STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1596
A07-2415

US Federal Credit Union,
Respondent,

vs.

Avidigm Capital Group, Inc.,
Respondent,

Steven J. Mattson,
Respondent,

Homecomings Financial Network, Inc.,
Appellant.

Filed July 22, 2008
Affirmed
Johnson, Judge

Carver County District Court
File No. 10-CV-06-1078

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Considered and decided by Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Two companies--US Federal Credit Union (USFCU) and Homecomings Financial Network, Inc.--held interests in a parcel of real property in Carver County when the owners defaulted on both loans. On cross-motions for summary judgment, the district court held that USFCU's interest in the property is superior to that of Homecomings. On appeal, Homecomings argues that the district court erred because its decision is contrary to a default judgment of the same court concerning the same property and because Homecomings registered its interest with the county registrar before USFCU registered its interest. We conclude that the doctrine of res judicata does not apply and that Homecomings' interest lapsed when it failed to redeem its interest following a sheriff's sale of the property. Therefore, we affirm.

FACTS

This case concerns mortgage liens on a parcel of real estate in Carver County that is described as Lot 6, Block 3, Kings Meadows, which was owned by Richard P. and Elizabeth L. Axtman from 1999 to 2004. The property is registered with the county under the Torrens land title registration system.

A. Mortgage Granted to Bremer Bank

On July 5, 2002, the Axtmans borrowed $47,000 from Bremer Bank and, in consideration for the loan, granted a mortgage on their property to Bremer. On July 29,

2002, Bremer filed documentation concerning the mortgage with the county registrar, and the documentation was registered.

On May 4, 2004, Bremer filed a notice of intent to foreclose on the Axtman loan. On June 29, 2004, a sheriff's sale was held, at which Avidigm Capital Group, Inc., purchased the sheriff's certificate and registered the purchase with the county registrar.

On December 29, 2004, six months after the foreclosure of the Bremer mortgage, the Axtmans' redemption period expired. During the redemption period, the Axtmans did not redeem their interest in the property, and Homecomings (which independently had acquired a mortgage interest in the property, as explained further below) did not file a notice of intent to redeem.

On January 5, 2005, seven days after the expiration of the Axtmans' redemption period, Homecomings' redemption period expired. During that period, Homecomings did not redeem.

On February 17, 2005, Avidigm conveyed its interest in the property to USFCU. On April 12, 2005, USFCU registered its interest with the county registrar.

B. Mortgage Granted to Wells Fargo Bank

On June 23, 2003, the Axtmans borrowed $220,000 from Wells Fargo Home Mortgage, Inc. and, in consideration for the loan, granted a mortgage on their property to Wells Fargo. Before making the loan to the Axtmans, Wells Fargo induced Bremer to subordinate its mortgage to the Wells Fargo mortgage.

On July 8, 2003, Wells Fargo delivered the mortgage to the county registrar for registration. The county registrar, however, refused to register the subordination

agreement because the documentation submitted by Wells Fargo did not include the document number and other information relating to the Bremer mortgage.

On August 30, 2004, Wells Fargo conveyed its mortgage interest in the Axtman property to Wilshire Credit Corporation. On September 1, 2004, Wilshire transferred its interests to Homecomings.

Later in 2004, Homecomings foreclosed on the Axtman loan. On November 2, 2004, a sheriff's sale was held, at which Homecomings purchased the sheriff's certificate. On the same day, Homecomings registered its purchase with the county registrar.

It appears that, at some time between June 29, 2004, and April 11, 2005, Homecomings became aware of Avidigm's interest in the property. On April 11, 2005, Homecomings filed a claim with the county registrar, alleging that it had an interest in the Axtman property that was prior and superior to that of Avidigm. At this time, Homecomings apparently was unaware that Avidigm had conveyed its interest to USFCU. Homecomings' filing of its claim occurred one day before USFCU registered its interest.

C. Procedural History of Lawsuits

In June 2005, Homecomings commenced a civil action against Avidigm seeking a declaration that its interest (which was based on the mortgage originally granted to Wells Fargo) was superior to Avidigm's interest (which was based on the mortgage originally granted to Bremer). Homecomings filed a notice of lis pendens with the county registrar. USFCU was not named as a party to the action. Avidigm did not respond to the summons and complaint. On February 22, 2007, the district court issued an order

granting Homecomings' motion for default judgment. The order states that the mortgage originally granted to Wells Fargo (which is the basis of Homecomings' interest) is prior and superior to the mortgage originally granted to Bremer (which is the basis of USFCU's interest).

Meanwhile, on October 18, 2006, USFCU commenced a civil action against Homecomings, Avidigm, and Avidigm's CEO. USFCU sought to recover money damages from Avidigm and its CEO equal to the outstanding balance on the loan. USFCU also sought to obtain a declaration that USFCU's mortgage on the property was superior to all other interests, including that of Homecomings. In March 2007, USFCU and Homecomings filed cross-motions for summary judgment, each arguing that its respective mortgage was superior to that of the other. At a hearing on the motions, at which a different district court judge presided, Homecomings' counsel produced a copy of the order for default judgment in Homecomings' action. It appears that neither the judge in the second case nor USFCU's counsel previously was aware of the ruling of the judge in the first case. On May 25, 2007, the district court issued an order granting USFCU's motion and denying Homecomings' motion. The order states that USFCU interest "is senior and prior to any interest in the Properties claimed by Homecomings."

On August 20, 2007, Homecomings filed a notice of appeal from the judgment entered on the May 25, 2007, order. On September 18, 2007, a sheriff's sale was held to foreclose on the USFCU mortgage, at which USFCU purchased the property, thereby retaining its interest. On October 2, 2007, USFCU filed a motion in the district court to confirm the sheriff's sale. On October 26, 2007, the district court granted the motion but

instructed USFCU to not dispose of the proceeds of the sale until the pending appeal was concluded. On December 21, 2007, Homecomings filed a notice of appeal from the judgment entered on the October 26, 2007, order. Homecomings' two appeals have been consolidated.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State ex rel. Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment shall be granted when "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; *see also Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). If there are genuine issues of material fact, a reviewing court will reverse the grant of summary judgment and remand for trial. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 330 (Minn. 2004).

I. Res Judicata Doctrine

We first consider Homecomings' argument that USFCU is bound by the decision in Homecomings' action against Avidigm. The district court in USFCU's action concluded that the prior decision had "no legal effect" on USFCU's and Homecomings' cross-motions for summary judgment. Homecomings' argument requires us to apply the doctrine of res judicata, which may preclude a party from relitigating a cause of action in a second lawsuit if:

> (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter.

Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 220 (Minn. 2007) (quotation omitted). "Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action." *Id.* The applicability of res judicata is a question of law, which is subject to de novo review. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

In this case, the first element of res judicata is satisfied because the second action concerns "the same set of factual circumstances" as the first action. *Id.* Likewise, the third element is satisfied because the first action reached a final judgment, and a default judgment may satisfy the third element of res judicata. *See Roberts v. Flanagan*, 410 N.W.2d 884, 886-87 (Minn. App. 1987) (citing *Herreid v. Deaver*, 193 Minn. 618, 622, 259 N.W. 189, 191 (1935)).

Nonetheless, the doctrine of res judicata does not bar USFCU's action because Avidigm and USFCU are not in privity with each other. There is no single definition for privity, *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1988), but privity generally "requires a person so identified in interest with another that he represents the same legal right," *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 533 (Minn. 1988). Privies include "(a) those who control an action although not parties to it, (b) those whose interests are represented by a party to the action, and (c) successors in interest to those having derivative claims." *Denzer v.*

Frisch, 430 N.W.2d 471, 473 (Minn. App. 1988) (citing *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 47-48 (1972)). The existence of privity is determined by the facts of each case. *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. App. 2000) (citing *Johnson v. Hunter*, 447 N.W.2d 871, 874 (Minn. 1989)), *review denied* (Minn. Nov. 21, 2000).

Homecomings contends that USFCU was in privity with Avidigm because USFCU was a successor in interest to Avidigm, which was named in the first action. In *Roberts v. Friedell*, 218 Minn. 88, 15 N.W.2d 496 (1944), the supreme court stated, "[N]o one is privy to a judgment whose succession to the rights of property . . . occurred previously to the institution of the suit." *Id.* at 94, 15 N.W.2d at 499. Avidigm granted its interest to USFCU five months before Homecomings commenced its action against Avidigm, and USFCU registered the conveyance. Contrary to Homecomings' suggestion, this case is unlike *Twin City Fed. Sav. & Loan Ass'n v. Radio Serv. Lab., Inc.*, 242 Minn. 10, 64 N.W.2d 32 (1954), in which the supreme court stated, "One is the privy by estate of another if he succeeded to an estate or interest held by a party to the judgment *after* the commencement of the action by which he is sought to be bound." *Id.* at 11, 64 N.W.2d at 33 (emphasis added). Thus, there was no privity between USFCU and Avidigm.

Furthermore, the fourth element of res judicata is not satisfied because USFCU did not have a full and fair opportunity to litigate the matter in the first action. *See Brown-Wilbert*, 732 N.W.2d at 220. USFCU was not a party to the first action, and there is no

indication in the record that USFCU had notice of the first action or of the motion for default judgment that Homecomings filed against Avidigm.

Even if all the elements of the res judicata doctrine are satisfied, the district court's ruling nonetheless should be affirmed. Res judicata is "an equitable doctrine that must be applied in light of the facts of each individual case." *R.W. v. T.F.*, 528 N.W.2d 869, 872 n.3 (Minn. 1995). The doctrine is "flexible," and a court should inquire whether "its application would work an injustice on the party against whom estoppel is urged." *Id.* (citing *Johnson v. Consolidated Freightways, Inc.*, 420 N.W.2d 608, 613-14 (Minn. 1988); *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984)). In this case, applying the res judicata doctrine as a bar to USFCU's action would "work an injustice on" USFCU. *R.W.*, 528 N.W.2d at 872 n.3. The first action was brought against a company, Avidigm, that no longer had an interest in the property and, thus, had no motivation to defend against Homecomings' action. Homecomings obtained a default judgment, apparently unbeknownst to USFCU, simply because Avidigm did not appear. It further appears that in Homecomings' action against Avidigm, the district court did not receive any evidence that Homecomings had failed to redeem its interest in the property, which is the dispositive issue in this case.

Thus, USFCU is not barred by Homecomings' prior action from pursuing a declaratory judgment in its subsequent action against Homecomings.

II. USFCU's Declaratory Judgment Action

A. Homecomings' Failure to Redeem

Homecomings' primary argument on appeal is that it registered its interest with the county registrar one day before USFCU registered its interest. Homecomings argues that its earlier registration gives it a prior and superior interest in the property. Indeed, it is a fundamental principle in the Torrens system that real-property rights are established by registration.

> No voluntary instrument of conveyance purporting to convey or affect registered land, except a will, and a lease for a term not exceeding three years, shall take effect as a conveyance, or bind or affect the land, but shall operate only as a contract between the parties, and as authority to the registrar to make registration. The act of registration shall be the operative act to convey or affect the land.

Minn. Stat. § 508.47, subd. 1 (2006); *see also In re Collier*, 726 N.W.2d 799, 803-05 (Minn. 2007) (noting that purpose of Torrens system is to simplify conveyancing and avoid expensive title searches characteristic of the abstract system); *Mill City Heating & Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984) (explaining that purpose of Torrens system is to establish certainty with respect to real property rights); John L. McCormack, *Torrens & Recording: Land Title Assurance in the Computer Age*, 18 Wm. Mitchell L. Rev. 61, 70-73, 80-91 (1992) (noting that Torrens system establishes legal status of property without requiring search of entire recorded legal history).

But this is not a case in which the district court was faced with determining priority between two valid interests. The district court found that there was only one valid interest--USFCU's--because Homecomings' interest was extinguished when

Homecomings, as the junior creditor (by virtue of the earlier failure to properly register the subordination agreement), failed to redeem its interest following the sheriff's sale that was prompted by Bremer's foreclosure. It is undisputed that USFCU had no interest in the property until April 12, 2005, when USFCU registered the interest that it had acquired from Avidigm two months earlier. And it also is undisputed that Homecomings filed its adverse claim one day earlier, on April 11, 2005. But to prevail on appeal, Homecomings must establish that it had a valid interest in the property when it registered its adverse claim on April 11, 2005.

Under Minnesota law, a mortgagor (for example, a property owner who granted a mortgage to a lender) may redeem property sold at a foreclosure sale within six months of the sale by paying the sale price to the party that purchased the property at the foreclosure sale. Minn. Stat. § 580.23, subd. 1 (2006). If the mortgagor (the property owner) does not elect to redeem the property within the six-month period, the most senior creditor may redeem the property within seven days of the expiration of the redemption period, so long as the creditor previously filed a notice of intent to redeem with the county registrar. Minn. Stat. § 580.24(a)(1) (Supp. 2007).

Nearly a century ago, the supreme court stated that "in order to preserve any rights under a junior lien, the junior creditor must redeem under it from the senior creditor who made the redemption next prior in time, even if he himself be such senior creditor." *Moore v. Penney*, 141 Minn. 454, 456, 170 N.W. 599, 600 (1919). Likewise, in *Graybow-Daniels Co. v. Pinotti*, 255 N.W.2d 405 (Minn. 1977), the supreme court held that the rights of a creditor who failed to redeem were extinguished. *Id.* at 407. And in

Community Ins. Agency, Inc. v. Kemper, 426 N.W.2d 471 (Minn. App. 1988), *review denied* (Minn. Sept. 16, 1988), this court held that "[b]y not exercising its right of redemption, [the creditor's] interest in the subject property as junior creditor [was] forfeited." *Id.* at 474. In light of this precedent, Homecomings' interest in the Axtman property was extinguished seven days after the Axtmans' redemption period because Homecomings failed to file a notice of intent to redeem during the six-month period and failed to redeem during the seven-day period that following the redemption period.

Homecomings makes two additional arguments on this issue. First, Homecomings argues that it had a superior interest to the Bremer mortgage by virtue of the subordination agreement between Wells Fargo and Bremer. Homecomings would be correct if the subordination agreement had been properly registered, but it was not. A subordination agreement that has not been registered does not bind or affect title to Torrens property. Minn. Stat. § 508.47, subd. 1. Rather, priority may be established only by registration. Minn. Stat. §§ 508.25 (2006); 508.47, subd. 1; 508.70, subds. 1(a), 5 (2006). Homecomings cites no authority for an exception to these general principles.

Second, Homecomings argues that its interests could not have been extinguished unless and until it had received notice of adjudication of the title under Minn. Stat. § 508.58, subd. 1 (2006). But a court proceeding is not always necessary. Subdivision 2 of the same section provides that a person who has become the owner of property through foreclosure may obtain a new certificate of title "upon the written directive of the examiner of titles as to the legal sufficiency of the mortgage foreclosure proceeding." Minn. Stat. § 508.58, subd. 2. (2006). In any event, even if a court proceeding had

occurred, Homecomings' arguments would have failed for the same reasons as are stated above.

Thus, Homecomings' interest in the property was extinguished by its failure to redeem following the sheriff's sale.

B. Good-Faith Purchaser

Homecomings also argues that USFCU did not purchase the property in good faith because USFCU had constructive notice of Homecomings' adverse claim at the time USFCU registered its purchase from Avidigm.

Even if order of registration has been established, a court may inquire further into whether the "subsequent purchaser of registered land . . . receive[d] a certificate of title in good faith" under Minn. Stat. § 508.25. *Collier*, 726 N.W.2d at 805 (emphasis and quotation omitted). Section 508.25 provides that a "subsequent purchaser" who receives a certificate of title by registration holds that interest "free from all encumbrances and adverse claims" except for those noted on the certificate of title, provided that the purchaser "receives a certificate of title in good faith." Consequently, the Torrens system "abrogates the doctrine of constructive notice except as to matters noted on the certificate of title." *In re Juran*, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929). The supreme court recently held that a person with "actual knowledge of a prior, unregistered interest in the property is not a good faith purchaser." *Collier*, 726 N.W.2d at 809. In doing so, the court reiterated that in the absence of actual knowledge, the general rule applies, and "unregistered instruments do not affect registered land." *Id.* at 808 (quotation omitted).

Homecomings' argument fails for two reasons. First and most fundamentally, constructive notice establishes priority only with respect to an otherwise enforceable interest. A person may purchase in good faith within the meaning of the Torrens Act even if the purchaser has knowledge of an interest that has been extinguished. *Moore v. Henricksen*, 282 Minn. 509, 519, 165 N.W.2d 209, 217 (1968). There is no indication in section 508.25 or the caselaw that notice to a subsequent registrant revives an interest that has been extinguished. Second, even if USFCU had constructive notice of Homecomings' alleged interests *when USFCU registered its mortgage*, there is no indication that USFCU had actual knowledge of Homecomings' interest *when USFCU purchased Avidigm's interest* nine months earlier.

Thus, Homecomings has not demonstrated that USFCU was not a good-faith purchaser under section 508.25.

III. Confirmation of Sheriff's Sale

Homecomings argues that the district court erred by confirming the sheriff's sale because there were irregularities in the sale. Specifically, Homecomings argues that the priority of rights had not been finally determined, that Homecomings did not know that the foreclosure sale would actually occur, and that the bid was inadequate.

"[A] foreclosure sale free from fraud or irregularity will not be held invalid for inadequacy of the price, since the mortgagor has a period to redeem from foreclosure." *G.G.C. Co. v. First Nat'l Bank of St. Paul,* 287 N.W.2d 378, 383 (Minn. 1979). Such irregularities might include conducting the sale in a manner that would "discourage bidding, or in some way result in an inadequate bid." *In re Strawberry Commons*

Apartment Owners Ass'n, 356 N.W.2d 401, 403 (Minn. App. 1984). We review an order confirming a foreclosure sale for an abuse of discretion. *See Zetah v. Isaacs*, 428 N.W.2d 96, 103 (Minn. App. 1988).

Homecomings' first contention, that the sale was inappropriate because the priority had not been established, is now resolved by our conclusion in part II that Homecomings' interest was extinguished by its failure to redeem.

Homecomings' second contention, that it did not have notice of the foreclosure sale, is defeated by its concession that USFCU served Homecomings with notice of the foreclosure sale as required by law. Homecomings argues that it was led to believe that the sale would not occur when USFCU did not respond to a letter sent by Homecomings' counsel, which stated:

> I do not believe that there is any enforcement proceeding that can be stayed, and therefore, no supersedeas bond is required, to maintain the status quo. If you disagree, please contact me and advise me of your position so that we may either reach an accord or submit the matter to the trial court.

Homecomings has not cited any authority for the proposition that USFCU's silence in response to the letter invalidated its prior notice, let alone that the letter imposed a burden on USFCU to provide additional information to Homecomings regarding its intentions to follow through with the sheriff's sale.

Homecomings' third contention, that the bid was inadequate, is contrary to well-established caselaw. Inadequacy of the sale price, even if proven, is insufficient to invalidate a foreclosure sale. *G.G.C. Co.*, 287 N.W.2d at 383; *Guidarelli v. Lazaretti*, 305 Minn. 551, 553, 233 N.W.2d 890, 891 (1975); *Kantack v. Kreuer*, 280 Minn. 232,

240, 158 N.W.2d 842, 847-48 (1968); *Berke v. Resolution Trust Corp.*, 483 N.W.2d 712, 717-18 (Minn. App. 1992); *Zetah v. Isaacs*, 428 N.W.2d 96, 101 (Minn. App. 1988). "The rationale behind this rule is that any windfall gained by the lender as a result of its bad faith is negated by redemption." *Sprague Nat'l Bank v. Dotty*, 415 N.W.2d 725, 727 (Minn. App. 1987), *review denied* (Minn. Jan. 28, 1988). Because Homecomings had the opportunity to redeem and has not shown any irregularity or fraud, the alleged inadequacy of the sale price is not grounds for a challenge to the sheriff's sale.

Thus, the district court did not abuse its discretion by confirming the sheriff's sale.

Affirmed.