STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1283

Shamrock Enterprises, et al.,
Appellants,

vs.

Holm Brothers Construction, Inc.,
Respondent,

County of Dodge,
Respondent.

Filed July 1, 2008
Affirmed
Collins, Judge[*]

Dodge County District Court
File No. 20-CV-06-426

Francis J. McAnulty, Suite 100, 2518 Superior Drive Northwest, Rochester, MN 55901 (for appellants)

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Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Collins, Judge.

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

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

COLLINS, Judge

On appeal from summary judgment, appellants challenge the district court's determination that the excavation and sale of a large amount of "common borrow material" from mortgaged property during the redemption period was not waste, but rather was a legitimate exploitation of rents and profits from the land by the mortgagor. Appellants argue that, by excavating and purchasing the borrow, respondents committed trespass and conversion, and that the district court erred in denying appellants' motion for partial summary judgment on their conversion claim. Because there are no issues of material fact and the district court did not err in its application of the law, we affirm.

D E C I S I O N

"On an appeal from summary judgment, [this court] asks 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 by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But if that party fails to raise a genuine issue of material fact on any element essential to establishing its case, summary judgment is appropriate. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). No genuine issue of material fact exists for trial "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable

persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

This case involves the excavation, sale, and purchase of a large amount of "common borrow material" from a tract of farmland (the property) then owned by James and V. Diane Brogan, subject to a mortgage held by appellants Shamrock Enterprises and Road Constructors, Inc. (collectively Shamrock[1]). "Common borrow material" (borrow) is ordinary dirt materials excavated and mined generally for fill purposes; it is not topsoil.

In March 2004, to facilitate highway improvements, the Brogans granted respondent Dodge County a permanent easement over .20 acres and a temporary easement over 4.25 acres of the property. The permanent easement granted to the county the right to "use and remove all earth and other materials lying within the parcel of land hereby conveyed." The county contracted with respondent Holm Brothers Construction, Inc. (Holm Brothers) to conduct the roadwork.

Soon thereafter, the Brogans defaulted on repayment of their mortgage loan, and Shamrock initiated foreclosure proceedings. Shamrock purchased the property at the foreclosure sale, and the Brogans did not redeem within the statutory redemption period. But three days prior to the foreclosure sale, the Brogans signed a contract with Holm Brothers for the excavation and purchase of approximately 18,000 cubic yards of borrow, which Holm Brothers would then sell to the county in connection with the road

[1] Shamrock Enterprises and Road Constructors, Inc. are distinct Minnesota companies with the same principal, William Quick. The parties refer to the companies together as "Shamrock."

construction. The record does not reveal whether Holm Brothers removed the borrow entirely from within the areas of the easements. Ultimately, approximately 123,190 cubic yards of borrow was excavated; all of it was removed prior to the expiration of the redemption period while the Brogans were still in possession of the property. Shamrock argues that excavation of the borrow was obviously waste because "it literally reduced the property by a substantial amount."

Specifically, Shamrock contends that it had the right to expect that it would receive no less than the exact property it bid on at the foreclosure sale; therefore, removal of 123,190 cubic yards of borrow constituted waste because it was contrary to Shamrock's reasonable expectations for the purchase of the property.[2] "Waste is conduct by a person in possession of land which is actionable by another with an interest in that same land to protect the reasonable expectations of the nonpossessing party." *Rudnitski v. Seely*, 452 N.W.2d 664, 666 (Minn. 1990). "Waste involves more than just ordinary depreciation, it involves negligence or intentional conduct which results in material damage to the property." *Id.* Because Shamrock has failed to introduce conclusive evidence of material damage to the property, or evidence showing that its security interest in the property was in any way diminished, we find no merit in Shamrock's arguments.

Initially, however, Shamrock is correct that if the excavation and sale of the borrow constituted waste, Shamrock, as the mortgagee, would have been entitled to restrain such activity. *See Ewert v. Anderson*, 359 N.W.2d 293, 297 (Minn. App. 1984)

[2] See also the analysis in section II below regarding Shamrock's interests in the property between the sale and expiration of the redemption period.

(stating that during the redemption period of foreclosure proceedings, "the mortgagor retains his rights of ownership, including the right to possession and the right to profits"); *see also* Minn. Stat. § 561.18 (2006) (limiting mortgagor's right to possession and rents and profits by granting the mortgagee/purchaser the right to restrain waste on the property). "Waste by a mortgagor during the redemption period will be enjoined when it 'may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt.'"[3] *Ewert*, 359 N.W.2d at 297 (quoting *Gardner v. W.M. Prindle & Co.*, 185 Minn. 147, 152, 240 N.W. 351, 353 (1932)).

But in this case, we cannot conclude that removal of the borrow constituted waste. Other than referring to the volume of borrow removed, Shamrock does not explain its argument that the property was reduced by a "substantial amount." As noted, the property is a tract of farmland. Shamrock has not presented any evidence contradicting Holm Brothers' evidence that it added black dirt and replaced all of the topsoil after removing the borrow. And the only arguable evidence of material damage to the property is the bare assertion by Shamrock's principal, William Quick, that "[t]he removal of the borrow has damaged that part of the property from which it was removed. The area has been packed hard by Holm Brothers' machinery and the crop is not able to penetrate through the packed area." This assertion is unsubstantiated in the record and is not materially probative of whether removing the borrow constituted waste. Moreover,

[3] At no time did Shamrock initiate an action to enjoin alleged waste by the Brogans during the redemption period.

the record reflects that the estimated market value of the property for property tax purposes has steadily increased each year since 2005.

Shamrock argues that whether the excavation of the borrow reduced the fair market value of the property is irrelevant to the waste analysis. Shamrock contends that instead, the appropriate question is whether removal of the borrow frustrated its reasonable expectations of the purchase. But even if this is an appropriate interpretation of waste analysis, it is not clear how removal of the borrow frustrated Shamrock's expectations with respect to its security interest in the property. Shamrock foreclosed on the property because the Brogans defaulted on repayment of their loan, and Shamrock made the decision to purchase the property at the foreclosure sale, presumably in order to protect its security interest. Viewed objectively, the purchaser of the property at the foreclosure sale could not have any reasonable expectation that the value was for something other than agricultural use.

In sum, Shamrock has not presented any evidence that creates a fact question about whether waste occurred, including whether the property was diminished in value or was impaired, or whether Holm Brothers and the county somehow frustrated Shamrock's reasonable expectations of the purchase.

II.

Shamrock argues, based on its assertion that excavating the borrow was waste, that it established the elements of its conversion claim as a matter of law. "Conversion occurs where one willfully interferes with the personal property of another without lawful justification, [thereby] depriving the lawful possessor of use and possession" of the

property. *Williamson v. Prasciunas*, 661 N.W.2d 645, 649 (Minn. App. 2003) (quotation omitted). An action for conversion may be brought where soil or gravel are removed from land without authority. *See, e.g.*, *Mineral Res., Inc. v. Mahnomen Constr. Co.*, 289 Minn. 412, 184 N.W.2d 780 (1971). The elements of conversion are: "(1) the plaintiff has a property interest and (2) the defendant deprives the plaintiff of that interest." *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838 (Minn. App. 1994), *review denied* (Minn. June 29, 1994).

Shamrock contends that it unquestionably had an interest in the borrow at the time it was removed, and that Holm Brothers deprived it of that interest. We disagree. It is well established that "[w]here the mortgagee is the purchaser at the foreclosure sale, he simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have a lien on the premises for the amount of the purchase price, which was applied in payment of his debt." *State v. Zacher*, 504 N.W.2d 468, 471 (Minn. 1993) (quotation omitted). The mortgagee's interest in the premises remains nearly the same after the sale as before, except that his title under his mortgage becomes absolute if the mortgagor fails to repay the purchase price, with interest, within one year. *Id.* Therefore, "[u]ntil the time to redeem expires, [the mortgagee] has a lien on the premises, and holds them for the security of his bid." *Id*. (quotation omitted).

Shamrock purchased the property at the foreclosure sale and was entitled to full ownership and possession when the Brogans' statutory redemption period expired. But Shamrock's interest in the property at the time Holm Brothers removed the borrow was in protecting the value of its purchase price at the foreclosure sale and preventing waste.

See Bradley v. Bradley, 554 N.W.2d 761, 764 (Minn. App. 1996) (stating that a purchaser at a foreclosure sale takes title to the land being purchased subject to the previous owners' equitable right of redemption), *review denied* (Dec. 23, 1996). Here, Shamrock was not deprived of its general interest in acquiring absolute ownership of the property upon expiration of the redemption period.

There being no waste, and based on the nature of Shamrock's interest in the property during the redemption period, the district court did not err by denying Shamrock's motion for partial summary judgment on its conversion claim.

Affirmed.