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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-369**

H. Joseph Slater,
Appellant,

vs.

Alliance Bank,
f/k/a American Bank Lake City,
Respondent.

**Filed November 21, 2011
Affirmed
Worke, Judge**

Wabasha County District Court
File No. 79-CV-10-1323

H. Joseph Slater, Lake City, Minnesota (pro se appellant)

Thomas C. Atmore, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., Minneapolis,
Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's dismissal of his complaint in this foreclosure action, arguing that the district court erroneously determined that (1) appellant lacked standing to challenge service of the notice of foreclosure sale on the

property's occupants; (2) appellant waived his right to have the property sold in separate parcels; and (3) respondent's foreclosure notices and publication were not defective. We affirm.

D E C I S I O N

Appellant H. Joseph Slater filed a complaint, alleging that respondent Alliance Bank, f/k/a American Bank Lake City, conducted illegal foreclosure sales of his agricultural property after he defaulted on his mortgage. The district court dismissed appellant's case pursuant to Minn. R. Civ. P. 12.02(e). "When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citing *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997)). When reviewing a dismissal under rule 12.02(e), we accept the facts alleged in the complaint as true and "construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citing *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978)). "The standard of review is therefore de novo." *Id.*

Service

Appellant first argues that respondent failed to serve foreclosure notices. The district court determined that the property was unoccupied when service of the notice of foreclosure was attempted, but that even if the property was occupied, appellant lacked

standing to assert any occupant's rights because it is undisputed that appellant did not live on the property.

The question of standing focuses on whether the plaintiff is the proper party to make a claim. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007). To have standing, a plaintiff must have a sufficient personal stake in a justiciable controversy. *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). A sufficient stake may exist if the party has suffered an "injury-in-fact." *Id.* To show an "injury-in-fact," a party must demonstrate that it has "suffered actual, concrete injuries caused by the challenged conduct." *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. App. 2003).

Regarding notice of a foreclosure sale and service on the occupant:

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.*

Minn. Stat. § 580.03 (2010) (emphasis added).

Service was attempted, but the process server was unable to reach the home on the property because the driveway had not been plowed and there was a large, impassible snow bank at the end of the driveway. He also observed that there were no footprints, no walking paths leading to the home, no snowmobile tracks, no smoke from the furnace/chimney, and no dated mail in the mailbox. The process server submitted an affidavit of vacancy swearing that the premises were vacant and unoccupied. Thus,

respondent complied with the statute because it attempted serving notice of the foreclosure sale upon a person occupying the premises, but it appeared that the premises were unoccupied. Respondent then complied with the publication notice by publishing notice of the foreclosure sale in the Wabasha County Herald for six successive weeks.

Appellant claims that he had tenants on the premises; however, the process server's affidavit refutes this claim. And, if there had been occupants on the property, it is undisputed that appellant was not occupying the property. Thus, appellant would not have been prejudiced by a failure to receive notice of the foreclosure sale, and lacks standing to assert any occupant's rights. Finally, appellant had notice of the sale when it was published for six weeks.¹ The district court did not err in determining that appellant lacked standing to challenge the alleged defect in service.

Waiver

Appellant next argues that the district court erred in determining that he waived any right to have the property sold in separate parcels. The district court determined that appellant waived this right when he entered into the mortgage agreement.

“[W]aiver is the intentional relinquishment of a known right.” *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) (quotations omitted). A valid waiver requires two elements: (1) knowledge of the right, and (2) intent to waive the

¹ Appellant had adequate notice of a foreclosure sale. In January 2009, respondent sent appellant notice of the mortgage default. In September 2009, the parties participated in mediation, but were unable to reach an agreement. In December 2009, respondent sent appellant a pre-foreclosure notice. On January 26, 2010, respondent sent notice of a foreclosure sale. Respondent published notice of the foreclosure sale for six consecutive weeks beginning on February 10, 2010. The foreclosure sales occurred on March 31, and April 28, 2010.

right. *Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn. 1977). Waiver may be express or implied—“knowledge may be actual or constructive and the intent to waive may be inferred from conduct.” *Valspar*, 764 N.W.2d at 367 (quotation omitted).

If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale.

Minn. Stat. § 580.08 (2010). This right to separate sales can be waived “by entering into [a] mortgage agreement.” *John W. Swenson & Sons, Inc. v. Aetna Life Ins. Co.*, 571 F. Supp. 895, 902 (D. Minn. 1983). The mortgage provides that if there is a default, respondent may “sell the Property as a whole or in separate parcels.” The district court correctly determined that appellant waived any right to sell separate parcels when he entered into the mortgage agreement.

Notice

Appellant finally challenges the district court’s determination that respondent complied with the statutory notice requirements. Appellant first argues that respondent failed to publish the legal addresses and city where the parcels are located. Requisites of notice include: “a description of the mortgaged premises, conforming substantially to that contained in the mortgage, and the commonly used street address of the mortgaged premises.” Minn. Stat. § 580.04(a)(4) (2010). In a foreclosure by advertisement, notice must include “the physical street address, city, and zip code of the mortgaged premises” based on “the best of the knowledge of the party foreclosing the mortgage.” Minn. Stat. § 580.025, subd. 2(1) (2010).

No liability shall accrue to the party foreclosing the mortgage or the party's attorney for de minimis, good faith, or commercially reasonable errors in this information. The omission of all or some of the information required by this section from the notice shall not invalidate the foreclosure of the mortgage.

Id., subd. 2.

The notices included the legal descriptions of the property, the tax ID numbers, and the county where the property is located. Respondent's attorney submitted an affidavit indicating that "[o]f the twenty-parcels that make up the [p]roperty, only one had a street address. This street address did not show up on the title work . . . and thus, was inadvertently not included in the description of the [p]roperty in the notices of mortgage foreclosure that were published." This inadvertent failure to include the one street address is a "de minimis, good faith, or commercially reasonable error." *See id.*

Appellant also argues that the advertisement was not published in an appropriate publication. The advertisement appeared in the Wabasha County Herald, which qualifies as an appropriate publication to place the foreclosure-sale advertisement. *See* Minn. Stat. § 331A.02, subd. 1 (2010). Finally, appellant argues that the mortgagor was listed incorrectly as H. Joseph Slater, Trustee of the Harry Slater Irrevocable Trust, claiming that the trust no longer exists. But that does not change the name of the mortgagor. *See* Minn. Stat. § 580.04(a)(1) (stating that the notice must include "the name of the mortgagor, the mortgagee, [and] each assignee of the mortgage"). The district court did not err in concluding that respondent complied with notice requirements.

Affirmed.