STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1565

David A. Gruenzner,
Appellant,

vs.

Jeffrey A. Hickok,
Respondent,

Geraldine M. Hickok,
Respondent,

Community Bank Vernon Center,
Respondent,

First National Bank at St. James,
Respondent,

Professional Credit Analysts of Minnesota, Inc.,
Respondent.

Filed July 5, 2011
Affirmed in part, reversed in part, and remanded; motion denied
Wright, Judge

Blue Earth County District Court
File No. 07-CV-09-2302

Margaret K. Koberoski, Kakeldey & Koberoski, Mankato, Minnesota (for appellant)

Ryan B. Magnus, Stacey R. Edwards Jones, Jones & Magnus, Mankato, Minnesota (for respondent First National Bank at St. James)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Collins, Judge.*

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

WRIGHT, Judge

In this foreclosure dispute, appellant-mortgagee argues that (1) he is entitled to recover interest accrued after the foreclosure sale, (2) the district court abused its discretion by limiting appellant's attorney-fee award and awarding attorney fees to respondent, and (3) the district court abused its discretion by not considering equitable principles. Respondent moves to strike a portion of appellant-mortgagee's appendix and brief. We affirm in part, reverse in part, and remand; and we deny respondent's motion to strike.

FACTS

On July 17, 2009, appellant-mortgagee David A. Gruenzner initiated a foreclosure by action in district court for certain parcels of land. On January 12, 2010, the district court issued a default judgment and adjudged the amount due on the mortgage to be $145,246.43 plus $4,239.07 in pre-judgment interest—amounts consistent with the amount Gruenzner sought in his complaint and his default judgment request—as well as interest through the date of sale, costs, disbursements, and attorney fees. The district court also directed the Blue Earth County sheriff to sell the property and apply the proceeds of the sale to the payment of the judgment amount.

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

Gruenzner published a public notice of sale listing the amount due on the mortgage as $197,224.81. On March 15, 2010, respondent First National Bank at St. James (First National), a junior lienholder on the property, advised Gruenzner via letter that Gruenzner should remedy the discrepancy between the published amount and the January 12 judgment amount by cancelling the scheduled sheriff's sale and obtaining a new judgment and order for sale, or else First National "will anticipate that as second creditor on the property [it] will be compensated any excess beyond the original $145,246.43 judgment plus reasonable costs." Gruenzner proceeded with the sheriff's sale and bid $199,834.71 as the highest bidder.

Gruenzner moved the district court to confirm the foreclosure sale and filed an affidavit claiming $1,115 in attorney fees. First National moved the district court to apply the surplus amount—the amount by which Gruenzner's bid exceeded the January 12 judgment—to the debt obligation owed to First National as junior lienholder. Gruenzner argued that no surplus exists because the bid amount reflects the actual value of the mortgage, irrespective of the January 12 judgment amount. Gruenzner advised the district court that the amount he sought and received in the January 12 judgment was based on a miscalculation and that he based his foreclosure bid on a higher amount to reflect the actual value of the mortgage because he expected to recover the difference when the property is redeemed.

On July 7, 2010, the district court issued an order confirming the foreclosure sale. The order also confirmed that the foreclosure sale satisfies the January 12 judgment amount of $145,246.43 plus $4,239.07 in pre-judgment interest, as well as an unspecified

amount of interest accrued between the judgment and the foreclosure sale and other costs. The district court also ordered that, to the extent that Gruenzner's overbid resulted in a surplus, the surplus amount is to be deposited with the district court "'for the benefit of the mortgagor or the person entitled thereto,' pursuant to Minn. Stat. § 581.06." The district court ruled that, because the mortgage value was adjudged pursuant to a foreclosure by action, the January 12 judgment amount reflects the mortgage value regardless of whether, by some reason, a different amount might be calculated as due. Accordingly, the district court ruled that Gruenzner cannot cure his earlier miscalculation by overbidding and then recapturing the surplus if the property is redeemed.

Because Gruenzner did not record the certificate of sale within the 20 days required by statute, First National moved the district court to reconfirm the foreclosure sale, to compel Gruenzner to record the certificate of sale and deposit any surplus with the district court, and to award $750 in attorney fees to First National. Gruenzner moved the district court to correct the July 7 order to specify the amount of his attorney-fee award, and he filed an affidavit claiming $5,770 in attorney fees. Gruenzner additionally sought equitable relief from the July 7 order to deposit the surplus.

Gruenzner also appealed the July 7 order, which we stayed pending the district court's decision on the parties' pending motions. On November 12, 2010, the district court issued an order reconfirming the foreclosure sale, ordering Gruenzner to deposit the surplus with the district court, denying Gruenzner's motions to correct the previous judgment and for additional attorney fees. The district court held that the amount of

Gruenzner's attorney-fee award is $1,115 and awarded First National $500 in attorney fees. We subsequently dissolved the stay of Gruenzner's appeal.

D E C I S I O N

I.

Gruenzner argues that the Minnesota foreclosure statutes entitle him to recover interest accrued after the foreclosure sale through the date of redemption.[1] Statutory interpretation presents a question of law, which we review de novo. *Halvorson v. Cnty. of Anoka*, 780 N.W.2d 385, 389 (Minn. App. 2010). The goals of statutory interpretation are to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). When the legislature's intent is clearly discernible from a statute's plain and unambiguous language, we interpret the language according to its plain meaning, without resorting to other principles of statutory construction. *Beecroft v. Deutsche Bank Nat'l Trust Co.*, 798 N.W.2d 78, 82-83 (Minn. App. 2011).

In a foreclosure by action, a mortgagor or those claiming under the mortgagor may redeem within the statutory redemption period. Minn. Stat. § 581.10 (2010). Here, there was no redemption by the mortgagor. Nor was there a redemption by someone claiming under the mortgagor. Therefore, creditors having a lien on the property were permitted to redeem in the order and manner specified in Minn. Stat. § 580.24 (2010). *Id.*; *see* Minn. Stat. § 580.24(a) (permitting creditors to redeem if no redemption is made by mortgagor or those claiming under mortgagor). "The amount required to redeem from the holder of

[1] Gruenzner does not indicate, and the record does not reflect, whether he is seeking interest accrued on the January 12 judgment amount or the bid amount. But this ambiguity is irrelevant in light of our resolution of this issue.

the sheriff's certificate of sale is the amount required under section 580.23." Minn. Stat. § 580.24(c). The holder of the sheriff's certificate of sale is the buyer at a confirmed sheriff's sale. *See* Minn. Stat. § 581.08 (2010) (requiring sheriff to issue certificate of sale when district court confirms sale). When, as here, the redemption period is six months, the amount required to redeem includes "the sum of money for which the [premises] were sold, with interest from the time of sale" at the appropriate interest rate. Minn. Stat. §§ 580.23, subd. 1(a), 581.10.

Under the plain language of sections 581.10, 580.24, and 580.23, interest that accrued after the foreclosure sale is collectable on redemption. But the record does not establish that First National exercised its right to redeem.[2] And to the extent that Gruenzner requests that we compel First National to exercise its right to redeem, his request is unavailing because First National is not required to exercise its right to redeem. Rather, First National "*may* redeem" if it chooses to do so. Minn. Stat. § 581.10 (emphasis added); *see also* Minn. Stat. § 645.44, subd. 16 (2010) (stating that word

[2] Gruenzner contends that a June 13, 2010 email that he received from First National constituted notice of an intent to redeem and that the amount offered was deficient. First National moves to strike that email from Gruenzner's appendix and from the portions of Gruenzner's brief addressing the email, arguing that the email is not a part of the record because it was a settlement offer, not a notice of intent to redeem. Generally, an appellate court may not base its decision on matters outside the record on appeal, and it may not consider matters not produced and received in evidence below. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The papers and exhibits filed in the district court constitute the record on appeal in all cases. Minn. R. Civ. App. P. 110.01. Because the June 13, 2010 email was received by the district court as an exhibit, we deny First National's motion to strike.

We observe, however, that an offer to redeem is not a redemption. Moreover, our careful review establishes that this email does not include the statutory requirements for redemption, and it more accurately reflects a settlement offer. Thus, Gruenzner's argument is unavailing.

"may" is permissive). Moreover, the district court's July 7 order did not address redemption. Rather, the district court addressed the satisfaction of the January 12 judgment, which, with respect to interest, included only interest accrued through the date of sale.

Because a redemption has not occurred and the district court's July 7 order addressed only the calculation of the January 12 judgment amount, Gruenzner's argument is premature. Accordingly, the district court, in the July 7 order, did not err by denying Gruenzner recovery of interest that accrued after the foreclosure sale.

II.

Gruenzner next argues that the district court abused its discretion by (a) limiting his attorney-fee award to the statutory amount set forth in Minn. Stat. § 582.01, subd. 1 (2010) (foreclosure by advertisement); and (b) awarding attorney fees to First National. As a general rule, attorney fees may be recovered only if specifically authorized by a contract or statute. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). We review a district court's decision to award or deny attorney fees for an abuse of discretion. *In re Estate of Van Den Boom*, 590 N.W.2d 350, 354 (Minn. App. 1999), *review denied* (Minn. May 26, 1999).

A.

The affidavit of costs for a foreclosure by action may include "reasonable attorney fees incurred after the foreclosure sale." Minn. Stat. § 582.03, subds. 1, 2 (2010). The statutes governing foreclosure by action do not specifically provide for attorney fees incurred before the foreclosure sale but acknowledge that a mortgage may contain a

"covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure" and, under those circumstances, the district court shall establish the amount of such attorney fees when there has been a foreclosure by action. Minn. Stat. § 582.01, subds. 1, 2 (2010). The mortgages at issue here contain clauses permitting the mortgagee to collect reasonable attorney fees from the mortgagors.[3] Because the January 12 judgment was against the mortgagors, the contractual provision in the mortgage held by Gruenzner supports the district court's decision to award attorney fees to Gruenzner and to deduct those fees from the surplus amount.

Gruenzner argues that the district court erroneously limited the amount of this award to $1,115 by applying the foreclosure-by-advertisement statutory formula for calculating attorney fees, as set forth in Minn. Stat. § 582.01, subd. 1. But the record does not reflect that the district court applied this formula or placed any statutory limitation on Gruenzner's attorney-fee award. On May 7, 2010, Gruenzner filed an affidavit with the district court claiming $1,115 in attorney fees associated with the foreclosure. On August 26, 2010, Gruenzner filed another affidavit with the district court claiming $5,770 in attorney fees associated with the foreclosure. Both affidavits were signed by Gruenzner's attorney and notarized on the date of the foreclosure sale, March 25, 2010. The record does not establish any basis for the discrepancy between these two

[3] The mortgage held by Gruenzner states: "If Lender hires an attorney to assist in collecting any amount due for enforcing any right or remedy under this Mortgage, Mortgagor agrees to pay Lender's reasonable attorneys' fees and costs." And the mortgage held by First National states that "Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses."

affidavits, and Gruenzner provided no explanation to the district court or on appeal. The district court awarded Gruenzner the amount he claimed in the affidavit he filed on May 7, 2010. Thus, Gruenzner has failed to establish that the district court abused its discretion by awarding him $1,115 in attorney fees.

B.

The district court also awarded First National $500 in attorney fees from Gruenzner. But the district court cites no law, and we are unaware of any, that provides a statutory basis for awarding attorney fees to First National, a junior lienholder. Moreover, the contractual provisions in the mortgages require only the *mortgagor* to pay attorney fees; they do not bind Gruenzner as a mortgagee. Accordingly, we reverse the district court's award of attorney fees to First National.

III.

Gruenzner next argues that the district court abused its discretion by not considering whether equitable principles warrant adjusting his foreclosure bid downward so that it is consistent with the January 12 judgment, thereby eliminating the surplus. Because the decision to grant equitable relief rests within the district court's sound discretion, only a clear abuse of that discretion will warrant reversal. *Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

A bid in a foreclosure sale results in a surplus if, "after satisfying the mortgage debt, with costs and expenses," there are additional funds. Minn. Stat. § 581.06 (2010). Generally, the mortgagee has no claim to this surplus, even if the bid is from the mortgagee. *First Minn. Bank v. Overby Dev., Inc.*, 783 N.W.2d 405, 411 (Minn. App.

2010) (citing *Babcock v. Am. Sav. & Loan Ass'n*, 67 Minn. 151, 152, 69 N.W. 718, 718 (1897)). But it is within a district court's equitable powers to set aside a foreclosure sale that is based on a mistaken bid. *Peterson v. First Nat'l Bank*, 162 Minn. 369, 377-78, 203 N.W. 53, 56 (1925); *see* Minn. Stat. § 581.08 (2010) (allowing district court to refuse to confirm sale and "order a resale on such terms as are just" if it believes that "justice has not been done"). When the mortgagee's bid is based on a mistake of law and deliberately made, however, equitable relief may be denied even if it may result in a hardship for the mortgagee. *See Babcock*, 67 Minn. at 153, 69 N.W. at 718 ("The [mortgagor] was entirely blameless in the matter, and there was no mistake of facts. The method of foreclosure was deliberately adopted, and the mistake one of law, pure and simple. The result of this litigation may be a hardship for the [mortgagee], but it alone is to blame."); *see also First Minn. Bank*, 783 N.W.2d at 415 (citing *Babcock*, 67 Minn. at 153, 69 N.W. at 718) (holding that district court did not abuse its discretion by refusing equitable relief to overbidding mortgagee when mortgagee made a mistake of law).

In *Peterson*, the Minnesota Supreme Court held that it was within the equitable powers of the district court to set aside a foreclosure sale because the mortgagor attempted to deliberately take unconscionable advantage of plaintiff-mortgagee's mistaken bid amount through redemption proceedings. 162 Minn. at 372-74, 378-79, 203 N.W. at 54, 56-57. The *Peterson* court provided the following "controlling equities" to be applied in such cases to justify relief from a unilateral mistake:

> (1) A blameless plaintiff fallen into serious error, whether of fact or law is immaterial, which promises a disastrous result, wholly unintended by any of the parties to the transaction

> wherein the mistake occurred; (2) absence of negligence of the person seeking relief; (3) defendants with knowledge of the mistake attempting to secure by inequitable conduct an unconscionable advantage of plaintiff and to enrich themselves unjustly at his expense; (4) the ability of the court to restore the status quo as to all of the interests involved.

Id. at 379, 203 N.W. at 56-57. A district court's award of equitable relief may be proper if the mortgagee was a "blameless party" and was not negligent, but rather the mortgagee's attorney was at fault. *Anderson v. Peterson's N. Branch Mill, Inc.*, 503 N.W.2d 517, 519 (Minn. App. 1993) (citing *Peterson*, 162 Minn. at 370-71, 203 N.W. at 53) (affirming equitable relief and observing that district court properly separated mortgagee's conduct from mortgagee's attorney's conduct when determining blamelessness).

Here, Gruenzner's counsel candidly concedes that his foreclosure bid was based on a mistake of law. Although the district court has discretion to grant or deny equitable relief under these circumstances, the record does not reflect that the district court exercised its discretion. The district court's November 12, 2010 order denies Gruenzner's "motion to correct the judgment previously ordered" and states that the district court "will not correct the judgment on the basis of a clerical error." But Gruenzner's motion sought both the correction of a clerical error and equitable relief, and the district court's order does not reflect any consideration of equitable relief. A remand is appropriate to permit the district court to do so. *See In re Welfare of M.F.*, 473 N.W.2d 367, 370 (Minn. App. 1991) (remanding for district court to exercise discretion). We,

therefore, remand to the district court to decide whether equitable relief is warranted here. The district court may, in its discretion, reopen the record on remand.

Affirmed in part, reversed in part, and remanded; motion denied.