NO. 20100280

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 6, 2010
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

IN SUPREME COURT

First International Bank & Trust,

Plaintiff,

and

Village Homes at Harwood Groves, LLC a/k/a Village Homes at Harwood Groves Condominium Association, Danovic Properties, LLC, Marland Hoff, et al.,

Appellees,

vs.

Defendant. Duane Peterson, MID AM Group, LLC, a North Dakota Limited Liability Company, and Mid Am Group Realty,

Appellants.

Appeal from Judgment
Cass County District Court, East Central Judicial District
The Honorable John C. Irby

Brief of Appellants D.Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty

PAUL A. SORTLAND (#03732)
SORTLAND LAW OFFICE
431 South Seventh Street, Suite 2440
Minneapolis, Minnesota 55415
(612) 375-0400
Attorney for Appellants. D. Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

STATEMENT OF THE ISSUES

The issues presented are as follows:

1. Whether Interveners, which took through the Bank, are entitled to any of the insurance proceeds?

2. Whether Intervener, Village Homes at Harwood Groves, LLC, has standing to sue?

3. Whether the attorney's lien filed by counsel for Appellants meets the statutory requirements and should be effective?

STATEMENT OF THE CASE

[1] This case involves ownership of hail insurance proceeds. The Appellants, D. Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty claim ownership of at least 80 percent. The Appellees, Interveners, however, were awarded all of the insurance proceeds.

[2] This lawsuit was commenced on March 16, 2009, by First International Bank & Trust, seeking ownership of the insurance proceeds. On August 25, 2009, Judge Racek held that First International Bank & Trust had no claim to the check, but invited the owners of the ten units which had been sold at the time of the hail damage to intervene.

[3] On November 19, 2009, Judge Irby allowed intervention, not only by the ten original owners, but also by owners who had come in after the hail storm, and following foreclosure.

[4] On June 25, 2010, the court ruled that the insurance proceeds should be paid over to the Village Homes at Harwood Groves, LLC. The court also denied the attorneys lien of Appellants' counsel. This appeal follows.

STATEMENT OF THE FACTS

[5] Mid Am Group, LLC is a North Dakota limited liability company which is owned by Defendant and Appellant, D. Duane Peterson. Mid Am and Peterson did business through the name Mid Am Group Realty. Findings of Fact, ¶¶ 1 and 2, App. 86.

[6] Mid Am, Peterson, and Mid Am Group Realty developed and built a

condominium project known as Village Homes at Harwood Groves Condominiums ("Village Homes"), consisting of 50 condominium units within one building, and described as follows:

> [7] Lots One, Two, and Three, in Block Two of Harwood Groves Commercial Park Second, a Replant of a portion of Eleventh Street South and Lot One, Block One, of Harwood Groves Commercial Park, to the City of Fargo, situated in the County of Cass in the State of North Dakota.
> Findings of Fact, ¶ 3, App. 86.

[8] The Declaration, Bylaws, and Covenants and Restrictions for Village Homes were recorded with the Cass County Recorders Office on May 24, 2005, as Document No. 1138084. Findings, ¶ 4, App. 86. The Bylaws provided that the Board of Managers was to be elected at the first annual meeting of the unit owners, which was to be held 30 days after 75% of the building units had been sold. Findings, ¶ 6, App. 87.

[9] On September 12, 2007, a hail storm occurred. Duane Peterson for Mid Am submitted a Proof of Loss and made a claim with Auto Owners Insurance Company under the insurance policy. Auto Owners adjusted the claim in the amount of $215,503.22.

[10] At that time, ten of the fifty Village Homes' condominium units had been sold by Mid Am at that time to the following individuals: John and Molly Volkerding, Danovic Properties, LLC, Gerald and Jane Hendricks, Abner Selvig, Ralph and Gwen Peterson, Robert Norwood, Arlen Anderson, Marland and Virginia Hoff, Daniel Shelstad, and Ramsey Nat'l Bank & Trust Co. as Trustee of

the Daniel E. Shelstad IRA.

Findings, ¶ 8, App. 87.

[11] The remaining units were owned by Mid Am. Id. Some of the units have changed hands. The unit owned by John and Molly Volkerding is currently owned by Park West II Investments. The unit owned by Marland and Virginia Hoff is currently owned by First International Bank, and the unit owned by Ramsey Nat'l Bank & Trust Co. as Trustee of the Daniel Shelstad IRA is owned by the Rogne Family, LLP. Id.

[12] Mid Am obtained financing from First International Bank & Trust ("First International") to develop and build Village Homes. Findings, ¶ 9, App. 88.

[13] Mid Am obtained insurance for the building with Auto Owners Insurance Company ("Auto Owners") which included coverage for hail damage. Mid Am and Mid Am Group Realty were listed as the insured parties. Findings, ¶ 10, App. 88.

[14] At the time of the hail storm, 75% of the condominium units had not been sold. Consequently, a Board of Managers had not been elected, and Mid Am was the de facto Board of Managers. Findings, ¶ 14, App. 88-89.

[15] On October 18, 2007, more than one month following the hail storm, First International initiated a foreclosure proceeding against Mid Am for the remaining forty condominium units which it owned which were mortgaged and secured the debt of Mid Am. Findings, ¶ 12, App. 88. On February 28, 2008, judgment was rendered in favor of First International. Id.

[16] On April 23, 2008, a foreclosure sale was held in which First International

purchased the remaining forty condominium units for the full amount of the indebtedness and costs, then calculated at $7,325,313.08. After the redemption period expired, First International owned the remaining forty units which were subsequently sold to Adams Development Corporation. Findings, ¶ 12, App. 88.

[17] First International's attempt to seek more than the foreclosure amount was denied in a separate action. That was affirmed by this Court in First International Bank & Trust v. Peterson, Mid Am, et al., 2009 ND 207, 776 N.W.2d 543.

[18] First International Bank then sold much of its interest in the building. Through additional sales and transfers, a number of individuals and entities became owners of the remaining forty units. The new purchasers included Adams Development (35 units), David and Valerie Halverson, Duane Rogne, Gary Cornforth Revocable Living Trust, Gerald and Jane Hendricks, and Richard and Jean Ripplinger. See, Findings, ¶ 8, App. 87, and ¶ 17, App. 89-90.

[19] On November 20, 2008, Auto Owners issued its settlement check in payment of the hail storm claim in the amount of $215,503.22, made payable to Mid Am, Mid Am Group Realty, and First International. Findings, ¶ 13, App. 88.

[20] This present lawsuit was commenced by the Bank in March, 2009, by First International Bank & Trust, against D. Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty seeking sole possession of the insurance proceeds. Complaint, App. 7. The Defendants denied the claims, and sought sole possession of the insurance proceeds. Joint and Several Answer and Counterclaim of Defendants D. Duane Peterson, Mid Am Group, LLC, and Mid Am Group Realty,

App. 37.

[21] On August 25, 2009, the District Court, the Honorable Frank L. Racek presiding, issued an order determining that First International Bank was not entitled to the insurance proceeds as a loss payee or under its mortgage. See, Order on Cross-Motions for Summary Judgment, App. 52.

[22] At that time, the court held that First International's interest was satisfied by bidding in the full amount of its mortgage at the foreclosure sale. See, for example, Order on Cross-Motions for Summary Judgment, App. 56. It was held, at that time, that First International has no claim for the insurance proceeds by virtue of its mortgage. App. Id.

[23] However, the court held that since ten of the units had already been sold to various individuals prior to completion of the building, and prior to the storm, these unit holders would have expected to take possession of the condominiums without hail damage to their undivided interest in the roof of the building. See, Order, at App. 58.

[24] The court further held that the ten owners of individual condominium units, at the time of the hail storm, were not named in the Complaint and had not appeared in the action. The court held that they were real parties in interest by virtue of their ownership interest in the condominium. Order, App. 61.

[25] Consequently, the court ordered Auto Owners to pay the insurance proceeds

into the court, pending resolution of the action, and that Plaintiff serve notice on the unit owners at Village Homes, informing them that said amounts have been paid into court, allowing them 45 days to intervene. See, Order, August 25, App. 62.

[26] Subsequently, the Interveners, which included not only the ten Interveners contemplated by Judge Racek, but also the subsequent parties who purchased their interests through the Bank, moved to intervene. This was allowed by Judge John Irby on November 19, 2009. Order, App. 75.

[27] The parties then moved for cross-motions for summary judgment on April 30, 2010. Findings, App. 85. The district court held that the Village Homes unit owners and the association were the intended beneficiary of Mid Am's actions when it purchased insurance for Village Homes. See, Conclusions, ¶ 5, App. 91. The court also held that the Village Homes' unit owners had an expectation under the condominium documents that the insurance proceeds would be applied to make roof or other repairs or to otherwise maintain Village Homes. Findings, ¶ 6, App. 91.

[28] The court further held that Mid Am would be unjustly enriched if allowed to collect any portion of the insurance proceeds, and that the association was entitled to the insurance proceeds in the amount of $215,503.22. Findings, ¶¶ 8 and 9, App. 91.

[29] The court also held that the attorney lien filed by Paul Sortland is of no

effect, concluding that it did not meet the statutory requirements and no money was due to Defendants. Findings, ¶ 10, App. 91.

[30] A timely Notice of Appeal was filed on August 27, 2010. App. 97.

ARGUMENT

STANDARD OF REVIEW

[31] Summary judgment permits the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact, or if the only issues to be resolved are questions of law. See Farmers Insurance Exchange v. Schirado, 2006 ND 141, ¶ 8, 717 N.W.2d 576. Summary judgment is appropriate when there is "no longer [any] dispute as to the salient facts involved in the matter." Aid Insurance Services, Inc. v. Geiger, 294 N.W.2d 411, 413 (N.D. 1980). Whether a district court properly granted judgment is a question of law that the Supreme Court reviews de novo. Schirado, supra, at ¶ 9.

[32] A district court's decision on a motion for summary judgment is a question of law which this Court reviews *de novo* on the record. In determining whether summary judgment was appropriately granted, this Court views the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. Kambeintz v. Acuity Insur. Co., 2009 ND 166, ¶ 8, 772 N.W.2d 632.

I. INTERVENERS WHICH TOOK THROUGH THE BANK ARE NOT ENTITLED TO ANY OF THE INSURANCE PROCEEDS.

[33] In the district court decision, not only were the original ten unit owners, who purchased the property prior to the hail storm, allowed to intervene, but also the persons who acquired their property subsequently from the Bank were also entitled to intervene.

[34] The court had previously ruled, in its Order on cross summary judgments, that the Bank was not entitled to the insurance proceeds. The court held that First International Bank was not entitled to any insurance proceeds, because it had already been satisfied.

[35] In a foreclosure sale, if the mortgagee bids in the full amount of the mortgage and receives title to the property it is considered to be in full satisfaction of the debt, and also terminates the mortgagee's insurance interest. Whitestone Savings & Loan Ass'n v. Allstate Insur. Co., 270 N.E.2d 694, 695 (N.Y. 1971). See also, Countrywide Home Loans v. Allstate Insur. Co., 246 S.W.2d 515 (Mo. App. 2007). See also, Margaretten Co., Inc. v. Illinois Farmers Insur. Co., 526 N.W.2d 389 (Minn. App. 1995), which held that a mortgagee could not recover mortgage-interest fire policy benefits where the subsequent foreclosure sale at which it bid in the full amount of secured debt left no remaining debt on the property.

[36] The district court also rejected the claims of First International on other grounds, holding that whatever privileges a mortgagor is given, they are for the purpose of securing payment of the note. Once a deficiency is satisfied, the mortgagee's additional recovery of proceeds representing undamaged property would amount to unjust enrichment since its bid represented the value of the damaged property. Rodriguez v. First Union Nat'l Bank, 810 N.E.2d 1282, 1284 (Mass. App. 2004).

[37] It stands to reason, that if First International is not entitled to insurance proceeds, those who purchased through First International are not entitled to the proceeds, either. A party can convey no more than what it had in the first place. Aure v. Mackoff, 93 N.W.2d 807 (N.D. 1958). See also, Bragg v. Burlington Res. Oil & Gas Co., LP, 2009 ND 33, ¶ 19, 763 N.W.2d 481.

[38] It is axiomatic that a deed cannot convey a greater interest or estate in the property than the grantor has. Green v. Gustafson, 482 N.W.2d 842, 849 (N.D. 1992). A deed which purports to convey a greater interest than that held by the grantor conveys only the lesser interest actually held by the grantor. Van Sickle v. Olsen, 92 N.W.2d 777, 784 (N.D. 1958).

[39] If the Bank could not obtain the insurance proceeds in question directly, it certainly could not convey the interest in the proceeds to those who it sold the property to. There was no right of expectation by the individuals or entities acquiring title through the Bank, for any more than the Bank could give them.

[40] Consequently, this Court should reverse the findings of the district court,

insofar as they purport to convey an expectation in the insurance proceeds to the Interveners who came after the hail storm. The decision of the district court should be reversed and this matter remanded back for further proceedings consistent with the Order of this Court.

II. INTERVENER, VILLAGE HOMES AT HARWOOD GROVES, LLC, LACKS STANDING TO SUE.

[41] The Intervener, Village Homes at Harwood Groves, LLC has no right to intervene. Village Homes at Harwood Groves, LLC, was not formed until October 16, 2009, after commencement of this lawsuit. Mid Am requests that this Court rule that Village Homes at Harwood Groves, LLC, should not be entitled to intervene.

[42] In State v. Rosenquist, 78 N.D. 671, 51 N.W.2d 767 (N.D. 1952), this Court ruled that to have standing, a plaintiff must have a remedial interest in the action that is justiciable and enforceable by a court of law. This Court said: "One cannot rightfully invoke the jurisdiction of the court to enforce private rights or maintain a civil action for the enforcement of such rights unless he has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." Id. at 708. The purpose of the standing requirement is to avoid an "unreasonable and anomalous" result. Id.

[43] A condominium is "an estate in real property consisting of an undivided interest or interests in common in a portion of a parcel of real property together

with a separate interest or interests in space in a structure, on such real property." N.D.C.C. § 47-04.1-01(1). A condominium functions as a quasi-government. See Agassiz West Condominium Association v. Solum, 527 N.W.2d 244, 246 (N.D. 1995). Under N.D.C.C. §47-04.1-06(2), the "common areas are owned by the owners of the units as tenants in common in proportion to each unit's interest."

[44] In Jablonsky v. Klemm, 377 N.W.2d 560 (N.D. 1985), this Court said that in jurisdictions that statutorily authorize a condominium association sue on behalf of individual unit owners, courts generally hold that the association has standing as real party in interest in an action for damage to a condominium's common elements, regardless of whether the association actually owns the common elements. This Court found, however, that in jurisdictions that do not statutorily authorize a condominium association to sue on the unit owners' behalf, and where the association does not hold title to the common areas, courts generally hold "that the association lacks standing and is not the real party in interest in suits relating to the common elements." Id. at 569.

[45] In Jablonsky, this Court ultimately determinated that the condominium association did not own the common elements of the property, and that North Dakota law does not expressly authorize a condominium association to sue on behalf of unit owners for damages to the common elements. See N.D.C.C. § 47-04.1. This Court ruled that the lower court did not err in finding that the

individual unit owners, and not the condominium association, were the real parties in interest. Id. at ¶ 40.

[46] Here, at the time Defendants developed Village Homes, Defendants owned the parcel of real property on which Defendants built the condominium building, and the entirety of the structure erected on the parcel. At the time of the hail storm, Defendants owned 40 out of 50 condominium units, and thus held an undivided interest in the parcel of real property, and an interest in common in the space in the condominium structure.

[47] On the other hand, Intervener, Village Homes at Harwood Groves, LLC, which was ultimately awarded the insurance proceeds in the district court's Judgment of June 29, 2010 (See Judgment, June 29, 2010, App 93), held no ownership interest whatsoever in the common elements, or any other part of the Village Home property at the time of the hail storm. At that time, no condominium association had been formed, and Defendant Mid Am Group was serving as the de facto Board of Managers for the condominiums.

[48] Under the principles set forth in Jablonsky, supra, since there was no condominium association in place at the time of the hail storm, and because North Dakota does not authorize a condominium association to sue for damage to common areas on behalf of its unit owners, Appellee, Village Homes, was not a real party in interest in this action and did not have standing to sue.

[49] Since Village Homes at Harwood Groves, LLC lacks standing to sue, the district court erred in awarding the insurance proceeds to it. The judgment should be reversed.

III. THE ATTORNEY'S LIEN FILED BY COUNSEL FOR APPELLANTS MEETS THE STATUTORY REQUIREMENTS AND SHOULD BE EFFECTIVE.

[50] On October 30, 2009, Counsel for Defendants filed a Notice claiming an attorney's lien of a one-third contingency, plus expenses in this matter. See Notice of Attorney's Lien, App. 73. In its Judgment dated June 29, 2010, the District Court released that Attorney's Lien. See Judgment, App. 93. The Court found that the lien was of no effect and did not meet the statutory requirements, and that no money was due to Defendants. See Findings of Fact, Conclusions of Law and Order for Judgment, June 25, 2010, p.7, App. 91.

[51] Section 2 of N.D.C.C.§ 35-20-08, the North Dakota Attorney's Lien Statute, provides that an attorney has a lien for compensation for any case upon:

[52] > Money due the attorney's client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to the adverse party, or the attorney of such party if the money is in the possession or under the control of such attorney, which notice must state the amount claimed and in general terms for what services. After judgment in any court of record, the notice may be given and the lien made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment.

[53] The North Dakota Attorney's Lien statute requires written notice to the adverse party, or its attorney, indicating the amount claimed and the services rendered in connection with the lien. See N.D.C.C. § 35-20-08(2), supra. The lien is not rendered ineffective by stating a percentage rather than a specific amount. See, for example, Greenleaf v. Minneapolis St. Paul & S.S.M Railway Co., 30 N.D. 112, 151 N.W. 879 (1915).

[54] In this case, it is clear that, but for the actions of Appellants' attorney, there would have been absolutely nothing left for the Interveners. The money would have gone to the Bank, and nobody else. At the very least, Appellants' counsel should be rewarded for such action. Moreover, since Defendants are entitled to recover at least 80% of the insurance proceeds, the attorneys lien should be honored.

[55] If the Interveners had a claim against Mid Am, it should have been in a separate lawsuit. By allowing the intervention to proceed, however, the court essentially changed two lawsuits into one. At the very least, counsel should be entitled to the results of his efforts and entitled to the lien.

[56] The court does not point out where the attorneys lien was deficient, nor where it failed to meet the statutory requirements. While the court found that no

money was due to the Defendants, that is only because the court erred in its application of the law, and also erred by consolidating two separate distinct actions.

[57] The attorneys lien statute should be honored, and Appellants' counsel commensurately awarded. The attorneys lien is viable. Timely notice was given. The district court's judgment should be reversed, and the attorneys lien should be given effect.

CONCLUSION

[58] The Judgment of the district court, dated June 29, 2010, awarding the insurance proceeds of $215,503.22, plus costs, to Appellee, Village Homes at Harwood Groves, LLC, should be reversed in accordance with this decision. The attorneys lien should also be honored.

Respectfully submitted this 6th day of October, 2010.

SORTLAND LAW OFFICE

s/ Paul A. Sortland

Paul A. Sortland (#03732)
431 South Seventh Street, Suite 2440
Minneapolis, Minnesota 55415
(612) 375-0400

ATTORNEY FOR APPELLANTS