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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1762
A10-2113, A10-2221**

Weavewood, Inc.,
Appellant, (A10-1762, A10-2113),
Respondent (A10-2221),

vs.

S & P Home Investments, LLC,
Respondent,

Palladium Holdings, LLC, et al.,
Defendants,

M. Jacqueline Stevenson,
Respondent,

Highland Bank,
Appellant (A10-2221)

**Filed February 19, 2013
Reversed and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-10-3540

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Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

On remand from the supreme court, in a case in which appellant-mortgagor's challenge to respondent-mortgagee's foreclosure by advertisement is timely under the statutes that specifically govern challenges to foreclosures by advertisement, we conclude that because appellant's underlying claims for declaratory relief present pure defenses, they are not barred by the statutes of limitation that apply to those claims. We therefore conclude that appellant timely filed its declaratory judgment action. We reverse the district court's grant of summary judgment to respondent on appellant's request for declaratory relief and remand for further proceedings.

D E C I S I O N

This case comes to us on remand from the Minnesota Supreme Court. The historical facts and procedural posture of the underlying litigation between appellant-mortgagor Weavewood Inc. and respondent-mortgagee S&P Home Investments LLC are recited in *Weavewood, Inc. v. S&P Home Invs., LLC*, 821 N.W.2d 576 (Minn. 2012), and we do not repeat them here. The supreme court has instructed this court "to consider whether Weavewood's complaint presents any pure defenses and, ultimately, whether

Weavewood timely filed its declaratory judgment action.” *Weavewood*, 821 N.W.2d at 581.

I.

“The general rule is that the statute of limitations may be used as a shield, not as a sword, and that the statute of limitations does not bar a party from raising a *pure defense*.” *Reynolds v. Reynolds*, 458 N.W.2d 103, 105 (Minn. 1990). The following discussion from American Jurisprudence, Second Edition, is instructive.

Statutes of limitation are not intended to affect matters asserted strictly in the defense of an action. The object of a statute of limitations in keeping stale litigation out of the courts would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes are aimed at lawsuits and not at the consideration of particular issues in lawsuits.

Statutes of limitation should be used only as a shield and not as a sword, and courts ordinarily allow defendants to raise defenses which, if raised as claims, would be time-barred. Thus, as a general rule, statutes of limitation are not applicable to, or do not run against, defenses.

A statute of limitations does not bar a pure defense, or a defense involving no claim for affirmative relief, or a defense which, if given effect, . . . would negate the plaintiff’s right to recover. Defenses such as fraud and misrepresentation therefore are not barred by statutes of limitation. Statutes of limitation also do not run against defenses arising out of the transaction sued upon, and so long as the courts will hear a plaintiff’s case, time will not bar a defense if the cause of action and the asserted defense are closely and logically related in a sort of legal affinity.

51 Am. Jur. 2d *Limitation of Actions* § 98 (2011).

The phrase “pure defense” is used in Minnesota caselaw to describe positions or arguments that are not barred by statutes of limitation. See *In re Estate of Jotham*, 722 N.W.2d 447, 456 (Minn. 2006) (distinguishing “between a defensive denial of paternity and an action to declare the nonexistence of a parent-child relationship pursuant to [statute],” explaining that “the right to deny paternity defensively . . . is not subject to time limitations and may be exercised by the defendant in any action in which it is alleged that he is the child’s father” (quotation omitted)). But we are not aware of any Minnesota caselaw expressly defining the phrase “pure defense,” and neither of the parties proposes a definition for our use on remand. We conclude that in the context of a foreclosure by advertisement, a mortgagor’s challenge to the validity of the mortgage or foreclosure sale presents a pure defense so long as it is asserted to prevent a pending foreclosure. See *Reynolds*, 458 N.W.2d at 105 (stating, “the statute of limitations may be used as a shield, not as a sword”).

In doing so, we reject S&P’s contention that, because “Weavewood is not defending itself against a suit,” Weavewood’s “[c]omplaint does not assert a pure defense.” Whether any of Weavewood’s claims is a pure defense must be determined in the context of a foreclosure by advertisement. As the foreclosing mortgagee, S&P had the option of foreclosing by advertisement or by action. Compare §§ 580.01-.30 (2012) (governing foreclosure by advertisement) with §§ 581.01-.12 (2012) (governing foreclosure by action). A foreclosure by action occurs in a judicial proceeding. See Minn. Stat. §§ 581.01 (“Actions for the foreclosure of mortgages shall be governed by the same rules and provisions of statute as civil actions, except as in this chapter

otherwise provided.”), .03 (“Judgment shall be entered, under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, to satisfy such amount, and directing the sheriff to proceed to sell the same according to the provisions of law relating to the sale of real estate on execution, and to make report to the court. A certified transcript of the judgment shall be delivered to the sheriff, and shall be the sheriff’s authority for making the sale.”).

Foreclosure by advertisement, on the other hand, “was developed as a non-judicial form of foreclosure designed to avoid the delay and expense of judicial proceedings.” *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 494 (Minn. 2009) (quotation omitted). It is a nonjudicial process. See Minn. Stat. §§ 580.01-.30 (setting forth a nonjudicial process for foreclosures by advertisement). However, a foreclosure by advertisement may be challenged in a judicial proceeding. Section 580.20 states that

[n]o such [foreclosure-by-advertisement] sale shall be held invalid or be set aside by reason of any defect in the notice thereof, or in the publication or service of such notice, or in the proceedings of the officer making the sale, unless *the action in which the validity of such sale is called in question be commenced, or the defense alleging its invalidity be interposed*, with reasonable diligence, and not later than five years after the date of such sale.

Minn. Stat. § 580.20 (emphasis added).

Section 580.21 similarly provides:

No such [foreclosure-by-advertisement] sale shall be held invalid or set aside unless *the action in which its validity is called in question be commenced, or the defense alleging its invalidity be interposed*, within 15 years after the date of such

sale; provided that persons under disability, as provided in section 580.20, may commence such action or interpose such defense within the time therein provided. This section shall not affect or prejudice the rights of any bona fide purchaser.

Minn. Stat. § 580.21 (emphasis added).

This court has previously concluded that the legislature's references to "the action" in which the validity of the foreclosure sale is questioned or the defense to the foreclosure sale is "interposed," in addition to its imposition of a time limit during which such proceedings may occur, contemplate that foreclosures are set aside in judicial proceedings. *Pole v. Trudeau*, 516 N.W.2d 217, 218, 220 (Minn. App. 1994) (holding that "[a] mortgage holder must acquire a judicial determination to set aside an allegedly invalid foreclosure [by advertisement] sale before reforeclosing against the property").

Because a foreclosure by advertisement under chapter 580 is a nonjudicial process but a challenge to the foreclosure-by-advertisement sale must be determined in a judicial proceeding, the only way a mortgagor can interpose a "defense alleging [the foreclosure-by-advertisement sale's] invalidity" is by initiating a judicial proceeding. And because the mortgagor would be the party initiating the judicial proceeding, the mortgagor has no choice but to raise its defenses to foreclosure in a complaint. Such are the circumstances here: the only way that Weavewood could challenge the validity of S&P's foreclosure by advertisement was to file a lawsuit. And because Weavewood was the party that initiated the judicial proceeding, Weavewood's defenses to S&P's foreclosure were necessarily raised in a complaint.

Because the statutory scheme allows a mortgagee to foreclose in a nonjudicial process but requires a mortgagor or other challenger to raise its defenses in a judicial proceeding, we reject S&P's argument that because S&P did not initiate the underlying lawsuit, Weavewood's complaint cannot present pure defenses. We hold that in a challenge to a foreclosure by advertisement, placing an assertion in a complaint is not automatically fatal to the assertion being treated as a pure defense.

We also reject S&P's policy argument that

if Weavewood's claims are pure defenses, and as such not subject to *any* statute of limitations, a mortgagor can at *any* time bring an action to declare the mortgage void[,] asserting fraud or that the mortgage had been paid. Such a result would eliminate the efficiency of which foreclosure by advertisement is designed. Furthermore, the status of title of a particular parcel of real estate which went through the foreclosure process would never be known if a mortgagor could, at any time, challenge the validity of the mortgage which was foreclosed.

S&P's predictions of inefficiency, unlimited challenges, and perpetual uncertainty seem exaggerated. Contrary to S&P's argument, a pure defense—as that phrase is used here—may not be raised “at any time”; a pure defense is asserted to prevent a *pending* foreclosure. It therefore must be raised prior to completion of the statutory foreclosure-by-advertisement process, including expiration of the applicable redemption period. See Minn. Stat. § 580.12 (“[U]pon expiration of the time for redemption, the certificate shall operate as a conveyance to the purchaser or the purchaser's assignee of all the right, title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage, without any other conveyance.”).

Moreover, our decision is limited to the facts before us: S&P does not argue that Weavewood’s lawsuit is time-barred by the statutes that set deadlines specific to an action challenging the validity of a foreclosure by advertisement. For example, a party may commence an action challenging the validity of a foreclosure-by-advertisement sale up to 15 years after the date of such sale—which refutes S&P’s suggestion that a foreclosure by advertisement is unassailable. See Minn. Stat. §§ 580.21 (setting a 15-year time frame for some challenges), .20 (setting a five-year time frame), 582.25 (2012) (operating as a statute of repose to validate a foreclosure sale unless it is challenged within specified time frames).

But S&P does not discuss application of the time limits under sections 580.20, 580.21, and 582.25, which specifically address challenges to a foreclosure by advertisement. Instead, S&P argues that even though section 580.28 is “not titled specifically as a statute of limitation,” it “sets forth a time frame by which a party must bring claims to challenge a mortgage which is foreclosed by advertisement.” We reject that argument based on the plain language of section 580.28, which does not provide a legal mechanism for invalidating a mortgage or a deadline for bringing such an action.¹ As we explained in our previous opinion, section 580.28

¹ Minn. Stat. § 580.28 provides that

[w]hen an action is brought wherein it is claimed that any mortgage as to the plaintiff . . . is fraudulent or void, or has been paid or discharged, in whole or in part, . . . if such mortgage has been foreclosed by advertisement, and the time for redemption from the foreclosure sale will expire before final judgment in such action, the plaintiff . . . for the purpose

does not create a separate cause of action. The statute merely sets out steps that may be taken to prevent loss of mortgaged property based on the expiration of the redemption period where it is claimed that the mortgage is fraudulent, void, or has been paid or discharged; it does not provide a method by which a mortgagor may challenge the validity of the mortgage or foreclosure sale.

Weavewood, Inc. v. S&P Home Invs., LLC, Nos. A10-1762, A10-2113, A10-2221, 2011 WL 4345904, at *7 (Minn. App. Sept. 19, 2011), *rev'd on other grounds*, 821 N.W.2d 576 (Minn. 2012).

In sum, none of S&P's arguments persuades us to disallow Weavewood's reliance on the "pure-defense" exception to the statutes of limitations that govern the specific claims in Weavewood's complaint. We therefore proceed with the supreme court's directive to determine "whether Weavewood's complaint presents any pure defenses." *See Weavewood*, 821 N.W.2d at 581. In doing so, we ask whether Weavewood's denial of the validity of S&P's mortgage and foreclosure sale is asserted to prevent S&P from foreclosing. We now apply that question to each of the counts in Weavewood's complaint.

of saving such right in case the action fails, may deposit with the sheriff before the time of redemption expires the amount for which the mortgaged premises were sold, with interest thereon to the time of deposit, together with a bond to the holder of the sheriff's certificate of sale, in an amount and with sureties to be approved by the sheriff, conditioned to pay all interest that may accrue or be allowed on such deposit if the action fail. . . . In case such action fails, such deposit shall operate as a redemption of the premises from such foreclosure sale, and entitle the plaintiff to a certificate thereof. Such foreclosure, deposit, bond, and notice shall be brought to the attention of the court by supplemental complaint in the action

Count One – Fraud

Weavewood alleges that an individual defendant made representations “with the knowledge that they were false or with reckless disregard for their truth or falsity; and intended that [Weavewood] rely on these representations . . . in execution of a Mortgage and promissory note prior to any consideration being afforded.” Weavewood asks the district court “to set aside the Mortgage and the foreclosure” and the “related sheriff’s sale.” This claim denies the validity of S&P’s mortgage and attempts to prevent S&P from foreclosing. We therefore conclude that Weavewood’s request that the district court “set aside the Mortgage and related sheriff’s sale” under count one presents a pure defense.

However, Weavewood also requests monetary damages on its fraud claim. By requesting monetary damages, Weavewood does not attempt to prevent S&P from foreclosing.² Thus, Weavewood’s request for monetary relief does not present a pure defense.

Count Two – Breach of Contract

Weavewood asserts that S&P breached its contractual obligation, under the “purported promissory note . . . and purported ‘Mortgage’” to “issue and file a satisfaction of Mortgage” after Weavewood paid the amounts due under the note in full and that Weavewood sustained damages in an amount in excess of \$50,000 “[b]y reason

² Weavewood concedes that its “affirmative actions for damages for fraud, breach of contract, breach of fiduciary duty, slander of title, etc. are barred.”

of said conduct.” Weavewood therefore seeks judgment against S&P in an amount in excess of \$50,000.

Weavewood’s breach-of-contract claim does not attempt to prevent S&P from foreclosing. To the contrary: Weavewood attempts to enforce S&P’s obligations under the purported mortgage. We therefore conclude that the claim does not present a pure defense.

Count Three – Conversion

Weavewood asserts that S&P “willfully and maliciously, knowing the same not to be their property and having reason to know and being advised that the Mortgage which is the subject of the foreclosure action was void and illegal, converted and seized for [its] own individual benefit the equity interest in the real property.” Although the claim is based on Weavewood’s assertion that the mortgage is “void and illegal,” Weavewood’s request for relief is limited to a request for money damages. Weavewood’s conversion claim does not attempt to prevent S&P from foreclosing. For this reason, the claim does not present a pure defense.

Count Four – Unjust Enrichment

Weavewood alleges that S&P has been “unjustly enriched at [Weavewood’s] expense, entitling [Weavewood] to equitable restitution from [S&P].” Weavewood attempts “to set aside the Mortgage and foreclosure, and retain or regain ownership of the Property.” This claim denies the validity of S&P’s mortgage and attempts to prevent S&P from foreclosing. We therefore conclude that Weavewood’s request that the district

court “set aside the Mortgage and foreclosure” and allow it to “retain or regain ownership of the Property” presents a pure defense.

However, Weavewood also seeks monetary damages on its unjust-enrichment claim. Weavewood’s request for monetary relief is not an attempt to prevent S&P from foreclosing. For this reason, Weavewood’s claim of unjust enrichment, limited to a request for monetary relief, does not present a pure defense.

Count Five – Slander on Title

Weavewood alleges that S&P acted in concert with other defendants to “record the Mortgage and institute the foreclosure process and published a notice of sheriff’s sale based upon the Mortgage, with full knowledge that the Mortgage was void and or satisfied and otherwise acted to disparage Weavewood’s title to the Property without legal right consent or privilege to do so.” Weavewood asks the district court to set aside S&P’s mortgage and related sheriff’s sale on this basis. Weavewood also seeks monetary damages.

Weavewood’s request to set aside S&P’s mortgage and foreclosure sale is an attempt to prevent S&P from foreclosing. Thus, that portion of the claim presents a pure defense. But because Weavewood’s request for monetary relief is not an attempt to prevent S&P from foreclosing, that part of the slander-on-title claim does not present a pure defense.

Count Six – Set Aside Mortgage and Foreclosure Pursuant to Minn. Stat. § 580.28.

Weavewood asserts that S&P “is not entitled to complete its foreclosure or otherwise acquire legal title to the property pursuant to Minn. Stat. § 580.28, because the Mortgage upon which the foreclosure is based has been paid or discharged, in whole or in part and is void or illegal.” Weavewood also asserts that it has “paid all amounts” due on the note associated with S&P’s mortgage and that “there exists no ‘principal balance’ on the Note secured by the Mortgage.” Weavewood seeks “to set aside the Mortgage and foreclosure and otherwise respectfully petitions [the district court] under Minnesota law, for an Order voiding said Mortgage; or, in the alternative, for an Order requiring the foreclosure by advertisement statute, Minn. Stat. § 580.01, et. seq.” Weavewood also seeks monetary damages against S&P.

Weavewood’s assertions are an attempt to prevent S&P from foreclosing. With the exception of that portion of the claim requesting monetary damages, the claim presents a pure defense.

Count Seven – Set Aside Mortgage and Foreclosure Pursuant to Minn. Stat. § 582.25.

Weavewood’s final assertion is that “[e]ven assuming that the Mortgage and Promissory Note were valid . . . [S&P] is not entitled to complete its foreclosure or otherwise acquire legal title to the property pursuant to Minn. Stat. § 582.25 because the notice of sale” did not “state the amount due or failed to state the correct amount due or claimed to be due” and did not “state the original principal amount secured, or failed to

state the correct original principal amount secured.”³ Weavewood seeks a judgment “declaring that the Mortgage is void and of no force and effect; in the alternative, deem the Mortgage satisfied; find that [S&P] has no legal right to foreclose upon the Property and to take legal title or obtain any legal interest in the Property.” Because Weavewood’s notice-based claim attempts to prevent S&P from foreclosing, it presents a pure defense.

Conclusion

Having determined “whether Weavewood’s complaint presents any pure defenses,” we next determine “whether Weavewood timely filed its declaratory judgment action.” *See Weavewood*, 821 N.W.2d at 581. We previously construed Weavewood’s challenge to the validity of S&P’s mortgage and its request to set aside the mortgage and foreclosure sale under counts one (fraud), four (unjust enrichment), six (Minn. Stat. § 580.28), and seven (Minn. Stat. § 582.25) as a request for declaratory relief. *Weavewood*, 2011 WL 4345904, at *5. As explained above, Weavewood’s request for declaratory relief under counts one (fraud), four (unjust enrichment), six (Minn. Stat.

³ A party foreclosing by advertisement must comply with specific notice requirements. *See* Minn. Stat. § 580.03 (“Six weeks’ published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied.”), .04 (a)(1), (3) (requiring that each notice contain “the original or maximum principal amount secured by the mortgage” and “the amount claimed to be due on the mortgage on the date of the notice”). “Because foreclosure by advertisement is a purely statutory creation, the statutes are strictly construed. [The supreme court] require[s] a foreclosing party to show exact compliance with the terms of the statutes. If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void.” *Jackson*, 770 N.W.2d at 494 (quotation and citation omitted).

§ 580.28, and seven (Minn. Stat. § 582.25) present pure defenses. Because statutes of limitation do not bar pure defenses, Weavewood timely filed its declaratory judgment action. *See Weavewood*, 821 N.W.2d at 581 (“[R]esolving whether Weavewood’s declaratory judgment action is timely would require us first to determine whether Weavewood’s complaint presents pure defenses or affirmative claims for relief.” (citing *Reynolds*, 458 N.W.2d at 105 (stating that statutes of limitation do not bar “pure defense[s]”))).

Having concluded that Weavewood timely filed its declaratory judgment action, we reverse the district court’s grant of summary judgment to S&P on Weavewood’s request for declaratory relief and remand for further proceedings consistent with this opinion. Nothing we do here impacts any aspect of this court’s prior decision that was not reviewed by the Minnesota Supreme Court. *See id.* (stating that the supreme court’s review was limited “to a single issue: whether statutes of limitation apply to actions for declaratory judgment”).

Reversed and remanded.