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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1901**

Collaborative Design Group, Inc.,
Appellant,

vs.

Mendota Homes, Inc., et al.,
Defendants,

Highland Bancshares, Inc.,
Respondent,

and

Highland Bancshares, Inc.,
Respondent,

vs.

Lilydale Commons, LLC, et al.,
Defendants,

Collaborative Design Group, Inc.,
Appellant.

**Filed May 13, 2013
Affirmed
Cleary, Judge**

Dakota County District Court
File Nos. 19-C2-08-006770, 19HA-CV-08-1760

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Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Chutich, Judge.

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

CLEARY, Judge

In this consolidated foreclosure action, the district court initially ruled that appellant-lienor's interest in the property had priority over the mortgage interest of respondent-bank but, after the supreme court issued *Riverview Muir Doran, LLC v. JADT Dev. Grp.*, 790 N.W.2d 167 (Minn. 2010), the district court ruled that the mortgage interest had priority, that lienor no longer had a right to redeem the property, and that the lienor's interest had been extinguished. We affirm.

FACTS

This dispute involves a land redevelopment project (the project) located on the bluffs of the Mississippi River at the intersection of Interstate I-35E and Sibley Memorial Highway. Mendota Homes, Inc. (Mendota) was the project developer. Mendota hired appellant Collaborative Design Group, Inc. (Collaborative) in 2005 to perform engineering and architectural-design services for the project. Collaborative began its work in September 2005 and continued to perform services through February 2006. On January 30, 2006, Lilydale Commons, LLC (Lilydale) executed a promissory note secured by a mortgage in favor of respondent bank Highland Bancshares, Inc. (Highland) in order to finance acquisition of the project property. Highland recorded the mortgage

on February 27, 2006. On April 10, 2007, Collaborative recorded a mechanic's lien against the project property in the amount of \$301,872.55.¹

In February 2008, Collaborative filed a complaint seeking to foreclose its mechanic's lien. In June 2008, Highland filed a complaint seeking to foreclose its mortgage and in which it asserted that its mortgage was senior to all other creditor interests in the property, including Collaborative's lien. In July 2008, the district court issued an order and partial judgment wherein it (1) ordered that Highland's mortgage was paramount and superior to all liens or interest against the property except for Collaborative's interest,² (2) granted default judgment against all creditors except Collaborative, and (3) consolidated Highland and Collaborative's foreclosure actions.

In early 2009, the district court heard the parties' cross-motions for summary judgment on the issue of priority. Pursuant to an order filed in April 2009, the district court determined that Collaborative's lien attached when it began performing work for Mendota on the project in September 2005. The district court denied both parties' motions for summary judgment, however, and made no specific ruling on priority.

In an order filed in February 2010, the district court determined that the consolidated matter would proceed to trial to determine the amount of Collaborative's lien. In the same order, and because the parties had questioned whether the priority of Collaborative's lien was still an issue for trial, the district court clarified the April 2009 order and explained that "[b]ecause Collaborative did not have knowledge of Highland's

¹ Whether Collaborative properly perfected its lien is not at dispute on appeal.

² The order did not make any specific determination regarding priority as between Highland's mortgage and Collaborative's lien.

mortgage at the time its lien attached in September of 2005, Collaborative's lien has priority over Highland's mortgage." The issue of priority would not proceed to trial, which was held on March 22–25 and May 17–18, 2010.

In June 2010, before the district court issued its trial order, Highland proceeded with its foreclosure-by-action sale of the mortgage. At the foreclosure sale, Highland purchased the property for \$5 million. In an order dated June 16, 2010, the district court entered an order confirming the foreclosure sale. This order set Lilydale's redemption period to expire on December 16, 2010. The order also provided that if neither Lilydale nor any creditors otherwise having a lien on the property redeemed within the six-month redemption period in accordance with Minn. Stat. § 581.10 (2010) and the statutes cited therein, Highland would become the fee owner of the property

subject to a mechanic's lien ("Lien") in favor of [Collaborative] recorded on April 10, 2007 The priority of the Lien was determined by Court Order [filed] February 2[3], 2010 ("Priority Order"). The Priority Order, and the priority of the Lien as established therein, is subject to any and all appeal rights held by [Highland]. The amount of the Lien is currently being litigated in Dakota County. . . .

In October 2010, the district court issued its trial order awarding Collaborative a mechanic's lien judgment on the property in the amount of \$301,872.55. In a motion filed in early November 2010, Collaborative requested that the district court issue a decree of foreclosure based on the October 2010 trial order so that it could proceed with the foreclosure. At that same time, Highland filed a motion pursuant to Minn. R. Civ. P. 52.02 requesting that the district court amend its findings of fact and conclusions of law as to priority. Highland's motion argued that an opinion issued by the Minnesota

Supreme Court eight days earlier, *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167 (Minn. 2010), required the district court to amend the October 2010 trial order to reflect that Highland's mortgage had priority over Collaborative's mechanic's lien. *Riverview* held that a mechanic's lien takes priority over a mortgage only if, at the time the mortgage is recorded, the mortgagee is actually aware that unpaid work exists. 790 N.W.2d at 174. *Riverview* affected the priority determination in this case and necessitated amended findings, according to Highland, because at the time it recorded its mortgage in February 2006, it was unaware that Collaborative still had not been paid for all of its work.

Highland served its opposition brief to Collaborative's motion for a decree of foreclosure by mail on December 7, 2010. In the brief, Highland urged the district court to address priority based on *Riverview* before it issued a decree of foreclosure to Collaborative because priority affected the parties' redemption rights. Highland explained that if the district court were to rule that Highland's mortgage has priority over Collaborative's lien, and "Collaborative fails to redeem within the applicable redemption period, Collaborative's lien will be extinguished and Highland will own the [p]roperty unencumbered by Collaborative's mechanic's lien." Highland argued in the alternative that if the district court were to deny its motion for amended findings and allow Collaborative to proceed with the foreclosure, it should stay the redemption period because Highland would appeal the priority determination and the time in which it could redeem from a Collaborative foreclosure would lapse during the appeal, and it wanted to

preserve its rights. Collaborative, by contrast, did not seek such a stay of its redemption period from the court even though priority was still disputed.

On December 16, 2010, Lilydale's six-month redemption period ended.

In July 2011, the district court held a hearing on the parties' motions. In an order filed three months later, the district court relied on *Riverview* and vacated its "previous priority determination," thereby leaving priority between Highland's mortgage and Collaborative's lien "an open question." Discovery was reopened on the question of whether, when Highland recorded its mortgage in late February 2006, Highland knew that Collaborative had not been paid for services performed in January and February of 2006. The order set an evidentiary hearing on priority for early January 2012 and reserved ruling on Highland's motion for amended findings and Collaborative's motion for a decree of foreclosure pending the outcome of the evidentiary hearing.

In an order filed in April 2012, the district court found that Highland did *not* have actual notice of Collaborative's unpaid work at the time the mortgage was recorded, and that, under *Riverview*, Highland's mortgage had priority. The district court vacated its previous priority-related orders and amended the October 2010 trial order to hold that Highland's mortgage is "prior, paramount and superior" to all of Collaborative's interests in the property. Referencing the December 2010 expiration of Lilydale's six-month redemption period, the district court found that Collaborative "is barred and foreclosed from any equity of redemption . . . in the [p]roperty." The district court went on to conclude that "[b]ecause of this Court's determination that Highland's mortgage has first priority, Collaborative's lien has essentially been extinguished."

Thereafter, Collaborative brought a motion for amended findings, a new trial, and for leave to amend its complaint. The district court denied each of Collaborative's motions in an order filed in August 2012. In that order, the district court noted that Collaborative "did not make any effort to secure its redemption rights" in late 2010 even though it had been put "on notice" that Highland's mortgage could be deemed prior. The district court concluded that, because Collaborative took no action to "meet the statutory requirements for redemption" in order to "preserve its redemption rights," it would not be allowed to redeem from Highland's foreclosure.

This appeal followed.

D E C I S I O N

Collaborative argues that the district court erred when it determined that its mechanic's lien was extinguished. First, Collaborative argues that its lien could not have been extinguished because the district court's order confirming sale reflected an agreement between Highland and Collaborative that the lien would remain an encumbrance on the property without any need to be redeemed *regardless* of how the district court settled the parties' priority dispute. Second, Collaborative argues in the alternative that, regardless of whether its lien still encumbers the property, it is entitled to redeem because its redemption right could not expire before it vested.

Agreement between the parties

Collaborative asserts that the district court erred by determining that its lien was extinguished because, when Highland foreclosed its mortgage, it "struck a deal" with Collaborative wherein it agreed that the lien would survive the foreclosure and that

Collaborative was not obligated to comply with the statutory redemption process, regardless of priority. This agreement, according to Collaborative, is memorialized via the “subject to” language in the June 2010 order confirming the mortgage foreclosure sale. We decline to consider Collaborative’s argument.

In its August 2012 order denying Collaborative’s motion for a new trial and amended findings, the district court did not address Collaborative’s argument regarding the alleged “agreement” between Collaborative and Highland. To the extent the district court considered whether such agreement, if it even existed, precluded extinguishment, the court’s refusal to address the argument in its order indicates that it found Collaborative’s argument either without merit or not properly raised. *See Palladium Holdings, LLC, v. Zuni Mortg. Loan Trust*, 775 N.W.2d 168, 178 (Minn. App. 2009) (holding that reviewing courts are to treat a district court’s silence on a motion as an implicit denial thereof), *review denied* (Minn. Jan. 27, 2010); *Cleys v. Cleys*, 363 N.W.2d 65, 72 (Minn. App. 1985) (deeming the district court’s silence on an issue to be a denial of claimant’s requested relief on that issue).

Moreover, despite an 18-month period during which the relative priorities of the parties’ interests in the property were being *relitigated*,³ it was not until May 2012 when Collaborative was challenging the April 2012 order that it first raised this argument that the parties, apparently back in June 2010, had agreed that Collaborative’s lien would

³ Highland put the relative priority of its mortgage and Collaborative’s mechanic’s lien at issue for the second time in November 2010 when, based on the *Riverview* opinion, Highland sought amended findings of fact stating that its mortgage had priority over Collaborative’s lien. This motion, after an evidentiary hearing, culminated in the April 2012 order ruling that Highland’s mortgage did have priority over Collaborative’s lien.

have priority over Highland's mortgage. A claim is made "too late" when it is made for the first time in a motion for a new trial or for amended findings. See *Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971); *Allen v. Cent. Motors*, 204 Minn. 295, 297, 283 N.W. 490, 492 (1939).

Redemption rights

Collaborative argues that the district court erroneously reasoned that because Collaborative did not make any effort to protect or exercise its redemption right, the right was extinguished at the time priority between the mortgage and lien was reversed. The district court's conclusions challenged by Collaborative turn on an application of statutory language to undisputed facts, which is a matter we review de novo. See *Branch v. Branch*, 632 N.W.2d 261, 263 (Minn. App. 2001) ("Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court.").

In foreclosure-by-action proceedings, once a foreclosure sale is confirmed, a redemption period immediately begins wherein the mortgagor and lien creditors, if any, have statutory rights to redeem the property. Minn. Stat. § 581.10 (2010). "The purpose of redemption is to allow junior creditors to preserve their interests, which would otherwise be extinguished by foreclosure of senior liens." *In re Petition of Brainerd Nat'l Bank*, 383 N.W.2d 284, 289 (Minn. 1986). A mortgagor, here Lilydale, typically has six months from the date the district court enters an order confirming the foreclosure sale in which to redeem and regain possession of the property. Minn. Stat. § 581.10. If the mortgagor does not redeem, then the creditors having an interest in or lien on the

property may redeem. *Id.* Creditors exercise their redemption rights in order of seniority or priority, which is established on the basis of record without regard for the nature of the interest. *See Lowe v. Rierson*, 201 Minn. 280, 284, 276 N.W. 224, 226 (1937).⁴

A right of redemption is a “strict legal right, to be exercised, if at all, in accordance with the terms of statute by which the right is conferred.” *State ex rel. Anderson v. Kerr*, 51 Minn. 417, 420, 53 N.W. 719, 719 (1892). Whether a creditor has an exercisable right to redeem depends largely upon whether that creditor has complied with the redemption statutes. *See id.*; *see also TCM Props., LLC v. Gunderson*, 720 N.W.2d 344, 350 (Minn. App. 2006) (holding that a creditor who wishes to redeem from a foreclosure must strictly adhere to and comply with express statutory requirements). The question here, therefore, is not when Collaborative’s redemption rights vested, but instead whether, if ever, Collaborative properly exercised its redemption rights according to the statutory requirements. “In order to be entitled to redeem . . . a lien creditor is required under [Minn. Stat. § 580.24(a)(1)] to file notice of his intention to redeem . . . within the specified redemption period.” *First Nat’l Bank in Winnebago v. Boler*, 291 Minn. 185, 185, 190 N.W.2d 94, 95 (1971) (quotation omitted). The filing of a notice of intent to redeem is considered a “condition precedent” to redemption. *Brady v. Gilman*, 96 Minn. 234, 236, 104 N.W. 897, 897 (1905).

Here, at the time Lilydale’s redemption period expired, there had been no final judgment on priority. Collaborative was keenly aware that priority had been and still was

⁴ The older cases construing the redemption statute at section 580.24 remain binding precedent, as the statute is essentially unchanged since 1878. *Graybow-Daniels Co. v. Pinotti*, 255 N.W.2d 405, 407 (Minn. 1977).

in dispute and that there was a possibility its priority would be reversed. For example, the language in the district court's order confirming sale and stating that Highland would take the property "subject to" Collaborative's lien merely reflected the priority determination at that time, and specifically acknowledged that the determination was subject to appeal. At the time Highland moved for amended findings on priority in November 2010, Collaborative still had approximately one month to act on its rights before the expiration of the redemption period. Highland's briefing, submitted before the expiration of the redemption period, warned that Collaborative could lose all of its rights if priority was reversed and Collaborative failed to redeem within the redemption period. In response to that explicit warning, Collaborative did not act.

If Collaborative intended to redeem, it could have and should have done so, or at least protected its right to do so. *See Wash. Mut. Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 503–05 (Minn. App. 2008) (noting that a third-in-priority mortgagor—whose interest had arguably been extinguished after failing to redeem from the foreclosure of the second-in-priority interest—had tendered redemption money to the sheriff in order to “protect its interests” during the running of the redemption period on the subsequent foreclosure of the first-in-priority mortgage because that third-in-priority mortgagor intended to challenge priority and argue that it should be in first position), *review denied* (Minn. Dec. 16, 2008). Collaborative could have met the statutory redemption requirements at Minn. Stat. § 580.24 or availed itself of Minn. Stat. § 580.28 (2010), which provides various avenues by which parties involved in a foreclosure action priority dispute may protect their redemption rights if the redemption period is set to expire before final

judgment in the underlying proceeding.⁵ At the very least, Collaborative could have requested that the district court temporarily stay the redemption period until a final priority determination had been made, as Highland had requested of the court.

Because Collaborative did not act to ensure that its redemption rights were exercisable before the expiration of Lilydale’s redemption period, it was not and is not “entitled to redeem.” *Boler*, 291 Minn. at 185, 190 N.W.2d at 95. When the district court ultimately reversed priority, it was not erroneous to also conclude that Collaborative’s lien had been extinguished. *Graybow-Daniels Co.*, 255 N.W.2d at 406–07 (holding that if a junior lienholder fails to exercise its right of redemption, that lienholder’s interest in the subject property is forfeited); *cf. Elfelt*, 756 N.W.2d at 504, 508–09 (reversing and remanding the district court’s order which held that the second-in-priority creditor—who had tendered money to the sheriff to redeem from the foreclosure of the first-in-priority mortgage—was extinguished following reversal of priority between the first- and third-in-priority mortgages in part because it had acted to protect its rights by tendering the redemption money).

Priority disputes are not uncommon in foreclosure proceedings, and the supreme court, whose precedent we are bound to follow, has long mandated strict application of the redemption statutes. *See Brainerd Nat’l Bank*, 383 N.W.2d at 289 (holding that, to promote certainty in real-estate transactions, redemption statutes are interpreted and enforced strictly according to their terms); *see also Brainerd Daily Dispatch v. Dehen*,

⁵ Minn. Stat. § 581.10, the foreclosure-by-action redemption statute, incorporates Minn. Stat. § 580.24 as the method for redeeming.

693 N.W.2d 435, 439–40 (Minn. App. 2005) (providing that the Minnesota Court of Appeals is bound to follow Minnesota Supreme Court precedent), *review denied* (Minn. June 14, 2005). We are aware that this is a harsh result for Collaborative, who performed engineering and architectural-design services for the project over a six-month period. Yet we conclude that we are constrained from considering an equitable remedy in view of the statutory framework and controlling caselaw. *See Kerr*, 51 Minn. at 420, 53 N.W. at 719 (providing that, as a general rule, because our statutes “determine[] conditions on which [redemption] rights shall vest or be forfeited . . . [t]he courts have no power to relieve against statutory forfeitures”); *see also First Nat’l Bank of Glencoe/Minnetonka v. Pletsch*, 543 N.W.2d 706, 711–12 (Minn. App. 1996) (declining to provide equitable remedies for a creditor whose interests were extinguished when it could have redeemed but failed to properly avail itself of the redemption statute), *review denied* (Minn. Apr. 16, 1996).

Affirmed.