STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2056

James J. Shorter,
Appellant,

Doretta M. Shorter,
Appellant,

vs.

Equity Bank,
Respondent,

James I. Vermilya, et al.,
Respondents.

Filed September 10, 2012
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Olmsted County District Court
File No. 55-CV-10-8935

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Paul V. Sween, Adams, Rizzi & Sween, P.A., Austin, Minnesota (for respondent Equity Bank)

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Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellants challenge the district court's award of summary judgment to respondent bank and respondent purchasers of appellants' farm. The district court rejected appellants' (1) challenge to the foreclosure proceeding, (2) claim for damages and equitable relief for bank's failure to comply with the notice requirements of Minn. Stat. § 500.245 (2010), and (3) claims that purchasers violated Minn. Stat. § 504B.365 (2010) and converted appellants' personal property left on the foreclosed property. Because there are no genuine issues of material fact concerning service of the foreclosure action and appellants' claims regarding personal property, we affirm summary judgment on those claims. Because material fact questions remain concerning whether bank failed to comply with Minn. Stat. § 500.245, and, if so, what remedy is appropriate, we reverse summary judgment on that issue and remand for further proceedings.

FACTS

In August 2007, appellants James J. and Doretta M. Shorter (Shorters) defaulted on a note to respondent Equity Bank. The note was secured by a mortgage on agricultural property located in Dover, Olmstead County, at 5602 185th Avenue. Shorters have lived on the property for more than 50 years. In January 2008, Equity began a non-judicial foreclosure proceeding. According to the affidavit of Olmstead County Sheriff's Deputy Malinda Hanson, James J. Shorter, an occupant of the property, was timely served at the mortgaged property with a notice of mortgage foreclosure sale, homestead designation notice, and help for homeowners in foreclosure notice. Notice

was also published in the Rochester-Post-Bulletin. A sheriff's sale was conducted on March 31, 2008, and the property was sold to Equity, the highest bidder, for $349,030.59. Shorters had one year to redeem pursuant to Minn. Stat. § 580.23, subd. 2 (2010).

On March 27, 2009, Shorters' attorney telephoned Equity's attorney to discuss the possibility of Shorters redeeming the property. Equity's attorney responded by letter on the same day, stating that the total outstanding amount to redeem (which included a first and second mortgage) was $444,182.19 and noting that there was another judgment against the property that would probably also have to be "dealt with" in order for Shorters to redeem. On March 30, 2009, Shorters filed for bankruptcy, which extended the redemption period for 60 days. The bankruptcy documents do not list as Shorters' assets any of the personal property claimed in this action.

On May 20, 2009, counsel for Equity sent a letter to Shorters' attorney stating that the current amount necessary to redeem was $452,186.95 and that a copy of the letter was being sent to "Bill Oehler" because he had left a message for Equity's attorney that he was working with "the possible buyer."[1] On June 5, 2009, Equity's counsel sent a letter to counsel for respondents James and Susan Vermilya (Vermilyas), confirming an agreement between Vermilyas and Equity for Vermilyas' purchase of Shorters' property for $490,000.00 plus $37,866.28 for custom farming of the tillable acres. The letter states that Equity intends to start an unlawful detainer action against Shorters in the following week and states that Shorters will have a 65-day right of first refusal. The

[1] The record on appeal does not identify Bill Oehler's role in working with the possible buyer.

letter states that Equity's counsel will put together a purchase agreement and custom farming agreement "over the weekend." The purchase agreement and an addendum to the purchase agreement signed by Equity and Vermilyas are dated June 9, 2009, but Vermilyas point to subsequent letters concerning the terms of the addendum to support their assertion that the purchase agreement was not finalized until June 16, 2009.

By letter dated June 10, 2009, Equity informed Shorters' attorney that "[w]e are now making efforts to sell the property and will advise you and your clients when that has been completed. . . . [U]nder the Minnesota Farmer Lender Mediation Act, [Shorters] would have a right of first refusal for 65 days."

On June 18, 2009, Equity served Shorters with an eviction summons and filed an unlawful detainer action in district court. On June 23, 2009, Equity's counsel sent a certified, return-receipt-requested letter to Shorters, with a copy to their attorney, enclosing the notice, including attachments required by Minn. Stat. § 500.245, subd. 2, of their 65-day right to purchase the property for $527,866.28. The cover letter states: "You have 65 days to exercise your option to purchase and then 10 days thereafter to perform pursuant to the enclosed Purchase Agreement. . . . This Notice of Offer to Buy is extremely important. You should communicate with [your attorney] regarding the same."

The unlawful detainer action was scheduled for trial on July 13, 2009. At that time, Equity's attorney noted for the record that Shorters had raised as defenses to the eviction action issues about the adequacy of the (1) notice of the foreclosure,

(2) mediation process, and (3) right-of-first-refusal notice. Equity's counsel moved in limine to exclude testimony regarding those issues from the eviction proceeding as collateral to the eviction proceeding. Shorters' attorney asserted that Shorters' primary defense to the eviction action was that they were trying to find a buyer so that they could exercise their right of first refusal before it expired on August 28. Shorters' counsel acknowledged that Shorters had no good-faith basis for asserting collateral issues in the eviction action, but wanted more time and wanted to "establish their case" at the eviction trial. Counsel told the district court that Shorters would waive the eviction trial if they could have some additional time to make sure that all of their property is "out of there." Counsel said that Shorters "are trying to get a buyer to match the offer so that they can stay there." Equity introduced certified copies of the sheriff's notice of sale and Shorters agreed that they retained possession. James J. Shorter testified that he was working on trying to buy the farm, and he requested 30 to 45 days to remove his property. The district court, noting that the law left little choice, ordered the eviction but stayed issuance of the writ for seven days, until July 20, 2009. For reasons not explained in the record, the writ of recovery and order to vacate was not signed until September 1, 2009.

Shorters arranged to sell much of their personal property, including farm equipment, at an August 2009 consignment sale. Shorters removed other personal property from the farm to an apartment they had rented and to other properties. Vermilyas took possession of the property on September 22, 2009, and they assert that any property left behind by Shorters was abandoned, "worthless junk."

In March 2010, Shorters sued Equity and Vermilyas. alleging that Equity failed to properly serve the foreclosure documents, failed to give the required notice of their right of first refusal, and violated the bankruptcy stay, and that Vermilyas violated Minn. Stat. § 504B.365 and converted personal property that Shorters left on the property. Shorters sought damages and rescission of the purchase agreement and warranty deed. Equity and Vermilyas answered, and, after discovery, both moved for summary judgment. The district court granted the motions, and this appeal followed.

D E C I S I O N

I. Standard of Review

We review a district court's summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp.*, *LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, this court determines "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Summary judgment should be granted "if 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. This court will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). A party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must

present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

II. Notice of foreclosure

The district court concluded that there are no issues of material fact relating to the adequacy of service of the notice of foreclosure. Minn. Stat. § 580.03 (2010) provides in relevant part:

> Six weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied. . . . The notice required by section 580.041 must be served simultaneously with the notice of foreclosure required by this section.

Shorters allege that they were not personally served and that "this potentially . . . constitutes wrongful foreclosure." They assert that their son, who lived in a mobile home on the property at the time, may have been served. The district court found Shorters' "unverified and conclusory allegation" that the required documents were not properly served inadequate to overcome the evidence of the sheriff deputy's affidavit of service showing personal service on James J. Shorter. And Equity correctly argues that even if service had been made on Shorters' son who misrepresented himself as James J. Shorter, service was proper under Minn. R. Civ. P. 4.03(a), which provides that personal service can be made by "leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein."

> In deciding whether an individual is 'then residing therein' for purposes of service of process, there must be a nexus between the individual and the defendant that establishes some reasonable assurance that notice would reach the defendant. . . . [A] relationship of confidence, including but not limited to a familial relationship, may establish a nexus and support the conclusion that notice would reach the defendant.

O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. App. 1999). For service of process, "residence" means something more than mere physical presence and something less than domicile. *Id.*

Doretta Shorter testified in her deposition that their son lived with his wife and two children in a "trailer house" that sat approximately 250 feet from Shorters' house on the farm property, that Doretta took care of her grandchildren during the day, and that her son was in the house "maybe once a day." The nexus between son and parents in this case is sufficient as a matter of law to assure that notice would reach Shorters. Leaving the papers with the son who lived on the property would constitute proper service in this case, and the district court did not err in granting summary judgment to Equity on Shorters' claim that service of the notice of foreclosure was improper.

III. Minn. Stat. § 504B.365 and conversion claims

Shorters argue that Equity and Vermilyas failed to comply with the requirements of Minn. Stat. § 504B.365, subd. 1(c), and committed common-law conversion when they removed or disposed of Shorters' personal property left on the farm. The district court found that there was ample evidence showing that Shorters abandoned the items left on the property because they had ample time to move their property, hired an auction

company to sell many of their belongings, moved other belongings to a new residence or to the residences of relatives, and, in their bankruptcy proceeding, they did not list as assets any of the personal property they now claim to have been left on the property and converted by Vermilyas.

Minn. Stat. § 504B.365, subd. 1 (a) – (c) provide:

> (a) The officer who holds the order to vacate shall execute it by demanding that the defendant, if found in the county, any adult member of the defendant's family who is occupying the premises, or any other person in charge, relinquish possession and leave, taking family and all personal property from the premises within 24 hours.
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> (b) If the defendant fails to comply with the demand, then the officer shall bring, if necessary, the force of the county and any necessary assistance, at the cost of the plaintiff. The officer shall remove the defendant, family, and all personal property from the premises and place the plaintiff in possession.
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> (c) If the defendant cannot be found in the county, and there is no person in charge of the premises, then the officer shall enter the premises, breaking in if necessary, and remove and store the personal property of the defendant at a place designated by the plaintiff as provided in subdivision 3.

Subdivision 3 describes the required procedure for removal and storage of a defendant's personal property. Shorters argue that Equity had a duty under the statute to remove and store any remaining personal property as described in subdivision 3. Equity argued, and the district court agreed, that subdivision 1(c), the only subdivision that refers to removal and storage under subdivision 3, does not apply because Shorters were "found in the county" at the time of the eviction and subdivision 1(a) required Shorters to take all

personal property from the premises within 24 hours of eviction. In this case, even if subdivision 3 could be held to apply, the evidence is conclusive that none of the property left behind belonged to Shorters or had any value. During the bankruptcy proceeding, Shorters valued their listed personal property at $4,575. In this lawsuit, Shorters listed 57 items valued at approximately $38,000 as left on the property and converted. But during his deposition, James J. Shorter admitted that the majority of the items on the list belonged to others and that "everything [Doretta Shorter] and I owned went to [the auction house]" with the exception of a few household items not identified as items left on the property. The district court did not err in concluding that Shorters failed to present evidence sufficient to support their claim that they left personal property of any value on the vacated farm and that there was no material question of fact regarding their claims under Minn. Stat. § 504B.365 on common-law conversion. The district court did not err in granting summary judgment on this claim or on Shorters' common law-conversion claim against Equity.

Vermilyas correctly argue that Minn. Stat. § 504B.365 claims cannot apply to them because they were not parties to the eviction action. And Shorters' failure to establish that any property of value that they owned was left on the property at the time Vermilyas took possession defeats their claim of conversion against Vermilyas. The district court did not err in granting summary judgment to Vermilyas on these claims.

IV. Claims for violation of Minn. Stat. § 500.245

Minn. Stat. § 500.245, subd. 1(a), provides, in relevant part, that when the seller acquires agricultural property or a farm homestead through foreclosure of a mortgage:

> A . . . corporation . . . may not lease or sell agricultural land or a farm homestead before offering or making a good faith effort to offer the land for sale or lease to the immediately preceding former owner at a price no higher than the highest price offered by a third party that is acceptable to the seller or lessor. The offer must be made on the notice to offer form under subdivision 2. . . . Selling or leasing property to a third party at a price is prima facie evidence that the price is acceptable to the seller or lessor. *The seller must provide written notice to the immediately preceding former owner that the agricultural land or farm homestead will be offered for sale at least 14 days before the agricultural land or farm homestead is offered for sale.*

Minn. Stat. § 500.245, subd. 1(a) (emphasis added).

Although Shorters received the required offer on the appropriate form and with the appropriate attachments, they dispute that Equity provided timely written notice that the property was being offered for sale. And Shorters argue that failure to provide timely notice of intent to sell deprived Equity of the ability to sell the property such that the purchase agreement and warranty deed to Vermilyas are void. The district court concluded that "there remains a question of material fact as to whether or not Equity complied with the 14-day requirement embodied by Minn. Stat. § 500.245." But, based on uncontroverted evidence that Shorters were not financially able to timely redeem the property even if they had received at least 14 days' notice of Equity's intent to sell, the district court granted the motion for summary judgment, concluding that Equity's "failure to provide the 14 day notice caused [Shorters] no harm as a matter of law." Shorters, relying on *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227 (Minn. App. 2005), argue that the former owner is not required to show prejudice in order to preserve the right of first refusal and that the 14-day requirement is mandatory.

In *Ag Services*, the lender, Ag Services, foreclosed on a farm owned by Schroeders and purchased the farm at a sheriff's sale. 693 N.W.2d at 230. Schroeders negotiated with Ag Services to redeem the property during the 12-month redemption period, but no agreement was reached. *Id.* On November 20, 2001, Ag Services approached a real estate broker about selling the property, and the broker offered to purchase the property for $1.2 million. *Id.* On the same day, Schroeders met with Ag Services to present a new offer. *Id.* Ag Services rejected their offer. *Id.* The next day, after signing a purchase agreement with the broker, Ag Services informed Schroeders that an offer had been made, hand delivered to them a copy of the purchase agreement, and informed them that the delivery of the agreement triggered their statutory right of first refusal. *Id.* On November 30, Ag Services sent Schroeders written notice of their right of first refusal and attached another copy of the purchase agreement. *Id.* Schroeders timely notified Ag Services that they were exercising their right of first refusal, but then failed to make a payment. *Id.* at 231. Ag Services filed an action to quiet title. *Id.*

In the quiet-title action Schroeders claimed that, because Ag Services had failed to give them the required 14-day notice of intent to sell *and* an affidavit statutorily required to accompany the notice of offer, their statutory right of first refusal had not been extinguished. *Id.* The district court granted summary judgment to Ag Services, finding that Ag Services had substantially complied with the requirements of the statute. *Id.* On appeal, this court concluded that "[f]ailure to give the mandatory notice of intent to sell and failure to provide the required affidavit constitute failure to offer the right of first refusal as required by law," and that Minn. Stat. § 500.245 does not require a former

owner to show prejudice in order to preserve that right. *Id.* at 234. After discussing the purpose of the 14-day notice and noting the confusion caused by Ag Services's actions, we held that "until the notice of intent is given, as required by law, Ag Services could not, as a matter of law, contract to sell the property to a third party and that the purchase agreement . . . is unenforceable," and Schroeders still have a right of first refusal. *Id.* at 235, 237.

We agree with Equity and Vermilyas that the facts of *Ag Services* are distinguishable in many respects. Schroeders were making continuous efforts to redeem their property, had the financial ability to negotiate, and were unaware of any attempts to sell to others until they were presented with a signed purchase agreement. In contrast, the evidence in this case is conclusive that Shorters were aware that Equity was intending to sell the property and that Shorters were financially unable to engage in any negotiations with Equity to redeem their property. Nonetheless, neither party asserts that the notice requirement in Minn. Stat. § 500.24, subd.1(a), is merely directive and not mandatory, and the holding in *Ag Services* appears to preclude affirmance of the district court's ruling that failure to give the 14-day notice was harmless as a matter of law.[2]

Equity argues that, unlike Ag Services, they gave adequate notice of the intent to sell, and the district court also concluded that Shorters "were effectively put on notice at some point during the required time frame." Equity asserts that (1) its May 20, 2009, letter to Shorter's attorney stating that a copy was being sent to a person who was

[2] *See Johnson v. Cook Cnty.,* 786 N.W.2d 291, 295 (Minn. 2010) (discussing the distinction between statutory provisions that are mandatory and those that are directory in the context of the findings requirement contained in Minn. Stat. §15.99, subd. 2 (2010)).

working with a possible buyer gave notice that Equity was intending to offer the property for sale; (2) Equity's June 10, 2009 letter advised Shorters' attorney that Equity was making efforts to sell the property, and (3) the June 23, 2009 letter gave the required offer to purchase in the required form notifying Shorters that they had 65 days to purchase the property for the price offered in the purchase agreement. But only the May 20 letter predated the signing of the purchase agreement, so that is the only letter that could possibly meet the 14-day requirement of notice of intent to sell.[3] There is a material question of fact about the adequacy of the May 20 letter to satisfy the 14-day notice requirement, and, because granting summary judgment based on harmless error was not appropriate, we reverse summary judgment on this issue and remand to the district court for further proceedings, including a determination of the proper remedy in the event that a violation of the statute is found.[4]

Affirmed in part, reversed in part, and remanded.

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[3] Shorters' argument that the May 20 letter was not in the form designated by statute is without merit because Minn. Stat. § 500.245 does not prescribe the form of the 14-day notice.

[4] Vermilyas have argued extensively on appeal that Shorters are not entitled to the equitable remedy they seek of voiding the purchase agreement and warranty deed. The supreme court noted in *Lilyerd v. Carlson* that, "[g]enerally, specific performance is the appropriate remedy when a right of first refusal has been improperly denied. . . .[but] [s]pecific performance is an equitable remedy . . . addressed to the sound discretion of the district court." 499 N.W.2d 803, 811 (Minn. 1993) (citations omitted). Because the issue of Shorters' entitlement to an equitable remedy or damages has not been addressed by the district court, review is premature.