

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0773**

SW Partners, LLC,
Appellant,

vs.

Trade Center Property, LLC, et al.,
Respondents.

**Filed March 8, 2021
Affirmed
Johnson, Judge**

Clay County District Court
File No. 14-CV-18-4723

Jason R. Asmus, Adam G. Chandler, Taft Stettinius & Hollister, L.L.P., Minneapolis,
Minnesota (for appellant)

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respondents)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Larkin,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Two affiliated companies jointly borrowed \$1,800,000. The loan was secured by a mortgage on two properties. After the borrowers defaulted, the two properties were sold in separate foreclosure sales at which the lender submitted winning bids of \$600,000 and \$1,800,000, respectively, for a total of \$2,400,000. The borrowers sought to establish and

recover a surplus by subtracting the amount of their outstanding debt from the sum of the lender's two bids. The district court granted the borrowers' motion and awarded the surplus to one of the borrowers. We conclude that the district court did not err by determining that a surplus exists. Therefore, we affirm.

FACTS

The lender in this case is SW Partners, L.L.C., a Florida company. The borrowers are two affiliated companies, M.I.G. Properties Hospitality-1, L.L.C., and Trade Center Property, L.L.C., both of which are Minnesota companies. The loan was guaranteed by Kenneth A. Martin, the president of both Minnesota companies. For the sake of simplicity, we will refer to the borrowers as respondents throughout this opinion.

In November 2017, respondents jointly borrowed \$1,800,000 from SW. The parties agreed that respondents would make monthly interest-only payments, at an interest rate of 13%, until December 31, 2018, at which time all outstanding principal and interest would be due in full. Respondents secured the loan with a mortgage on two properties, which are identified in the mortgage as the TCP property and the MIG property. The record indicates that respondents made untimely payments in April, June, and July of 2018 and made no payments in August, September, October, or November of 2018.

In November 2018, SW commenced an action in the district court (No. 14-CV-18-4515) in which it sought a judgment in the amount of respondents' outstanding debt. In December 2018, SW commenced two additional actions (Nos. 14-CV-18-4718 & -4723) in which it sought to foreclose on the two properties identified in the mortgage.

In February 2019, the parties' attorneys signed three stipulations, one for each case. In each stipulation, the parties agreed that respondents are in default, agreed on an amount of outstanding debt, and agreed that the district court may enter an order with findings of fact, conclusions of law, and an order for judgment. In the stipulations in the second and third cases, the parties also agreed that the district court may order the foreclosure of the mortgaged properties. In March 2019, the district court filed three orders, each of which consists of findings of fact, conclusions of law, and an order for judgment. Shortly thereafter, the district court administrator filed three judgments, each of which generally conforms to one of the district court's orders.

As a result, respondents are jointly and severally liable to SW in the first case in the amount of \$1,983,815.63 plus interest, attorney fees, and costs. In the second case, in which SW sought foreclosure of the TCP property, respondents are jointly and severally liable to SW in the amount of \$1,990,012.67 plus interest, attorney fees, and costs. And in the third case, in which SW sought foreclosure of the MIG property, respondents are jointly and severally liable to SW in the amount of \$2,005,371.35 plus interest, attorney fees, and costs. The amounts of the judgments are different because property taxes of \$6,197.04 and \$21,555.72 were included in the judgments in the second and third cases, respectively.

In May 2019, SW submitted the highest bid of \$600,000 at the foreclosure sale of the TCP property. In September 2019, SW submitted the highest bid of \$1,800,000 at the foreclosure sale of the TCP property.

In November 2019, respondents filed a motion in the third case for turnover of surplus. They asserted that SW's winning bid of \$600,000 in the first foreclosure sale

reduced the outstanding debt to approximately \$1,437,000 (after accounting for post-judgment interest and costs associated with the TCP property), so that SW's winning bid of \$1,800,000 in the second foreclosure sale created a surplus of approximately \$296,000 (after accounting for post-judgment interest and costs associated with the MIG property). Respondents argued that the surplus should be turned over to them. SW opposed the motion on the ground that there was no surplus because its winning bid of \$1,800,000 on the MIG property in the second foreclosure sale was less than the amount of the judgment in the third case.

In January 2020, the district court conducted a hearing on respondents' motion. At the outset of the hearing, the district court asked SW's attorney whether the money judgment in the first case had been satisfied, and SW's attorney answered in the affirmative. After receiving oral arguments on respondents' motion, the district court took the matter under advisement.

In February 2020, the district court filed an order in which it granted respondents' motion in part. The district court determined that a surplus exists but deferred a final ruling on the motion. The district court requested supplemental memoranda from the parties on two specific issues: first, the amount of the surplus and, second, the party or parties to whom the surplus should be awarded. In their subsequent memoranda, the parties submitted similar numbers with respect to the first issue. Respondents asserted that the amount of the surplus is \$296,673.31. SW asserted that, if a surplus exists (a premise that it reserved its right to challenge), the amount is \$273,900.36. With respect to the second

issue, the parties agreed that M.I.G. Property Hospitality-1, L.L.C., is entitled to any surplus identified by the district court.

In March 2020, the district court filed an order in the third case in which it adopted SW's proposal concerning the amount of the surplus and awarded the surplus to M.I.G. Property Hospitality-1, L.L.C. SW appeals.

DECISION

I. Existence of Surplus

SW's primary argument is that the district court erred by finding that a surplus exists.

Because the third case is a foreclosure by action, we apply the relevant provisions of chapter 581 of the Minnesota Statutes. "Judgment shall be entered . . . adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, to satisfy such amount, and directing the sheriff to proceed to sell the same according to the provisions of law relating to the sale of real estate on execution, and to make report to the court." Minn. Stat. § 581.03 (2020). If multiple properties secure a debt, they generally should be sold separately, unless the district court orders them to be sold together. *See* Minn. Stat. § 581.04 (2020). The mortgagee may submit a good-faith bid at a foreclosure sale, which "shall have the same effect as a receipt for money paid upon a sale for cash." Minn. Stat. § 581.05 (2020). "[I]f, after satisfying the mortgage debt, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court." Minn. Stat. § 581.06 (2020). "Upon confirmation of the report of sale, the court administrator

shall enter satisfaction of the judgment to the extent of the sum bid for the premises, less expenses and costs.” Minn. Stat. § 581.09 (2020). We apply a *de novo* standard of review to a district court’s interpretation and application of a statute. *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010).

In its February 2020 order, the district court recited the relevant historical and procedural facts before stating that it “cannot simply ignore the two other related cases given that those two cases involved the exact same claim as in the instant case.” The district court reasoned that “[t]here was *one* promissory note” underlying “three separate actions,” that “the three cases likely should have been consolidated,” that SW “can only collect what it is owed,” that “the money judgment [in the first case] has been satisfied pursuant to the agreement of the parties,” and that SW “is not claiming it is owed any additional funds.” The district court reasoned further that the sum of SW’s two winning bids, \$2,400,000, “exceeds the money judgment [in the first case] and the two foreclosure judgments” in the second and third cases, all of which “stem from the *one* promissory note.” For these reasons, the district court concluded that “there is in fact some type of a surplus.”

SW contends that the district court erred for three reasons. We first consider SW’s contention based on section 581.06, which is the statute authorizing a motion for the turnover of a surplus. As stated above, the statute provides that “if, after satisfying the mortgage debt, . . . there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court.” Minn. Stat. § 581.06. SW contends that there is no surplus under the statute because respondents’ mortgage debt was not satisfied. This contention is counterintuitive because SW’s two

bids totaling \$2,400,000 obviously exceed both the outstanding debt, which was stipulated to be \$1,983,815.63, and the judgment in the third case, which was stipulated to be \$2,005,371.35. In addition, SW's attorney agreed at the January 2020 hearing that the money judgment in the first case had been satisfied.

SW relies on this court's opinion in *First Minnesota Bank v. Overby Development, Inc.*, 783 N.W.2d 405 (Minn. App. 2010), for the proposition that a stipulation between parties may be used to calculate a surplus. The facts of *Overby* are meaningfully different from the facts of this case. In *Overby*, the loan was secured by multiple residential lots. *Id.* at 407. There was only one district court action and only one foreclosure sale. *Id.* at 407-08. Because some of the lots securing the loans had been sold or were being sold, the parties stipulated to a foreclosure order that "excluded certain lots from the action and subtracted from the judgment the mortgage principal and interest allocated to those excluded lots." *Id.* at 407. The parties' stipulation was consistent with the statute that authorizes a "sale of the mortgaged premises, *or some part thereof*." See Minn. Stat. § 581.03 (emphasis added). In applying section 581.06, the district court in *Overby* determined that the "mortgage debt" was the amount to which the parties had stipulated, which was *less than* the amount of the outstanding debt because of the exclusion of the lots that had been sold or were being sold. 783 N.W.2d at 408. On appeal, the lender argued that the surplus calculation should be based on the outstanding mortgage debt, not the lesser amount of the stipulated foreclosure judgment. *Id.* at 410-12. This court rejected the lender's argument and affirmed, reasoning that, in the circumstances of that case, "the better interpretation of the phrase 'mortgage debt' in section 581.06 is that it refers to the

portion of the mortgage debt on which the lender actually forecloses,” *i.e.*, “the debt corresponding to and secured by the property that is sold at the foreclosure sale.” *Id.* at 412. We also expressed concern that the lender’s method of calculating a surplus, if adopted, would allow a lender, “by overbidding, [to] manipulate the foreclosure process, obtain ownership of properties, retain a ‘surplus,’ and frustrate a mortgagor’s . . . right of redemption.” *Id.*

The *Overby* opinion has limited applicability to this case, in which the circumstances are different in multiple ways. SW commenced *three* district court actions, including *two* foreclosure actions. The parties stipulated—for reasons that are not fully explained—to three judgments, the sum of which *exceeds* the mortgage debt by a multiple of approximately three. One similarity between the two cases is that SW’s position, like that of the lender in *Overby*, would allow a lender to effectively prevent both redemption and a surplus. *See id.* at 412. In any event, the holding in *Overby* does not compel the conclusion that, in the circumstances of this case, the stipulated judgment must be substituted for the mortgage debt when determining a surplus under section 581.06.

Second, SW contends that the surplus calculation should be based solely on the amount of the stipulated judgment in the third case because of section 581.03, which provides, “Judgment shall be entered . . . adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, *to satisfy such amount*, and directing the sheriff to proceed to sell the same” Minn. Stat. § 581.03 (emphasis added). SW contends that the language we have italicized means that “the proceeds from the sale authorized by the foreclosure judgment will be applied only to such

judgment.” SW cites no caselaw in support of this contention. When read in context, the italicized language simply indicates that the proceeds of a foreclosure sale should be considered for purposes of entering a satisfaction of judgment pursuant to section 581.09. In any event, section 581.03 cannot be interpreted in a manner that contradicts section 581.06, the statute that governs the issue of surplus.

Third, SW contends that the district court’s reasoning is inconsistent with the judgment that was entered in March 2019. SW relies on paragraph 14 of the judgment in the third case, which states that “the Sheriff shall first apply the proceeds of the [foreclosure] sale to the payment of costs and disbursements, and second on the principal of said judgment” and that “the Sheriff shall bring the surplus money, if any, arising from the sale, after the payment described, into Court for the benefit of the mortgagor or the person entitled thereto.” SW notes that the judgment in the second case, which concerned the first foreclosure sale, contained identical language. We interpret the first part of paragraph 14, which directs the sheriff to apply the proceeds of the sale to “said judgment,” to be relevant to the entry of a satisfaction of judgment pursuant to section 581.09. The second part of paragraph 14, which directs the sheriff to “bring the surplus money, if any” into court obviously is relevant to the district court’s determination of a surplus pursuant to section 581.09. But the second part of paragraph 14 does not specify a method by which the existence of a surplus should be determined. That issue is governed by section 581.06, which provides that “there is a surplus” if, and only if, the “mortgage debt” is satisfied. *See* Minn. Stat. § 581.06. In this case, the district court appropriately focused on whether the mortgage debt was satisfied after the second foreclosure sale.

Thus, the district court did not err by determining that a surplus exists.

II. Equitable Relief

SW also argues, in the alternative, that “this court should exercise its equitable discretion to eliminate the unconscionable windfall that a surplus would grant to respondents.” SW contends that equitable relief is appropriate because it did not intend to create a surplus, because respondents stipulated to the entry of multiple judgments, and because it is appropriate to restore the parties to the pre-existing *status quo*.

SW did not present this argument to the district court. When the district court asked for supplemental memoranda on the amount of the surplus, SW filed a memorandum stating that, if there is a surplus, it is \$273,900.36. The district court adopted SW’s argument on that issue. Now, for the first time on appeal, SW argues that, for equitable reasons, the amount of the surplus should be zero. The district court did not have an opportunity to consider SW’s argument for equitable relief. Accordingly, SW has forfeited the argument. As a general rule, this court does not consider forfeited arguments. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42-43 (Minn. App. 2014). The general rule is especially appropriate with respect to issues of equity, for which the district court “is in the best position to analyze the facts and balance the relevant factors.” *Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 819 (Minn. 2016). Thus, we decline to consider SW’s forfeited argument.

In sum, the district court did not err by determining that a surplus exists. Accordingly, the district court did not err by determining that the amount of the surplus is

\$273,900.36 and that the surplus should be awarded to M.I.G. Property Hospitality-1, L.L.C.

Affirmed.

A handwritten signature in cursive script, appearing to read "Matthew Johnson".