

State of Minnesota
Olmsted County

District Court
Third Judicial District

Court File Number: **55-CV-11-928**

Case Type: Civil Other/Misc.

DONALD C MACDONALD
90 S SEVENTH ST STE 2200
MINNEAPOLIS MN 55402-3901

Notice of:

- | | |
|-------------------------------------|------------------------------|
| <input checked="" type="checkbox"/> | Filing of Order |
| <input type="checkbox"/> | Entry of Judgment |
| <input type="checkbox"/> | Docketing of Judgment |

BARBARA LOUISE FURLOW vs HSBC Bank USA as trustee for MANA 2007-A1 by assignment from Mortgage Electronic Registration Systems Inc as nominee for lender First National Bank of Arizona, Galaxy Publications LLC

You are hereby notified that the following occurred regarding the above-entitled matter:

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | An Order was filed on June 07, 2011. |
| <input type="checkbox"/> | Judgment was entered on . |
| <input type="checkbox"/> | You are notified that judgment was docketed on
at in the amount of \$. Costs and interest will accrue on this amount from the
date of entry until the judgment is satisfied in full. |

Dated: June 8, 2011

Charles L. Kjos
Court Administrator
Olmsted County District Court
151 S.E. 4th Street 5th Floor
Rochester MN 55904
507-206-2400

cc: JEFFERY ADAM MINTZ
MELANIE JAYNE LETH

A true and correct copy of this Notice has been served by mail upon the parties named herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA
COUNTY OF OLMDSTED

IN THE DISTRICT COURT
CIVIL DIVISION
THIRD JUDICIAL DISTRICT

Barbara Louise Furlow,
Plaintiff,

vs.

ORDER

Court File No. 55-CV-11-928

HSBC Bank USA, as Trustee for MANA 2007 A1,
by assignment from Mortgage Electronic
Registration Systems, Inc., a Delaware corporation
as nominee for lender First National Bank of
Arizona, N.A., and Galaxy Publications, LLC, a
Minnesota limited liability company,

Defendants.

On April 27, 2011, the above matter came before the Honorable Jodi L. Williamson, Judge of District Court, for hearing on Defendant's motions to dissolve/vacate the preliminary injunction.

APPEARANCES: **Jeffery A. Mintz, Esq.**, Law Offices of Jeffery A. Mintz, 3257 19th Street NW, Rochester, Minnesota, appeared on behalf of Plaintiff. **Ellen B. Silverman, Esq.**, Faegre & Benson, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, Minnesota, appeared on behalf of Defendant HSBC Bank USA. **Melanie J. Leth, Esq.**, Weber & Leth, PLC, 38 West Main Street, P.O. Box 130, Dodge Center, Minnesota, appeared on behalf of Defendant Galaxy Publications, LLC.

FILED

JUN 07 2011

COURT ADMINISTRATOR
Olmsted County, MN

The Court issued an order for preliminary injunction following a hearing on February 14, 2011. There was no appearance by any of the named Defendants at said hearing.

Following the February 14, 2011 hearing, the respective Defendants retained counsel, filed answers and moved to dissolve/vacate the injunction.

At the hearing on April 27, 2011 each Defendant acknowledged due and proper service of the summons and complaint and the ex-parte temporary restraining order.

At the hearing Attorney for Plaintiff and Attorney for Defendant HSBC agreed to amend the language in the Order for Preliminary Injunction to "toll the redemption period" in lieu of voiding the sale.

At the hearing, Attorney for Galaxy moved to vacate paragraph 5 of the Order for Preliminary Injunction. Attorney for Plaintiff opposed the motion.

Following the hearing, Attorney for HSBC submitted a proposed Order for signature that went beyond the scope of the agreement at the hearing. Attorney for Plaintiff objected to the proposed Order and submitted her own proposed order.

Based upon the hearing held, the arguments and submissions of counsel, and all the files and records herein, the court vacates paragraph 4 of the Order.

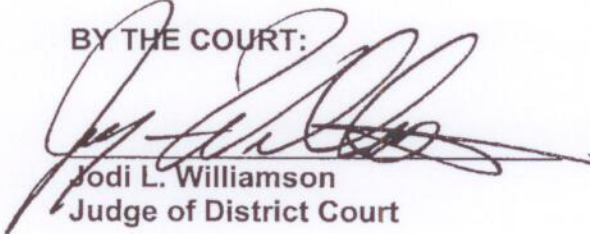
IT IS ORDERED:

1. That based upon the agreement of the parties the redemption period pursuant to the foreclosure is tolled pending further proceedings or resolution by the parties.

2. That Defendant Galaxy Publications, LLC motion to vacate paragraph 5 of the Order for Preliminary Injunction is denied.
3. That the attached memorandum is incorporated herein.

Dated: June 7, 2011

BY THE COURT:



Jodi L. Williamson
Judge of District Court

MEMORANDUM

FACTS

This matter arises from a foreclosure sale of certain property ("Property") located in Northwest Rochester on August 6, 2010. Plaintiff Barbara Louise Furlow ("Plaintiff") and her husband, Bruce Ekhoﬀ,¹ were co-owners of a certain parcel of residential real estate ("Property") located in the City of Rochester. Defendant HSBC Bank USA ("HSBC") is the trustee for MANA 2007-A1 ("Lender"), the holder of a mortgage and note (collectively, "Mortgage") on the Property. Plaintiff's failure to comply with the payment terms of the Mortgage resulted in a default. Accordingly, Lender began a foreclosure by advertisement and published notice in the *Stewartville Star* ("*Star*") newspaper, published by Defendant Galaxy Publications ("Galaxy"), that a sheriff's sale would occur on August 6, 2010. It is undisputed that Lender knew the location of the area and person that would be affected by the substance of the notice published.

The *Star* is listed with the Office of the Minnesota Secretary of State as a legal newspaper. It purports to serve the Minnesota communities of High Forest, Pleasant Grove, Racine, Rock Dell, Stewartville, and Sumner Center.² The newspaper does not advertise or market itself as an Olmsted County publication and, in fact, two of the communities it purports to serve are located in counties other than Olmsted.³

Plaintiff states that she did not become aware of the notice published in the *Star* until October 2010. Defendants respond that Ekhoﬀ was personally served with notice

¹ Plaintiff commenced a dissolution proceeding against Ekhoﬀ on October 4, 2010. It is unclear from the record if this corresponds to her discovery that the foreclosure notice was published in the *Star*.

² See generally <http://thinkstewartville.com/>. An affidavit submitted by an employee of Plaintiff's counsel states that a Galaxy employee informed her the *Star* also is distributed in Grand Meadow, Chatfield, Spring Valley, and "55904 rural Rochester"—all of which are to the south and east of the Property. Grand Meadow is in Mower County, Spring Valley is in Fillmore County, and Chatfield straddles the border of Olmsted and Fillmore Counties.

³ Racine is in Mower County, while Sumner Center is located in Fillmore County.

of the sale on May 26, 2010, and that Plaintiff therefore was "served by substitute." Counsel for Plaintiff filed a request for an ex parte temporary restraining order on February 4, 2011, to prevent Lender from taking possession of the Property at 11:59 p.m. on February 7, 2011.⁴ The Court granted Plaintiff's request and a hearing was scheduled for February 14, 2011, to determine whether Plaintiff should be granted temporary relief.

Plaintiff appeared through counsel at the February 14 hearing, but neither Lender nor Galaxy appeared. Accordingly, the Court inquired of Plaintiff's counsel whether he had proof of service of the motion and notice of the hearing. Plaintiff provided the necessary documents. The Court also inquired as to the Plaintiff's connection, if any, to Stewartville to determine the propriety of the Lender's publication of the notice therein. Plaintiff's counsel stated that neither Plaintiff nor the Property had any known connection to Stewartville or the *Star*. He then requested the Court to declare that the *Star* was not a qualified newspaper for properties lying outside the bounds of its regular distribution area.⁵ The Court issued an order to this effect on February 15, 2011 at paragraph 5 of said order.

On April 27, 2011, the Court presided over a hearing to determine whether Defendants' motion to dissolve/vacate the preliminary injunction should be granted. Galaxy requested that the Court vacate paragraph 5 of the Order, declaring that the *Star* is not a qualified newspaper for the purpose of publishing legal notices that affect the Property. Galaxy asserted that the *Star* is a qualified newspaper because

⁴ February 7, 2011, marked the closing date of the statutory redemption period mandated by Minn. Stat. § 580.23 (2010).

⁵ Plaintiff also moved to enjoin Lender from taking possession of the Property, to stay the expiration of the redemption period until a properly noticed sale could be completed, and to declare that the August 2010 foreclosure sale was void.

Minnesota Statute § 331A.01 includes counties in its definition of "political subdivision." Because the *Star* is published in Olmsted County and the Property also is located in Olmsted County, Galaxy reasoned that the *Star* is a qualified newspaper for legal notices affecting the Property. Galaxy therefore claimed that the Court's Order contradicts the plain meaning of the statute and that allowing the order to stand "would call in question every judgment obtained in an action commenced by publication . . . in a newspaper not located in the city in which the Defendant resides."

STATEMENT OF LAW

Chapter 331A of Minnesota Statutes establishes the minimum requirements a publication must meet in order to be deemed a qualified newspaper for purposes of publishing public notices. *See generally* Minn. Stat. §§ 331A.01 *et seq.* (2010). One such requirement is that the newspaper "be circulated in the political subdivision which it purports to serve." Minn. Stat. § 331A.02, Subd. 1(d) (2010). The term "political subdivision" includes both counties and cities. Minn. Stat. § 331A.02, Subd. 3-4 (2010). But publication in a qualified newspaper is not sufficient by itself to provide notice to the public. Minn. Stat. § 331A.03, Subd. 1 (2010). Rather, the law requires that the qualified newspaper selected to publish legal notice be one "that is likely to give notice in the affected area or to whom it is directed." *Id.* (emphasis added). Because foreclosure by advertisement is a statutory creation, this and other statutory notice requirements must be complied with strictly. *See e.g. Jackson v. Mortgage Electronic Registration*, 770 N.W.2d 487, 494 (2009); *Moore v. Carlson*, 128 N.W. 578, 579 (1910).

Although little to no case law exists that interprets Chapter 331A, a 1986 Minnesota Court of Appeals case is instructive on when a qualified newspaper is considered "likely to give notice." *See generally Electro-Measure, Inc. v. Ewald Enterprises, Inc.*, 398 N.W.2d 85 (Minn. App. 1986). In *Electro-Measure, Inc. v. Ewald Enterprises, Inc.*, the plaintiff was a Wisconsin resident and the defendant was a Minnesota resident. *Id.* at 87. The plaintiff had contact information for the defendant at two Minnesota business addresses and became aware of a new forwarding address after mail sent to one of the known addresses was returned. *Id.* Nevertheless, the plaintiff resorted to service by publication in the Wisconsin county where it resided after several unsuccessful attempts to serve the defendant personally through the local Minnesota sheriff's office. *Id.* The defendant failed to appear at the hearing and a default judgment was entered against him. *Id.* at 88. The defendant later filed and was granted a motion in Minnesota District Court to vacate the Wisconsin judgment based on insufficient notice. *Id.*

On appeal, the Minnesota Court of Appeals was required to interpret Wisconsin's legal notice publication statute. *Id.* The statute required that legal notice be published in a newspaper "likely to give notice in the area or to the person affected." *Id.*; *see also* Wis. Stat. § 985.02 (1985).⁶ The appellate court determined that this language codified the mandate articulated by the United States Supreme Court in *Mullane v. Central Hanover Bank and Trust*: "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested

⁶ This language is nearly identical to that in Minnesota's publication statute. Minn. Stat. § 331A.03, Subd. 1 (2010); *see also* Page 3, *supra*.

parties of the pendency of the action.”⁷ *Electro-Measure*, 398 N.W.2d at 88 (citing *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950)).

Accordingly, the Court of Appeals affirmed the lower court’s determination that a legal notice published in a Wisconsin paper was insufficient for a known resident of Minnesota because such publication was not likely to notify the defendant of the pending proceeding.

ANALYSIS

Publication of a legal notice affecting the Property at 4424 56th Street Northwest, Rochester, in the *Star* does not meet the notice requirement mandated by Minn. Stat. § 331A.03. It is not sufficient that the *Star* is published in the same county wherein the Property lies without a showing that a legal notice published in the *Star* was likely to give notice in Northwest Rochester or to Plaintiff. Plaintiff does not work in Stewartville, does not live in Stewartville, and does not have any known ties to Stewartville. That the *Star* is not likely to give notice to the person affected by this foreclosure notice, specifically Plaintiff, is demonstrated by the fact that Plaintiff did not, in fact, learn of the publication until several months after such publication occurred. Furthermore, the *Star* is a localized newspaper that advertises itself as and purports to be the newspaper for six different municipalities—none of which is Rochester and two of which lie outside the bounds of Olmsted County.

⁷ In *Mullane*, the Supreme Court weighed the sufficiency of a New York statute that merely required legal notice to be published in any newspaper. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). In holding that sufficient notice is that which is “reasonably calculated” to apprise interested parties of the fact their rights might be affected, the Court commented that, “It is not an accident that the greater number of cases reaching this court on the question of adequacy of notice have been concerned with actions founded on process through local newspapers.” *Id.* at 315.

Contrary to Galaxy's assertion, the Court's holding does not cast a shadow over all judgments obtained through publication in newspapers that are published in municipalities other than ones in which defendants or other affected parties reside. More importantly, the Court's holding does not challenge the *Star's* status as a qualified publication for other properties or other parties not involved in this matter. Instead, the Court's Order upholds the plain meaning of the statute as it relates to *this* particular publication, *this* particular Property, and *this* particular Plaintiff by requiring notice to be published in a qualified newspaper likely to give notice to her. It is not likely that a newspaper with a circulation of approximately one thousand issues that purports to serve six rural communities outside and to the southeast of the City of Rochester—some of which are not even located in Olmsted County—would be likely to give notice to the area of, or a resident living in, Northwest Rochester. For the foregoing reasons, Galaxy's motion to vacate paragraph 5 of the Order, that publication of a legal notice affecting this Property in the *Stewartville Star* does not comply with the requirements of Minn. Stat. § 331A.03 is denied.

JLW