STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0247

Donald G. Sirek, et al.,
Appellants,

vs.

Currie State Bank,
Respondent,

Michael John Ginter, et al.,
Respondents/Co-Appellants.

Filed November 5, 2012
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Rice County District Court
File No. 66-CV-11-1602

David Hvistendahl, Mary L. Hahn, Hvistendahl, Moersch, Dorsey & Hahn, P.A., Northfield, Minnesota (for appellants)

Kristine K. Nogosek, Stein & Moore, P.A., St. Paul, Minnesota (for respondent)

Kevin J. Dunlevy, Diann L. Dunlevy, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondents/co-appellants)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KIRK, Judge

Appellant challenges the district court's grant of summary judgment to respondent, arguing that the court erred by finding that respondent did not violate Minn. Stat. § 500.245 (2010) (the statute), which governs the right of first refusal held by the former owner of foreclosed agricultural land. Co-appellants challenge the district court's holding that respondent did not violate its promises under the limited warranty deed. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Appellants Donald and Linda Sirek owned a 197-acre family farm in Rice County encumbered by mortgages in favor of Currie State Bank. Appellants defaulted on the loan and the bank started foreclosure proceedings in June 2007. When the bank published its notice of foreclosure by advertisement in late 2007, appellants owed $674,161 on the mortgage loans. The bank purchased the property at a sheriff's sale on January 10, 2008, subject to a 12-month redemption period. On March 2, 2009, the bank sent appellants notice of its intent to offer the property for sale in three parcels: A, B, and C.

The bank offered the parcels for sale at auction on March 18, 2009, and on the same day entered into three purchase agreements with co-appellants Michael John Ginter, Jeremy P. Gibbs, and Mark and Christina Duhme. The sale of parcel A relied on a standard-form purchase agreement reflecting the presence of structures on the land, while

parcels B and C both employed vacant land purchase agreements. The various purchase agreements and addenda recited a closing date of May 27, 2009.

By letter dated March 19, 2009, the bank advised appellants that it had received offers on the properties. Included with the letter was an affidavit from a bank officer attaching copies of the three purchase agreements and addenda. The bank also included a notice of offer for each parcel with text prescribed by the statute advising appellants that their right of first refusal must be exercised within 65 days and, if electing to buy back the property, they must tender performance within ten days. The notices of offer all recited three required terms: (1) conveyance would be by limited warranty deed; (2) conveyance was subject to the various addenda attached to the relevant purchase agreement; and (3) cash payment of the purchase price was required.

On May 21, 2009, appellants returned signed copies of the notices of offer to the bank, indicating that they intended to exercise their options to buy back the properties. For the three parcels, appellants would have been required to pay approximately $750,000 to reacquire title. Sometime after receiving the signed notices of offer, the bank rescheduled the closing dates for a date after June 1, 2009, when the ten-day statutory window for appellants' performance expired. The bank did not notify appellants that it had rescheduled the closing dates contained in the purchase agreements. Over the next ten days, neither appellants nor the bank attempted to contact the other to schedule a closing or otherwise arrange for payment. On June 9 and 12, 2009, the bank sold the properties to co-appellants by limited warranty deed, warranting that it "has not done or suffered anything to encumber the property."

On June 13, 2011, appellants sued the bank and co-appellants, alleging that the bank violated the statute by including closing dates in the purchase agreements that occur before the expiration of the statute's ten-day window.[1] Appellants additionally alleged unjust enrichment, and they filed notices of lis pendens with the Rice County Recorder. Co-appellants cross-claimed against the bank for breach of the limited warranty contained in the deeds. The parties then moved for summary judgment.

After noting the uncontested fact that appellants did not tender performance within the statute's ten-day window, the district court granted summary judgment for the bank and co-appellants on appellants' statutory and unjust-enrichment claims. The court also concluded that the bank's actions did not encumber the properties in violation of the limited warranty deed and granted summary judgment for the bank on co-appellants' warranty claim. This appeal follows.

D E C I S I O N

Summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court "review[s] the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). This court's review of the

[1] Pursuant to Minn. R. Civ. P. 19.01, appellants named co-appellants as defendants because they presently hold title to the parcels.

district court's decision is de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "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." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)), *review denied* (Minn. May 29, 2001).

I. The district court properly granted the bank summary judgment on appellants' statutory claim.

A. The statutory framework.

The statute establishes a multistep process for a mortgagee to sell agricultural land or a farm homestead on which it has foreclosed. Minn. Stat. § 500.245. It prohibits the mortgagee from selling the property "before offering or making a good faith effort to offer the land for sale or lease to the immediately preceding former owner at a price no higher than the highest price offered by a third party that is acceptable to the seller or lessor." *Id.*, subd. 1(a).

Once the mortgagee takes possession of land by foreclosure, the statute requires first that the former owner be provided with a 14-day notice that the mortgagee intends to offer the property for sale. *Id*. Once the 14 days have elapsed and the mortgagee has received an offer from a third party to purchase the property, the same offer is extended to the prior owner. *Id.* "The offer must be made on the notice to offer form under subdivision 2" of the statute. *Id*.

The form contained in subdivision two provides the framework for transmitting the offer to the former owner. It notifies the former owner that the mortgagee has received an "acceptable offer," and it instructs the mortgagee to insert the "[t]erms, if any, of acceptable offer." *Id.*, subd. 2(a). The form must be accompanied by copies of the purchase agreements between the mortgagee and the third-party offeror. *Id.*, subd. 2(b).

Within 65 days of the notice of offer, the former owner must exercise the right to buy back the property. *Id.*, subd. 1(i). And "[w]ithin ten days after exercising the right to . . . buy by accepting the offer, the immediately preceding owner must fully perform according to the terms of the offer including paying the amounts due." *Id.*

B. The statute requires exact duplication of the terms of the purchase agreements between third parties and the holder of a right of first refusal.

At the center of this dispute is a disagreement between the parties as to whether the statute required the offer the bank received from the co-appellants to be extended to appellants with all the same terms. The bank argues that the terms it placed in the notices of offer it sent to appellants contained the only applicable terms, and terms found in the purchase agreements, but not included in the notice of offer, did not bind appellants. Because it did not select the closing date from the purchase agreements or their addenda, the bank argues that the statute's ten-day timeline governs.

The bank and co-appellants also contend that, when appellants signed and returned the notice of offer, they agreed to adhere to the statutory requirement of performance within ten days, since the closing dates contained in the purchase agreements were not

recited in the notices of offer and were not applicable to appellants. Appellants argue that they were forced to exercise their rights to repurchase the property with a closing date that violated the statutory requirements.

When the meaning of a statute is unambiguous, the appellate court's task is to apply the unambiguous meaning of the statute to the facts. *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010). If a statute is ambiguous, this court inquires into the legislature's intent using the canons of construction. *Id.*

Under the statute, appellants "must fully perform according to the *terms* of the offer including paying the amounts due." Minn. Stat. § 500.245, subd. 1(i) (emphasis added). Failure to perform "the *obligations* of the offer" within ten days after accepting the offer subject it to withdrawal. *Id.*, subd. 1(i)(2) (emphasis added). The statute, by using the plural form, indicates that instead of requiring appellants only to meet the pricing term, they must instead render full performance of multiple terms. The parties dispute, however, whether the multiple terms must be the same between appellants and co-appellants, or whether the bank can select certain terms for inclusion and exclude others.

Subdivision two of the statute prescribes the statutory form that the bank was required to follow when it notified appellants that it received an offer from co-appellants. *Id.*, subd. 2(a). That form required the bank to notify appellants that it had received an "acceptable offer" from another party. *Id.* The statute instructs the bank to fill in the "[t]erms, if any, of acceptable offer" and to attach the purchase agreement containing the

"price and terms of the highest offer made by a third party that is acceptable to the seller." *Id.*, subds. 2(a)-(b).

"While statutory construction focuses on the language of the provision at issue, it is sometimes necessary to analyze that provision in the context of surrounding sections." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). The statute does not define the term "acceptable offer." However, as it is used in the statute, the term "acceptable" always refers to the offer coming from a third party. The only apparent exception is in subdivision two where the bank is asked to provide the "[t]erms, if any, of acceptable offer." Minn. Stat. § 500.245, subd. 2(a). Yet given the otherwise consistent usage of the word "acceptable," the statute plainly calls for the bank to recite the terms in the notice of offer that it received from the third party, not terms that the bank has chosen to apply to appellants. We conclude that, under its plain meaning, the statute requires the bank to include in the right-of-first-refusal notice the agreement it struck with the co-appellants without modification.

C. The closing dates in the purchase agreements were subject to statutory modification.

We turn next to the terms of the purchase agreement and the performance required of appellants. The purchase agreement to parcel A provides that "PREVIOUS OWNERS (DONALD G. AND LINDA L. SIREK) HAVE FIRST RIGHT OF REFUSAL ON SAID PROPERTY TO MATCH THE SAME TERMS OF THIS AGREEMENT ACCORDING TO MN STATUTES 500.245." The agreement also contains a merger clause indicating

that the writing constitutes the entire agreement, and that the agreement can only be modified or canceled in writing or "by operation of law."

The purchase agreements to parcels B and C contain similar terms. They provide that "PREVIOUS OWNERS (DONALD G. SIREK AND LINDA L. SIREK) HAVE FIRST RIGHT OF REFUSAL ON SAID PROPERTY UNDER MN STATUTES TO PURCHASE THIS PROPERTY ACCORDING TO ALL TERMS OF THIS AGREEMENT." Like parcel A, the purchase agreements for parcels B and C contain a merger clause permitting the terms of the agreement to be modified or canceled by operation of law.

The statute requires that the "immediately preceding owner must fully perform according to the terms of the offer including paying the amounts due" within ten days after exercising the right to buy the land. Minn. Stat. § 500.245, subd. 1(i).

We conclude that the merger clauses in the agreements modify the closing date through operation of statute to allow appellants a full ten days to perform. This approach gives effect both to the contractual term allowing for appellants' right of first refusal and to all of the provisions of the statute itself. "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2010).

Thus, every party was on notice through the terms contained in the purchase agreement that appellants had a right of first refusal, and that the terms of the agreements were subject to that right. When appellants invoked their right, the terms of the purchase agreement provided that the closing date would be revised by operation of law.

It is useful to note that the May 27 closing date is not facially defective. Had appellants chosen not to exercise their right of first refusal, or had they submitted their notice of offer so that their ten-day window to perform fell before May 27, the closing date would not have changed. When appellants purported to exercise their statutory right, the bank correctly concluded that the purchase agreements provided for the modification of the closing date to match the statutory timeframe.

Appellants argue strenuously that *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227 (Minn. App. 2005), mandates reversal, contending that the case stands for the proposition that the bank has failed to strictly comply with the mandatory requirements of the statute and that, therefore, appellants' right of first refusal remains intact. In *Ag Servs.*, the mortgagee failed to provide the statutory 14-day notice of its intent to sell, and it did not provide the required affidavit from a bank officer with the purchase agreements. 693 N.W.2d at 230-31. This court held that the statutory requirement to provide the 14-day notice and the affidavit were mandatory, not directive, because the statute unambiguously employs the word "must" to establish these duties. *Id.* at 233-34. We concluded that "[f]ailure to give the mandatory notice of intent to sell and failure to provide the required affidavit constitute failure to offer the right of first refusal as required by law." *Id.* at 234.

Appellants misconstrue the holding of *Ag Servs.* The statutory provisions creating a ten-day performance window are directed not at the bank but at the immediately preceding owner, who "*must* fully perform according to the terms of the offer." Minn. Stat. § 500.245, subd. 1(i) (emphasis added). If *Ag Servs.* says anything, it is that the

word "must" within a statute creates a mandatory obligation. Our legislature makes this doubly—and succinctly—clear in its rules of statutory interpretation. *See* Minn. Stat. § 645.44, subd. 15a (2010) ("'Must' is mandatory."). The statute's ten-day performance window imposes a duty on appellant, not on the bank. It is fair to conclude that the bank may not do anything to hinder appellants from performing that duty, and here it did not. The bank revised the closing date in order to give appellants time to meet their mandatory duty. Since appellants did not perform under the statute within the ten-day window, they have no further rights to the property.

D. Appellants had a duty to clarify the closing date.

In addition to failing to comply with the mandatory ten-day window for performance upon receipt of a valid offer of their right to first refusal, appellants also did not meet their duty to inquire and clarify the terms of the closing date. "Once a landowner reasonably discloses the terms of an acceptable third-party offer, the holder of the right of first refusal has a duty to undertake a reasonable investigation of any terms unclear to him." *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 585 (Minn. App. 2003) (quotation omitted), *aff'd*, 689 N.W.2d 779 (Minn. 2004).

There is no dispute that the bank reasonably disclosed the terms of the offer: it provided complete copies of the purchase agreements certified by the affidavit of a bank official, as required by the statute. Having done so, the burden then shifted to appellants to clarify the terms. They could have chosen to remain with the May 27 closing date, or they could have rescheduled to another day within their ten-day performance window. Either way, the burden of clarifying this term lies with appellants.

Appellants argue against the application of *Dyrdal* here, contending that it is a holding at common law that is inapplicable to this statutory right of first refusal. However, "[s]tatutory enactments, even though they provide new procedures to enforce pre-existing rights at law and in equity, are to be read in harmony with the existing body of law, inclusive of existing equitable principles, unless an intention to change or repeal it is apparent." *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955). Nowhere does the statute expressly vitiate the use of common law right-of-first-refusal principles to fill the gaps where the statute is silent. Consequently, the duty to inquire into the terms of the offer applies with equal force to this statutorily created right of first refusal as it does to a common law right.

It is noteworthy that, no matter what closing date the bank and co-appellants established in their purchase agreement, that date would require clarification once appellants accepted the notice of offer. If, as in this case, the closing date was within the ten-day period for appellants to perform, closing on that date cannot proceed without running afoul of the statute. If the closing date was set beyond the ten-day period, appellants might argue that, since they must meet the terms of the purchase agreement, they have until that later date to perform even though it is beyond the statute's ten-day performance window. Even if, by chance, the closing date was set for the tenth day, the bank and co-appellants could no longer close on that date since appellants would have

until the end of that day to tender performance.[2] In each circumstance, appellants are faced with a duty to clarify.

Appellants suggest that the best option for the bank is to omit a closing date altogether and just make note that the date will be determined by the parties. However, a closing date is often a necessary material term to a purchase agreement. *Gresser v. Hotzler*, 604 N.W.2d 379, 384 (Minn. App. 2000) (holding that modifications to a closing date constituted changes to a material term of the purchase agreement).

In sum, the bank met its mandatory duties under the statute, perfecting an offer of the right of first refusal to appellants as required by law. Once that offer was extended to appellants, appellants had the burden to meet the statute's mandatory strictures of acceptance and performance, and they also had the duty to inquire and clarify confusing terms. When appellants failed to do so, their right of first refusal was extinguished.

II. The district court properly granted the bank summary judgment on appellants' unjust-enrichment claim.

Appellants argued to the district court that they were entitled to prevail on their claim for unjust enrichment because the bank profited by selling the property before the statutorily permissible deadline, rather than holding onto the property and providing proper notice. A claim for unjust enrichment is an equitable remedy, and is only available "where there is [no] adequate remedy at law available." *Servicemaster of St. Cloud v. GAB Business Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996).

[2] As noted above, it was the action of the appellants in returning the signed notice of offer on May 21 that set the ten-day period in motion. The bank had no way of knowing when, or if, appellants would sign and return the notice.

The bank correctly notes that a remedy at law is available to appellants, namely the right to assert a cause of action under the statute. Appellants have availed themselves of the right to seek a statutory remedy, and the district court properly granted the bank and co-appellants summary judgment on the unjust-enrichment claim.

III. Material facts remain in dispute regarding whether the bank did or suffered anything to encumber the property.

Co-appellants assert a cross-claim, alleging that the bank breached its promise in the limited warranty deeds that it "has not done or suffered anything to encumber the property." They contend that appellants' right of first refusal and their notices of lis pendens operate as encumbrances, making it difficult to convey the properties and that they are, in turn, entitled to payment for the costs they have incurred defending this action. The district court granted summary judgment for the bank, holding that even if the lis pendens recordings constituted an encumbrance on the property, the encumbrance was created by appellants, not the bank.

An encumbrance "is something that is a burden or charge. It is a right or interest in some person other than the owner to the diminution of the value of owner's interest in the land." *Carver v. Lane*, 153 Minn. 203, 204, 190 N.W. 68, 69 (1922). Minnesota courts have not addressed whether uncertain compliance with the statute can operate to encumber property; however co-appellants correctly note that the question of whether the bank met the terms of the statute does not dispose of the question of whether the bank met the terms of the limited warranty deed. And the district court's analysis was incomplete when it held that appellants' filing of notices of lis pendens cannot amount to

a warranty violation by the bank. Simply because appellants filed notices of lis pendens does not answer whether the bank has done or suffered anything to encumber the property. The record is silent as to whether the bank acted so incautiously in the transactions here so as to have caused an avoidable burden or charge to the land.

For example, appellants and the bank contend that neither had a duty to contact the other to clarify the closing date. As discussed above, appellants had a duty to inquire as the holder of the right of first refusal. As it relates to the co-appellants, the record does not reflect whether a notice by the bank to the appellants of the modified closing date would have cleared any uncertainty in the transfer of title. For these reasons, material facts remain in dispute as to whether the bank's actions caused an encumbrance to be created, and we remand to the district court for further proceedings consistent with this decision.

Affirmed in part, reversed in part, and remanded.