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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0008**

In the Matter of the Petition of U.S. Bank National Association
for a New Certificate of Title after Mortgage Foreclosure Sale
U.S. Bank National Association, petitioner,
Appellant,

vs.

Traverse Pointe Association,
Respondent.

**Filed August 6, 2018
Reversed and remanded
Johnson, Judge**

Dakota County District Court
File No. 19HA-CV-16-3911

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Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

The primary issue in this appeal is whether an association organized under the
Minnesota Common Interest Ownership Act has an assessment lien on a condominium unit

that was acquired in a mortgage foreclosure sale. We conclude that the association's assessment lien does not comply with section 515B.3-116(c) of the Minnesota Statutes because it reflects assessments of expenses that were not included in the association's then-current annual budget. We also conclude that the district court erred by not ordering the issuance of a new certificate of title. We further conclude that the district court erred by granting the association's request for attorney fees and costs and by denying the unit owner's request for attorney fees and costs. Therefore, we reverse and remand for further proceedings.

FACTS

In 2001, Anita R. Kennedy and James M. Kennedy purchased a condominium unit in Inver Grove Heights. In 2004, the Kennedys granted a mortgage on the property to Optimum Mortgage Services, Inc. The mortgage later was assigned to U.S. Bank, N.A.

On July 22, 2015, significant water and mold damage in the condominium unit was discovered. The City of Inver Grove Heights ordered the Traverse Pointe Association, a common-interest community, to repair the damaged unit. The association partially demolished the residence and rebuilt it. The expenses of demolition and rebuilding were paid by an insurance company, with some exceptions, including the association's payment of a \$10,000.00 deductible and \$7,989.19 in expenses that were not insured. The association asserts that it levied assessments on the unit to account for those two expenditures.

U.S. Bank later foreclosed on its mortgage. On June 23, 2016, U.S. Bank purchased the unit at a sheriff's foreclosure sale. On June 27, 2016, U.S. Bank recorded the certificate

of sale. In August 2016, U.S. Bank commenced an action to shorten the Kennedys' redemption period, and a district court granted relief by declaring that the six-month redemption period would be shortened to five weeks and would expire on October 5, 2016. *See* Minn. Stat. § 582.032, subs. 1, 3 (2016). The Kennedys did not redeem.

In December 2016, U.S. Bank commenced this action by filing a petition to cancel the existing certificate of title and to order the issuance of a new certificate of title "free and clear of all interest of [the Kennedys] and all junior liens." On March 16, 2017, the association recorded an assessment lien against the unit in the amount of \$20,810.16. The amount of the assessment lien includes the association's payment of the \$10,000.00 insurance deductible, the association's payment of \$7,989.19 in uninsured repair expenses, \$2,208.16 for association dues from April 4, 2016, to March 2017, late fees of \$180.00 from October 2016 to March 2017, and attorney fees and costs of \$1,533.00, less a \$1,100.00 payment from U.S. Bank in February 2017.

In September 2017, the association moved for summary judgement on U.S. Bank's petition. The association argued that U.S. Bank's title is subject to an assessment lien and that the bank is not entitled to a new certificate of title free and clear of other interests. U.S. Bank argued that the assessment lien should not include assessments for expenses that were not included in the association's then-current annual budget. The district court granted the association's motion for summary judgment. The district court determined that the association's assessment lien is proper and that U.S. Bank's certificate of title shall be subject to a lien in favor of the association in the amount of \$20,405.35 (which is approximately \$400 less than the lien that the association recorded). The district court,

however, did not cancel the existing certificate of title and did not order the issuance of a new certificate of title. The district court also awarded the association attorney fees and costs in the amount of \$12,000.00 and denied U.S. Bank's request for attorney fees and costs. U.S. Bank appeals.

D E C I S I O N

I. Request for New Certificate of Title

U.S. Bank argues that the district court erred by granting the association's motion for summary judgment. A district court must grant a motion for summary judgment "if 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 (2017). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotation omitted). This court applies a *de novo* standard of review to a district court's legal conclusions on summary judgment and views the evidence in the light most favorable to the non-moving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotations omitted); *Day Masonry v. Independent Sch. Dist. No. 347*, 781 N.W.2d 321, 325 (Minn. 2010).

U.S. Bank argues that the district court erred by determining that the association's assessment lien complies with the applicable provision of the Minnesota Common Interest Ownership Act (MCIOA). In general, a common-interest association "has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due."

Minn. Stat. § 515B.3-116(a) (2016). But a common-interest association's right to an assessment lien is limited after a mortgage foreclosure:

If a first mortgage on a unit is foreclosed, . . . and no owner or person who acquires the owner's interest in the unit redeems . . . , *the holder of the sheriff's certificate of sale from the foreclosure of the first mortgage* or any person who acquires title to the unit by redemption as a junior creditor *shall take title to the unit subject to a lien in favor of the association for unpaid assessments for common expenses levied pursuant to section 515B.3-115(a), (e)(1) to (3), (f), and (i) which became due, without acceleration, during the six months immediately preceding the end of the owner's period of redemption.* The common expenses shall be based upon the association's then current annual budget, notwithstanding the use of an alternate common expense plan under section 515B.3-115(a)(2).

Minn. Stat. § 515B.3-116(c) (emphasis added). "Common expenses" are defined within the MCIOA to mean "expenditures made or liabilities incurred by or on behalf of the association . . . together with any allocations to reserves." Minn. Stat. § 515B.1-103(8) (2016).

In the district court, the association argued that the insurance deductible and the uninsured repair expenses were common expenses that were assessed during the six months immediately preceding the expiration of the redemption period. U.S. Bank argued in response that the association's annual budget for 2016 did not include expenses for an insurance deductible or for uninsured repair expenses for the Kennedys' unit. In its reply memorandum, the association argued that, although the association's 2016 budget originally did not include such expenses, the association amended its budget to include those expenses before the expiration of the redemption period. In support of that argument,

the association submitted documentary evidence consisting of some financial statements and the minutes of an October 4, 2016 meeting of the association's board of directors.

The district court determined as a matter of law that an amended budget would satisfy the requirements of section 515B.3-116(c) and further determined that the association amended its budget on October 4, 2016 (one day before the expiration of the redemption period), to account for the \$10,000.00 insurance deductible and the \$7,989.19 in uninsured repair expenses. Accordingly, the district court determined that the association's assessment lien was proper.

A.

On appeal, U.S. Bank first contends that the district court erred by considering an argument that the association made for the first time in its reply memorandum and by allowing the association to submit additional evidence with its reply memorandum.

A party making a dispositive motion may include affidavits and exhibits with its motion papers, which must be served at least 28 days before the hearing on the motion. Minn. R. Gen. Pract. 115.03(a), (a)(3). A party responding to the motion may serve supplementary affidavits and exhibits with its responsive memorandum. Minn. R. Gen. Pract. 115.03(b)(2). The moving party's reply memorandum must be "limited to new legal or factual matters raised by an opposing party's response to a motion." Minn. R. Gen. Pract. 115.03(c).

In this case, the argument made in the association's reply memorandum, and the evidentiary materials associated with the argument, were pertinent to the matters raised by U.S. Bank's responsive arguments. U.S. Bank challenged the association's motion by

arguing that the association's annual budget for 2016 did not include expenses for a \$10,000.00 insurance deductible or \$7,989.19 in uninsured repair expenses for the unit. The association's reply relates directly to U.S. Bank's responsive argument. Thus, the district court did not err by considering the argument and the evidentiary materials served with contained in the association's reply memorandum.

B.

U.S. Bank next contends (as its main argument on appeal) that the association's evidence does not create a genuine issue of material fact with respect to the question whether the association's then-current annual budget for 2016 included a \$10,000.00 insurance deductible or \$7,989.19 in uninsured repair expenses for the unit.

In response, the association contends that the undisputed facts show that the association "amended its annual budget to include the insurance deductible and repair costs prior to the expiration of the owners' redemption period." In support of this argument, the association relies on its August 31, 2016 balance sheet, which lists six liabilities, including one item described as "repair escrows" in the amount of \$17,989.19. In addition, the association relies on the minutes of the October 4, 2016 meeting of its board of directors. The minutes include mention of a "financial report," which is briefly summarized, with dollar amounts for revenues, expenses, and net income, as well as dollar amounts for assets, liabilities, and equity.

The association's evidence does not satisfy the plain language of the statute. The balance sheet that the association cites is not, by itself, a "budget" and does not reflect the association's annual budget. A "budget" is an "itemized summary of estimated or intended

expenditures for a given period along with proposals for financing them,” *The American Heritage Dictionary* 249 (3d ed. 1996), or “an estimate, often itemized, of expected income and expense for a given period in the future,” *The Random House Dictionary of the English Language* 272 (2d ed. 1987). In contrast, a “balance sheet” is a “statement of the financial condition of an individual or organization at a given date” with “a statement of assets, liabilities, and net worth,” *Webster’s New International Dictionary* 206 (2d ed. 1946), or a “statement of a business or an institution that lists the assets, debts, and owners’ investment as of a specified date,” *American Heritage, supra*, at 139. The association’s August 31, 2016 balance sheet reflected a liability (or perhaps a contingent liability, given the word “escrow”) of \$17,989.19, which appears to correspond to the disputed components of the association’s assessment lien. But that line item does not indicate whether such amount is a budgeted expense.

The association’s evidence also includes a document that relates more directly to its budget. But the association does not cite it in its appellate brief. The one-page document is entitled “operating budget comparison as of 8/31/2016.” The document lists (in rows) ten categories of expenses and a total amount of operating expenses. For each category, the document shows (in columns) the amount in the 2016 budget, the year-to-date amount in the 2016 budget, the amount actually spent year-to-date, and the “operating variance” between the budgeted amount and the amount actually spent year-to-date. The document implies that the association’s original budget had *not* been revised, updated, or amended as of August 31, 2016.

Furthermore, the minutes of the association's October 4, 2016 board meeting do not indicate that the board amended the annual budget at that meeting. The minutes do not reflect that the board took any action concerning the annual budget. The minutes simply refer to a "financial report." In the context of a meeting of a board of directors, a "report" generally is for informational purposes only, and any recommendation associated with a report likely would require formal action, such as a motion, a second, and a majority vote. *See* Henry M. Robert III, *Robert's Rules of Order: Newly Revised* § 48, at 476-77 (11th ed. 2011). No such action appears in the minutes of the association's October 4, 2016 board meeting.

Thus, we agree with U.S. Bank that the district court erred by determining that the disputed components of the association's assessment lien (the \$10,000.00 insurance deductible and \$7,989.19 in uninsured repair expenses for the unit) were included in the association's then-current annual budget.

C.

The association argues in the alternative that, as a matter of law, the disputed components of the association's assessment lien are proper even if they were not included in the association's then-current annual budget. Specifically, the association argues that the term "common expenses" in section 515B.3-116(c) should be interpreted to mean "customary and necessary operating expenses," which would harmonize that section with another section of the MCIOA. *See* Minn. Stat. § 515B.3-1151(a) (2016). The association argues further that the disputed components of its assessment lien were not "customary and necessary operating expenses" that are appropriate for an annual budget because the

association was not and is not responsible for the repair, replacement, and maintenance of individual units. *See* Minn. Stat. § 515B.1-103(8); *cf.* Minn. Stat. § 515B.3-115(e)(2).

U.S. Bank argues in its reply brief that the association did not preserve this argument by presenting it to the district court. At oral argument, the association conceded that it did not make this argument to the district court. Our review of the association’s motion papers confirms that the association relied solely on an argument that is inconsistent with its alternative argument; the association accepted U.S. Bank’s premise that all assessments reflected in its assessment lien must be “based upon the association’s then current annual budget.” *See* Minn. Stat. § 515B.3-116(c). We will not consider the association’s alternative argument for the first time on appeal because it has been forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 43 (Minn. App. 2014).

D.

U.S. Bank next contends that the district court erred by not canceling the existing certificate of title and ordering the issuance of a new certificate of title. U.S. Bank’s action is based on the following statute:

Any person who has . . . become the owner in fee of the land, or any part thereof, may have the title registered. . . . [T]he owner shall apply by duly verified petition to the court for a new certificate of title to such land, and the court shall thereupon, after due notice to all parties in interest and upon such hearing as the court may direct, make an order for the issuance of a new certificate of title to the person entitled thereto, and the registrar shall thereupon enter a new certificate of title to the land, or of the part thereof to which the petitioner is entitled as in the case of a voluntary conveyance.

Minn. Stat. § 508.58, subd. 1 (2016).

In its petition, U.S. Bank asked the district court to cancel the existing certificate of title and issue a new certificate of title for the unit in the name of U.S. Bank “as sole owner of the property described,” “free and clear of all interest of [the Kennedys] and all junior liens.” The parties agreed that some assessments reflected in the assessment lien (which total \$2,416.16) are properly included. The district court determined that the association is entitled to an assessment lien of \$20,405.35, which is less than the amount of the lien that the association recorded in March 2017. After resolving the parties’ arguments concerning the association’s assessment lien, the district court determined that the disputed components of the assessment lien (which total \$17,989.19) were properly included in the lien. But the district court entered judgment for the association without making any provision for the issuance of a new certificate of title.

The association does not oppose U.S. Bank’s argument that the district court erred by not ordering the issuance of a new certificate of title with an assessment lien in a lesser amount. We agree with both parties that the district court should have ordered the issuance of a new certificate of title. In light of our resolution of the parties’ arguments concerning the disputed components of the association’s assessment lien, *see supra* part I.B., the proper amount of the lien should be \$2,416.16.

II. Association's Attorney Fees and Costs

U.S. Bank also argues that the district court erred by granting the association's request for attorney fees and costs.

The association asked the district court for an award of attorney fees and costs in the amount of \$22,331.00. The district court awarded the association \$12,000.00 for services performed and costs incurred between December 2016 and December 2017. The district court stated that the legal basis of the award is section 515B.3-115(e)(4) of the Minnesota Statutes. That statute provides that "reasonable attorneys fees and costs incurred by the association in connection with (i) the collection of assessments and, (ii) the enforcement of this chapter, the articles, bylaws, declaration, or rules and regulations, against a unit owner, may be assessed against the unit owner's unit." Minn. Stat. § 515B.3-115(e)(4).

U.S. Bank contends that the district court erred because the statute allows an association to levy an assessment against a unit owner for certain fees and costs but does not permit a district court to enter a money judgment against the unit owner for those fees and costs. In response, the association points to a statute providing that a unit owner "shall be personally liable to the association for payment of the assessment levied against the unit." *See* Minn. Stat. § 515B.3-116(e).

In light of the plain language of the statute, we agree with U.S. Bank that the statute cited by the district court is not a proper legal basis for a money judgment for fees and costs. The statute merely allows the association to levy an assessment against the unit for certain attorney fees and costs. *See* Minn. Stat. § 515B.3-115(e)(4). A different provision

of the MCIOA expressly prohibits an association from asserting a lien on an assessment for those attorney fees and costs. *See* Minn. Stat. § 515B.3-116(c) (authorizing lien for assessments levied pursuant to subsections 515B.3-115(e)(1)-(3) but not subsection 515B.3-115(e)(4)). An association presumably may commence a civil action to obtain a judgment if an assessment is not paid. But that did not happen in this case. This action was commenced by U.S. Bank for the purpose of obtaining a new certificate of title. The association has not identified any other legal basis justifying the district court’s award of fees and costs.

Thus, the district court erred by granting the association’s request for attorney fees and costs.

III. U.S. Bank’s Attorney Fees and Costs

U.S. Bank last argues that the district court erred by denying its request for attorney fees and costs. U.S. Bank’s request for fees and costs is based on a statute that provides that “if . . . an association . . . violates any provision of this chapter, or any provision of the declaration, bylaws, or rules and regulations[,] any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief.” Minn. Stat. § 515B.4-116(a) (2016). In addition, “The court may award reasonable attorney’s fees and costs of litigation to the prevailing party.” Minn. Stat. § 515B.4-116(b). The district court denied U.S. Bank’s request for fees and costs on the ground that it was not the prevailing party. The district court’s reasoning should be reconsidered in light of our resolution of the

parties' arguments concerning the disputed components of the association's assessment lien. *See supra* part I.B.

In sum, we remand the matter to the district court for an order for the issuance of a new certificate of title reflecting an assessment lien in the amount of \$2,416.16 and for reconsideration of U.S. Bank's request for an award of attorney fees and costs.

Reversed and remanded.