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SELMA DEVELOPMENT, L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, ET AL., APPELLANTS, V. GREAT WESTERN BANK, A BANK CHARTERED UNDER THE STATE OF SOUTH DAKOTA, APPELLEE.

GREAT WESTERN BANK, A BANK CHARTERED UNDER THE STATE OF SOUTH DAKOTA, APPELLEE, V. MICHAEL P. EARL ET AL., APPELLANTS.

825 N.W.2d 215

Filed January 18, 2013. Nos. S-11-1021, S-11-1022.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Judgments vacated, and causes remanded for further proceedings.

James D. Sherrets, Diana J. Vogt, and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellee.

Mark A. Hunzeker and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for amicus curiae Home Builders Association of Lincoln.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In order to purchase and renovate an apartment building, Selma Development, L.L.C. (Selma), obtained a loan from TierOne Bank (TierOne) as evidenced by a note and secured by a trust deed. Upon a renewal of the loan, it was guaranteed with six individual guaranty agreements. Selma defaulted on the note, and the property was sold at a trustee's sale.

The sale price was insufficient to cover the amount of the debt, and TierOne brought an action seeking payment from the guarantors. Selma brought a separate action against TierOne to set aside the sale and quiet title. In response, TierOne filed a counterclaim against Selma seeking payment of the debt. The trial court consolidated the two actions. Selma dismissed its claims against TierOne, but specifically retained its affirmative defenses.

Following a hearing, the trial court determined the fair market value of the property to be $630,000, which greatly exceeded the $350,001 received from the trustee's sale. TierOne moved for summary judgment against Selma and the guarantors (collectively the defendants) on its deficiency actions. The court concluded that Nebraska's antideficiency statute, Neb. Rev. Stat. § 76-1013 (Reissue 2009), applied to Selma but not the guarantors. The court entered judgment against Selma for $306,229.99, the difference between the amount owed on the debt and the fair market value of the property. It entered judgment against the guarantors for $586,228.99, the difference between the amount owed on the debt and the amount received from the trustee's sale. The defendants appeal.

SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

Selma executed a $550,000 promissory note to TierOne on May 23, 2005, secured by a deed of trust on an apartment building located in Omaha, Nebraska. The building was a three-story 28-unit brick structure from the early 20th century. The promissory note was refinanced to $700,000 on December 5, 2005. Michael P. Earl, Louis A. Wright, Gerald W. Lee, Scott K. Schneiderman, Randall P. Roth, and Edward T. Kileen III executed separate contracts personally guaranteeing the note.

Selma made its last payment on the loan on November 2, 2006. It thereafter defaulted on the note, and TierOne elected to sell the property. A trustee's sale was set for November 28, 2007.

The defendants alleged that prior to the trustee's sale, Omaha Social Capital, LLC, had agreed to buy the property for $705,000. The trustee's sale was postponed to allow time for negotiations toward a possible sale. The trustee's sale was subsequently postponed several times. The last postponement extended the date of the sale to December 17, 2007, so TierOne could review financial information related to Omaha Social Capital's purchase of the property. At the December 17 trustee's sale, TierOne entered the first bid of $350,000. It sold the property to H & S Partnership, LLP, for $350,001.

On February 13, 2008, TierOne filed an action against the guarantors for payment of the remaining debt on the note, pursuant to the guaranty contracts. That case is docketed on appeal to this court as case No. S-11-1022.

TierOne alleged the real estate was sold at a trustee's sale for $350,001. The balance due on the note at the time of

the sale was $697,941.29, and after applying the sale proceeds ($350,001), there was a deficiency in the amount of $347,940.29 plus interest, late fees, and escrow balance for a total amount due of $424,896.09. Interest continued to accrue at $85.79 per day from December 17, 2007. TierOne also alleged that the guarantors were jointly and severally liable.

The guarantors denied the relevant allegations and asserted affirmative defenses, including failure to state the fair market value of the property as of the date of the trustee's sale, waiver and estoppel, and improper charging of fees and crediting of payments against the debt.

On February 20, 2008, the defendants filed a separate action against TierOne to set aside the trustee's sale and quiet title. That case is docketed on appeal to this court as case No. S-11-1021. TierOne denied the allegations made by the defendants. It counterclaimed, alleging the amount of the indebtedness owed by the defendants and asserting that the fair market value of the real estate sold by the trustee's sale was $350,001. It requested judgment against Selma in the amount of $347,940.29 in unpaid principal plus interest, late charges, and escrow balance.

The defendants filed a reply to the counterclaim, raising the same affirmative defenses of failure to state the fair market value of the real estate as of the date of the trustee's sale, waiver and estoppel, and improper charging of fees and crediting of payments.

The cases were consolidated by the trial court on November 13, 2008. On April 6, 2010, the defendants moved to dismiss all claims against TierOne in case No. S-11-1021, specifically reserving their affirmative defenses against TierOne, including the affirmative defenses raised by Selma in its reply to TierOne's counterclaim. At this point, TierOne believed that the remaining issue was the fair market value of the real estate and what, if any, deficiency remained under § 76-1013.

Meanwhile, TierOne was closed by the then federal Office of Thrift Supervision on June 4, 2010, and the Federal Deposit Insurance Corporation was appointed as receiver. Under a purchase agreement with the receiver, Great Western Bank assumed all of TierOne's interest in both cases. Great

Western Bank was substituted for TierOne in both actions. For consistency, we will continue to refer to the appellee as "TierOne."

Following a hearing, the trial court determined the property had a fair market value of $630,000 at the time of foreclosure. On March 10, 2011, TierOne moved for summary judgment, claiming the "pleadings, affidavits and depositions indicate that there are no genuine issue[s] of material fact and that TierOne . . . is entitled to judgment as a matter of law."

At the summary judgment hearing on May 5, 2011, TierOne claimed there were two issues that followed the trial court's determination that the fair market value of the real estate was $630,000: (1) whether the guarantors were entitled to the benefit of the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), and (2) as to the guarantors, the amount of their liability regarding the amount of the indebtedness.

The defendants objected to TierOne's characterization of the issues, claiming the order determining the fair market value was the final order in the proceedings. The trial court disagreed. A colloquy followed between the court and counsel to the effect that the affirmative defenses had not been decided by the court at the hearing on the fair market value. The court stated that the only issue that had been decided was the fair market value and that there were "a whole bunch of issues I [the court] haven't decided yet."

At the summary judgment hearing, TierOne offered numerous exhibits. The defendants also offered exhibits, and the hearing was continued to June 2011. At a June 20 hearing, TierOne requested that the trial court take judicial notice of all evidence that had been introduced by both parties up to the date of the hearing.

The trial court also took judicial notice of the court file that was offered. Additional exhibits were offered and received, and all objections were overruled. Argument was then presented on the application of the Nebraska Trust Deeds Act. No argument was made regarding the affirmative defenses set forth in the pleadings.

On November 10, 2011, the trial court sustained TierOne's motion for summary judgment, concluding that § 76-1013 of the Nebraska Trust Deeds Act did not apply to TierOne's action against the guarantors. The court found § 76-1013 covered only "an action that is 'commenced to recover the balance due upon the obligation for which the trust deed was given as security.'"

The trial court stated that TierOne's action against the guarantors was not an action to collect on an obligation for which a trust deed had been given as security, but an action to collect on the guaranties, which were separate contracts. After looking to persuasive authority in other states, the court concluded that § 76-1013 did not apply to TierOne's action against the guarantors. The guarantors were not entitled to the protection afforded to a debtor who has given a trust deed to secure an existing note of indebtedness.

The trial court entered judgment against Selma for $306,229.99, the amount of the debt ($936,229.99) minus the fair market value of the property ($630,000). It assessed the guarantors a liability of $586,228.99, the amount of the debt minus the sale price of $350,001. The court entered judgment for court costs and interest as of April 14, 2011, against both Selma and the guarantors.

The trial court's judgments were appealed on November 23, 2011, and the cases were consolidated on appeal. We moved the cases to our docket pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The defendants claim, summarized and restated, that the trial court erred (1) in finding that the terms of § 76-1013 do not apply to the obligation of the guarantors; (2) in not releasing the guarantors from their obligation, because TierOne's actions precluded the guarantors from appearing at the trustee's sale and protecting the value of the property; (3) in failing to find TierOne was estopped from seeking more than the fair market value of the property, because it started the bidding at a much lower amount than the fair market value, it accepted a bid of

$1 more than the opening bid, and it failed to mitigate its damages; and (4) in allowing TierOne to seek relief not pled prior to the court's order that determined the fair market value of the property in question.

We will group the errors into three categories: (1) errors relating to the trial court's order of February 4, 2011, which determined the fair market value of the real property in question; (2) errors relating to the affirmative defenses pled by the defendants; and (3) errors regarding the interpretation and application of § 76-1013.

ANALYSIS

February 4, 2011, Order Determining Fair Market Value

We first address the defendants' claim that the trial court's February 4, 2011, order, which determined the fair market value of the property, was a final order from which TierOne did not timely appeal. We conclude that the order was interlocutory and therefore not a final, appealable order.

[3,4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012). Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *In re Estate of McKillip, supra*.

Only the first type of final order is at issue here. To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court. Thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

The February 4, 2011, order did not dispose of the whole merits of the case. Until the trial court determined that the fair market value of the real estate was greater than the trustee's sale price, Selma was obligated to pay the difference between the amount of the debt and the sale price. The guarantors were obligated to pay the same amount. When the fair market value was determined to be greater than the sale price, Selma was entitled to the benefit of the fair market value, and its obligation was reduced accordingly. See § 76-1013. The remaining issue was whether the guarantors were entitled to the benefit of the fair market value that was afforded to the debtor under § 76-1013.

The trial court determined the fair market value of the property was $630,000, which was $279,999 more than the $350,001 received from the trustee's sale. Once the court determined the fair market value was greater than the sale price, the amount of the guarantors' liability became an issue. Pursuant to § 76-1013, Selma was liable for only the difference between the debt and the fair market value. As to the guarantors, the issue became whether they were liable for the difference between the debt and the amount received at the trustee's sale or the difference between the debt and the fair market value of the property.

Thus, the February 4, 2011, order which determined the fair market value of the property was interlocutory and not a final, appealable order. The trial court still had to resolve the affirmative defenses raised by the defendants and whether § 76-1013 applied to the guarantors.

Affirmative Defenses

On November 10, 2011, the trial court entered summary judgment in favor of TierOne. The court determined that § 76-1013 did not apply to the guarantors, and it entered deficiency judgments against Selma in the amount of $306,229.99 and against the guarantors in the amount of $586,228.99.

Because there remain material issues of fact in dispute concerning the affirmative defenses raised by the defendants, we vacate the trial court's order in which it summarily entered a judgment of deficiency against the defendants.

In our recent opinion of *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012), we discussed the requirements for summary judgment. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Id.* In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[5] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* This standard explicitly invokes the idea of sufficiency of the evidence.

> Furthermore, "[a]fter the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion."

Id. at 788, 826 N.W.2d at 234, quoting *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

TierOne argues that the defendants abandoned their claims related to how the trustee's sale was conducted because they dismissed all claims against TierOne in case No. S-11-1021. TierOne asserts the dismissal eliminated claims to set aside the trustee's sale and quiet title, as well as claims for equitable estoppel and declaratory judgment. We disagree.

In response to TierOne's counterclaim in case No. S-11-1021 and TierOne's claim in case No. S-11-1022, the defendants raised affirmative defenses. When Selma's claims against TierOne were dismissed in case No. S-11-1021, the affirmative defenses against TierOne's counterclaim were specifically reserved.

At the hearing on the motion to dismiss on April 27, 2010, the trial court noted that the affirmative defenses were not dismissed. At the first hearing on the motion for summary judgment on May 5, 2011, the court recognized that "there's a whole bunch of issues I haven't decided yet." The court then inquired as to what the issues were, noting the issues of fair market value, impairment of collateral, and amount of the deficiency. The defendants responded, "And all other affirmative defenses that we asserted in the matter."

At the hearing on summary judgment, evidence was offered and received, and the hearing was continued to June 20, 2011. At this hearing, TierOne asked the trial court to take judicial notice of the evidence already introduced. The defendants had presented evidence that TierOne promised it would contact the guarantors if the sale were to proceed on December 17, 2007, and that TierOne would bid the amount of the debt at the trustee's sale. The evidence showed that at the time of the sale, the amount of the debt was $774,897.09 and the fair market value was $630,000.

The defendants offered evidence to show that TierOne did not notify the guarantors that the sale would proceed on December 17, 2007, and that TierOne had promised to bid the amount of the debt at the sale. They also presented evidence that at least one other bidder would have attended and bid at the sale. TierOne offered evidence which disputed that it made these representations.

If the amount bid at the sale had been greater than the fair market value, Selma's liability would have been reduced. The guarantors would also benefit from an increase of the sale price. If TierOne had promised to bid the amount of the debt at the sale and had actually done so, the defendants' liability would have been extinguished. Therefore, there were material issues of fact in dispute regarding the defendants' affirmative defenses which prevented summary judgment on the amount of the indebtedness owed by the defendants. The amount of the deficiency was a material issue of fact in dispute.

Therefore, the trial court erred in granting summary judgment on this issue.

Nebraska Trust Deeds Act

The defendants claim that § 76-1013 of the Nebraska Trust Deeds Act applies to the liability of the guarantors. TierOne argues that § 76-1013 does not.

We do not reach this issue. A finding by the district court that any of the defendants' affirmative defenses are meritorious could reduce the liability of the defendants. If the district court were to find that the defendants have a valid affirmative defense because TierOne promised to bid the amount of the debt at the trustee's sale and failed to do so, the liability of all defendants would be extinguished. It would then be unnecessary to determine the application of the Nebraska Trust Deeds Act.

[6] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). Because of our determination that summary judgment was inappropriate, we do not reach or address the issue of the application of the Nebraska Trust Deeds Act. The parties may argue this issue on remand and in any subsequent appeal.

CONCLUSION

Once the trial court determined that the fair market value of the property was greater than the amount received at the trustee's sale, it had to determine whether the Nebraska Trust Deeds Act applied to the guarantors. Accordingly, its order determining fair market value was not a final order.

In order to enter judgment for a specific amount against either Selma or the guarantors, the court was required to consider the affirmative defenses raised by the defendants. The defendants offered evidence which created a genuine issue of material fact regarding their affirmative defenses, which precluded summary judgment. Because of this determination,

we do not reach the issue regarding the application of the Nebraska Trust Deeds Act.

We vacate the judgments against the defendants and remand the causes for further proceedings consistent with this opinion.

JUDGMENTS VACATED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

ZIAD L. ZAWAIDEH, M.D., APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEES.

825 N.W.2d 204

Filed January 18, 2013. No. S-12-069.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Courts: Jurisdiction: Immunity.** It is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.
6. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
7. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.