STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0560

Heritage Bank, petitioner,
Respondent,

vs.

Gary D. Stortenbecker,
Appellant.

Filed September 24, 2018
Affirmed
Hooten, Judge

Morrison County District Court
File No. 49-CV-18-228

Christopher W. Harmoning, Gray, Plant, Mooty, Mooty & Bennett, P.A. St. Cloud, Minnesota (for respondent)

Sarah R. Jewell, Franz Hultgren Evenson, P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant borrower challenges the district court's grant of respondent bank's petition under Minn. Stat. § 583.27, subd. 7 (2016), to proceed with remedies as a secured-party notwithstanding the requirements of the Farmer-Lender Mediation Act (FLMA), Minn. Stat. §§ 583.20–.32 (2016 & Supp. 2017). Appellant argues that the district

court improperly applied the *Dahlberg* factors in granting a temporary restraining order, erred in determining that he was ineligible for mediation under the FLMA, and erred in failing to recuse based on bias against appellant. We affirm.

FACTS

Appellant Gary Stortenbecker and respondent Heritage Bank executed two promissory notes in November of 2017. To secure repayment, Stortenbecker granted Heritage Bank a security interest in his farm and all of his tangible and intangible property. This collateral property included 320 heifer cows, 66 heifer calves, 19 bulls, and 6 bull calves, as well as farm equipment. The security agreement provided that Stortenbecker would not remove, change the location, sell, transfer, or dispose of any collateral without Heritage Bank's consent.

In late 2017, Stortenbecker sold his house, barns, and a portion of the farmland to L.R. and his wife, who took possession on or about February 9, 2018. During this same time period, he also sold some additional farmland to T.G. The proceeds from the sale of the farm were distributed to Heritage Bank in partial satisfaction of Stortenbecker's promissory notes. After the sale, Stortenbecker's farm equipment and cattle remained on the farm in the care of L.R. and T.G. Stortenbecker reached an agreement with L.R. that he would supply the hay and L.R. would feed his cattle. L.R. reported that in January, a cattle man in a black Ford Escalade visited the farm, indicating that he wanted to buy cattle. Shortly after this visit, L.R. reported that 20 out of approximately 50 of Stortenbecker's heifer calves were missing.

Upon learning Stortenbecker had fewer cows on the farm, an employee of Heritage Bank went to the farm on January 26, 2018, and counted approximately 250 heifer cows, 31 heifer calves, and three bulls. Heritage Bank contacted Stortenbecker to discuss the mysteriously missing cows, and he agreed to be present for a recount of his cattle on February 6, 2018. However, claiming that he was ill, Stortenbecker did not come to the farm for the recount. The Heritage Bank employee conducted the recount with almost the same results, with the exception of an additional 13 calves that had just been placed in Stortenbecker's pen at the farm. These calves had their identification tags removed. Heritage Bank learned from L.R. that these calves actually belonged to him and T.G. L.R. did not know who took the identification tags off of their calves or who put the calves in Stortenbecker's pen. L.R. reported that one of his hired hands had seen Stortenbecker at the farm at approximately 6:30 a.m. that morning.

On February 9, 2018, Heritage Bank, claiming that Stortenbecker had defaulted on his loan and security agreement, filed a motion for a temporary restraining order (TRO) under Minn. R. Civ. P. 65.01, preventing Stortenbecker from entering the farm and removing the remaining cattle. Heritage Bank also brought a petition to proceed with its remedies under its security agreement, including the sale of Stortenbecker's remaining cattle. The district court granted the ex parte TRO, and issued a summons for Stortenbecker to attend a hearing on February 16, 2018 regarding the petition and extension of the TRO.

Although Stortenbecker attempted to retain a lawyer within the seven days before the hearing, he was unsuccessful and appeared pro se at the hearing. The district court heard testimony from Stortenbecker, a bank employee, and L.R. Based on the testimony

and affidavits submitted by Heritage Bank, the district court extended the TRO and granted Heritage Bank the right to proceed with its remedies under its security agreement with Stortenbecker.

Stortenbecker later obtained counsel and filed a motion to modify the TRO and to stay the sale of the cattle. In a March order, the district court denied this motion, explaining that no additional evidence had been provided to warrant a different conclusion. Stortenbecker now appeals both the February and March orders.

D E C I S I O N

I. Although the District Court Failed to Provide Findings Indicating that It Sufficiently Considered the *Dahlberg* Factors in Granting a TRO, the Issue is Moot on Appeal.

Stortenbecker argues that the district court failed to sufficiently consider the *Dahlberg* factors when it granted Heritage Bank's motion for a TRO, preventing Stortenbecker from entering the farm and removing his cattle. Those factors are: the nature of the parties; the balance of relative harm suffered by each party; the likelihood of success on the merits; considerations of public policy; and "[t]he administrative burdens involved in judicial supervision and enforcement of the temporary decree." *Dahlberg Bros. Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965). "[T]he trial court has broad discretion in deciding whether to grant a temporary injunction, and the *Dahlberg* factors are to be applied in determining whether the court has abused its discretion." *Crowley Co. v. Metro. Airports Comm'n*, 394 N.W.2d 542, 545 (Minn. App. 1986). Further, the district court must make sufficient findings to allow for meaningful review. *Id.* If the district court "fails to analyze the *Dahlberg* factors in granting a temporary injunction, the court commits

error." *State by Ulland v. Int'l Ass'n. of Entrepreneurs of Am.*, 527 N.W.2d 133, 135 (Minn. App. 1995), *review denied* (Minn. Apr. 18, 1995).

Stortenbecker is correct that the district court made no findings regarding the *Dahlberg* factors. The district court addressed the initial petition for a TRO administratively. Although the memorandum in support of Heritage Bank's motion for the TRO listed the *Dahlberg* factors and argued how the factors were satisfied, the district court did not explicitly state that it considered these factors in its February 9 order. Instead, the district court issued a one-page order, stating that "based on the file, proceedings, and being fully advised in the matter," the TRO was granted. The district court extended the TRO in its February 16 order, again not explicitly mentioning its consideration of the *Dahlberg* factors. Because there are no findings that indicate that the district court considered the *Dahlberg* factors in granting Heritage Bank's motion for a TRO, we are unable to determine whether the district court abused its discretion in granting the TRO. *See Crowley*, 394 N.W.2d at 545 (holding that absent findings, appellate court is unable to determine whether grant of TRO by district court was an abuse of discretion); *see also* Minn. R. Civ. P. 52.01.

However, on appeal, any challenge to the TRO is moot. Appellate courts "will hear only live controversies . . . . If, pending an appeal, an event occurs which makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal will be dismissed as moot." *In re Inspection of Minn. Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984). The TRO prevented Stortenbecker from accessing the farm that had been sold to L.R. and disposing of any collateral located on that land. After the TRO was

renewed and the district court granted Heritage Bank's petition to proceed with its remedies, Stortenbecker's cattle were sold to L.R. and the proceeds were applied to Stortenbecker's debt to Heritage Bank. Because the TRO prevented Stortenbecker from going to the farm and accessing collateral that has since been sold, any objection to its issuance is moot.

II. Stortenbecker Does Not Qualify for Mediation Under the Farmer-Lender Mediation Act.

Stortenbecker argues that the district court erred by failing to refer this case to mediation under the Farmer-Lender Mediation Act prior to issuing the TRO and granting Heritage Bank's petition. The purpose of the FLMA is to "halt the process [of foreclosure] before agricultural property changes hands and to maintain the parties in their present respective positions until they have had an opportunity to adjust the indebtedness by mediation." *Prod. Credit Ass'n of Worthington v. Spring Water Dairy Farm, Inc.*, 407 N.W.2d 88, 91 (Minn. 1987). However, "a debtor who fraudulently conceals, removes, or transfers agricultural property in which the debtor knows there is a security interest is ineligible for mediation . . . if the concealing, removing, or transferring was in violation of a security agreement without remitting the proceeds to the secured party." Minn. Stat. § 583.27, subd. 7. If the secured party petitions to proceed under this exception, the district court must issue findings regarding the application of this exception. *Id.*

In its order following the February 16 hearing, the district court found that Stortenbecker was ineligible for farmer-lender mediation because the testimony offered at the hearing showed that he had not remitted to Heritage Bank any of the proceeds from the

sale of the missing cattle, which was a violation of his security agreement. These findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Minn. R. Civ. P. 52.01. "Findings of fact are clearly erroneous if [this] court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). In applying Minn. R. Civ. P. 52.01, this court views "the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

The security agreement between Stortenbecker and Heritage Bank provides that Stortenbecker shall not remove, change the location, sell, transfer, or dispose of any collateral without the Heritage Bank's consent. Stortenbecker would be considered in default if he violated that provision. The collateral pledged under the security agreement included 320 heifer cows, 66 heifer calves, 6 bull calves, and 19 bulls. In January 2018, an employee of Heritage Bank visited the farm to count Stortenbecker's cattle. She testified that there were roughly 250 head of beef cows, 31 heifers, and 3 bulls, reflecting that over 100 cattle were missing. She further testified that removal of any collateral violated the security agreement and that the bank had not received any proceeds from any sale of cattle. Heritage Bank agreed to do a recount in February 2018. Stortenbecker was originally going to be at the recount but was too sick to attend. L.R. testified that during the recount, there were 13 extra calves in Stortenbecker's pen. It was discovered that those 13 calves belonged to L.R., who testified that he had not put his calves in that pen and the tags indicating that the cows belonged to him had been removed. Stortenbecker testified that his cows were comingled with L.R.'s cows, which could have caused the discrepancy

in numbers. However, L.R. testified that he ran all of Stortenbecker's cattle through a chute and the count was still off by over 100 cattle. Stortenbecker also admits the original security agreement was an accurate count of his initial number of livestock. Based upon this record, we cannot conclude that the district court's determination that Stortenbecker fraudulently removed cattle from the land was clearly erroneous. Because there is support in the record for the district court's finding that Stortenbecker fraudulently removed cattle from the farm, the district court did not err by concluding that Stortenbecker was disqualified from participating in mediation under the FLMA.

Stortenbecker further argues that he was entitled to notice of farmer-lender mediation before the February 16 hearing took place and that this proceeding occurred too quickly. However, Heritage Bank petitioned the district court to proceed under Minn. Stat. § 583.27, subd. 7, which provides that after the complaining party files a petition to proceed with its remedies against a debtor without mediation under the FLMA, "[t]he district court shall issue a summons within seven days" and the debtor's "appearance must be no less than seven and no more than 14 days from the issuance of the summons." Consistent with the timeline of the statute, the district court issued the summons on February 9, 2018. The hearing took place seven days later, falling within the timeline required by statute. Additionally, a petition for the relief Heritage Bank sought "cannot be brought after the secured party has served a mediation notice on the debtor." Minn. Stat. § 583.27, subd. 7. Thus, Stortenbecker was not entitled to notice of farmer-lender mediation before this proceeding took place.

III. The District Court Did Not Exhibit Prejudice or Bias.

Stortenbecker argues that the district court was biased against him and erred by failing to recuse. However, he did not raise this issue in the district court. "[A] party who fails to remove a judge before the start of trial has lost its opportunity to do so unless it demonstrates prejudice or implied or actual bias." *Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990).

To establish prejudice, Stortenbecker argues that the district court made its intentions known prior to hearing all the evidence. At the hearing on February 16, the district court stated,

> [Counsel], regarding the particulars, I was comfortable in — after I reviewed the affidavits and following and reading the Findings of Fact, Conclusions of Law, and Order Permitting Petition to Proceed with Remedies, I was comfortable in signing that. If you would call your witnesses to get to the particulars that you're referencing in that particular proposed order, you can call your witnesses.

Counsel then clarified, asking the district court if it was prepared to sign the order. The district court replied that it "was comfortable in going as long as there's the — the information that you're talking about, the particulars, that are in this proposed order are different than the affidavits, so if you want to fill in the gaps, you can certainly call your witnesses."

Stortenbecker claims that these remarks by the district court indicated that it had prejudged the case prior to the taking of testimony at the hearing. But, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display

a deep-seated favoritism or antagonism that would make fair judgment impossible." *Byers v. Comm'r of Revenue*, 735 N.W.2d 671, 673 (Minn. 2007) (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)). Judicial remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157. Here, the district court's statements do not rise to the level of deep-seated favoritism or antagonism. The district court stated that it was comfortable with signing the order after reviewing the affidavits and proposed order. However, when questioned if it would immediately sign the order, the district court replied that counsel could instead call witnesses to fill in the gaps between the affidavits and the proposed order. The burden is on Stortenbecker to provide evidence of favoritism or antagonism and these statements do not rise to the level of necessary proof. *See State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008) (noting that it is presumed that judges will neutrally and objectively approach cases and the burden is on the party alleging bias to defeat this presumption).

Stortenbecker further argues that the district court's outright denial of his request for a continuance constituted bias warranting recusal. However, he offers no evidence to show that the denial exhibited any form of favoritism or antagonism against him. A denial of a motion does not raise questions of impartiality on its own. *See Braith v. Fischer*, 632 N.W.2d 716, 724–25 (Minn. App. 2001) (noting that appellant offered no evidence of bias and was simply dissatisfied with the outcome), *review denied* (Minn. Oct. 24, 2001).

In his reply brief, Stortenbecker argued for the first time that we should reverse the district court on the basis that it abused its discretion by denying his request for a

continuance. It is well settled that "[a] reply brief should be limited to a concise answer to new points made by a respondent; it should not include a repetition of arguments previously made or new matter not in response to points made by the respondent." *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006) (quotation omitted). Although Stortenbecker raised the issue of the district court's bias in his brief — and included the district court's failure to grant a continuance as evidence of bias — Stortenbecker did not raise the issue of reversal based solely upon this discretionary ruling until his reply brief. Therefore, we will not address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988).

Affirmed.