

IN THE COURT OF APPEALS OF IOWA

No. 1-748 / 10-1876
Filed November 23, 2011

**QUAD CITY BANK AND TRUST
COMPANY, an Iowa Banking
Corporation,**
Plaintiff-Appellee,

vs.

**JDHP DEVELOPMENT, L.L.C., an
Iowa Limited Liability Company;
DJP PARTNERS, LTD, a Colorado
Limited Partnership; DAVID J.
PETERSEN; and JASON J. HARDER,**
Defendants,

and

**MAXWELL CONSTRUCTION, INC.,
an Iowa Corporation; and STREB
CONSTRUCTION CO., INC., an Iowa
Corporation,**
Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Parties holding mechanic's liens on foreclosed property appeal a district court's ruling approving the sale of the property under Iowa Code section 654.17A. **APPEAL DISMISSED AS MOOT.**

Alison Werner Smith and John W. Hayek of Hayek, Brown, Moreland & Smith, L.L.P., Iowa City, for appellants.

Candy K. Pastrnak and Thomas J. Pastrnak of Pastrnak Law Firm, P.C., Davenport, for appellee.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

Two parties holding mechanic's liens on real estate in a pending foreclosure action appeal a district court ruling approving the sale of the property as "commercially reasonable" under Iowa Code section 654.17A. Subsequent to the lienholders filing their notice of appeal, the Bank applied for, was granted, and posted bonds to release the mechanic's liens from the foreclosed property under Iowa Code section 654.9A. The district court then discharged the liens. As the bonds have been substituted for the real estate, the objection to the sale of the property is now moot, and we dismiss the appeal.

I. Background Facts and Proceedings

On August 19, 2010, Quad City Bank and Trust Company (the Bank) filed a petition to foreclose a mortgage it held on real estate owned by JDHP Development, L.L.C. Maxwell Construction, Inc. (Maxwell) and Streb Construction Co., Inc. (Streb), both lienholders, were named as defendants. The petition elected foreclosure without redemption under Iowa Code section 654.20 (2009), with sale of the real estate to occur unless a written demand to delay the sale was filed with the court. Contemporaneous with the filing of the petition, the Bank applied for a district court order approving an offer to purchase seventeen of the lots that were subject to foreclosure based on a promissory note and mortgage given to the Bank from JDHP.¹ Notice of this application was provided to Maxwell and Streb, as each party had previously filed a mechanic's lien for

¹ Iowa Code section 654.17A sets forth the procedure that a plaintiff may use to apply to the court "for an order approving an offer for a commercially reasonable sale of the property free of the claims of the parties to the action and other persons served with notice pursuant to section 654.15B." Iowa Code § 654.17A.

work they had done to improve the property. Maxwell's work included the installation of sanitary sewers, storm sewers, water mains, and related underground and drainage work. Streb's work included the installation of streets, curbs, gutters, and other related street and drainage work.²

On September 22, 2010, Maxwell and Streb each filed a resistance and objection to the Bank's application, stating that instead of selling the lots to the proposed purchaser, Robson Homes, the lots should be sold through a sheriff's sale. A hearing regarding the proposed sale was held on September 29, 2010. On November 1, 2010, the district court granted the Bank's application, thereby approving its offer to purchase pursuant to Iowa Code section 654.17A. On November 8, 2010, Maxwell and Streb filed a joint motion to amend and enlarge the November 1 ruling. They specifically requested the district court delete a conclusion that their claims were junior to the Bank's claims and expand its ruling by addressing whether payment of \$42,500 in real estate commissions was commercially unreasonable. The Bank resisted this motion.

On November 16, 2010, an expedited telephonic hearing was held regarding Maxwell and Streb's motion to amend and enlarge the district court's November 1 ruling. Maxwell and Streb's motion to enlarge was granted in part by the district court on November 22, 2010. The district court amended the November 1 ruling by deleting the statement identifying Maxwell and Streb as

² Maxwell filed its mechanic's lien on December 30, 2009, in the amount of \$169,418.29 along with interest and costs, for work it performed from April 2008 to June 2009; Streb filed its mechanic's lien on January 8, 2010, in the amount of \$98,488.91 along with interest and costs, for work it performed from May 2008 to July 2008.

having claims junior to those of the Bank. It, however, wholly denied the parties' request to find the real estate commissions commercially unreasonable.

Maxwell and Streb filed an application for interlocutory appeal, challenging the district court's ruling on the sale of the lots in the pending foreclosure action under Iowa Code section 654.17A; they also requested a stay. The Bank resisted. On December 20, 2010, our supreme court determined that a ruling under Iowa Code section 654.17A is a final judgment, appealable as a matter of right, and stated it would treat the papers filed "as though these defendants had filed a notice of appeal as a matter of right pursuant to rule 6.101(1)(b)." Further, it denied the request for a stay, but stated "[t]his ruling shall not preclude these defendants from obtaining a stay of the challenged district court ruling by the filing of a supersedeas bond pursuant to the procedure provided by appellate rule 6.601." No bond was posted by the lienholders.

While this appeal was pending, the proceedings continued in district court. On October 19, 2010, the Bank filed a motion for summary judgment on the foreclosure petition. Maxwell and Streb filed a joint resistance. On January 18, 2011, the district court stayed any further proceedings on the foreclosure petition, pending outcome of Maxwell and Streb's appeal on the proposed sale. On February 25, the Bank filed a request for ruling and application to post bond pursuant to Iowa Code section 654.9A, as well as to obtain releases of the mechanic's liens. On March 31, 2011, the district court, "released, discharged and extinguished" Maxwell and Streb's mechanic's liens and the Bank subsequently filed a release of the liens. On May 31, 2011, our supreme court

denied Maxwell and Streb's application for interlocutory appeal of the order discharging the liens.

On June 3, 2011, the Bank filed a motion with our supreme court to dismiss the present appeal, or in the alternative a motion for an order authorizing immediate distribution of proceeds. Maxwell and Streb resisted and on June 24, 2011, our supreme court denied both motions.

II. Standard of Review

In equitable proceedings, including Iowa Code chapter 654, our review is de novo. Iowa Code § 654.1 ("Except as provided in section 654.18, a deed of trust or mortgage of real estate shall not be foreclosed in any other manner than by action in court by equitable proceedings."); *Cnty. State Bank, Nat'l Ass'n v. Cnty. State Bank*, 758 N.W.2d 520, 524 (Iowa 2008). Our review of issues of statutory interpretation is for errors at law. *Jensen v. Sattler*, 696 N.W.2d 582, 585 (Iowa 2005).

III. Mootness

The Bank argues this appeal, that is whether the proposed sale of the real estate was commercially reasonable, should be dismissed as moot because it posted bonds to secure Maxwell and Streb's claims, and by this action the mechanics' liens have been released by the Bank and discharged by the district court.

In general, an action is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent. Our test of mootness is whether an opinion would be of force or effect in the underlying controversy. In other words, will our decision in this case have any practical legal effect upon an existing controversy?

Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537, 540 (Iowa 1997) (internal citations, internal brackets, and internal quotation marks omitted).

In 2006, the Iowa legislature enacted Iowa Code section 654.17A, which provides a mechanism by which a plaintiff may apply to the court to conduct a commercially reasonable sale of foreclosed property, free from any other claims on the property. 2006 Iowa Acts ch. 1132, § 11 (codified at Iowa Code § 654.17A) (2006)). That same year it also enacted Iowa Code section 654.9A, which provides for the release of superior liens by bond.³ 2006 Iowa Acts ch. 1132, § 7 (codified at Iowa Code § 654.9A (2006)). A bond is required to be “in an amount not less than twice the amount of the claim.” *Id.* at § 654.9A.⁴ The district court approved the Bank’s application to post bonds under Iowa Code section 654.9A, and stated that upon the Bank’s posting of the bonds, the mechanics’ liens held by Maxwell and Streb “shall be released.” Following the Bank’s release of the liens, the court discharged the liens as to the subject real estate.⁵

In foreclosure actions where a bond releasing superior liens is filed, the claimant has one year to pursue a claim on the bond. See Iowa Code § 654.9A

³ Although the statute addresses “superior liens”, the priority of Maxwell and Streb’s claims has not yet been determined in the foreclosure action.

⁴ The Bank included an exhibit containing two bonds, underwritten by Developers Surety and Indemnity, in the amount of \$338,836.58 for Maxwell’s claim, and \$196,977.82 for Streb’s claim.

⁵ We view the release bond as a mechanism that substitutes a bond for the property. See *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 19 (Iowa 2001) (stating that where a bond is filed to discharge a mechanic’s lien, the property is free of any encumbrance); see also *Hunzinger Constr. Co. v. SCS of Wis., Inc.*, 694 N.W.2d 487, 491 (Wis. Ct. App. 2005) (stating the release bond procedure for construction liens “substitutes a bond for the property”); *Mountain Ranch Corp. v. Amalgam Enters., Inc.*, 143 P.3d 1065, 1068 (Colo. App. 2005) (stating that a release bond serves to substitute for the land as the security for the debt).

(“Unless the claimant files an action on the bond within twelve months from service of the notice, the claimant shall be barred from any further remedy.”). Our appellate courts have not addressed the procedure a party must follow in suing on a release bond under Iowa Code section 654.9A. However, on March 31, 2011, the district court ordered: “[P]ursuant to Iowa Code section 654.9A that unless [Maxwell and Streb] file an action on the bond within twelve (12) months from service of the notice, [Maxwell and Streb] shall be barred from any further remedy.” The district court’s ruling is consistent with Iowa Code section 654.9A. We therefore agree with the procedure set forth by the district court, as the bonds now function to secure Maxwell and Streb’s claims, and Maxwell and Streb may pursue their claims on the bonds as provided by the statute. An opinion by this court regarding the commercial reasonableness of the sale of the real estate would not serve to reverse the order discharging the liens.

Given the procedure set forth under Iowa Code section 654.9A, we hold the release of Maxwell and Streb’s mechanic’s liens by the posting of bonds, with subsequent judicial discharge of the liens, has rendered the commercial reasonableness of the sale and this appeal moot.

APPEAL DISMISSED AS MOOT.

Eisenhauer, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent. I do not believe the issue is moot because the appellants' entitlement to proceeds from a sale, if any, is dependent on the price received for the property. Considering the manner in which the real estate commission was determined and paid, I would find that the sale was not "commercially reasonable."