STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0100

Kanabec State Bank,
Respondent,

vs.

Daniel E. Olean a/k/a Danny Olean a/k/a Daniel Olean, Jr.,
Appellant,

Ronald Romanowski, et al.,
Defendants.

Filed December 30, 2013
Affirmed
Hudson, Judge

Pine County District Court
File No. 58-CV-12-299

Daniel L. M. Kennedy, Kennedy Law Group, PLLC, Minneapolis, Minnesota (for appellant)

Stephanie A. Ball, Eric S. Johnson, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

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

HUDSON, Judge

Appellant-mortgagor argues that the district court (a) should have awarded him the surplus created by respondent bank's overbids at the sale foreclosing his properties,

rather than allowing the bank to reform its bids; (b) improperly dismissed his counterclaims; and (c) erred by allowing the bank to recover certain amounts included in its reformed bid. The bank asserts that the appeal is moot. We affirm.

FACTS

When Kanabec State Bank (bank) foreclosed by advertisement on several parcels of real property covered by two agricultural mortgages granted by Daniel Olean, the bank's bids erroneously included $1,763.00 and $33,470.05 more in attorney fees than allowed by the statutes governing foreclosures by advertisement. The bank's bids also understated the amounts allowed for title work for each mortgage by $837.50. As a result, the bank's bids were overstated by $925.50 and $32,632.55, respectively. The bank filed the sheriff's certificates from the foreclosure sale reflecting its overbids. Pursuant to Minn. Stat. § 580.23, subd. 2 (2012), Olean had 12 months to redeem the foreclosed parcels.

A month after filing the sheriff's certificates, the bank brought an action in district court against Olean, seeking to reform the sheriff's certificates to reflect corrected, lower bids. Reformation would have lowered the amounts Olean would have needed to pay to redeem the properties. Before the district court could rule on the bank's motion, Olean redeemed nine of the properties by tendering amounts based on the bank's (unreformed) overbids. The bank then moved for summary judgment on its request that the district court reform the sheriff's certificates. Ten days later, Olean answered and counterclaimed, seeking, among other things, the surpluses created by the bank's overbids because the bank had not previously paid Olean the surpluses created by the

overbids. Olean later sought to amend his answer and counterclaims to seek punitive and treble damages.

By summary judgment, the district court granted the bank's motion to reform the bank's overbids and dismissed Olean's counterclaims with prejudice. The bank then wrote Olean a check for $21,810.47, representing the difference between the amounts for which Olean redeemed the nine parcels based on the bank's overbids, and the amount Olean would have had to pay to redeem those parcels based on the bank's reformed bids. When the bank wrote the check, Olean still had more than four months of his twelve-month redemption period remaining. Olean appeals.

D E C I S I O N

Appellate courts "review de novo the district court's grant of summary judgment to determine whether genuine issues of material fact exist and whether the district court erred in applying the law. Statutory interpretation presents a question of law subject to de novo review." *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013) (citation omitted). Here, Olean's principal brief makes three arguments: (1) he is entitled to a surplus created by the bank's overbids; (2) reversing the district court's ruling that no surplus exists requires reinstating his counterclaims; and (3) even if the district court correctly resolved the surplus issue, Olean is entitled to a surplus created by the difference between the cost of title work allowed by the district court in the bank's reformed bids ($1,325.00), and the cost of title work shown on the bank's affidavit of costs ($487.50). The bank, noting that Olean did not challenge the district court's grant of the bank's motion to reform the sheriff's certificates, asserts that Olean's arguments to

this court are "moot" because they are based on the bank's initial (unreformed) overbids, rather than the amounts shown on the reformed sheriff's certificates. In his reply brief, Olean asserts that the grant of reformation should be reversed because the bank's overbids created a surplus, and reforming the bids will prejudice Olean by eliminating that surplus.

I

The mootness doctrine requires appellate courts "[to] decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). Generally, courts dismiss moot questions, and a question is moot if a decision on the merits of the question is unnecessary or an award of effective relief is impossible. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997).

It is undisputed that, in appropriate circumstances, this court can review a district court's decision regarding whether a surplus is created in a mortgage foreclosure, reinstate erroneously dismissed counterclaims, and reverse a district court's decision to reform a document. Thus, no issue raised in Olean's appeal is "moot" in the technical sense that, under *Minnegasco*, a decision on the merits of these questions is unnecessary or an award of effective relief impossible. Rather, what the bank seems to be arguing is not that the appeal is moot, but that Olean's arguments to this court are legally insufficient to allow reversal because those arguments are based on the bank's unreformed overbids and because Olean does not properly challenge the district court's grant of reformation.

II

The closest Olean's principal brief gets to challenging the grant of reformation is an assertion that the district court "found that the bank was entitled to equitable relief, and that reformation was appropriate because the excess bids were the result of mistake. The surplus requires those findings to be overturned, but they are also independently erroneous." Olean cites various cases in support of this proposition, but none of the cited cases involves reformation. Therefore, those cases do not form a basis to challenge the district court's grant of reformation. Absent a viable argument on the point, Olean waived any challenge to the district court's grant of reformation. *See Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating that a party who inadequately briefs an argument waives that argument); *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (citing *Wintz*).

While Olean's reply brief purportedly makes a direct challenge to the grant of reformation, the relevant part of the reply brief, like the principal brief, fails to cite any cases actually involving reformation, and thus, Olean's reply brief fails to satisfy *Wintz* and *Brodsky*. Moreover, because Olean's reply brief is the first time he directly challenges the grant of reformation, the reformation issue is not properly before this court. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not addressed in a principal brief are "waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990).

Despite the fact that Olean's arguments challenging reformation are not properly before this court, this court has discretion to address the question. *See* Minn. R. Civ.

App. P. 103.04 (stating that appellate courts may review any matter "as the interest of justice may require"). Were we to address the question, however, we would not reverse the district court.

While sheriff's certificates can be reformed, *Everson v. De Schepper*, 157 Minn. 257, 258, 195 N.W. 927, 927 (1923), Olean's argument challenging reformation assumes that if the sheriff's certificates are reformed, he will be prejudiced because he will lose the surpluses he would receive if the certificates were not reformed, and that this prejudice precludes reformation. Prejudice to a party opposing reformation, however, is *not* part of the analysis for determining whether to grant reformation. *See SCI Minn. Funeral Servs. v. Washburn–McReavy Funeral Corp.*, 795 N.W.2d 855, 865 (Minn. 2011) (reciting test for reformation). Further, acquiring property at a foreclosure sale is in the nature of acquiring that land by contract. *See Everson*, 157 Minn. at 259, 195 N.W. at 928 (describing the process of bidding at a foreclosure sale using the words "offer," "contract," "mutual assent," "contractual operation," "meeting of the minds," and "a complete contract of sale"). Where, as here, a written contract is reformed on grounds of mistake, "it is the writing as corrected that is the measure of the parties' undertaking[.]" *Karger v. Wangerin*, 230 Minn. 110, 115, 40 N.W.2d 846, 849 (1950) (quotations omitted). Because these parties' obligations are determined by the reformed certificates, and because the reformed certificates create no surpluses, there can be no prejudice to Olean from the loss of nonexistent surpluses.[1]

[1] Pursuant to Minn. Stat. § 580.10 (2012), Olean argues that he is entitled to a surplus created by the bank's (unreformed) overbids. But, as analyzed above, because the

III

Noting that the bank's bids reflected in the reformed sheriff's certificates include $1,325 for title work and that the bank's original affidavits of costs assert only $487.50 for title work, Olean argues that the differences ($838.50 for each mortgage) are surpluses and that he is entitled to both that surplus and associated damages arising from the bank's failure to pay him those surpluses. The bank asserts that Olean failed to make this argument to the district court, and therefore it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that, generally, appellate courts address only questions presented to and considered by the district court). In the interests of finally resolving this aspect of this case, we will ignore our doubts about whether Olean adequately raised the question to the district court and exercise our discretion to address the question under rule 103.04.

The bank states that "[its] initial statements that it paid $487.50 for title work on each foreclosure were erroneous. For that reason, [the b]ank, as part of the reformation action, requested that such amounts be reformed to reflect [the b]ank's actual payments of $1,325.00 for title work on each mortgage." We note that the bank's argument is consistent with an affidavit in the file which states, regarding each mortgage, that the affidavit of costs and disbursements "should have included $1,325.00 for title work

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reformation issue is not properly before this court, and Olean's argument challenging the grant of reformation is, in any event, unpersuasive, there is no surplus to which Olean can be entitled. We note that this analysis also addresses Olean's argument that "[b]ecause it got the surplus issue wrong, the lower court also erroneously dismissed Olean's counterclaims to recover the surplus and denied his motion to amend those claims to include statutory [treble] and punitive damages."

instead of the $487.50 actually included in the affidavit." The district court ruled that the amounts for title work should be changed from $487.50 to $1,325.00 for each mortgage. We conclude that this ruling by the district court functionally reformed the bank's (erroneous) affidavits of costs to reflect $1,325.00 for title work, meaning that there is no discrepancy between the cost of title work claimed in the (reformed) affidavits and reflected in the reformed sheriff's certificates. Therefore, there is no surplus arising from the portions of the reformed sheriff's certificates addressing title work.

Affirmed.