IN THE COURT OF APPEALS OF IOWA

No. 0-961 / 10-1062
Filed March 30, 2011

U.S. BANK, N.A.,
Plaintiff-Appellee,

vs.

LIGHTHOUSE BUILDERS, L.C.,
and AARON D. TOOMAN,
Defendants-Appellants,

and

TRAK, INC., DOUGLAS F. DOLAN,
and BRADLEY D. JOHNSON,
Defendants.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Lighthouse Builders, L.C. and Aaron Tooman appeal from the district court's grant of summary judgment in favor of U.S. Bank in its action to foreclose mortgages on five undeveloped real estate lots in Ankeny, Iowa, and to collect against the guarantors. **AFFIRMED.**

Robert C. Gainer and Jerrold A. Wanek of Garten & Wanek, Des Moines, for appellants.

Alex M. Johnson and Marc T. Beltrame of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Lighthouse Builders, L.C. (Lighthouse) and Aaron Tooman appeal from the district court's grant of summary judgment in favor of U.S. Bank (the Bank) in the Bank's action to foreclose mortgages on five undeveloped real estate lots in Ankeny, Iowa, and to collect against the guarantors. Lighthouse and Tooman contend two issues of material fact exist which preclude summary judgment: (1) their total amount of indebtedness; and (2) the estoppel effect of a settlement agreement allegedly entered into by the Bank, Lighthouse, and several others who are not named parties in the present case. Because Lighthouse and Tooman filed their notice of appeal sixty-two days after the court issued its initial summary judgment ruling, their appeal is untimely and we decline to reach the merits.

I. Background Facts and Proceedings

On May 2, 2005, Lighthouse executed and delivered to U.S. Bank five single-payment notes. Each note was subject to a modification agreement entered into on July 11, 2007. In conjunction with each note, the Bank and Lighthouse entered into a construction loan agreement. And, as security for each note, Lighthouse executed and delivered to the Bank a security agreement and assignment of rents, as well a mortgage collateralizing a separate lot of undeveloped real estate property in Ankeny for each note.[1] On May 10, 2005,

[1] The mortgage securing Note 1 collateralized the following: "Lot Three (3) in the Otter Ridge Plat 6, an Official Plat, now included in and forming a part of the City of Ankeny, Polk County, Iowa." The mortgage securing Note 2 collateralized the following: "Lot Four (4) in the Otter Ridge Plat 6, an Official Plat, now included in and forming a part of the City of Ankeny, Polk County, Iowa." The mortgage securing Note 3 collateralized the following: "Lot Five (5) in the Otter Ridge Plat 6, an Official Plat, now included in and forming a part of the City of Ankeny, Polk County, Iowa." The mortgage

the Bank filed each mortgage with the Polk County Recorder's Office. The Bank is the owner and holder of each of the notes, loan agreements, mortgages, and modification agreements. Lighthouse is in default on its obligations and the Bank has declared the entire indebtedness immediately due and payable.

On May 2, 2005, guarantors—Aaron D. Tooman, Trak, Inc., Douglas F. Dolan, and Bradley D. Johnson—executed and delivered to the Bank continuing guaranties to secure the notes. Pursuant to the guaranties, the guarantors unconditionally assured the full and complete performance of Lighthouse's obligations on the notes.

On February 9, 2009, U.S. Bank filed a petition to foreclose the mortgages on the five undeveloped real estate lots and to collect against the guarantors. The Bank then filed an amended petition requesting foreclosure without redemption on February 24, 2009. On December 23, 2009, the Bank filed a motion for summary judgment. Lighthouse initially resisted on January 7, 2010; and filed a further resistance on February 19, 2010.

The court held a summary judgment hearing on March 11, 2010. On April 22, 2010, the court ruled against Lighthouse and Tooman. It found the principal amount due and owing to the Bank totaled $274,990.63, the stated interest due pursuant to the notes totaled $48,760.81, the default interest due pursuant to the notes totaled $30,592.71, late fees totaled $539.92, expenses incurred by the Bank totaled $750.00, and the per diem interest rate due was $78.30. The court

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securing Note 4 collateralized the following: "Lot Six (6) in the Otter Ridge Plat 6, an Official Plat, now included in and forming a part of the City of Ankeny, Polk County, Iowa." And, the mortgage securing Note 5 collateralized the following: "Lot Seven (7) in the Otter Ridge Plat 6, an Official Plat, now included in and forming a part of the City of Ankeny, Polk County, Iowa."

further found that Lighthouse had agreed to pay the Bank's reasonable attorney fees incurred in collecting the amounts owing under the notes. The court concluded a judgment foreclosing the mortgages should be entered with respect to lots three, four, five, six, and seven "against Defendants, as follows: $274,990.63 principal with accrued interest of $79,353.52 and $539.92 in late fees with costs and expenses totaling $750.00 and for reasonable attorney fees and the costs of this action." On May 4, 2010, U.S. Bank applied for attorney fees in the amount of $23,065.09, and on June 9, 2010, the court awarded that amount.

On June 23, 2010, Lighthouse and Tooman filed an appeal contesting the district court's grant of summary judgment. The notice was filed sixty-two days after the court filed its initial summary judgment ruling.

II. Scope and Standard of Review

We review the grant of summary judgment for the correction of errors at law. Iowa R. App. P. 6.907; *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). A genuine issue of material fact exists if reasonable minds could differ with respect to how the issue should be resolved. *Id.* In determining whether the moving party has satisfied its burden, we view the record in the light most favorable to the non-moving party. *Eggiman*, 718 N.W.2d at 758.

III. Analysis

Lighthouse and Tooman contend two genuine issues of material fact exist, which require us to reverse the grant of summary judgment. They assert the interest rate and per-diem calculations are in dispute, creating an issue of material fact as to their total amount of indebtedness. They also contend a genuine issue of material fact exists regarding the estoppel effect of a "Global Settlement Agreement and Release" allegedly entered into by U.S. Bank, Lighthouse, and several others who are not named parties in the present case. The Bank counters that no issue of material fact exists on either claim and that the appeal should be dismissed as untimely.

With respect to the threshold issue of timeliness, the Bank argues we should dismiss this appeal because Lighthouse and Tooman filed their notice of appeal too late—more than thirty days after the district court's initial April 22 ruling that granted the Bank's motion for summary judgment. Lighthouse and Tooman counter that the thirty-day time frame began running on June 9, when the court entered its later order granting the Bank attorney fees. They point out the initial summary judgment disposition was accomplished through a "ruling" rather than a "final order or decree." They contend the June 9 order granting attorney's fees is the only final order and because they filed this appeal within thirty days from that order, it is timely.

Iowa Rule of Appellate Procedure 6.101(1)(b) provides that "[a] notice of appeal must be filed within 30 days after the filing of the final order or judgment." This rule is "mandatory and jurisdictional." *Eaton v. Meester*, 464 N.W.2d 691, 692 (Iowa Ct. App. 1990). A party's failure to file a timely notice of appeal leaves

our court without subject matter jurisdiction to hear the appeal. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009).

Generally, a ruling on a motion for summary judgment is a final judgment subject to appeal. *Id.* In most situations, the thirty-day period for filing an appeal begins to run from the date of the court's original ruling granting summary judgment. *See id.* (citing *Flynn v. Lucas County Mem'l Hosp.*, 203 N.W.2d 613, 614–15 (Iowa 1973) (holding a ruling on a motion for summary judgment adjudicating the rights of a party is a final judgment subject to appeal)). But when the district court's ruling "specifically provides for subsequent entry of a final order," the original ruling itself is not a final judgment or decision. *Id.* In that situation, the thirty days does not begin to run on the date of the original ruling; rather, it begins to run on the later date that the final order specifically provided for in the ruling is entered. *Id.*

For example, in *Hills Bank*, the district court entered its ruling granting the parties' motions for summary judgment on February 1, 2007. *Id.* "In the court's February 1 ruling, the court specifically directed one of the parties to prepare a final decree entering a judgment on its ruling." *Id.* The court then entered the decree granting summary judgment on March 7, 2007. *Id.* Because the court's ruling specifically provided for later entry of a final order, the court concluded that the thirty days for filing an appeal began running from the date of the final order—March 7, 2007—rather than the date of the original ruling. *Id*. at 771–72.

Unlike *Hills Bank*, the district court's initial ruling here did not specifically contemplate the later entry of a final order on the summary judgment issue. The

only statement in the record that could potentially be interpreted as reserving finality for a later order is the last paragraph in the ruling, providing:

> The Court should retain jurisdiction of the parties and of the subject matter hereof, for the purpose of making such further orders, judgment, and decrees as may be just and necessary or required in the premises.
>
> SO ORDERED this 22nd day of April, 2010.

This statement does not rise to the level of specificity required to suspend the right of appeal from the ruling itself. Our supreme court stated the original ruling is not a final judgment when it "*specifically* provides for subsequent entry of a final order" on the issue resolved in the initial ruling. *Hills Bank*, 772 N.W.2d at 771 (emphasis added). It is not our province to extend that rule to suspend the finality of district court rulings that are ambiguous with respect to the entry of a later order on the issue. Because the statement referenced above does not specifically provide for the subsequent entry of a final order as required under *Hills Bank*, the initial ruling amounts to a final judgment subject to appeal.[2]

At oral argument, the attorney for Lighthouse and Tooman urged that the district court's phraseology that judgment "should be" entered suggested a future dimension rather than the present entry of a final order. The appellants provide no support for this interpretation and we do not find it persuasive. Grammatically, "should" is the past tense of the verb "shall." The American Heritage Dictionary 1134 (2nd ed. 1985); *see Richardson v. City of Jefferson*, 257 Iowa 709, 714,

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[2] The court's statement that it retains jurisdiction to enter "necessary" or "required" orders does not clearly signal the court's intent to enter a later order on the summary judgment issue. It would be necessary to enter a final order on the summary judgment issue if the court reserved finality for a later decree. But, if the court did not specifically provide for a later order, the order would not be necessary or required because the ruling itself would amount to a final judgment subject to appeal.

134 N.W.2d 528, 531 (1965); *see also State v. Wardner*, 725 N.W.2d 215, 222 (N.D. 2006) (noting that words "must" and "should" may be used interchangeably); *In re Adoption of Baby Boy A*, 236 P.3d 116, 125 n.11 (Okla. 2010) (defining "should" as expressing "a condition or obligation from a point of view in the past"); Black's Law Dictionary 1379 (7th ed. 1999) (listing "should" as a synonym of "shall"). The word "shall" imposes a duty. Iowa Code § 4.1(30)(a) (2009). Given the common meaning of the word "should," its use in the summary judgment order cannot be read to postpone the finality of the judgment entry.

We note that the district court's ruling articulated a comprehensive statement of both its findings of fact and conclusions of law, unequivocally granted the Bank summary judgment, and concluded its ruling with typical words of finality, stating it is "So Ordered." These aspects of the ruling signal that the district court did not intend to issue a subsequent, final order on the summary judgment issue.

Additionally, Lighthouse and Tooman argue their appeal was timely because it was filed within thirty days of a later order addressing an issue (attorney fees) different from that addressed in the original ruling (summary judgment). In *Hills Bank*, the original ruling and the subsequent final order both addressed the same summary judgment issue. Here the original ruling resolved the summary judgment disposition but the later order addressed only the Bank's derivative claim for attorney fees. This distinction bolsters our conclusion that this case does not fit the *Hills Bank* exception.

In this case, the initial summary judgment ruling was a final order, giving rise to the right of appeal. The thirty days for filing a notice of appeal provided by

rule 6.101(1)(b) began to run on April 22, 2010. Because Lighthouse and Tooman did not file their notice of appeal until June 23, 2010, well after thirty days had elapsed, the appeal is untimely and we do not have jurisdiction to consider their claims with respect to the interest rate, per-diem calculation, or the preclusive effect of the proffered settlement agreement.

AFFIRMED.