STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2158

First Resource Bank,
Respondent,

vs.

DJ Land Development, LLC, et al.,
Appellants.

Filed June 2, 2014
Affirmed
Larkin, Judge

Chisago County District Court
File No. 13-CV-12-456

J. Vincent Stevens, Miller & Stevens, P.A., Wyoming, Minnesota (for respondent)

Wayne Holstad, Frederic W. Knaak, Holstad & Knaak, PLC, St. Paul, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

LARKIN, Judge

In this foreclosure by judicial action, appellant guarantor challenges the district court's confirmation of the resulting sheriff's sale and deficiency judgment against

appellant. Appellant argues that he was entitled to a jury trial on respondent's request for a deficiency judgment and that the sheriff's sale is void as a matter of law. We affirm.

FACTS

In August 2007, DJ Land Development LLP, borrowed money from Patriot Bank to purchase property in Chisago County. To secure the loan, DJ Land Development LLP granted a mortgage to Patriot Bank.[1] Appellant Richard Bertram personally guaranteed the loan.[2] In May 2012, respondent First Resource Bank, as successor in interest to Patriot Bank, foreclosed the mortgage by judicial action. In March 2013, First Resource purchased the property at a sheriff's sale. Later, the district court granted First Resource's motion to confirm the sheriff's sale. The court also granted a deficiency judgment. This appeal follows.

D E C I S I O N

I.

Bertram argues that the district court "was wrong to enter judgment in favor of Respondent and the case should be remanded to give [him] the jury trial that he requested." Bertram relies on Minnesota Statutes section 582.30, which states:

> If a mortgage entered after March 22, 1986 *on property used in agricultural production* is foreclosed and sold, a deficiency judgment may only be obtained by filing an action for a deficiency judgment and a determination of the fair market value of the property within 90 days after the foreclosure sale. In the action all issues of fact, including determination of the fair market value of the property, *shall be tried by a jury*

[1] DJ Land Development LLP later conveyed the property to DJ Land Development LLC.
[2] DJ Land Development LLC and Douglas Jeans are also appellants in this case. But appellants' brief and oral arguments focus solely on appellant Bertram.

> unless a jury trial is waived as provided in Minnesota district court rules. A court may allow a deficiency judgment only if it determines that the sale of the property was conducted in a commercially reasonable manner.

Minn. Stat. § 582.30, subd. 3(a) (2012) (emphasis added). But section 582.30 also states: "Subdivisions 3 to 9 [of this section] do not apply to mortgages entered or amended on or after May 22, 1999, if the mortgaged property is used in agricultural production only by a tenant who is not the mortgagor." *Id.*, subd. 1(c) (2012). The application of a statute to undisputed facts presents an issue of law that we review de novo. *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

When granting the deficiency judgment without a jury trial, the district court reasoned that there is no evidence that "[appellants] themselves were using the mortgaged property in agricultural production." The district court's reasoning finds support in the record. Bertram submitted an affidavit stating that DJ Land Development was formed "to purchase a parcel of real estate which is the subject of this litigation in order to build and sell residential houses." Although Bertram later submitted an affidavit stating that he had "become active in attempting to farm . . . the property" and that he had "been approached by a couple of individuals who want to use the land for agricultural purposes and [he had] reached an agreement with one of them," intending to use the property in agricultural production is not the same as using the property in agricultural production. Moreover, section 582.30, subdivision 3, does not apply if the "property is used in agricultural production only by a tenant who is not the mortgagor." Minn. Stat. § 582.30, subd. 1(c). Thus, a neighboring property owner's affidavit stating that the neighbor had "agreed to

lease the parcel this year so that [he] can obtain an additional ten acres of soybeans and hay" does not provide a basis for relief.

Even though Bertram and DJ Land Development never used the property for agricultural production, Bertram nonetheless argues for application of section 582.30, subdivision 3, based on statutory construction. He contends that the phrase "used in agricultural production" is ambiguous because "used" reasonably could refer to past or current use and that this court should therefore construe the phrase to ascertain its meaning. *See State v. Rick*, 835 N.W.2d 478, 482 (Minn. 2013) ("[I]f a statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous and we may consider the canons of statutory construction to ascertain its meaning."). Bertram argues that the phrase "used in agricultural production" should be construed according to Minn. Stat. § 500.24, which defines "agricultural land" as "real estate used for farming or *capable of being used for farming*." Minn. Stat. § 500.24, subd. 2(g) (2012) (emphasis added). Under that construction, Bertram's intent to use the property for agricultural production might satisfy the used-in-agricultural-production requirement under section 582.30, subdivision 3.

But there is no indication that the legislature intended section 582.30, subdivision 3, to apply in foreclosure actions involving property that is capable of being used in agricultural production, even though the mortgagor never used it for that purpose. *See* Minn. Stat. § 645.16 (2012) (enumerating factors that may be used to determine legislative intent). And unlike section 500.24, subdivision 2(g), which alternatively defines agricultural land as real estate that is "used for farming" or "capable of being

used for farming," section 582.30, subdivision 3, only refers to "property used in agricultural production." *Compare* Minn. Stat. § 500.24, subd. 2(g), *with* Minn. Stat. § 582.30, subd. 3(a). Thus, Bertram's proposed construction adds words to section 582.30, subdivision 3, and our adoption of that construction would expand the statute's application. We decline to do so because it is not for this court to expand the law. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

Bertram also suggests that we should construe "used in agricultural production" as including past use. Under that construction 582.30, subdivision 3, might apply because the record contains evidence that the property was previously used in agricultural production by an unidentified person or entity.[3] But subdivision 3 does not apply if "the mortgaged property is used in agricultural production only by a tenant *who is not the mortgagor*." Minn. Stat. § 582.30, subd. 1(c) (emphasis added). Admittedly, that exclusion refers to current use in agricultural production and there is no evidence of such use here. *See id*. (referring to property that "*is* used in agricultural production" (emphasis added)). But subdivision 1(c) establishes that the legislature did not intend subdivision 3 to apply if the property is used in agricultural production by someone other than the mortgagor. It also suggests that the legislature did not intend past use by someone other than the mortgagor to trigger application of subdivision 3. Yet, Bertram does not address

[3] Bertram's May 2013 affidavit states: "It is my understanding that part of the land had been used in agriculture."

the impact of subdivision 1(c) on his statutory construction argument or the possibility that it suggests legislative intent to limit application of subdivision 3 solely to cases in which a mortgagor uses the property in agricultural production.

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464-65 (1944). Assuming, without deciding, that the phrase "used in agricultural production" is ambiguous, Bertram has not shown that the legislature intended section 582.30, subdivision 3, to apply in foreclosure actions involving property that is capable of being used in agricultural production, even though the mortgagor never used the property for that purpose. Because it is undisputed that Bertram and DJ Land Development never used the property in agricultural production, we conclude that section 582.30, subdivision 3, does not apply to the foreclosure in this case and that Bertram was not entitled to a jury trial on First Resource's request for a deficiency judgment.

II.

Bertram next argues that "the scheduling of the sale on the afternoon of 'Good Friday' was an attempt to 'chill' the bidding which renders the sheriff's sale unfair and unreasonable and void as a matter of law."

In a foreclosure by action, the district court must "direct[] the sheriff to proceed to sell the [property] according to the provisions of law relating to the sale of real estate on execution, and to make [a] report to the court." Minn. Stat. § 581.03 (2012). "The sale shall be by auction, between 9:00 a.m. and sunset, in the county where the property or

some part thereof is situated." Minn. Stat. § 550.20 (2012). "[A]bsent statutory prohibition, a foreclosure sale on a holiday will not be held invalid." *Kantack v. Kreuer*, 280 Minn. 232, 235, 158 N.W.2d 842, 845 (1968). Bertram does not cite a statute that prohibits the Good Friday sheriff's sale in this case, nor are we aware of one. *See* Minn. Stat. § 645.44, subd. 5 (2012) (stating that "[n]o public business shall be transacted" on certain enumerated holidays and not including Good Friday within the enumeration); *see also Kantack*, 280 Minn. at 240, 158 N.W.2d at 847 (concluding that "the mere fact that the sale is conducted by the sheriff or his deputy does not make the sale of real estate under foreclosure of a mortgage . . . public business").

Bertram concedes that "[t]echnically, the statute does not make any exception for the holiday of Good Friday," but nonetheless contends that "the Good Friday holiday is still regularly and widely observed and church attendance for Good Friday Mass during the afternoon is highly attended, meaning that a large percentage of potential purchasers cannot attend the sale."[4] Bertram therefore argues that holding the sale on Good Friday resulted in "chilled bidding" and a lower purchase price. But he acknowledges that "no Minnesota court has recognized the principle of 'chilled bidding.'" We decline to do so because it is for the legislature or the supreme court to change the law, and not this court.

[4] Bertram contends that "[t]here is no question that the foreclosure sale took place on Good Friday in the late afternoon." But the district court found that "in the Sheriff's Report of Sale, dated March 29, 2013, Sheriff Rick Duncan reported that on March 29, 2013 *at 10:00 a.m.* he sold the premises and real estate described herein at public auction and to the highest bidder." (Emphasis added.) This finding is supported by the record, whereas Bertram cites no evidence indicating that the sheriff's sale occurred in the "late afternoon."

See Tereault, 413 N.W.2d at 286 ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."). We nonetheless observe that the record does not contain evidence that the bidding was chilled as a result of the Good Friday sale date.

As to Bertram's contention that the amount paid for the property by First Resource was "unfair and unreasonable," the general rule is that "a foreclosure sale free from fraud or irregularity will not be held invalid for inadequacy of the price." *Kantack*, 280 Minn. at 240, 158 N.W.2d at 848. "Upon the coming in of the report of sale, the court shall grant an order confirming the sale, or, if it appears upon due examination that justice has not been done, it may order a resale on such terms as are just." Minn. Stat. § 581.08 (2012). "Where there is no irregularity in the sale, nor fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale . . . ." *Johnson v. Cocks*, 37 Minn. 530, 532, 35 N.W. 436, 437 (1887). Because there is no evidence of any irregularity in the sale or any fraud by First Resource, the district court did not err by confirming the sheriff's sale. We nonetheless observe that the only record evidence regarding the fair market value of the property is an appraisal valuing the property at $110,000. First Resource paid $103,400 for the property at the sheriff's sale, which is 94% of the appraised value.

Affirmed.