

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2638

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DONALD RUMAGE,

PLAINTIFF-APPELLANT,

V.

**ROBERT M. GULLBERG, JANET GULLBERG, ADVANTAGE
BANK F.S.B., AND THE BANK OF ELMWOOD,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County:
DENNIS FLYNN, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. This is a judgment lien foreclosure case. The issue is whether a properly docketed judgment in favor of Donald Rumage against Reinier Kemeling, a former owner of the property, constituted a valid lien which Rumage could foreclose against the current owners, Robert and Janet

Gullberg. At summary judgment, the trial court ruled that Ramage's lien was not valid because Kemeling's previous sale of the property did not produce an equity in excess of Kemeling's homestead interest in the property. Because we hold that a material issue of fact exists as to whether the sale price was for "fair value," we reverse and remand for further proceedings.¹

FACTS

The chronology of the relevant events are as follows. Kemeling purchased the property as his homestead in February 1978 for \$178,000. He financed the purchase with a mortgage from Northside Bank (Northside) in the amount of \$135,000.² In May 1986, Ramage docketed a judgment for \$122,359.90 against Kemeling in the circuit court of Racine county.

¹ Ramage raises other issues, including a claim that his judgment lien has priority over the Gullbergs' interest in the property. However, the trial court did not address these issues because of its threshold ruling that Ramage's lien did not attach because the property was Kemeling's homestead. Because we are reversing this ruling and remanding for further proceedings, these issues can now be considered by the trial court. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

As to Ramage's priority argument, we direct the parties' attention to a recent holding of this court that a successor owner of homestead property may not assert a homestead exemption defense to a foreclosure action based upon a judgment against the prior homestead owner. See *EPF Corp. v. Pfost*, No. 96-0006 (Wis. Ct. App. Apr. 7, 1997, ordered published May 27, 1997). This decision was released after the trial court proceedings in this case. While Ramage raised this as a defense in his answer to the Gullbergs' counterclaim, he did not pursue this potential defense at the summary judgment proceedings. He does raise this issue on appeal, but only in his reply brief, by challenging the Gullbergs' standing to assert Kemeling's homestead exemption. We do not address issues raised for the first time in a reply brief. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508 (Ct. App. 1995). The effect of *EPF* on this case can be debated by the parties in the trial court upon remand should Ramage choose to pursue the issue.

² Kemeling later executed two additional mortgages to private individuals in the amounts of \$14,285 and \$19,000 respectively.

On January 13, 1989, Northside commenced a mortgage foreclosure action against Kemeling. On that same day, Kemeling filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Wisconsin. In his bankruptcy petition, Kemeling identified the property as his homestead, thus qualifying for the homestead exemption. On February 27, the bankruptcy court lifted the automatic stay against Northside's foreclosure action and on March 20, 1989, a judgment was entered in the foreclosure action ordering a sheriff's sale of the property.

On May 30, 1989, during the six-month period of redemption, Kemeling privately sold the property to Gary L. Burmeister for \$165,000. After paying off the mortgages, delinquent taxes and related expenses, Kemeling netted \$19,500 from the sale. Thirty-seven days later, on July 9, Burmeister sold the property to the current owners, the Gullbergs, for \$192,000. Rumage had no knowledge of any of these sales.

On December 28, 1995, Rumage commenced this foreclosure action against the Gullbergs seeking to foreclose his judgment lien on the property.³ The Gullbergs counterclaimed seeking declaratory relief vacating Rumage's judgment lien and then moved for summary judgment. They argued that Rumage's lien never attached to the property because Kemeling's sale to Burmeister did not produce an equity amount in excess of Kemeling's \$40,000 homestead exemption. Rumage responded with his own motion for partial summary judgment, requesting

³ Rumage also named Advantage Bank F.S.B. and The Bank of Elmwood as additional defendants since each held mortgages executed by the Gullbergs. We will collectively refer to the defendants as the Gullbergs.

the trial court to declare that his lien had priority over the Gullbergs' interest in the property.

The trial court granted the Gullbergs' motion for summary judgment. In support of its ruling, the court noted that the equity amount realized by Kemeling from the sale, after the payment of the mortgages, taxes and related expenses, was less than the \$40,000 homestead exemption. Thus, the court concluded that Rumage did not have a valid lien against the property. Rumage appeals.

DISCUSSION

We independently decide whether summary judgment is appropriate without giving deference to the trial court's ruling. *See Schaller v. Marine Nat'l Bank*, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Nonetheless, we value a trial court's ruling on such a matter. *See Scheunemann v. City of West Bend*, 179 Wis.2d 469, 475-76, 507 N.W.2d 163, 165 (Ct. App. 1993). This is so whether we agree or disagree with the court's holding.

Summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party has established entitlement to judgment as a matter of law. *See Germanotta v. National Indem. Co.*, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting factual interpretations or inferences, summary judgment must be denied. *See State Bank of La Crosse v. Elsen*, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986).

The issue in this case is whether Rumage possessed a valid judgment lien which can be foreclosed against the property now owned by the Gullbergs.

The Gullbergs argue that the property was Kemeling's homestead at the time of the conveyance to Burmeister and that pursuant to § 806.15(1), STATS.,⁴ Rumage's judgment lien did not attach to homestead property because the sale did not produce net proceeds to Kemeling in excess of the \$40,000 homestead exemption set out in § 815.20(1), STATS. As we have noted, the trial court agreed. Rumage argues that this ruling was error because Kemeling's sale to Burmeister was not for fair value.

Whether Rumage's judgment lien on the property survived Kemeling's sale of the property to Burmeister depends upon whether Kemeling's equity in the property exceeded the statutory limitation to the homestead exemption. *See* § 815.20, STATS. Taking the sale price agreed to between Kemeling and Burmeister at face value, the resulting equity amount paid to Kemeling falls below the homestead exemption. As such, Rumage's lien did not survive the sale.

However, the sale price of property sold at a sheriff's sale during a foreclosure action must represent "fair value." *See Kremer v. Rule*, 216 Wis. 331, 339, 257 N.W. 166, 169 (1934); *First Wis. Nat'l Bank v. KSW Inv., Inc.*, 71 Wis.2d 359, 365-66, 238 N.W.2d 123, 127 (1976). Here, the property was sold at a private sale, not a sheriff's sale. However, a private sale cannot extinguish the lien of a lienholder. *See Carefree Homes, Inc. v. Production Credit Ass'n*, 81 Wis.2d 541, 551, 260 N.W.2d 759, 764 (1978). This principle is all the more true, we conclude, when the private sale occurs during the period of redemption.

⁴ This subsection has been amended. *See* 1995 Wis. Act 224, § 76. The changes do not affect our analysis.

Despite their other disagreements, the parties properly agree that the Kemeling sale to Burmeister must satisfy the “fair value” test.

In ruling on the question of fair value, the trial court noted that the lower price in the Kemeling/Burmeister sale, as compared to the higher price shortly thereafter in the Burmeister/Gullberg transaction, was due to the fact that the property was in foreclosure. The court took judicial notice that sales of property under those circumstances often produce a lower sales price. We have no quarrel with this general statement. However, we nonetheless conclude that, under the particular facts of this case, the question of the *proper* fair value was not a matter which could be determined at summary judgment.

We say this acknowledging that the summary judgment factual record is not in dispute. However, undisputed facts, as well as disputed facts, can create material issues necessitating a trial. Summary judgment is appropriate only if there is no genuine issue about both the material facts and the inferences that can reasonably be drawn from those facts. *See* § 802.08(2), STATS.; *See also Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis.2d 437, 446, 492 N.W.2d 131, 134(1992).

The relevant facts are these. Kemeling bought the property in 1978 for \$178,500. Eleven years later, he sold the property to Burmeister for \$165,000—\$13,500 less than what he paid for it. While that alone may not raise a material issue of fact as to fair value, at a minimum it raises a suspicion. However, when that history is complemented by the fact that a mere thirty-seven days later Burmeister sold the property to the Gullbergs for \$192,000—\$25,000 above his purchase price—we conclude that a clear issue of material fact was presented as to whether the Kemeling/Burmeister sale produced fair value. The

inference which the trial court drew from these facts—that the sale was arm’s length and produced fair value—may ultimately prove correct. However, the inference which Rumage urges—that the sale did not produce fair value—is also supported by these same facts. Had Kemeling received \$192,000 for his homestead property—as did Burmeister one month later—Kemeling’s equity interest in his homestead property would have exceeded the statutory limit and Rumage’s lien would have been enforceable against such interest.

Under these facts, we cannot say that the Gullbergs have demonstrated a right to summary judgment with such clarity as to leave no room for controversy. See *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). The facts allow for reasonable competing inferences on this critical issue.⁵

We reverse the order granting summary judgment and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

⁵ The Gullbergs additionally argue on appeal that Rumage is attempting to prove a fraudulent transfer of property from Kemeling to Burmeister. They claim that the statute of limitations has expired on this action. See § 893.425, STATS. However, our examination of the record does not reveal that the Gullbergs raised this issue in the trial court. As such, we are not obligated to address the issue. See *Zeller v. Northrup King Co.*, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985). And, in any event, Rumage’s action is one for foreclosure of a lien—not fraudulent conveyance. Such a lien is valid for a period of ten years. See § 806.15(1), STATS. Rumage commenced this action within this statutory time period.

We also reject the Gullbergs’ related argument that Rumage is guilty of laches in failing to assert his lien claim earlier. In support of this argument, the Gullbergs state that “[they] were not aware of the plaintiff’s judgment when they purchased the real estate and they have spent \$68,140 in non-cosmetic improvements.” However, it is undisputed that Rumage’s lien was properly docketed and a matter of public record. As noted above, such a lien is valid for a period of ten years. See *id.* Thus, the Gullbergs’ ignorance of Rumage’s lien was due to their own failure. Laches is an equitable defense. See *Kenosha County v. Town of Paris*, 148 Wis.2d 175, 188, 434 N.W.2d 801, 807 (Ct. App. 1988). One who seeks equity must have clean hands. See *id.*

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