail, the common interest." *See id*. at 456, 21 N.W. at 478.

As a reviewing court, it is not our role to determine whether the October 11 order and resulting amended judgment produced the most equitable result. We only review the grant of equitable relief for abuse of discretion. To this end, we conclude that the district court did not err or abuse its discretion by restoring the Blats' cotenancy interest in the property. The Blats and Takita are now cotenants in the property, based on Gruenberg's choice to convey his interest to Takita for $5,000.

II. SERVICE ON GRUENBERG

The next issue is whether Gruenberg was properly served and, if not, the impact of lack of proper service on the district court's October 13, 2010 judgment. Takita contends that the Blats did not properly obtain service of the complaint on Gruenberg. "Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

The defense of personal jurisdiction is deemed waived if not raised as a defense, made by motion, or included in a responsive pleading. Minn. R. Civ. P. 12.08(a). Gruenberg was named as a defendant in the lawsuit. He appeared but neither brought a rule 12 motion nor responded to the complaint with an answer. Gruenberg could have preserved the issue by pleading lack of jurisdiction in an answer or by motion. He failed to do so. Gruenberg waived any defects in service.

III. ADMITTED ALLEGATIONS

The third issue is whether the district court abused its discretion in finding certain allegations and assertions admitted. Takita argues that, even if Gruenberg was in default

because he never filed a responsive pleading or otherwise responded to the complaint, the allegations in the complaint regarding Gruenberg cannot be deemed admitted to the detriment of the other parties in this case. Takita also argues that the requests for admissions that were made of Gruenberg as a part of pretrial discovery and which were never answered by him were improperly considered by the district court. Takita argues that she and the other defendants had the right to have Gruenberg testify about the mortgage transaction.

Takita relies on Minn. R. Civ. P. 55.01(c), which states that "[i]f relief other than the recovery of money is demanded and the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, it may take or hear the same or order a reference for that purpose, and order judgment accordingly."

But Takita did not bring a motion for a new trial, so procedural matters such as those she raises now, particularly evidentiary matters, are not reviewable. *See Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) (stating that matters such as trial procedure and evidentiary rulings must be assigned as error in a motion for a new trial in order for an appellate court to consider them). The allegations Takita is challenging were part of the original July 9, 2010 findings of the district court and were reaffirmed in its final October 13, 2010 judgment. Takita did not move for amended findings or for a new trial, and she did not object to the admission of the requests for admissions into evidence or the exclusion of Gruenberg's testimony at trial.

Even if we were to consider Takita's argument regarding this procedural matter, her argument is without merit. If a party does not respond within 30 days to matters of

which an admission is requested, the matters are admitted. Minn. R. Civ. P. 36.01. Furthermore, the language in rule 55.01(c) is entirely discretionary: the district court "*may* take or hear" an account or proof of fact necessary to give judgment. Minn. R. Civ. P. 55.01(c) (emphasis added). Gruenberg never responded to the requests for admission or appeared at trial, and he therefore defaulted. On this record, we conclude that the district court did not abuse its discretion by not reopening the judgment to allow Gruenberg to testify, by admitting the requests for admission into evidence, and by accepting the allegations in the complaint.

IV. SHARED EXPENSES

The last issue is whether the district court erred in limiting the Blats' liability for interest-on-redemption expenses. Takita contends that if this court finds that a cotenancy does in fact exist here, the Blats should pay her interest on all of the money that she borrowed to redeem on October 22, 2007.

A cotenant's right to redemption is fulfilled by paying the portion of the redemption money attributable to the later-redeeming cotenant's interest in the property. *Buettel v. Harmount*, 46 Minn. 481, 482-83, 49 N.W. 250, 251 (1891). A cotenant who pays interest on a debt secured by a mortgage on the common property is entitled to contribution from her cotenant to the extent to which she paid the other cotenant's share of the indebtedness. *Kirsch v. Scandia Am. Bank*, 160 Minn. 269, 274, 199 N.W. 881, 882 (1924).

Takita borrowed money from CMF at an annual percentage rate of 14.50% to finance the redemption. Takita redeemed the entire property. Under the district court's

October 13, 2010 final judgment, this redemption benefited both cotenants equally. Thus, the CMF mortgage (now held by MinnWest as security for the loan) encumbers the entire property. There is no evidence that the interest rate is wrongful or that the CMF loan was improper. Absent any such evidence in the record, we conclude that the Blats, as cotenants, are responsible for paying their one-half share of the redemption price and of the costs of financing that redemption, including one-half of all interest on the CMF/MinnWest loan. We reverse in part and remand for calculation of the proper amount.

Affirmed in part, reversed in part, and remanded.