STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0047

Siwek Lumber & Millwork, Inc.,
Plaintiff,

vs.

Bluewater Holdings, LLC, et al.,
Respondents,
Vivo LLC, et al.,
Defendants,
Pine Financial Group, Inc.,
Appellant.

Filed December 23, 2019
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-CV-15-19201

William M. Topka, Stephen A. Ling, Dougherty, Molenda, Solfest, Hills & Bauer, P.A., Apple Valley, Minnesota (for respondents)

Jared M. Goerlitz, Goerlitz Law, P.L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Kirk, 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

FLOREY, Judge

The parties in this matter appeal and cross-appeal the judgment of the district court, challenging certain rulings contained in (1) an order granting reconsideration of cross-motions for partial summary judgment; (2) the same order granting, inter alia, the part of respondents' motion seeking declaratory judgment; and (3) an order granting respondents' subsequent motion for entry of judgment. Appellant challenges the orders in their entirety, whereas respondents' cross-appeal challenges two ancillary rulings within the order granting summary judgment. We affirm.

FACTS

The disputes giving rise to the current appeal initially concerned two different properties—one on Abbott Avenue in Minneapolis (the Abbott property), and the other on Zenith Avenue in Edina (the Zenith property). The Abbott property was owned by Bluewater Holdings, LLC (Bluewater); and Zenith by CG Architects, LLC (CG). Bluewater and CG (collectively, respondents) are the respondents and cross-appellants in this appeal.

In 2014, Bluewater sought to renovate a house on the Abbott property, and CG sought to construct a new house on Zenith. To fund their respective projects, respondents each entered into loan agreements with Pine Financial Group, Inc. (Pine), whereby Pine secured loans to respondents with mortgages on their respective properties. Escrow accounts were also created to serve as a line of credit for respondents. Pine was to, as

needed, disburse funds from that account to respondents upon approval and satisfaction of certain conditions.

In total, there were three agreements between each respondent and Pine (collectively, the loan agreements): a mortgage agreement for the mortgages attached to the respondents' properties; an escrow agreement establishing an escrow account and containing the terms by which loan funds would be advanced to and disbursed from it; and a promissory note setting forth the parties' rights and obligations with respect to repayment. Under the loan agreements, Pine was to take the following actions with respect to the total loan amount: (1) immediately distribute a certain amount to third-party construction entities on the respondent's behalf; (2) immediately distribute to itself the amount necessary to cover the fees it incurred; (3) immediately advance a certain amount into the escrow account; and (4) periodically advance certain amounts to the escrow account until the remainder of the total loan amount was fully advanced or disbursed.

Both Bluewater and CG eventually defaulted on their loans with Pine. Two of the subcontractors on the Zenith project—Siwek Lumber & Millwork (Siwek) and Affordable Comfort Mechanical, d/b/a Apollo Heating & Air (Apollo)—filed and recorded mechanic's-lien statements (the liens), claiming $36,971.93 and $20,000 due and owing respectively. On December 15, 2014, Pine initiated foreclosure proceedings on both properties, and sheriff's foreclosure sales were held on February 11, 2015. Pine bid on and acquired both properties.

The price for which Pine acquired each property exceeded the mortgage debt owed thereon. Pine retained the proceeds, however, arguing that a surplus did not result from

either sale, and that under the terms of its agreements with Bluewater and CG, it was entitled to keep all proceeds of the sale. Pine also purchased the liens from Siwek and Apollo and continues to hold them. Pine contended that the responsibility for satisfying the liens falls on CG and that as a successor in interest to the liens, Pine should be paid for the same out of the surplus, if any, from the foreclosure sale of the Zenith property. CG argues that to the extent that the liens are enforceable, they should not be paid from any surplus.

The parties moved the district court for partial summary judgment. Specifically, respondents sought summary judgment on their claims (1) seeking a declaration that the foreclosure sales resulted in surpluses; (2) that the liens are either invalid or extinguished; (3) for unjust enrichment; and (4) for conversion. In its summary-judgment motion, Pine argued that it is entitled to payment on the liens from the proceeds of the sales. On September 5, 2017, the court denied both motions.

Trial began in January 2018. On the third day of trial, at the district court's suggestion, the parties moved for reconsideration of the September 5 order denying summary judgment. The district court granted reconsideration, vacated its September 5 order, and decided the parties' respective motions for summary judgment as follows:

1. Respondents' declaratory judgment claim was granted; the district court determined (1) that the foreclosure sale of the Zenith property resulted in a surplus of $148,779.42 and (2) that the sale of the Abbott property resulted in a surplus of $38,061.88.

2. Pine's motion for summary judgment was granted in part and denied in part. The district court (1) granted the claim that the liens should be paid from any surplus and (2) denied, as precluded by fact questions, the claims regarding the amount of those liens.

Because the parties stipulated to the remaining fact issues, no issues remained and final judgment was entered. It is from this judgment that the parties appeal and cross-appeal, alleging the following errors:

1. Pine, as appellant, alleges that (1) the district court erred in concluding that surpluses resulted from the foreclosure sales, or, alternatively, it miscalculated the amount of surpluses and (2) the district court *did not* err in determining that Pine is entitled to attorney fees under mechanic's-lien statute, but it did err in denying the award on other grounds.

2. CG & Bluewater, as cross-appellants, allege that (1) the district court erred in determining that the liens should be paid out of the surpluses, rather than allocating the entirety of the surpluses to respondents and (2) the district court erred in calculating the surpluses.

We affirm.

D E C I S I O N

We review a grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). Statutory interpretation and contract construction are questions of law and are likewise subject to de novo review. *Id.*; *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009).

I

Pine contests the district court's determination that the foreclosure sales of each of the properties resulted in a surplus, arguing that the district court erred in its construction of the parties' agreements. While the nature and effect of surpluses are statutorily defined, Pine contends that the loan agreements structure the parties' dealings in such a way that a surplus, as contemplated by those statutes, did not result.

Minn. Stat. § 580.10 provides, in relevant part, that

> if, after sale of any real estate, . . . there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage, with interest, taxes paid, and costs of sale, the surplus shall be paid over by such officer, on demand, to the mortgagor, the mortgagor's legal representatives or assigns.

(2019). A surplus occurs when the foreclosing party has received from the property more than that party was owed and had any pretext to claim. *Seiler v. Wilber*, 13 N.W. 136, 137 (Minn. 1882). Under the statute, such a surplus shall, after satisfying all other outstanding obligations, be disbursed to the mortgagor—in this case, respondents. *Id.*; Minn. Stat. § 580.10. To calculate whether a surplus exists, we subtract the total amount owed to the mortgagee (the mortgage debt) from the total proceeds of the foreclosure sale. If the difference is positive, it is a surplus.

Pine's argument that surpluses did not result from the foreclosure sales rests on its assertion that the mortgage debt should not take the escrow agreements into account because those remain in effect after the foreclosure. Because the full loan amounts were advanced to the escrow accounts pursuant to the promissory notes, Pine's argument goes, respondents remain obligated, even after the foreclosure sales, to pay the total loan amount in full regardless of whether the funds were disbursed to respondents or advanced to and retained in the escrow accounts. That is, the provisions and financial obligations contained in the escrow agreements should not be included in determining the mortgage debt because they contemplate separate and distinct sets of obligations to which respondents remain bound.

To support the premise underlying this argument—that escrow agreements remain in full force and effect—Pine first points to the fact that the parties' relationship consists of three separate agreements. Pine also argues that the escrow agreements define Pine as both "Lender" and "Loan Servicer," which demonstrates that it entered these agreements in separate capacities, that it had separate roles and obligations, and thus that the agreements were separate and distinct and should not be conflated to determine the total mortgage debt. The district court found Pine's arguments unpersuasive, noting that "such an approach would result in Pine Financial receiving more than was ever due on the Loan [Agreements] and more than Pine Financial could possibly claim before the foreclosure sales, and therefore confer a benefit on Pine Financial." The district court concluded that the loan agreements cannot be separated and must be read as a single instrument, because "instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together." *White v. Miller*, 54 N.W. 736, 737 (Minn. 1893).

Here, each respondent entered into the differently titled agreements with Pine on the same day; each was clearly pursuing a single purpose—funding for construction projects; and the loan agreements are unquestionably part of the same transaction. Not only were the loan agreements executed at the same time and for the same purpose, but each comingled their obligations by referencing, incorporating, or conditioning on parts of the others. Pine's argument that the agreements should be separated because they are differentiated by title, term usage, and purpose, is without merit, as "[t]he appropriate inquiry under a divisibility issue should . . . focus on the facts and circumstances of a

particular transaction rather than relying on any mechanistic evaluation of the form of the documentation." *Anderson v. Kammeier*, 262 N.W.2d 366, 373-74 (Minn. 1977). Neither Pine nor respondents would have entered into one of the agreements without the others, as it was the combination that fully detailed the rights and responsibilities of the parties. *Id.* at 374 (finding multiple agreements severable in part because none of the "instruments would have been executed in the absence of the others").

The district court properly construed the loan agreements as a single instrument and did not include the portion of the loans advanced to, but not disbursed from, the escrow accounts in its calculation of the mortgage debt. Therefore, the district court properly concluded that there were surpluses.

II

Pine argues in the alternative that, if the foreclosure sales did result in surpluses, the district court miscalculated them. The district court found that a surplus of $148,779.42 was owed to CG for the Zenith property, and that a $38,061.88 surplus was owed to Bluewater for the Abbott property. We agree with the district court's calculations.

A. Zenith

The district court found there to be a principal amount of $514,918 that CG owed to Pine at the time of the foreclosure sale, and the parties do not dispute this. The district court added to this $55,695.81 in interest; $2,809.77 in late charges; and $2,102.03 in the foreclosure costs incurred for a mortgage debt of $575,525.61, inclusive of interest and costs. The district court then subtracted this amount from the price at which Pine acquired the Zenith Property at the foreclosure sale—$724,305.03—to arrive at a surplus of

$148,779.42. Pine disputes the district court's calculation of late charges, and CG disputes the calculation of interest.

The district court arrived at the interest value by applying an interest rate of 15% to all advanced and disbursed funds until Pine gave notice to CG of its default, after which the court used an interest rate of 18%. CG does not dispute that these rates were contained in the loan agreements, nor that Pine had the right to increase the interest rate to 18% upon default. CG argues, however, that Pine was required, under the loan agreement, to elect its right to increase the interest rate upon default and never did. The district court, relying on the language of the contract, correctly concluded that the interest rate would increase to 18% automatically upon Pine's election to accelerate the loan.

The relevant language states that, upon Pine accelerating the loan, it "*shall* bear interest at the rate of 18% percent per annum." (Emphasis added). This language unambiguously demonstrates that the parties intended the rate increase to be automatic if and when Pine elected to accelerate. Moreover, even if election were required, Pine sent CG a notice-of-breach letter in which it clearly stated that CG's failure to cure the breach "*will* result in an increase in the interest rate" to 18%. (Emphasis added).

The loan agreement states that CG will be charged a late fee of 10% of all regularly scheduled payments on which it is more than five days late. The district court arrived at the $2,809.77 figure by concluding that CG was more than five days late on two payments before Pine accelerated the loan, at which point the entire balance became due and no payments were due "as regularly scheduled." Pine argues on appeal that payments were still "regularly scheduled" after it accelerated, reasoning that because CG maintained the

right to reinstate the loan under Minn. Stat. § 580.30, subd. 1 (2019), by making past monthly payments, monthly payments endure after default and acceleration.

Pine cites no authority for this argument, and we cannot find any. This is an issue of contract interpretation—one upon which a borrower's unrealized statutory right in a hypothetical situation has no bearing. Pine argues that section 580.30, subd. 1, requires the borrower to make past monthly payments, not the accelerated principal; but the promissory note here unambiguously states that the entire principal and accrued interest become immediately due and payable upon acceleration. CG did not elect to reinstate the loan, and the mere fact that it could have done so does not compel us to contort the plain language of the loan agreements to infer that the parties intended monthly payments to continue as "regularly scheduled" for late-fee purposes while simultaneously giving Pine the right to demand repayment in full. The district court did not err in its construction of this unambiguous language and correctly calculated the surplus from the sale of the Zenith property.

B. Abbott

The parties do not dispute that Bluewater owed Pine a principal amount of $595,000. To this, the district court added $45,383.21 in interest; $2,973.50 in late charges; and $2,112.57 in foreclosure costs for a total mortgage debt, inclusive of costs, of $645,469.28. Subtracting this from the $683,531.16 in foreclosure-sale proceeds, the district court arrived at a surplus of $38,061.88. Like CG and Pine's arguments as to the Zenith property, Bluewater disputes here the district court's interest calculation, and Pine disputes the calculation of late charges. The language of the promissory note between Pine and

Bluewater pertaining to late charges is identical to that between Pine and CG. Because the contractual language and the parties' arguments are identical, the prior analysis regarding late charges applies here.

However, there are minor differences in the language of the promissory note between Pine and Bluewater with respect to interest rates. The Bluewater promissory note states that, upon acceleration, Pine "at its option, may" increase the interest rate. Pine offered no evidence that it exercised its right to increase the interest rate with respect to Bluewater. The district court therefore correctly determined that Bluewater's interest accrued at a rate of 15% from the time of execution to the foreclosure sale and correctly calculated the surplus from the sale of the Abbott property.

III

At the district court, Pine argued that, alternatively, if there is a surplus, it should be used to pay off the liens on the Zenith property that it purchased from Apollo and Siwek. CG counters that under Minn. Stat. § 580.10, only two categories of entities are entitled to receive surplus from foreclosure sales: the mortgagor and the mortgagor's legal representatives or assigns. Therefore, CG argues, the surplus cannot be used to pay Pine for the liens before being distributed to CG, as Pine is neither the mortgagor nor its assigns.

The district court ordered that the liens be paid out of the Zenith property surplus, relying on the principle that, "[w]hen property is sold under the execution of the power of sale, the proceeds of the sale stand in place of the property sold." *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002). CG makes the novel argument that there is a legal distinction between "voluntary" and "involuntary" liens and that the

language "legal representatives or assigns" in section 580.10 does not encompass the latter. CG relies on what it argues are the only logical inferences from (1) a Minnesota Supreme Court case from 1886 and (2) a 1925 amendment to an ostensibly analogous statute. Therefore, CG argues, since Pine holds involuntary mechanic's liens, Pine is not the mortgagor's "legal representative or assign" and therefore cannot receive any of the surplus for payment of the liens or otherwise.

There exists no authority for CG's argument, and we are not persuaded. CG remains obligated for the cost of the liens; and Pine, as the lienholder, is entitled to payment. The district court did not err in ordering that the liens be paid out of the Zenith property surplus.

IV

Pine contends that, because it purchased and holds the liens on the Zenith property, it is entitled to attorney fees as a lienholder under Minn. Stat. § 514.14 (2019). The district court agreed that Pine is the current lienholder, but it nevertheless declined to award attorney fees because Pine's status as a lienholder "is not wholly determinative."

"On review, this court will not reverse a trial court's award or denial of attorney fees absent an abuse of discretion." *Auto-Owners Ins. v. NewMech Cos.*, 678 N.W.2d 477, 485 (Minn. App. 2004) (internal quotation omitted). When a party requests an award for fees, the district court considers "all relevant circumstances." *State v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971).

Here, the district court denied Pine's request for attorney fees because Pine thrust CG (as well as Apollo and Siwek) into litigation for its own wrongful act—namely, withholding the Zenith property surplus and later taking the position that there was no

surplus. The district court observed that granting Pine an award of fees in this instance would in effect grant it a windfall. These are relevant factors for the district court to consider, and it did not abuse its discretion in doing so and denying an award of attorney fees.

Affirmed.