IN THE COURT OF APPEALS OF IOWA

No. 2-1062 / 12-0064
Filed February 13, 2013

LARRY D. SCHAEFFER and ELAINE M. SCHAEFFER,
Plaintiffs-Appellants,

vs.

DALE L. PUTNAM, PUTNAM LAW OFFICE, SMP, L.L.C., LIBERTY BANK, F.S.B., G.R.D. INVESTMENTS, L.L.C., RAYMOND SCHAEFER and DEAN SCHAEFER,
Defendants-Appellees.

LIBERTY BANK, F.S.B., Successor By Merger to Hancock County Bank & Trust,
Counterclaimant,

vs.

LARRY D. SCHAEFER and ELAINE M. SCHAEFER,
Defendants to Counterclaim.

LIBERTY BANK, F.S.B., Successor By Merger to Hancock County Bank & Trust,
Cross-Claimant,

vs.

DALE L. PUTNAM, PUTNAM LAW OFFICE, G.R.D. INVESTMENTS, L.L.C., RAYMOND SCHAEFER, DEAN SCHAEFER, JENNIFER SCHAEFER, SMP, L.L.C., JESSICA LYNN KRAGEL n/k/a JESSICA OLMSTEAD. MORT'S, INC., FARMERS MUTUAL HAIL INSURANCE COMPANY, STATE OF IOWA,

DUALE STAR, INC., FRED HOIBERG'S CLARION AUTO CENTER INC., MIDWESTONE BANK; UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, CHARLES BRADLEY PRICE, DEALER SERVICES CORPORATION and PARTIES IN POSSESSION,
Defendants in Cross-Claim.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Larry and Elaine Schaeffer challenge the district court's subject matter jurisdiction over a counterclaimant's foreclosure action and appeal a separate order refusing to quash a sheriff's levy on their appellate rights in money damages sought in a civil suit. **REVERSED AND REMANDED IN PART, AFFIRMED IN PART.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Bernard L. Spaeth of Whitfield & Eddy, P.L.C., Des Moines, for appellee Liberty Bank, F.S.B.

William W. Graham of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellee SMP, L.L.C.

Dale Putnam of Putnam Law Office, Decorah, for appellee Putnam.

Raymond Schaefer, Rockwell, appellee pro se.

Dean Schaefer, Mason City, appellee pro se.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

This case involves two consolidated appeals brought by property owners Larry and Elaine Schaefer against creditor SMP, L.L.C. and Dale Putnam. In the first matter, the couple contends the district court lacked subject matter jurisdiction to hear SMP's counterclaim to foreclose the mortgage on their forty-acre farmstead. Because we interpret the farm mediation requirement in Iowa Code section 654A.6(1) (2009) to apply to counterclaims, we reverse the foreclosure against the agricultural property and remand for dismissal without prejudice.

In the second matter, the Schaefers argue the district court improperly ruled Putnam could levy for unpaid attorney fees against their right to appeal from their unsuccessful legal malpractice action. Because "choses in action" under Iowa Code section 626.21 encompasses a debtor's right to appeal the denial of his or her claims for money damages, the district court correctly determined those rights are subject to levy. We disagree with Putnam's assertion the issue is moot, and hold the district court did not abuse its discretion in refusing to grant the Scheafers' motion to stay execution.

I. Background Facts and Proceedings

On September 28, 2008, Larry and Elaine Schaefer filed suit against multiple parties including their former attorney Dale Putnam and SMP, L.L.C.[1] The Schaefers claimed Putnam was negligent in advising them to transfer

[1] Because this appeal addresses only claims and counterclaims involving Larry and Elaine Schaefer, Putnam, and SMP, we will not belabor the history of the case as it pertains to the Schaefers' sons and other peripheral entities.

property to a separate business entity to stave off creditor claims. The Schaefers also alleged a breach of fiduciary duty by Putnam and SMP—a limited liability corporation set up by Putnam and his wife to secure the Schaefers' loans as mortgages on their property. The Schaefers asserted that the breach of duty rendered the mortgages unenforceable.

Putnam counterclaimed for unpaid attorney fees. SMP also counterclaimed, seeking to foreclose on all mortgages including its $85,000 mortgage on the Schaefers' homestead and surrounding forty acres of farmland. The SMP claim asserted "[d]ue to the Plaintiffs filing their Petition, and the claim of SMP constituting a compulsory counterclaim, there is no requirement for mediation or a Notice to Cure."

The district court bifurcated the proceedings and held a jury trial on the Schaefers' claims against Putnam and SMP on February 8, 2011. The jury rejected the Schaefers' claims and awarded Putnam $12,200 in unpaid legal fees.[2] On June 6, 2011, the court entered judgment in rem in favor of SMP for $149,596.80 on the homestead agricultural property plus $86,079.25 in attorney fees. The Schaefers subsequently received a notice of sheriff's levy and sale of property including the homestead on behalf of SMP dated September 7, 2011.

In response, the Schaefers filed a motion to quash the sale, claiming SMP failed to obtain a mediation release as required by Iowa Code section 654A.6 before foreclosing on the mortgage, and asserting the homestead is subject to a one-year right of redemption. On December 7, 2011, the district court imposed

[2] The Schaefers' appeal of that verdict is not before us here.

the one-year redemption period, but rejected the Schaefers' argument that SMP's failure to obtain a mediation release before initiating foreclosure deprived the court of subject matter jurisdiction over the counterclaim. The Schaefers appealed the order denying their motion to quash.

The couple also received a notice of sheriff's levy and sale based on Putnam's $12,200 judgment for attorney fees. Issued on Putnam's behalf, the notice levied upon "[a]ll the right, title and interest" of the Schaefers to appeal the suit. Addressing their motion to quash, the district court held that under Iowa Code section 626.21, Putnam could levy on the Schaefers' appeal rights relating to their money damage claims, but not on claims brought against them. Because the order cancelled the sale, Putnam again levied on the couple's right to appeal. The district court denied the Schaefers' motion to quash and they appealed.

Our supreme court consolidated the Schaefers' two appeals in an order filed June 27, 2012.

II. Standards of Review

We assess rulings on subject matter jurisdiction for errors at law. *Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006). Questions of statutory construction also call for legal-error review. *Zimmer v. Vander Waal*, 780 N.W.2d 730, 733 (Iowa 2010).

To the extent the question on appeal is whether the district court should have stayed execution of the judgment for attorney fees, we would reverse only upon finding an abuse of discretion. *See Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 304 (Iowa 1994).

III. Analysis

A. Did the District Court Have Jurisdiction over SMP's Foreclosure Counterclaim Absent a Mediation Release?

This issue centers on Iowa Code section 654A.6—legislation requiring agricultural property creditors to obtain a mediation release before beginning foreclosure proceedings. It reads, in pertinent part:

> A creditor subject to this chapter desiring to initiate a proceeding to enforce a debt against agricultural property which is real estate under chapter 654 . . . shall file a request for mediation with the farm mediation service. The creditor shall not begin the proceeding subject to this chapter until the creditor receives a mediation release, or until the court determines after notice and hearing that the time delay required for the mediation would cause the creditor to suffer irreparable harm.

Iowa Code § 654A.6(1)(a).

The Schaefers argue because SMP failed to obtain a mediation release before filing its counterclaim seeking to foreclose against their homestead, marked as agricultural property, the district court lacked subject matter jurisdiction to hear the counterclaim. On appeal, as in the district court, the Schaefers rely on *Klinge v. Bentien*, 725 N.W.2d 13 (Iowa 2006), in which our supreme court interpreted a similar mediation provision in Iowa Code chapter 654B.

Counsel for SMP contends the mediation prerequisite does not apply in this case because SMP did not "desire" to "initiate" a proceeding to enforce its debt, but the creditor felt compelled to pursue the foreclosure action as a

compulsory counterclaim under Iowa Rule of Civil Procedure 1.241.[3] SMP would have us construe counterclaims as falling outside the terms of section 654A.6(1)(a).

The district court accepted SMP's argument, focusing on the statutory term "initiate." The district court held:

> The requirement of obtaining a mediation release is applicable to a party ". . . desiring to *initiate* a civil proceeding." (emphasis added). The requirement is jurisdictional. *Klinge* at 18. In *Klinge* the court concluded that both the plaintiff's claim and the defendant's counterclaim should have been dismissed due to the plaintiff's failure to obtain a mediation release. In the present case, [] Larry and Elaine Schaefer initiated the lawsuit. No claim is being made that they failed to obtain a mediation release. Therefore, the court concludes that *Klinge* is distinguishable and that SMP was not required to obtain a mediation release before filing its compulsory counterclaim as it did not "initiate" the case.

We note the district court was quoting *Klinge*, which interpreted the following sentence in section 654B.3(1)(a): "A person who is a farm resident, or other party, desiring to initiate a civil proceeding to resolve a dispute, shall file a request for mediation with the farm mediation service." At issue in this case, however, is the slightly different language from section 654A.6(1)(a): "A creditor subject to this chapter desiring to initiate a proceeding to enforce a debt against agricultural property . . . ." Accordingly, the apt question is not whether SMP

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[3] Iowa Rule of Civil Procedure 1.241 provides:

> A pleading must contain a counterclaim for every claim then matured, and not the subject of a pending action, held by the pleader against any opposing party and arising out of the transaction or occurrence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be acquired. A final judgment on the merits shall bar such a counterclaim, although not pleaded.

initiated the lawsuit, but whether, as the farm creditor, SMP initiated a proceeding to enforce its debt—triggering the requirement to mediate.

Before engaging in statutory interpretation, we must decide whether the words or phrases in question are ambiguous. *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011). If the statute lacks ambiguity, we examine only its express language. *Id.* But if the terminology is ambiguous, we look for clues as to the legislative intent, including the history of the statute. *Id*. at 565. If reasonable minds may disagree as to its meaning, then a statute is ambiguous. *Id*. at 564. Ambiguity emanates from the meaning of particular words, as well as the general scope of the provision as a whole. *Id*. (describing words as "chameleons, drawing their color from the context in which they are found").

We find the terms of section 654A.6(1)(a)—as applied to SMP's counterclaim—to be subject to at least two plausible interpretations, and therefore ambiguous. Accordingly, we find it helpful to inquire into the legislature's intent in enacting this farm mediation requirement.

The Iowa general assembly enacted chapter 654A in 1986 in response to a crisis in the agricultural economy. 1986 Iowa Acts ch. 1214, § 1. Thousands of Iowa farmers were unable to meet their financial obligations and were in jeopardy of losing farmland, equipment, crops, and livestock through foreclosure and other collection actions. *Id.* The mandatory mediation legislation sought to alleviate tension between farmers and bankers. Bethany Verhoef Bands, Thomas M. Johnston, & Jill Korenevich Harker, *The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views on Mandatory Farm Mediation*, 79 Iowa L. Rev.

653, 674 (1994). Section 654A.6(1) remains largely unaltered since its passage, except for the general assembly's addition of subsection (b), which clarified that the farm mediation requirements were "jurisdictional prerequisites to a creditor filing a civil action that initiates a proceeding subject to this chapter." 2000 Iowa Acts ch. 1129, § 1.

In *Klinge*, our supreme court explained that the 2000 amendments to chapters 654A and 654B marked a reaction to *Rutter v. Carroll's Foods of the Midwest, Inc.*, 50 F. Supp. 2d 876, 881–82 (N.D. Iowa 1999), in which the federal district court opined that mediation under the Iowa statute was a condition precedent to suit rather than a jurisdictional requirement. *Klinge*, 725 N.W.2d at 17. Given the legislative response to *Rutter*, the *Klinge* court concluded a mediation release was a prerequisite to an Iowa court securing subject matter jurisdiction, and in the absence of a release, the small claims and district court orders in that case were void. *See id*. ("The legislature has merely made a policy decision that farm disputes shall be mediated before a suit is filed.").

The Schaefers cite *Klinge* to bolster their contention that the legislative policy decision mandating creditors submit to mediation before initiating a proceeding to enforce a debt on agricultural property applies to SMP's counterclaim. SMP distinguishes *Klinge* because in that case the party initiating the underlying action did not request mediation. SMP argues, as the counterclaimant, it was not required to comply with section 654A.6(1)(a) because it did not "wish to initiate a foreclosure action," but did so "out of necessity" in response to the Schaefers' suit.

We acknowledge *Klinge* does not settle the ultimate question in this case: Is a creditor who seeks to file a foreclosure action as a counterclaim subject to the mediation requirement in section 654A.6(1)(a)? But we do find the legislative history of the farm mediation requirements outlined in *Klinge* supports a broader reading of the statute than urged by SMP. The legislature obviously believed that mediation was an important protection for farmers facing creditors' actions to enforce debts against agricultural property when it responded to *Rutter* by clarifying that a mediation release was not merely a condition precedent to initiating an action, but a jurisdictional prerequisite.

We are not persuaded by SMP's argument that it did not "desire" to initiate the foreclosure action, but did so only as required by rule 1.241. Assuming, without deciding, SMP's counterclaim was compulsory, SMP still desired to pursue the matter, even if the creditor did not control the timing of the proceeding. SMP could have foregone legal action, but instead opted to enforce its debt against the Schaefers' agricultural property through the courts. In other words, we do not read the word "desire" as describing only a litigant's choice to file an original claim—as opposed to a litigant's decision to respond with a counterclaim.

Turning to the word "initiate" in section 654A.6(1)(a), we do not believe the term refers only to the action of the party originally filing the lawsuit. To be true to the legislature's intent that creditors pursue mediation before litigation, we ascribe a more encompassing interpretation to the statute. We find it useful to consider the entire phrase at issue: "desiring to initiate a proceeding to enforce a

debt against agricultural property." Iowa case law views a "proceeding" as more than an original claim, action or lawsuit. Our supreme court has defined the term "proceeding" as "all the steps or measures adopted in the prosecution or defense of an action" and generally as "the form and manner of conducting judicial business before a court or judicial officer" or more particularly as "any application to a court for aid in the enforcement of rights." *In re Lamm's Estate*, 67 N.W.2d 613, 615 (Iowa 1954). Embracing that expansive definition of proceeding, we construe a creditor's decision to "initiate a proceeding to enforce a debt" as including the filing of a counterclaim. When SMP filed its counterclaim, no proceeding had yet commenced to enforce the creditor's debt against the Schaefers' agricultural property. Accordingly, before filing its counterclaim, SMP faced a jurisdictional prerequisite of obtaining a mediation release.

Under SMP's interpretation of section 654A.6(1)(a), debtors who wish to file a claim against a creditor would effectively waive their opportunity to mediate before the creditor brought a counterclaim to enforce the debt on their agricultural land. That interpretation runs counter to legislative intent. By enacting section 654A.6(1)(b), the legislature deemed mediation to be a jurisdictional hurdle for a creditor seeking to enforce such a debt. Therefore, debtors cannot be held to confer subject matter jurisdiction on the district court by waiver or consent. *See Klinge*, 725 N.W.2d at 16–17.

Again, assuming without deciding SMP's counterclaim was compulsory,[4] we do not see the necessity of raising the counterclaim under the rules of civil procedure as excusing compliance with section 654A.6(1)(a). The statutory provision authorizes a creditor to start a proceeding to enforce a debt without a mediation release if "the court determines after notice and hearing that the time delay required for the mediation would cause the creditor to suffer irreparable harm." Iowa Code § 654A.6(1)(a). SMP could have addressed the competing demands posed by the counterclaim and mediation by filing a pre-answer motion in the Schaefer's suit or a motion for leave to amend after the mediation requirement was satisfied or excused by the court.

Because the mandatory mediation provision in section 654A.6 applies to SMP's counterclaim foreclosing on the Schaefers' agricultural property, the proceeding could not be brought absent a mediation release or a showing the delay would cause SMP irreparable harm. SMP did not satisfy this jurisdictional prerequisite, and therefore the district court lacked subject matter jurisdiction to hear the foreclosure counterclaim. We reverse and remand for a dismissal of that counterclaim without prejudice.

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[4] The parties debate whether SMP's claim was mature and therefore compulsory. *See Harrington v. Polk Cnty. Fed. Sav. & Loan Ass'n of Des Moines*, 196 N.W.2d 543, 545 (Iowa 1972) (listing four requirements for compulsory counterclaims, one of which is maturity); *see also* Iowa R. Civ. P. 1.241 official cmt. (using same four requirements to distinguish compulsory from permissive counterclaims). "A compulsory counterclaim is mature when the party possessing it is entitled to a legal remedy." *Bronner v. Harmony Agri Servs., Inc.*, 490 N.W.2d 861, 863 (Iowa Ct. App. 1992). Whether a party is entitled to a legal remedy is a separate question from whether a court holds jurisdiction over a claim. Accordingly, even if SMP is entitled to a legal remedy, the compulsory nature of the counterclaim does not confer jurisdiction on the court absent compliance with section 654A.6(1)(a).

B. Did the District Court Abuse Its Discretion by Denying the Schaefers' Motion to Quash the Sale of Their Rights to Appeal against Putnam?

The Schaefers next contend Putnam cannot levy for unpaid attorney fees against their right to appeal the denial of their original claims. The district court held these rights are subject to levy and a sheriff's sale was scheduled for January 12, 2012, but never occurred. The couple argues the district court erred in finding the right to appeal amounts to a "chose in action." They assert that even if their appeal rights are choses in action, the district court's refusal to stay the execution was an abuse of discretion.

For his part, Putnam asserts the issue is moot because no sale actually transpired on January 12. He offers no further argument or support for his mootness assertion. At oral argument, Putnam acknowledged the chose-in-action issue was "theoretically still alive."

An appeal point is moot when it no longer involves a justiciable controversy because the issue has become academic or nonexistent. *Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011). If a judgment would have no practical legal effect upon the controversy, the issue is moot. *Id.*

The fact that the appeal rights have not been sold does not prove the controversy is no longer justiciable. Because the Schaefers' appeal from their unsuccessful action for money damages against Putnam is still pending and subject to levy, the issue is not moot.

Iowa Code section 626.21 authorizes creditors to levy upon judgments, bank bills, money, "and other things in action" for sale or appropriation. A "thing in action" is the same as a "chose in action." *Brenton Bros. v. Dorr*, 239 N.W. 808, 811 (Iowa 1931). It is "a right not reduced into possession or a right under a contract which, in case of nonperformance, can only be reduced to beneficial possession by an action or suit." *Arbie Mineral Feed Co. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677, 680 (Iowa 1990). A cause of action falls within section 626.21 as one of the "other things in action." *Rosenberger*, 512 N.W.2d at 304.

Our caselaw has not extended section 626.21 to endorse levying on rights to appeal claims from the same suit from which the debts originated. Refusing the motion to quash, the district court considered the "very broad" language of the statute and held "[i]n the absence of clear authority to the contrary the plain language of the statute should be followed."

Our courts have long recognized a judgment creditor in an initial suit can levy upon claims which the creditor owes to the judgment debtor in a subsequent suit.

> But why not? It is property, it is capable of being transferred. It is capable of being converted into a judgment which is subject to execution. It is an asset of the judgment debtor, and why should not his assets, whatever their nature, be taken to satisfy a judgment? We cannot see any logical reason why such property should not be levied on.

Brenton, 239 N.W. at 813 (quoting *Johnson v. Dahlquist*, 225 P. 817, 818 (Wash. 1924)). But in those cases the claim to be levied upon arose in a separate suit rather than the exact action which provided the creditor's right to levy. *See Rosenberger*, 512 N.W.2d at 304 (holding district court did not abuse discretion

in denying stay of execution on defendant's separate federal claim against plaintiff); *Arbie*, 462 N.W.2d 677, 680 (Iowa 1990) (holding had default judgment creditor levied on debtor's separate breach of contract claim against insurer, it could have been sold at sheriff's sale); *Steffens v. Am. Standard Ins. Co. of Wis.*, 181 N.W.2d 174, 176 (Iowa 1970) (finding prevailing plaintiff's levy of defendant's separate cause of action against insurer permissible); *Brenton*, 239 N.W. at 809 (involving creditor in previous suit levying upon debtor's claim in subsequent suit yet to be tried).

Putnam gained his $12,200 judgment against the Schaefers for unpaid attorney fees in case LACV064669. In that same action, the district court clarified only the Schaefers' rights to appeal their affirmative claims asserted in case LACV064669 were subject to levy, not claims brought against them.

The district court captured the material distinction between rights to appeal claims originally brought by the debtor and defensive claims. *See In re Morales*, 403 B.R. 629, 633 (N.D. Iowa 2009) (differentiating between the two forms of appellate rights when deciding if "chose in action" existed). The right to appeal the denial of affirmative claims fits the definition of a chose in action and therefore can be levied upon. *See id*. (citing cases holding debtor's appellate rights to their own claims are subject to levy). Because Putnam's levy reached only the appellate rights involving the Schaefers' affirmative claims, they are choses in action and the district court did not err in refusing to quash.

The Schaefers further contend that even if we agree their appeal rights are choses in action, the district court should have granted their motion to stay. The party requesting a stay must show

> why judgment should not be enforced against him at the present time because of an independent proceedings and to proceed with the execution would impair his equities or render the independent proceedings ineffective, or otherwise prejudice him, and the court may grant a reasonable stay of execution and afford him an opportunity to establish his claim and to escape the inequitable use of the writ.

Rosenberger, 512 N.W.2d at 305 (quoting *Brenton*, 239 N.W. at 810).

The Schaefers offer a bare assertion the district court "abused its discretion by not addressing the issue of its discretion to stay the sale," but fail to prove that execution would impair their equities, render the proceedings ineffective, or result in prejudice. Absent such proof, we find the district court did not abuse its discretion in refusing to stay execution of the levy and sale.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.