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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Howard Malloy and Great Plains Potato Production, LLP, Plaintiffs and Appellees, vs. James Behrens, Defendant and Appellant.	Supreme Court No. 20210155 District Court No. 30-09-C-00869 **APPELLANT'S REPLY BRIEF**

APPEAL FROM THE MORTON COUNTY DISTRICT COURT'S ORDER GRANTING PETITION FOR APPRAISAL OF HOMESTEAD, ORDER GRANTING PETITION FOR SALE OF HOMESTEAD, AND ORDER CONFIRMING SALE, JUDGE DAVID E. REICH PRESIDING

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I. BEHRENS' APPEAL IS NOT MOOT BECAUSE THIS COURT IS ABLE TO GRANT EFFECTIVE RELIEF BY RESTORING THE PARTIES TO THEIR PRE-APPEAL POSITION.

[¶ 4] Malloy argues this appeal is moot because "Behrens failed to request a stay before the homestead was sold …" (Malloy's Brief ¶ 49, Sept. 28, 2021) (hereinafter "Malloy's Br."). Courts will not issue advisory opinions and will dismiss an appeal as moot if the issues become academic and there is no actual controversy left to be determined. In re Estate of Shubert, 2013 ND 215, ¶ 12, 839 N.W.2d 811 (citation omitted). No actual controversy exists if subsequent events make it impossible for a court to provide effective relief. Id. While it is true that the failure to obtain a stay and a sale of property *can* render an appeal moot, this is not one of the cases in which it does. For example, in In re Estate of Johnson, 2015 ND 110, 863 N.W.2d 215, two heirs of an estate sought to restrain the personal representative from selling land to a devisee. Id. at ¶ 1. The district court denied the heirs' application to restrain the sale of the land and the personal representative completed the sale before the appeal was complete. Id. at ¶ 5. This Court concluded the devisee-buyer had notice of the appeal due to his involvement in the probate and was not an "uninterested third party like the purchasers in *Shubert.*" Therefore, the appeal was not moot. Id. at ¶ 10.

[¶ 5] Here, like in Johnson, the buyer of the property is a party to this action. Therefore, this Court can provide effective relief and this appeal is not moot. This Court must reach the merits of Behrens' appeal and REVERSE the district court for the reasons argued below.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED MALLOY'S PETITION FOR APPRAISAL BECAUSE NO LEVY WAS RECORDED AGAINST THE HOMESTEAD WHEN THE PETITION WAS FILED.

[¶ 6] Malloy argues the district court did not err by granting his petition for appraisal because N.D.C.C. § 47-18-06 "does not require that the levy be pending" and N.D.C.C. § 47-18-06 only establishes "the order in which things must occur." (Malloy's Br. ¶ 32) (emphasis in original). Malloy also argues Behrens is requiring him to complete "judicial gymnastics" and is rending the homestead statutes "meaningless." (Malloy's Br. ¶¶ 30 and 34). But Malloy does not deny the process described in Paragraphs 42 - 54 of Appellant's Brief is the correct procedure to complete an execution sale of a homestead. So even if the process requires "judicial gymnastics," (which is denied) that does not mean Behrens is wrong. North Dakotans' homestead rights are an important substantive right. See Red River State Bank v. Reierson, 533 N.W.2d 683, 688 (N.D. 1995). Therefore, a sheriff's sale of a homestead is **supposed to be difficult.** The homestead statutes were drafted for the benefit of homeowners - not creditors. If the actual, legal, statutory procedure for creditors to complete an execution sale of a homestead is cumbersome, that is a feature of North Dakota's homestead statutes, not a bug.

[¶ 7] Furthermore, Behrens' proposed method for executing on a homestead is the exclusive method followed by creditors in other states with similar homestead statutes. For example, portions of the State of Washington's homestead statutes are nearly identical to North Dakota's homestead statutes. See RCW 6.13.010 et seq. Among other things, the Revised Code of Washington says "When execution for the enforcement of a judgment obtained in a case … is levied upon the homestead, the judgment creditor shall apply to the

superior court of the county in which the homestead is situated for the appointment of a person to appraise the value thereof." RCW 6.13.100.

[¶ 8] Accordingly, in Aronson v. Murk, 406 P.2d 607 (Wash. 1965), when a creditor sought to execute upon a judgment-debtor's homestead, the creditor obtained a "writ of execution" and then "levied on the real property." Id. at 608. See also Swearingen v. Byrne, 67 Cal. App. 3d 580, 587 (1977) (holding a creditor was not entitled to execute on a homestead because there was no "levy of an execution on [the] homestead property."). Malloy, on the other hand, cannot identify one case from any state in which a sheriff's sale is completed *without* either an execution or levy pending. Therefore, the district court erred as a matter of law and this Court must REVERSE the district court.

III. THE DISTRICT COURT ERRED WHEN IT GRANTED MALLOY'S MOTION FOR SALE OF HOMESTEAD BECAUSE MALLOY HAS NOT OBTAIN JULIE BEHREN'S CONSENT TO THE SALE.

[¶ 9] Malloy argues the district court did not err when it granted his Motion to Sell Homestead because N.D.C.C. § 47-18-05 "is inapplicable when the conveyance is by operation of law and does not come from either spouse." (Malloy's Br. ¶ 39). However, Malloy does not deny that applying *only* the plain language of N.D.C.C. § 47-18-05 would result in his sheriff's certificate and/or a subsequent sheriff's deed being declared void. Instead, Malloy argues N.D.C.C. § 47-18-05 was not *intended* to apply in this situation. See Malloy's Br. ¶ 39 (the "statute is inapplicable when the conveyance is by operation of law and does not come from either spouse."). But the statute does not say it is limited to instruments signed by a spouse. Instead, it says "the instrument by which it is conveyed or encumbered" must be "executed an acknowledged by both husband and wife." And the argument that Malloy's forced sale of property is "made by operation of law" ignores the

requirement that a sheriff's certificate and deed be issued before title is transferred. See N.D.C.C. §§ 28-23-11(1) and 28-24-13. These are plainly "instruments" under N.D.C.C. § 47-18-05. See Black's Law Dictionary 918 (Deluxe 10th ed. 2014) (an instrument is "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate …").

[¶ 10] Malloy also argues Kipp v. Sweno, 683 N.W.2d 259 (Minn. 2004) is distinguishable because "[i]n Kipp, the married judgment debtor owned his home with his wife as joint tenants." Malloy's Br. ¶ 41. While this is true, such was not a dispositive fact in the case because, in Minnesota, joint tenancy can be severed by court order. Id. at n.4. Instead, the court's primary concern was the non-debtor spouse's rights to the homestead. For example, the court was concerned about lack of notice to the non-debtor spouse and allowing a sale of the homestead would "threaten her possessory interest, right of survivorship, and remainder interest in the property." Id.at 266. Ultimately the court held it was an error to order "an execution sale of [the debtor's] and his spouse's homestead property to satisfy a judgment that was strictly against [the debtor]" because "a judgment creditor cannot acquire more property rights in a property than those already held by the [a judgment debtor]" and "a judgment debtor … may not increase the reach of the judgment lien beyond property owned by the judgment debtor." Id.

[¶ 11] The purpose of N.D.C.C. § 47-18-05 is to protect spouses from losing their home regardless of who is on title. See Conlon v. City of Dickinson, 5 N.W.2d 411, 414 (N.D. 1942) ("The homestead right is not peculiar to the holder of the legal title. It is wholly immaterial in whom the legal title is vested, provided it is the home of the family.") (citation omitted). Behrens' interpretation of 47-18-05 is supported by the plain language

and the legislative intent of the statute, namely that a spouse should not lose their home without their consent. Therefore, the district court erred as a matter of law and this Court must REVERSE the district court.

IV. THE DISTRICT COURT ERRED WHEN IT FAILED TO INCLUDE THE BALANCE OF THE JUDGMENT WHEN IT CALCULATED BEHRENS' HOMESTEAD EXEMPTION BECAUSE THE JUDGMENT IS A LIEN OR ENCUMBRANCE AGAINST THE HOMESTEAD.

[¶ 12] Malloy argues the district court did not err when it failed to include the balance of the judgment in Behrens' homestead exemption because the judgment "is not a lien or encumbrance on the Homestead." (Malloy's Br. ¶ 44). But the issue here is not whether the docketing of a judgment creates a lien against a homestead, the issue is whether the filing of a petition for appraisal of homestead and/or the levy of a sheriff's execution creates a lien or encumbrance against a homestead. Under North Dakota law, it clearly does.

[¶ 13] For example, in CTI Group/Equipment Financing v. Travelers, Ins., 504 N.W.2d 565, 569 (N.D. 1993), this Court said "[a] levy of execution without a sale of real property results in the judgment creditor having, at best, a lien[.]" Also compare the district court's order granting petition for sale of homestead (App. 23-24 (concluding N.D.C.C. § 47-08-04(4) applied to Malloy's judgment)) with N.D.C.C. § 47-18-16 which says "[i]f a homesteads is … sold for the satisfaction of any **lien** mentioned in section 47-18-04, the price thereof or the proceeds of the sale beyond the amount necessary to satisfy such **lien** … is entitled … to the same protection against legal process as the law gives to the homestead." (emphasis added). See also Texas Employers' Ins. Ass'n. v. Engelke, 790 S.W.2d 93, 95 (Tex. App. 1990) ("A valid levy of an execution creates a lien on the debtor's property in favor of the judgment creditor[.]").

[¶ 14] Reading N.D.C.C. Ch. 47-18 as a whole, Malloy's judgment is a "lien or encumbrance" under N.D.C.C. § 47-18-01 and must be included in the homestead calculation. Had the district court correctly calculated Behrens' exemption, it would have arrived to the amount of about $870,000, which exceeds the appraised value of the Homestead. Therefore, the district court misapplied and misconstrued the law and this Court must REVERSE the district court.

V. THE DISTRICT COURT ERRED WHEN IT APPROVED THE SALE OF THE BEHRENS' HOMESTEAD BECAUSE IT DID NOT HAVE JURISDICTION WHEN IT APPROVED THE SALE.

[¶ 15] Malloy argues the district court had jurisdiction when it approved the sale of the Homestead because when Behrens filed an appeal on May 27, 2021, there was not yet an appealable order. See Malloy's Br. ¶ 51 ("[A] notice of appeal must be of an appealable issue in order for the Supreme Court's appellate jurisdiction to attach."). First, Malloy provides contradicting arguments regarding whether Behrens has appealed the correct order of the court and whether this appeal is moot. On the one hand, Malloy argues this appeal is moot because Behrens failed to obtain a stay "before the homestead was sold." (Malloy's Br. ¶ 49). On the other hand, Malloy argues the appeal from the order to sell homestead "should have been dismissed …" due to it not being an appealable order (Malloy's Br. ¶ 55). Therefore, according to Malloy, only an order approving sale is appealable and also according to Malloy, an order approving sale is also *not* appealable because a sheriff's sale renders an appeal moot.

[¶ 16] Second, the cases cited by Malloy actually establishes the district court lacked jurisdiction. For example, in Farm Credit Bank of St. Paul v. Rub, 478 N.W.2d 279 (N.D. 1991), the appellant appealed from "a notice of a Special Execution Sale." This Court

did not dismiss the appeal and remanded to the district court for consideration of whether the sale should be confirmed. This Court **retained** jurisdiction while the case was remanded. If this Court did not believe it had jurisdiction, it would have dismissed the appeal. Instead, it acknowledged it *had* jurisdiction and the district court could only confirm the sale **after** the remand. Finally, this Court has never held that an order approving a sale of homestead is not an appealable order and there are multiple grounds upon which an appeal may be sought. See N.D.C.C. § 28-27-02; see also App. 26-27 (Behrens' May 27, 2021 Notice of Appeal arguing a right to appeal on multiple grounds). Here, the district court lacked jurisdiction when it signed the Order Confirming Sale. Therefore, the Order Confirming Sale must be REVERSED.

VI. THE DISTRICT COURT ERRED WHEN IT APPROVED THE SALE OF THE BEHRENS' HOMESTEAD BECAUSE BEHRENS WAS NOT GIVEN ANY NOTICE OR OPPORTUNITY TO BE HEARD TO OPPOSE THE REQUEST FOR APPROVAL OF THE SALE OF HIS HOMESTEAD.

[¶ 17] Malloy argues the district court did not err when it approved the sale of Behrens homestead because judgment-debtors have no due process rights when a district court determines whether to approve an execution sale. Compare Ourada v. State, 2019 ND 10, ¶ 6, 921 N.W.2d 677 ("Due process … requires notice and an opportunity to be heard") and State ex rel. Hussman v. Hursh, 92 N.W.2d 673 (Minn. 1958) ("Notice and an opportunity to be heard are universally recognized as essential to due process.") with Malloy's Br. pg. 23 Heading IV. C. (arguing "no notice or motion is required" to confirm an execution sale of property). Malloy is wrong. The U.S. Constitution and the North Dakota Constitution grant litigants due process. Litigants' due process rights are not lost merely because their case may involve civil liability as opposed to criminal liability. It is crucial that judgment debtors be given due process to protect their rights from unscrupulous

creditors. In fact, this very case provides a perfect example of why judgment debtors should not be deprived of their due process rights.

[¶ 18] Specifically, the district court ordered the first $320,000 (approximately) of the sale should be paid to Jim and the balance to Malloy "to satisfy his judgment." (App. 24 ¶ 8). But after the sale, the Sheriff retained $135 for its fees and expenses to conduct the sale and paid the remainder of the sale proceeds were paid to Malloy. Doc. Id. #208 ¶ 4(g)(2). The district court deprived Behrens of his due process rights when it signed an order approving sale without providing Behrens any notice or opportunity to respond. Therefore, the Order Confirming Sale must be REVERSED.

[¶ 19] CONCLUSION

[¶ 20] For the reasons argued herein, and Behrens' initial Appellant's Brief, Behrens requests that the district court be REVERSED and this matter REMANDED with directions to void the June 2, 2021 sheriff's certificate.

Dated: October 12, 2021.

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[¶ 21] **CERTIFICATE OF COMPLIANCE:** The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief does not exceed 12 pages. Specifically, the total number of pages for this brief is 12 pages.

Dated: October 12, 2021.

/s/ James Teigland

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Howard Malloy and Great Plains Potato Production, LLP, Plaintiffs and Appellees, vs. James Behrens, Defendant and Appellant.	Supreme Court No. 20210155 District Court No: 30-09-C-00869 **CERTIFICATE OF SERVICE**

[¶1] I, James A. Teigland, an attorney licensed to practice law in this state, hereby certifies that on the date below, the following documents were served on all individual Parties:

- Appellant's Reply Brief

[¶2] Service was completed by sending true and correct copies to the following address(es):

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Dated: October 12, 2021.

/s/ James A. Teigland

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