STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1671

Michael M Whalen,
Appellant,

vs.

200 River Drive Condominium Association,
Respondent,

Minneapolis Property LLC,
Respondent.

Filed August 5, 2024
Affirmed in part and reversed in part
Ross, Judge

Ramsey County District Court
File No. 62-CV-22-6061

Carl E. Christensen, Christopher J. Wilcox, Robert Kouba, Christensen Sampsel PLLC, Minneapolis, Minnesota (for appellant)

Kurt M. Mitchell, Neven Selimovic, Phaedra J. Howard, Brendan M. Kenny, Hellmuth & Johnson, Edina, Minnesota (for respondent 200 River Drive Condominium Association)

Gregory J. Holly, Hugo, Minnesota (for respondent Minneapolis Property LLC)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Michael Whalen owns a residential condominium unit in a complex governed by a housing association whose controlling board decided to repair the deteriorating ironwork on balconies in the complex and assess the repair cost to the unit owners. Whalen refused to pay his assessed, proportionate share of the repair cost, leading the association to record an assessment lien against his unit and then foreclose on the lien. Whalen sued the association, primarily seeking a judgment declaring the special assessment, the lien, and the foreclosure and consequent sale invalid as a matter of law. The district court rejected Whalen's invalidation arguments and granted summary judgment favoring the association, dismissing Whalen's civil complaint. We affirm the summary-judgment dismissal on those issues, but we reverse in part because Whalen also alleged and has identified evidence supporting his claim that the association failed to meet its statutory duty to provide him with records that he requested related to the balcony project.

FACTS

Appellant Michael Whalen owns a residential condominium unit in a complex whose housing association, respondent 200 River Drive Condominium Association, is composed of unit owners and maintains the complex's common areas. The common areas include exterior ironwork balconies that are affixed to each residence and that were deteriorating in April 2020, needing to be repaired. The association considered plans to repair the balconies, and its board of directors held two votes to approve its proposed project. Whalen alone voted against it, resulting in a final tally of 13 to 1. The association completed the project and specially assessed each member a share of the overall cost, proportionate to the value of each member's residential unit.

The opposing parties then dug in on principle. Whalen refused to pay his assessed cost of $11,200 until the association provided requested documentation concerning the project. The association provided him some, but allegedly not all, of the requested documentation and added a $75 late fee. Whalen then agreed to pay the assessment amount but not the late fee. The association refused to accept Whalen's payment without the late fee. The fight over that $75 grew into this litigation.

The association recorded a lien statement against Whalen's unit in February 2022 for his unpaid assessment, and it notified Whalen in March 2022 that it had accelerated his assessments due for the entire year. The association began the foreclosure process. In April 2022, it published notice in the newspaper of a foreclosure sale of Whalen's unit scheduled for June 22, 2022, and it attempted to serve Whalen directly with the notice. But foreclosure by advertisement requires the foreclosing party to both publish notice of the foreclosure sale for six weeks before the scheduled date of sale and to personally serve the property possessor four weeks before the sale. Minn. Stat. § 580.03 (2022). Because it had not served Whalen in time for a June 22, 2022 sale, in September 2022, the association published notice that the foreclosure sale was postponed until November 17, 2022, and it served Whalen with the notice.

Whalen unsuccessfully moved the district court for a temporary restraining order to prevent the foreclosure sale. He also filed a civil complaint in district court to prevent the sale, alleging that both the underlying lien and the sale were invalid and alleging that the association had failed to meet its statutory duty to provide him with requested documentation.

Minneapolis Property LLC purchased the property at the sale, which occurred as rescheduled. Whalen and the association filed competing motions for summary judgment. Shortly before the statutory redemption period was set to expire, Whalen redeemed the property by paying $28,226.78. The district court granted the association's motion, determining that the association's assessment lien was valid and that Whalen waived his opportunity to challenge the foreclosure process by redeeming the property.

Whalen appeals.

DECISION

Whalen challenges the district court's summary-judgment dismissal of his civil complaint. We review a grant of summary judgment *de novo. Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We apply the same standard as the district court, affirming summary judgment if the moving party has demonstrated that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. On this review, we conclude that Whalen has demonstrated that material fact disputes prevent summary judgment favoring the association as to only one claim in his complaint, specifically, whether the association met its legal obligation to properly respond to Whalen's requests for records maintained by the association.

I

We begin our summary-judgment assessment by addressing the association's threshold argument asserting that, by redeeming the property, Whalen waived the claims he made in his civil complaint. The association argues that we should affirm summary judgment in its favor based on the application of two statutes to these circumstances. We determine *de novo* how statutes are interpreted and applied. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). The association argues specifically that, because Whalen failed to follow "all [the] steps [outlined in Minnesota Statutes section 580.28 (2022)] to preserve his claims," and because Whalen redeemed the property after the foreclosure sale and therefore rendered the sale annulled by virtue of Minnesota Statutes section 580.27 (2022), he waived his right to challenge the foreclosure. Construing the statutes on their plain terms, we reject the association's waiver argument.

Contrary to the association's proposition that Whalen "had to follow [section] 580.28's requirements" for him to have "preserve[d] his *right to challenge the validity of the sale* while the redemption period was running," that section instead outlines the process a claimant may invoke to preserve his *right to redeem the property* being foreclosed by advertisement pending his legal action challenging the validity of the underlying mortgage:

> When an action is brought wherein it is claimed that any mortgage as to the plaintiff or person for whose benefit the action is brought is fraudulent or void, or has been paid or discharged, in whole or in part, or the relative priority or the validity of liens is disputed, if such mortgage has been foreclosed by advertisement, and the time for redemption from the foreclosure sale will expire before final judgment in such action, the plaintiff or beneficiary having the right to redeem, for the purpose of saving such right in case the action fails, may deposit with the sheriff before the time of redemption expires the amount for which the mortgaged premises were sold, with interest thereon to the time of deposit, together with a bond to the holder of the sheriff's certificate of sale, in an amount and with sureties to be approved by the sheriff, conditioned to pay all interest that may accrue or be allowed on such deposit if the

> action fail. The person shall, in writing, notify such sheriff that the person claims the mortgage to be fraudulent or void, or to have been paid or discharged, in whole or in part, as the case may be, and that such action is pending, and direct the sheriff to retain such money and bond until final judgment. In case such action fails, such deposit shall operate as a redemption of the premises from such foreclosure sale, and entitle the plaintiff to a certificate thereof. Such foreclosure, deposit, bond, and notice shall be brought to the attention of the court by supplemental complaint in the action, and the judgment shall determine the validity of the foreclosure sale, and the rights of the parties to the moneys and bond so deposited, which shall be paid and delivered by the sheriff as directed by such judgment upon delivery to the sheriff of a certified copy thereof. The remedy herein provided shall be in addition to other remedies now existing.

Minn. Stat. § 580.28. Whalen did not follow the steps to invoke the statute, which is expressly established "for the purpose of saving such right [to redeem] in case the action [challenging the mortgage] fails." *Id.* Whalen instead actually exercised his right to redeem, and the statute says nothing about any effect redemption might have on the claimant's underlying claims.

We are partially convinced by the association's related supposition that, based on Minnesota Statutes section 580.27, Whalen could not "both annul the foreclosure [by redeeming the property] and challenge it on the merits." Section 580.27 does not say that, by redeeming, a property owner waives any pending foreclosure-related claims. The statute's operative language declares only, "If redemption is made by the owner of the property sold, . . . such redemption annuls the [foreclosure] sale." Minn. Stat. § 580.27. The association reasonably contends that redemption and the consequent annulment of the sale result in Whalen having "no claims to preserve regarding the validity of the sale," and

Count IV of Whalen's complaint challenges the validity of the foreclosure sale and asks the court expressly to nullify it. Because Whalen's redemption nullified the sale, Count IV cannot survive under section 580.27 to the extent it challenges the sale.

But as we have said, we are only partially persuaded by the association's argument arising from section 580.27. This is because Whalen's complaint is not limited to his claim challenging the validity of the foreclosure sale and seeking its nullification. His complaint also alleges that he is entitled to a declaratory judgment and the recovery of attorney fees under Minnesota Statutes section 515B.4-116 (2022), which establishes a cause of action by any aggrieved person "for appropriate relief" against an association for its having failed to act properly under its own bylaws. In support of that claim, Whalen alleged that the association failed to follow the procedures indicated in its bylaws when it specially assessed his unit for the balcony repairs, when it refused to provide him documentation related to the ballot for approval of the project, when it sought foreclosure under the wrong mechanism, and when it attempted to obligate him to pay its attorney fees. The complaint seeks unspecified relief under section 515B.4-116, including but not limited to an award of attorney fees to be paid by the association and excluded from any assessment against Whalen. Neither section 580.27 nor 580.28 expressly or implicitly precludes Whalen from pursuing his claim under section 515B.4-116 simply because he redeemed the property after the foreclosure sale.

II

Whalen advances a different threshold argument. He contends primarily that, because the association did not postpone the foreclosure sale before it occurred, the foreclosure action terminated automatically when the scheduled sale date passed without a sale and could not, after that date, be revived by the association's notice of sale postponement. He builds this argument on the fact that the association did not publish notice of the sale postponement until September 22, 2022, almost nine weeks after the scheduled sale date of June 22, 2022. No case or statute that Whalen cites directly supports his argument, and we are aware of none. It is not our prerogative to add words when we construe a statute, even to fill a gap that we suppose the legislature might have overlooked. *Martinco v. Hastings*, 122 N.W.2d 631, 638 (Minn. 1963) ("[C]ourts cannot supply that which the legislature purposely omits or inadvertently overlooks."). Under the controlling statute, a mortgagee can postpone a foreclosure sale by publishing notice of the postponement in the newspaper where the initial notice of sale was published and by mailing notice to the mortgagor. Minn. Stat. § 580.07, subd. 1 (2022). The postponement statute requires the postponing party to "publish, only once, a notice of the postponement and the rescheduled date of the sale, if known," *id.*, subd. 1(a)(1), and neither of its two timing restrictions includes the bar that Whalen would have us incorporate into the statute. One of the timing references requires the postponing party to publish the postponement notice "as soon as practicable" after determining the date of the rescheduled sale, and the other requires the party to send the occupant of the foreclosed property the notice, "postmarked within ten days of the rescheduled sale." *Id.*, subd. 1(a)(1), (b)(2). The statute does not otherwise regulate the timing of the postponement notice. Nor does it or any other authority referenced by Whalen suggest that a foreclosure proceeding dies instantly if the sale does not occur on the original date scheduled. We decline to hold that the timing of the postponement notice automatically ended the sale process. We turn to Whalen's other arguments for reversal.

III

Whalen contends that we should reverse the district court's decision dismissing his claim for relief under Minnesota Statutes section 515B.4-116 because the association engaged in various conduct not authorized by its bylaws or by statute. His complaint identifies five allegedly unlawful actions: (1) failing to obtain member approval to specially assess the units for the balcony-repair project; (2) failing to respond to Whalen's requests for documentation regarding the ballot used in the balcony-project vote; (3) seeking to foreclose by advertisement instead of by action; (4) failing to follow the law when foreclosing by advertisement; and (5) seeking to recover attorney fees through foreclosure by advertisement. Our *de novo* review of the summary-judgment arguments leads us to reject all but one of Whalen's contentions.

Member Approval of Balcony-Repair Project

We first address Whalen's claims arising from the association's alleged bylaw violations in its process for approving the balcony project. A condominium association's authority is framed by its declarations, by its bylaws, and by statute. *Chapman Place Ass'n, Inc. v. Prokasky*, 507 N.W.2d 858, 863 (Minn. App. 1993), *rev. denied* (Minn. Jan. 24, 1994). The Minnesota Common Interest Ownership Act (MCIOA), codified under Minnesota Statutes chapter 515B, applies in part to condominiums created under a predecessor statute, chapter 515. Minn. Stat. § 515B.1-102 (2022). The association's declaration establishes that it was created under chapter 515. It is a nonprofit corporation organized in relevant part to provide for the maintenance, preservation, operation, and management of the complex property. Whalen argues that the association is not entitled to summary judgment because the board of directors violated the association bylaws by undertaking the balcony project without first obtaining member approval through an election process that meets the procedural requirements for membership elections outlined in the bylaws. The association counters, maintaining that, because the bylaws authorize the board to provide "care" and "maintenance" of common areas, no membership vote was necessary to approve the balcony project. The association alternatively asserts that a membership vote in fact ratified the board's decision and that Whalen has offered no evidence to support his assertions that the membership vote included disqualifying irregularities.

We conclude that the association bylaws empowered the board to approve the balcony-repair project. Under the MCIOA, a condominium owners' association has the power to "levy and collect assessments for common expenses from unit owners, . . . regulate the use, maintenance, repair, replacement, and modification of the common elements" and "cause improvements to be made as a part of the common elements." Minn. Stat. § 515B.3-102(a)(2), (6), (7) (2022). The association's bylaws provide that "[t]he Board of Directors shall have the powers and duties necessary for the administration of the affairs of the Association and may do all such acts and things as are not by law or by these By-Laws directed to be exercised and done by the owners." Two of the board's express duties in the bylaws not directed to be done by the owners are the "care [and] upkeep . . . of the . . . common areas and facilities." And the bylaws categorize the unit balconies as common areas. Although Whalen argues that "[n]owhere is the board authorized to undertake capital improvement projects," he does not identify any provision in the bylaws or declaration that prohibits the board from contracting on the association's behalf to repair common areas. Nor does he point to any provision distinguishing repairs that are "capital improvements" from repairs that are "upkeep" and "maintenance" of the property.

Our analysis is also informed by a provision in the association's declaration, which expressly requires a members' decision whether to "rebuild, repair, or restore, or sell the property" if the property has been damaged or destroyed. This provision requiring member authorization is limited to property subject to repair particularly because it has been damaged or destroyed, not property that is subject to repair because of its ordinary wear or deterioration over time. We agree with the district court that, by contrast and "[m]ore specific to this case, the Association's Declaration and By-Laws leave to the elected Board of Directors, acting on behalf of the Association, decisions relating to the 'care' and 'upkeep' of the project as well as 'designation and dismissal' of personnel 'necessary for the maintenance and operation' of the project." We are unpersuaded by Whalen's contention on appeal that this provision about "damage or destruction" applies to the balcony project, which, according to the record, was initiated by the association because the ironwork had begun deteriorating, not because it had been damaged or destroyed. We hold that the duty to maintain the property's common areas necessarily implies the authority to undertake periodic repairs and that repairing the balconies' time-worn ironwork falls under the board's authority with or without member approval. Although it might be prudent for the board to submit particularly expensive maintenance and upkeep projects to the association membership for approval, Whalen has not shown that the bylaws require it here.

We similarly are not persuaded by Whalen's contention that the board needed member approval before assessing the cost of the balcony project to the unit owners. Whalen emphasizes that the bylaws do not specifically grant the board the authority to fund repairs by a special assessment. But they also do not list situations where an assessment would require member approval. Nor do they describe the process for covering costs through a special assessment. The bylaws do authorize the association to "establish[] and collect[] monthly assessments." Although they do not define what "establishing" an assessment entails, the record supports the reasonable understanding that it includes allocating the cost of repair projects to unit owners to be included in their monthly assessment obligations.

On his premise that the board could not undertake the project without the vote of association members, after acknowledging that the board "submitted to the vote of the [m]embers whether to authorize a balcony project for the redesign and replacement" of the balconies' ironwork for $235,000, Whalen maintains that the membership vote was infirm for five reasons. He asserts that the membership ballots failed to state that the project would be funded by a special assessment, that the board held the election over a 5-day period rather than the 15-day period required by statute, that the board allowed the votes to be cast by mail rather than limiting voting to an association membership meeting, that the ballot box remained open past the voting period established by the board, and that the board did not provide Whalen documents proving that the members voted in favor of the project.

Because we have concluded that a membership vote was unnecessary, we do not discuss Whalen's contentions against the voting process.

Documentation Regarding Balcony Project

Whalen's complaint alleges that the association is liable under Minnesota Statutes section 515B.4-116 for violating the bylaws and the MCIOA by refusing to grant his requests for information and documents related to the ballot circulated for approval of the balcony project. His brief on appeal discusses the association's alleged "fail[ure] to present any evidence that the board actually undertook any vote to approve the [b]alcony [p]roject and assess the costs," and he presents two distinct arguments about this failure. He first references the association's treatment of his requests for information to support his contention that the board never administered an authentic vote of members to approve the project. Because we have already determined that the bylaws did not require the association to secure member approval of the project, this argument about documentation is no longer relevant.

But Whalen's second argument about the association's alleged failure to provide him with requested documents has legal and evidentiary support. He identifies various categories of documents that he requested and specific dates on which he requested them, and he identifies evidence in the record to support his allegation that the board members either ignored or misled him about those documents. The MCIOA requires an association to "keep adequate records of its membership, unit owners meetings, board of directors meetings, committee meetings, contracts, leases and other agreements to which the association is a party, and material correspondence and memoranda relating to its operations." Minn. Stat. § 515B.3-118 (2022). It also requires associations to make those records "reasonably available for examination by any unit owner" and to "provide copies [in the form] requested by the owner." *Id.* The MCIOA provides a cause of action for violations of its provisions, establishing that "any person . . . adversely affected by the failure to comply" with "any provision of this chapter" will have a "claim for appropriate relief." Minn. Stat. § 515B.4-116(a). The district court did not explain why it was dismissing Whalen's failure-to-provide-requested-documents claim when it granted summary judgment favoring the association. And the association's brief on appeal does not address Whalen's argument that the evidence supports his allegations. For these reasons we reverse the district court's summary-judgment decision on this issue. We offer no opinion as to the claim's merit, the specifics of which the association has not addressed on appeal.

Foreclosure by Advertisement and Attorney Fees Sought Through Foreclosure

Whalen promotes his complaint's allegation about foreclosure by advertisement rather than foreclosure by action by including it as part of his assertions about the foreclosure sale's postponement. We have already explained why those assertions fail. Regarding his complaint's allegation that the association improperly sought attorney fees based on the assessment and foreclosure, he does not develop an argument except to assert that the association engaged in "bad faith insistence on attorney fees," and he clarifies the argument by contending, "[T]o the extent the board actually took unilateral action to approve the project and assessment, . . . it did so in bad faith." Because we have already addressed that argument, we need not discuss it further.

Our *de novo* review informs us that the district court did not err by granting summary judgment against almost all of Whalen's claims. As a mortgagor, he cannot contest the foreclosure proceeding after redeeming his property from the foreclosure sale. He may still contest the validity of the underlying lien, but we conclude that the lien against his property was a valid exercise of the association's power under its declaration and bylaws and the applicable Minnesota statutes. But Whalen has identified genuine issues of material fact regarding his claim that the association failed to adequately provide requested records as required by law.

Affirmed in part and reversed in part.