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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1345**

Larry E. Reed,
Appellant,

vs.

The Highlands of Edinburgh Sixth Association,
Respondent,
ACI Properties, LLC,
Respondent.

**Filed June 8, 2020
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CV-18-10450

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Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and
Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant homeowner challenges the district court's grant of summary judgment to respondent homeowners association on appellant's 13-count complaint seeking to invalidate an assessment-lien-foreclosure sale. Appellant also challenges the district court's determination of the amount required to redeem. By notice of related appeal (NORA), respondent/cross-appellant sheriff's-certificate-holder challenges the district court's ruling establishing the redemption period. We affirm.

FACTS

In 1996, appellant and cross-respondent Larry E. Reed purchased property located on Highlands Road in Brooklyn Park (the property) where he resides as his homestead. The property is part of respondent The Highlands of Edinburgh Sixth Association (Highlands).

Highlands was incorporated in 1986 as a chapter 317 nonprofit corporation. Highlands's board of directors is empowered to, among other things, fix the amount of annual assessments and foreclose liens against association properties when assessments remain unpaid for thirty days after they become due. Reed paid his annual assessments in 1997 and 1998, but did not pay any subsequent annual assessments.

In January 2010, Highlands served Reed with notice of an association-assessment lien recorded against the property. The lien was for \$3,350.64, comprising \$960 in association dues; \$685 for an outstanding 2004 conciliation court judgment; \$488.64 in interest; \$1,171 in legal fees; and \$46 in costs. Highlands placed a second lien against the

property in April 2018 which amended the still outstanding January 2010 lien. The April 2018 lien was for \$6,634.03, comprising \$1,805 in association dues for 2005-2018; \$1,411.03 in interest; \$3,326 in legal fees; and \$92 in costs.

Highlands sent Reed a preforeclosure notice on April 20, 2018, and personally served him on May 14, 2018, with notice of the assessment-lien-foreclosure sale set for June 28, 2018. On June 22, 2018, Highlands's attorney sent Reed a letter stating that the total amount outstanding against his property was \$10,299.10, which included a reduction in the amount of outstanding interest due to a change in the manner that Highlands calculated interest.

Reed filed a complaint in district court on June 26, 2018, seeking to invalidate the foreclosure sale on eight bases. An amended complaint was later filed increasing Reed's total number of claims against Highlands to thirteen.

Highlands purchased the property for \$11,379.10 at the sheriff's sale on June 28, 2018. Highlands then entered into a purchase agreement with respondent and cross-appellant ACI Properties, LLC (ACI) on September 20, 2018, in order to sell the property to ACI. ACI intervened in Reed's action to invalidate the foreclosure sale.

Reed moved for a temporary restraining order to toll the statutory redemption period, which the district court denied. Reed then deposited \$11,818.04 with the sheriff, along with an \$1,000 cash bond, in order to preserve his right to redeem pursuant to Minn. Stat. § 580.28 (2018).

Highlands moved for summary judgment on all claims in Reed's amended complaint. Following the briefing on Highlands's motion, Reed moved the district court

to stay ACI's related eviction action and establish the amount necessary to redeem the property. The district court granted Reed's motion to stay the eviction action and reserved ruling on Reed's request for a determination of the redemption amount. Next, the district court granted Highlands summary judgment, dismissing all 13 claims.

In an order filed on June 20, 2019, the district court determined that Reed preserved his right to redeem by depositing \$11,818.04 and a \$1,000 bond with the sheriff. The district court also allowed ACI additional costs of \$10,743.76, bringing the total amount needed to redeem to \$21,972.86.¹ Reed appeals the district court's grant of summary judgment to Highlands dismissing all of Reed's claims, and ACI, by NORA, appeals the district court's determination of the redemption period.

D E C I S I O N

Reed first argues that the district court erred by granting Highlands summary judgment dismissing all 13 claims in his amended complaint. This court reviews the grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 626, 628 (Minn. 2017). This court reviews "whether there are any genuine issues of material fact and whether the district court erred in its application of the law. [This court] view[s] the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is inappropriate "when reasonable persons might draw

¹ At oral argument, Reed's attorney indicated that Reed has since deposited the full redemption amount set forth in the district court's June 20, 2019 order.

different conclusions from the evidence presented.” *Montemayor*, 898 N.W.2d at 628 (quotation omitted).

Before addressing the substance of each of Reed’s 13 claims, we note that Reed frequently relies on *Ruiz v. 1st Fidelity Loan Servicing, LLC* for the asserted proposition that any action taken by Highlands that is not in strict compliance with Highlands’ governing documents entitles Reed to invalidation of the foreclosure sale. 829 N.W.2d 53 (Minn. 2013). But *Ruiz* does not support this asserted proposition.

As in the present matter, *Ruiz* involved an action to void a foreclosure by advertisement. *Id.* at 54-55. However, unlike the present matter, *Ruiz* was decided based on the foreclosing party’s failure to strictly comply with the recording requirement set forth in Minn. Stat. § 580.02(3) (2012), which the supreme court stated “is requisite to make such foreclosure by advertisement” and thus “the statute unambiguously mandates strict compliance.” *Id.* at 58. Here, Reed identifies a number of alleged errors in the manner in which Highlands levied certain charges against the property in accordance with its governing documents. However, Reed does not identify any asserted statutory violations in the manner in which the foreclosure-by-advertisement sale occurred. His repeated references to *Ruiz*’s requirement of strict *statutory* compliance are therefore inapplicable.

Relevant to the present dispute, Minn. Stat. § 580.04(a)(3) (2018), requires that the foreclosure notice contain “the amount claimed to be due on the mortgage on the date of the notice.” Reed did raise the applicability of section 580.04 in his brief to the district court when he cited to section 580.04(a)(3) in support of his contention that Highlands was required “to provide a notice that contains the amounts actually due so that a homeowner

will know what he must pay to avoid a foreclosure or to redeem.” Reed misstates what the statute requires.

Contrary to Reed’s assertion in his brief to the district court, section 580.04(a)(3) requires inclusion of the amount “claimed to be due” as of the date of the notice, which Highlands satisfied. *See also Leeco, Inc. v. Cornerstone Bank*, 898 N.W.2d 653, 659 (Minn. App. 2017) (stating that “the caselaw recognizes that a mortgagee, under a mistake of law or fact may honestly claim more than by law he would be entitled to . . . [except] if there is fraud in law, fraud in fact, or actual injury with respect to the claiming of more than is . . . legally due” (quotation omitted)), *review denied* (Minn. Jul. 3, 2017). Furthermore, Reed did not bring a cause of action to invalidate the foreclosure sale based on Highlands’s alleged failure to comply with Minn. Stat. § 580.04 (2018). Accordingly, Reed’s repeated references to *Ruiz*’s requirement of strict statutory compliance are misplaced.

Statutes of limitations

Reed asserted in his amended complaint that Highlands’s foreclosure proceedings were time barred under Minn. Stat. § 515A.3-115(d) (2018) (the Uniform Condominium Act), Minn. Stat. § 515B.3-116(d) (2018) (the Minnesota Common Interest Ownership Act), and, without identifying a specific statutory provision, Minnesota Statutes Chapter 541.² The district court determined that Highlands does not meet the statutory definition

² In his appellate brief, Reed specifically identifies Minn. Stat. § 541.05, subd. 1(1) (2018) (providing for a six-year statute of limitations for actions on a contract which does not contain an express limitations provision).

of a condominium set forth in Minn. Stat. § 515A.1-103(7) (2018), and therefore neither the limitations period in section 515A.3-115(d) nor the period in 515B.3-116(d) applied.

Regardless of whether Reed’s property falls within section 515A.1-103(7)’s definition of a “condominium”—“[r]eal estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners”—Highlands’s foreclosure action would still be timely under either statutory limitations provision relied on by Reed. Under both provisions, “[p]roceedings to enforce an assessment lien shall be instituted within three years after the last installment of the assessment becomes payable, or shall be barred.” Minn. Stat. § 515B.3-116(d); Minn. Stat. § 515A.3-115(d) (also requiring that assessment enforcement proceedings be “instituted within three years after the last installment of the assessment becomes payable”). Reed does not contest that he did not pay his 2018 annual assessment. Therefore, Highlands’ foreclosure proceeding, which was initiated on May 14, 2018, was timely under sections 515A.3-115(d) and 515B.3-116(d) if those provisions are applicable.³

Reed also asserts that the foreclosure was untimely under section 541.05, subd. 1(1). Under that statute, an action on a contract must be commenced within six years unless the contract expressly provides for a different limitations period. However, Highlands’s foreclosure of its lien against Reed’s property by advertisement was not an action for breach of contract.

³ Reed argues that if Chapters 515A and 515B do not apply to Highlands, then the articles and covenants recorded against the property are inoperative. However, this theory may not be asserted for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Highlands recorded a lien against Reed's property in April 2018, and foreclosed that lien in June 2018. The 2018 lien incorporated and amended a 2010 lien also recorded against the property. Under section 4.1 of Highlands's covenants, "[t]he general annual and special assessments, together with such interest thereon and costs of collection thereof . . . shall be a charge on each such Lot and shall be a continuing lien on such Lot against which each such assessment is made." Because the action that Reed asserts in his amended complaint is time barred was a foreclosure by advertisement of an assessment lien, and not an action at law for breach of contract, the limitation period set forth in section 541.05, subd. 1(1), is inapplicable.

Interest

Reed argues that the district court erred by granting Highlands summary judgment on his claim that the foreclosure should be invalidated due the inclusion of an incorrect amount of interest. Neither the district court nor Reed's amended complaint identifies a basis upon which a foreclosure sale may be invalidated due to the inclusion of an incorrect amount of interest on the underlying obligation.

In his memorandum to the district court, Reed identified three statutes that he asserted entitled him to relief on the basis of the inclusion of an incorrect amount of interest. The first statute identified by Reed was Minn. Stat. § 580.28, but that statute only provides for the procedure to preserve a redemption right during the pendency of an action to invalidate a foreclosure. Next, Reed identified Minn. Stat. § 580.20 (2018), which provides for a five-year limitations period from the date of the foreclosure sale when challenging, among other things, defect in the notice. Finally, Reed identified Minn. Stat. § 580.21

(2018), which is another statute of limitations stating that no foreclosure sale may be invalidated unless an action challenging its validity is commenced within 15 years of the sale.

Furthermore, the district court noted that Reed failed to produce any authority to support his contention that Highlands' computation of interest on Reed's outstanding assessments at the contractual rate of 8% per year was inappropriate.⁴ Therefore, the district court appropriately granted Highlands summary judgment on Reed's purported cause of action for incorrect interest computation.

Attorney fees

Reed argues that the district court erred by granting Highlands summary judgment on his two claims relating to the amount of attorney fees incurred by Highlands in its attempts to collect Reed's outstanding assessments. In his amended complaint, Reed claimed that the lien foreclosure was invalid because it included attorney fees in excess of the amount recoverable under Minn. Stat. § 582.01, subd. 1 (2018),⁵ and because it included fees related to the 2010 assessment lien Highlands placed against the property.

⁴ Highlands initially computed the interest as compound, but then switched to a simple-interest calculation at Reed's request. Highlands's governing documents are silent on the manner of calculation and only provide that interest on outstanding assessments accrues "at the rate of eight percent (8%) per annum."

⁵ Reed brought a separate claim for "illegal foreclosure sale"—count nine of the amended complaint—but the only asserted violation was of Minn. Stat. §580.21. The district court granted Highlands summary judgment on this claim because it is duplicative of his earlier claim for excessive attorney fees in violation of the same statutory provision. The district court's determination that the two claims are duplicative of one another was not erroneous.

Under Highlands’s by-laws, “the Association may bring an action at law against the Owner personally obligated to pay [an assessment, secured by a continuing lien] or foreclose the lien against the Property, and interest, costs, and reasonable attorneys’ fees of any such action shall be added to the amount of such assessment.” Similarly, Highlands’s declarations provide that Highlands may foreclose on a lien either by action or advertisement, and “[i]n the event that the Association shall prevail in any such foreclosure, the person personally obligated to pay the same shall be required to pay all costs of foreclosure, including but not limited to reasonable attorneys’ fees.”

The declarations also provide that “[a]ll such costs and expenses and any assessments against the Lot which shall become due during the period of foreclosure and redemption shall be added to and become a part of the amount secured by said lien.” Finally, if Highlands “should employ the services of an attorney in connection with a breach of the terms [of the declarations], or in connection with [their] enforcement . . . and if the Association shall prevail in any such action, such Owner shall pay . . . the Association’s reasonable attorneys’ fees.”

Reed first asserts that the amount of attorney fees recoverable by Highlands is limited by operation of Minn. Stat. § 582.01, subd. 1.⁶ As the district court determined, Minn. Stat. § 582.01, subd. 1, only caps the amount of attorney fees recoverable related to the foreclosure itself, not other fees incurred in the attempt to collect Reed’s outstanding

⁶ We note that Reed repeatedly argues that Minnesota Statutes Chapter 515B should apply to the property. If that is the case, then the limitation on attorney fees set forth in section 582.01 does not apply. Minn. Stat. § 515B.3-116(h)(4) (2018).

assessments. *See Oleisky v. Midwest Fed. Sav. and Loan Ass'n of Minneapolis*, 398 N.W.2d 627, 630 (Minn. App. 1986) (stating that attorney fees incurred in attempts to lift a bankruptcy stay in order to initiate the foreclosure were not limited by section 582.01, because “attorney’s fees are limited by statute only for actions relating directly to actual foreclosure”), *review denied* (Minn. Feb. 18, 1987); *see also Benson v. Empire State Bank*, 516 N.W.2d 550, 555 (Minn. App. 1994) (also stating that limits imposed by section 582.01 do not apply to attorney fees incurred in bankruptcy proceedings related to the foreclosed property), *review denied* (Minn. June 29, 1994).

As noted by the supreme court in *Ruiz*, “[a]n alternative to foreclosure by action, foreclosure by advertisement was devised to avoid the delay and expense of judicial proceedings.” 829 N.W.2d at 56 (quotation omitted). As such, the statutory limitations on attorney fees incurred in a foreclosure-by-advertisement sale imposed by section 582.01 operate to limit the costs incurred during this non-judicial proceeding. *See Oleisky*, 398 N.W.2d at 630. The fees incurred by Highlands and upheld by the district court were incurred as a result of Highlands’s decades-long attempt to enforce the terms of its covenants and by-laws against Reed, and were specifically recoverable under the terms of those governing documents. Reed does not identify any separate amount of attorney fees incurred in the course of the foreclosure sale itself, which would be limited by operation of section 582.01. Therefore, the district court did not err by granting Highlands summary judgment on this aspect of Reed’s amended complaint.

Reed next argues that the district court erred by granting Highlands summary judgment on his claim that attorney fees related to the 2010 lien were unrecoverable

because they were time barred. As discussed above, under its by-laws and declarations, Highlands was entitled to add attorney fees to the amount of unpaid assessments, and all assessments “are secured by a continuing lien upon the Property against which the assessment is made.” For the reasons already stated above, the district court did not err in dismissing Reed’s causes of action to invalidate the foreclosure sale as untimely, and the same is true for Reed’s cause of action relating to the timeliness of the continuing lien for attorney fees.

Procedural irregularities

In his amended complaint, Reed brought a number of claims relating to purported procedural irregularities made by Highlands in the operation of its board, which he asserted invalidated the foreclosure of the property. Reed’s amended complaint asserts that: the board did not provide notice thirty days in advance of an assessment; annual assessments increased by more than 5% in 2008 and 2018 without authorization of two-thirds of the members;⁷ the board was improperly reconstituted in 2014 after being administratively dissolved by the secretary of state in 2012; and the board improperly delegated authority to its attorney to recover Reed’s outstanding assessments.

The district court granted Highlands summary judgment on the four claims related to purported procedural irregularities by the Highlands board because Reed offered no evidence in support of the averments in his complaint, and because he failed to follow the proper procedure to challenge the board’s actions.

⁷ The annual assessment also appeared to increase by more than 5% in 2017, but Reed did not rely on this increase in his amended complaint.

Crucially, Reed never identified a legal basis to invalidate the foreclosure of the assessment lien based on any of the purported procedural irregularities. Reed raised a number of asserted violations of Highlands' by laws and declarations, but never presented the district court with any authority to invalidate a foreclosure sale based on these alleged procedural violations.

The only law identified by Reed to the district court was Minn. Stat. § 515B.2-121 (2018), which governs the delegations of authority within a common-interest ownership association. However, Reed did not identify any authority that supports his contention that it was improper for Highlands to retain an attorney to collect on his outstanding obligations, or even if that delegation was somehow improper, how it would entitle him to invalidate the foreclosure sale. On this basis, the district court appropriately granted Highlands summary judgment on Reed's claims relating to procedural irregularities regarding Highlands's imposition of annual assessments and its attempts to collect thereon.

Reed does identify a number of allegedly applicable statutes in his appellate brief, but Reed may not raise these new arguments for the first time on appeal. *Thiele*, 425 N.W.2d at 582 (stating that a party cannot raise a new issue on appeal, “[n]or may a party obtain review by raising the same general issue litigated below but under a different theory”).

Fraud

In his amended complaint, Reed alleged that Highlands defrauded him by originally charging interest on his outstanding assessments based on a compound-interest calculation—which it later voluntarily reduced based on a simple-interest calculation—and

by including attorney fees in the foreclosed lien and cost to redeem that he considered to be “excessive.” The district court granted Highlands summary judgment on this claim because Reed never identified any evidence that Highlands intended him to rely on a knowing or recklessly indifferent falsehood, which are necessary elements of fraud. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007).

Reed’s assertion of error relies on the same argument he made to the district court: that because he disagrees with the amounts charged by Highlands for interest and attorney fees, they are somehow evidence of an attempt by Highlands to deceive him. Because Reed failed to identify any evidence to support the necessary elements of fraud, the district court did not err by granting Highlands summary judgment on this claim.

Fiduciary duty

In his amended complaint, Reed alleged that Highlands breached a fiduciary duty it owed him by

failing to operate in good faith, by refusing to provide books and records, by failing to respond to the offer to resolve the dispute, by an improper delegation to its attorney which allowed the amounts to be increased, and allowing the matter to go to foreclosure based on amounts that were not noted in the Notice of Lien Foreclosure.

The district court granted Highlands summary judgment on this claim because Reed did not present evidence that Highlands breached a specific duty it owed to him in foreclosing on his property, even though that action was adverse to his interests.

On appeal, Reed argues that his breach-of-fiduciary-duty claim was authorized by Minn. Stat. § 515B.4-116 (2018), but that statute merely provides a private right of action

for violations of its provisions or an association's by-laws and does not discuss the fiduciary duties owed by an ownership association to an individual member. Because Highlands's by-laws permit it to initiate a foreclosure against a homeowner to recover overdue assessments, the district court did not err by finding that Reed failed to establish a claim for breach of fiduciary duty based on Highlands's actions authorized by its own governing documents.

Redemption amount

The district court addressed Reed's request to determine the cost to redeem the property in an order issued following the grant of summary judgment to Highlands dismissing all the claims in Reed's amended complaint. In the redemption-cost order, the district court found that ACI—which purchased the sheriff's certificate for the property from Highlands—was permitted to add an additional \$10,743.76 in costs and set the redemption price at \$21,972.86. The district court also determined that Reed preserved his right to redeem until the resolution of his action to invalidate the foreclosure sale, as permitted by Minn. Stat. § 580.28.

Reed challenges the district court's inclusion of \$9,970.90 in additional attorney fees in his cost to redeem, and by NORA, ACI challenges the district court's determination that Reed preserved his right to redeem. Both challenges center on questions of statutory interpretation, which we review de novo. *See Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). This court reviews “the district court's factual findings for clear error.” *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013).

Under Minn. Stat. § 580.23, subd. 1(a) (2018), Reed may redeem the property by paying Highlands’s purchase price at the sheriff’s sale, plus interest from the date of sale, plus additional costs allowed under Minn. Stat. § 582.03 (2018). Pursuant to section 582.03, subdivision 1, ACI, as the holder of the sheriff’s certificate, is allowed to pay and claim, among other items, “any taxes or assessments on which any penalty would otherwise accrue,” “any . . . installment of principal upon any prior or subsequent . . . lien . . . in default or that becomes due during the period of redemption,” and “reasonable attorney fees incurred after the foreclosure sale not to exceed one-half of the amount authorized by section 582.01.”

Reed argues that under the plain meaning of section 582.03, subdivision 1, ACI’s claim for attorney fees is capped at \$250, or, half the amount recoverable under section 582.01—which Reed maintains is \$500. Instead, the district court allowed ACI to pay and claim as part of the redemption cost \$9,970.90 in attorney fees incurred by Highlands during the pendency of Reed’s action challenging the validity of the foreclosure. For the same reasons discussed above, the district court found the limitations on attorney fees set forth in Minn. Stat. § 582.01 inapplicable.

The district court instead allowed ACI to add the \$9,970.90 in attorney fees pursuant to the allowance in section 582.03, subdivision 1, for the addition of the costs pertaining to an “assessment on which any penalty would otherwise accrue” and any “installment of principal upon any prior or subsequent . . . lien . . . in default or that becomes due during the period of redemption.”

As more fully discussed above, Highlands's by-laws and declarations allow Highlands to add its attorney fees incurred in the enforcement of an assessment, or the foreclosure of the lien thereon, to the amount of the assessment. They also provide that all costs and expenses, which include attorney fees, "which shall become due during the period of foreclosure and redemption shall be added to and become a part of the amount secured by said lien." Because Minn. Stat. § 582.03, subd. 1, allows ACI, as the holder of the sheriff's certificate, to pay and claim on redemption "any . . . installment of principal upon any prior or subsequent . . . lien . . . that becomes due during the period of redemption," Reed has not shown that the district court erred by allowing ACI to claim the amount it paid for Highlands's attorney fees as an assessment placed against the property during the period of redemption.

Preservation of right to redeem

By NORA, ACI argues that Reed did not preserve his right to redeem, and thus title to the property passed to ACI on the expiration of the original redemption period. The district court found that Reed's deposit of \$11,379.10, the price Highlands paid to purchase the property at the sheriff's sale, plus \$438.96 for the amount of interest accrued since the sale, plus an additional \$1,000 bond to cover any additional interest that might accrue until the estimated date of trial, were sufficient to preserve Reed's right to redeem under Minn. Stat. § 580.28 until resolution of his underlying action.

ACI argues that because Reed's deposit with the sheriff did not include additional costs incurred by ACI during the extended redemption period, his preservation under section 580.28 was ineffective. ACI argues that the provisions of Minn. Stat. § 582.03,

subd. 1—which allow for the taxation of additional costs incurred during the redemption period—should be read into section 580.28’s preservation procedures. ACI’s argument, however, is inconsistent with the plain language of section 580.28.

If a statute, construed according to ordinary rules of grammar, is unambiguous, a court may engage in no further statutory construction and must apply its plain meaning. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). The requirements to preserve a right to redeem under Minn. Stat. § 580.28 are unambiguous. In order to preserve his redemption right during the pendency of his underlying action, Reed was required to “deposit with the sheriff . . . the amount for which the mortgaged premises were sold, with interest thereon to the time of deposit, together with a bond to the holder of the sheriff’s certificate of sale, in an amount . . . conditioned to pay all interest that may accrue . . . if the action fail.” Minn. Stat. § 580.28. Reed complied with the unambiguous requirements of section 580.28. Therefore, the district court did not err by determining that he preserved his right to redeem until resolution of the underlying action.

Affirmed.