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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1989**

Boldon Recycling & Converting, Inc.,
Respondent,

vs.

Hiawatha Partners, LLC,
Appellant.

**Filed July 23, 2012
Affirmed in part and reversed in part
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-10-17096

Richard M. Carlson, Morris Law Group, P.A., Edina, Minnesota (for respondent)

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(for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this appeal from summary judgment, appellant argues that the district court erred in concluding that its redemption of property following a foreclosure by advertisement was invalid. Alternatively, appellant argues that the district court erred in

awarding respondent monetary damages because respondent failed to prove that it suffered legally recoverable damages as a result of appellant's redemption. By notice of related appeal, respondent argues that the district court abused its discretion in denying respondent's request for specific performance. We limit our review to the issue of remedy, without considering the district court's determination regarding the validity of appellant's redemption. Because the district court did not abuse its discretion in denying respondent's request for specific performance, we affirm in part. But because respondent failed to prove damages under the theory that it asserted in district court and because the district court's alternative damage theories find no support in law, we reverse the district court's award of damages.

FACTS

This dispute stems from competing claims to a property commonly known as 4135 Hiawatha Avenue South, Minneapolis (the Hiawatha property). Appellant Hiawatha Partners LLC and respondent Boldon Recycling & Converting Inc. each claimed liens on the property and attempted to redeem the property in foreclosure proceedings initiated by the most senior creditor, Park Midway Bank. The circumstances and events that led to the parties' competing claims to the Hiawatha property are as follows.

Jeffrey Boldon is a manager and owner of respondent Boldon Recycling. Jeffrey Boldon and his former wife Carla Boldon previously owned property legally described as Lot 19, Turtle Lake Shores, Ramsey County, Minnesota (the Turtle Lake property). In October 2004, the Boldons granted a mortgage on the property to Park Midway. In October 2008, after the Boldons had defaulted on the terms of the mortgage, Park

Midway sued the Boldons in Ramsey County District Court and, on May 26, 2009, obtained an order for both foreclosure of its mortgage and for judgments against Jeffrey Boldon in the amounts of \$332,018.63 and \$4,068.36. For reasons not clear on this record, despite the district court's directive in the May 26, 2009 order for judgment that judgment be entered immediately, judgment was not actually entered until July 8, 2009.

Park Midway did not foreclose on the Turtle Lake property. Instead, it exercised its statutory right of redemption on June 23, 2009, after a senior creditor, Wachovia Bank, FSB, foreclosed its mortgage on the property. Park Midway's redemption was based on its status as a mortgagee. Park Midway paid \$627,907.48 to redeem the Turtle Lake property from Wachovia, and no junior creditor redeemed from Park Midway. The amount due on the Boldon's mortgage to Park Midway on the day of redemption was \$348,750.86. In December 2009, Park Midway sold the Turtle Lake property for \$472,500.

Jeffrey Boldon also owned an undivided one-half interest in the Hiawatha property that is the object of this dispute. When Boldon purchased his interest in the Hiawatha property in October 2002, the property was subject to a mortgage held by Park Midway. In July 2009, Park Midway foreclosed its mortgage on the Hiawatha property and was the highest bidder at the sheriff's sale. No party with a mortgagor's interest redeemed the property from Park Midway. Also in July 2009, final judgment was entered in Park Midway's lawsuit against the Boldons involving the Turtle Lake property (the Turtle Lake judgment). The Turtle Lake judgment was docketed in Hennepin County District Court in August 2009. In January 2010, Park Midway assigned the Turtle Lake judgment

to appellant. On July 6, appellant filed notice of intent to redeem in the Park Midway foreclosure proceeding on the Hiawatha property, based on its assignment of the Turtle Lake judgment from Park Midway.

On July 8, the Helen C. Boldon Living Trust, of which Jeffrey Boldon was the sole beneficiary and trustee, granted a mortgage on the Hiawatha property to respondent.¹ Respondent filed notice of intent to redeem in the Park Midway foreclosure proceeding on the Hiawatha property. Respondent also initiated a lawsuit against appellant, seeking an order barring appellant from taking any further action to effectuate redemption in the Hiawatha property foreclosure.

On July 22, the district court denied respondent's motion for a temporary order that would restrain appellant from taking any further action to effectuate its redemption in the foreclosure on the Hiawatha property. The district court ordered that appellant's redemption period in the foreclosure proceeding on the Hiawatha property would run from July 23 to July 30, and that respondent's redemption period would run from July 30 to August 5. Appellant redeemed pursuant to the district court's order. The total amount

¹ In the underlying district court action, the parties disputed whether Jeffrey Boldon's interest in the Hiawatha property was owned by Jeffrey Boldon or the Helen C. Boldon Living Trust when the Turtle Lake judgment was docketed against the Hiawatha property. The district court concluded that Jeffrey Boldon was the lawful owner, and not the trust. This conclusion is not challenged on appeal. During oral argument, this court raised the following question: "How does the trust grant a mortgage on the property if it does not own it?" Counsel for appellant responded, "Unfortunately, I am not prepared to tell you the answer . . . because at this point, despite all of the other issues in the case, that issue hasn't reared its head again."

of appellant's redemption was \$345,015.41.² Respondent did not exercise its right to redeem. Instead, respondent amended its complaint to request judgment declaring that appellant's redemption in the foreclosure proceeding on the Hiawatha property was improper and void, and damages against appellant in an amount to be determined at trial.

The parties' competing claims to the Hiawatha property came before the district court on cross-motions for summary judgment. The district court concluded that appellant's redemption in the foreclosure proceeding on the Hiawatha property was "improper and void, because it was not supported by a judgment lien." In reaching this conclusion, the district court apparently reasoned that in the absence of a deficiency judgment, appellant could not rely on the Turtle Lake judgment as a basis for redemption in the Hiawatha property foreclosure because the Turtle Lake judgment had been satisfied as a result of Park Midway's post-redemption sale of the Turtle Lake property for more than the amount of the Turtle Lake judgment. The district court immediately entered final summary judgment for respondent.

Because the district court's order granting respondent's motion for summary judgment did not address or decide the question of remedy, respondent moved for supplemental findings and relief from judgment. Specifically, respondent requested supplemental findings permitting it to redeem the property or an evidentiary hearing or trial on the issue of damages. Appellant opposed the motion, arguing that respondent had

² By the time of its redemption, appellant had purchased the sheriff's certificate of sale for the Hiawatha property from Park Midway, so it actually redeemed from itself. Because the issue is not before this court, we express no opinion on this sequence of events.

the opportunity to present these issues in the summary-judgment proceeding but failed to do so. The district court ruled that respondent would not be allowed to redeem the Hiawatha property. But the district court determined that respondent had “inadvertently failed to raise the question of damages” and that it would be “unjust for the Court to rule in [respondent’s] favor and potentially to leave [respondent] with no remedy through inadvertence.” After concluding that respondent should have an opportunity to prove that it had recoverable damages, the district court granted respondent’s motion for relief from final judgment, vacated the judgment, and ordered a hearing on the issue of damages.³ After the ensuing damages hearing, the district court ordered that respondent was entitled to judgment against appellant in the amount of \$345,015.41, plus statutory costs and disbursements, and entered judgment on its order. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred in concluding that its redemption in the Hiawatha property foreclosure was improper and asks this court to reverse the district court’s award of summary judgment to respondent and to remand for entry of summary judgment for appellant. Alternatively, appellant requests that this court reverse the district court’s award of damages to respondent, arguing that respondent failed to establish that it suffered any legally recoverable damages. By notice of related appeal, respondent argues that it is entitled to specific performance granting it title to the

³ At the damages hearing, respondent once again asked for specific performance in the form of “the right to redeem—[to be] able to redeem [the Hiawatha property] by paying off what [appellant] initially redeemed the property for.” The district court refused to consider this request, explaining that its earlier ruling that respondent would not be allowed to redeem was “the law of the case, period.”

Hiawatha property. In the alternative, respondent argues that this court should affirm the district court's damages award. Because (1) appellant's requests for relief are made in the alternative, (2) both parties challenge the district court's decision on damages, and (3) we ultimately conclude that respondent is not entitled to equitable relief or the monetary damages awarded by the district court, we limit our review to the district court's decisions regarding the issue of remedy, without considering or determining whether the district court erred in concluding that appellant's redemption of the Hiawatha property was invalid for lack of a deficiency judgment.

I.

We first review the district court's denial of equitable relief in the form of specific performance. Specific performance is an equitable remedy addressed to the sound discretion of the district court, and it is generally not afforded where it will work a hardship or injustice on a party. *Lilyerd v. Carlson*, 499 N.W.2d 803, 811 (Minn. 1993). On review, an appellate court does not interfere with the district court's determination unless the court clearly abused its discretion. *Id.*

In its request for specific performance, respondent asked for the opportunity to redeem the Hiawatha property by paying appellant the amount that appellant paid to redeem the property. In other words, respondent asked to be put in the position it would have been in but for appellant's redemption. The district court denied this request, reasoning that respondent previously had an opportunity to redeem the Hiawatha property pursuant to statute and the district court's earlier order, and chose not to do so. The district court explained that "to provide [respondent] with another opportunity to redeem

the property, after [respondent] declined the opportunity available to it in July 2010, is improper if not unlawful” and that “[t]o modify the redemption period by judicial fiat would potentially place a cloud on the title and prejudice the rights of all interested parties.”

On appeal, respondent contends that the district court erred in denying its request for specific performance, but respondent does not offer persuasive argument or legal authority in support of its contention. Although respondent asserts that it “is entitled to specific performance granting it title to the Hiawatha [p]roperty upon payment to [appellant in] the amount of [appellant’s redemption],” respondent does not convince us that the district court abused its discretion in denying this request. None of the cases cited by respondent as support for its assertion involves improper redemption of real estate by a senior creditor in a foreclosure proceeding.

This court does not presume error on appeal. *White v. Minnesota Dep’t of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). The district court considered respondent’s failure to redeem when respondent had the opportunity to do so and the possibility of prejudice to other parties, and decided not to disturb appellant’s court-sanctioned redemption in the Hiawatha property foreclosure. But the district court also gave respondent the opportunity to establish monetary damages at an evidentiary hearing. We discern no abuse of discretion in the district court’s reasoning or approach. In sum, respondent fails to establish that the district court abused its discretion in denying respondent’s request for specific performance. We therefore affirm the district court’s denial of equitable relief.

II.

We next review the district court's award of monetary damages. An award of damages may not be based on speculation or conjecture. *Ahrenholz v. Hennepin County*, 295 N.W.2d 645, 649 (Minn. 1980). "Ordinarily, the amount and extent of damages is a question of fact. But whether the trial court's theory of valuation of damages is speculative or erroneous is a question of law." *Synder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989).

Appellant argues that the district court's damage award was erroneous because the theory under which the district court awarded damages was not argued by respondent and because the damage award lacks a factual and legal basis. We agree. In district court, respondent argued that damages should be calculated as follows: "[the] fair market value of the property less any cost [respondent] would have had to expend to redeem the property in the first position." Accordingly, respondent presented evidence at the damages hearing regarding the purported value of the Hiawatha property at the time of appellant's redemption. After receiving and considering respondent's property-valuation evidence, the district court found that the evidence was "unduly speculative." The district court specifically found that respondent

asserted three different measures of damages for the [Hiawatha] property: the tax assessed value of \$793,500; an alleged offer to purchase the [Hiawatha] property from Nick Boosalis for \$1.1 million, subject to numerous development approval contingencies; and the opinion of former owner Jeffery [Boldon] that the Hiawatha property was worth \$1.3 million if fully rented and producing full rental income. In light of the countervailing evidence of the economic downturn which has negatively affected development,

financing, sales and rental values, the Court finds all three measures are unduly speculative.

The district court concluded that respondent had “not proven any measure of fair market value [of the Hiawatha property] in excess of the amount required to redeem.”

Despite the district court’s explicit rejection of respondent’s valuation evidence, respondent now contends that “the trial court stated that the value of the Hiawatha Property at the time [respondent] would have redeemed from the foreclosure was about \$1.2 or \$1.4 million” and that the “undisputed facts” establish that value. Respondent does not cite to the district court’s findings of fact, conclusions of law, and order for judgment from the damages hearing as support for that contention. Instead, respondent cites to statements that the district court judge made at a hearing on appellant’s motion to amend the findings of fact, conclusions of law, and order for judgment on damages. But the record shows that the district court did not say that the evidence established that the value of the Hiawatha property was \$1.2 or \$1.4 million at the time of redemption. Instead, in explaining its damages theory, the district court stated that if respondent had been able to redeem and obtain title to the Hiawatha property, “[respondent] would be the owner of the piece of property that [it] value[s], based upon the evidence of the hearing before this court, at about 1.2, \$1.4 million,” and that respondent probably feels that it is out a piece of property “that [it] think[s] is worth over a million dollars.”

In sum, respondent’s contention that the district court determined the value of the Hiawatha property to be over one million dollars is without merit. And because we do not discern error in the district court’s determination that respondent failed to establish

that the property was worth any more than the amount that respondent would have paid to redeem the property but for appellant's redemption, respondent failed to prove damages under the theory that it asserted in district court.⁴

We next consider the district court's alternative theories of recovery, which it used sua sponte. The district court correctly identified the damages issue as "whether, the Court having determined that [appellant's] judgment lien was improper, and therefore improperly placed ahead of [respondent's] claim of lien priority, the [respondent] has suffered damages." The district court proceeded to find that respondent proved damages in the amount of \$345,015.41. The district court's description of the theory it used to arrive at this amount is inconsistent. The district court's judgment can be read as awarding damages based on the extra amount that respondent would have paid to redeem the property after appellant redeemed the property. It can also be read as awarding damages in the amount that respondent would have paid to redeem the property had appellant not redeemed the property. The damage award is defective under either calculation. The district court did not cite legal authority in support of either valuation method, and respondent cites no persuasive supporting authority on appeal. Moreover, both of the valuation methods are inconsistent with the supreme court's explanation of how to calculate damages when a senior creditor's improper redemption prevents a junior creditor from redeeming.

⁴ We also observe that respondent fails to provide legal support for the damages theory that it asserted in district court. As explained later in this section, the theory is inconsistent with the only Minnesota Supreme Court opinion of which we are aware regarding the proper measure of damages where a senior creditor improperly prevents a junior creditor from exercising its right of redemption.

In *Parker v. St. Martin*, 53 Minn. 1, 55 N.W. 113 (1893), a junior creditor redeemed property from a senior creditor in a foreclosure proceeding and later claimed that the senior creditor's mortgage was fraudulent. *Parker*, 53 Minn. at 7, 55 N.W. at 114. The junior creditor sought damages based on the increased redemption cost that resulted from the senior creditor's allegedly improper redemption. *Id.* The supreme court concluded that under the facts of the case, the senior creditor's mortgage could not "be treated as wholly invalid." *Id.* at 8, 55 N.W. at 114. The supreme court nonetheless discussed the measure of damages that may be appropriate when a senior creditor's improper redemption prevents a junior creditor from redeeming. The court stated:

A subsequent lien creditor is entitled to his right to secure the amount of his debt by redemption, if the property is sufficient. He cannot lawfully be deprived of this right by the interposition of apparent and simulated, but spurious, incumbrances. What the exact form of remedy should be, in any particular case, it is not necessary to determine here. But if fraudulently prevented from redeeming, or his right to do so is seriously impaired, *his damages would not exceed the amount of his debt and expenses necessarily incurred.* The court will not consider the speculative or extra value of the land beyond this, or allow him the benefit of his bargain in addition to the recovery of his debt. . . The purpose of the statute, in providing for redemption by creditors, is to enable them to collect their debts out of the debtor's lands, to the extent of the value of the property over the amount paid to redeem.

Id. at 9, 55 N.W. at 115 (emphasis added).

We recognize that the supreme court's discussion of damages in *Parker* was arguably dictum. See *State v. Misquadace*, 629 N.W.2d 487, 490 n.2 (Minn. App. 2001) ("Dictum is a statement in an opinion that could have been eliminated without impairing

the result of the opinion.”) *aff’d*, 644 N.W.2d 65 (Minn. 2002). But the supreme court’s opinion regarding the proper measure of damages is entitled to weight. *See In re Estate of Bush*, 302 Minn. 188, 207, 224 N.W.2d 489, 501 (1974) (“Even dictum, if it contains an expression of the opinion of the court, is entitled to considerable weight.”). Moreover, we, like the supreme court, question whether a benefit-of-the-bargain measure of damages is appropriate where respondent’s right to acquire the Hiawatha property results from the redemption statute and not from a bargained-for exchange. *See Parker*, 53 Minn. 9, 55 N.W. at 115.

Under *Parker*, respondent’s damages would be limited to the amount of the outstanding debt secured by the mortgage that the Helen C. Boldon Living Trust granted respondent. But respondent did not request or prove damages in this amount in the district court. And because we are aware of no legal authority supporting the valuation methods referenced by the district court and the methods are inconsistent with the supreme court’s reasoning in *Parker*, we reverse the district court’s award of judgment against appellant in the amount of \$345,015.41.

Affirmed in part and reversed in part.