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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0691**

Federal National Mortgage Association,
Respondent,

vs.

Jill R. Forseth, et al.,
Appellants.

**Filed January 14, 2013
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27-CV-HC-11-8275

Jonathan R. Cuskey, Peterson, Fram & Bergman, P.A., St. Paul, Minnesota (for
respondent)

William B. Butler, Jeramie R. Steinert, Butler Liberty Law, LLC, Minneapolis,
Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

On appeal from summary judgment granted to respondent bank in this eviction
proceeding, appellants, former owners who held over after failing to redeem the property

from a foreclosure sale, assert that fact questions about the foreclosure procedure and ownership of the property made summary judgment inappropriate. We affirm.

FACTS

In December 2007, appellants Jill and Michael Forseth (the Forseths) executed a note to Countrywide Bank (Countrywide) for a principal amount of \$248,000. On the same day, the Forseths also executed a mortgage on their property located at 210 75th Avenue in Brooklyn Park (the property) in favor of Countrywide's nominee, Mortgage Electronic Registration Systems, Inc. (MERS), which MERS recorded with the Hennepin County Registrar of Titles on January 4, 2008. MERS assigned the mortgage to BAC Home Loans Servicing, LP (BAC), on December 16, 2010, and that assignment was recorded on March 9, 2011. BAC is part of Bank of America, N.A. (BOA).

The Forseths defaulted on the mortgage and, in April 2011, BAC started a foreclosure by advertisement. Jill Forseth was personally served with a notice of mortgage foreclosure sale scheduled for May 11, 2011. After receiving notice of the foreclosure sale, the Forseths attempted to qualify for the Home Affordable Modification Program (HAMP). On April 30, 2011, BAC sent a letter informing the Forseths that it needed additional information from them by May 30, 2011, in order to determine whether they were eligible for the HAMP. The letter included the following information:

If your loan has been previously referred to foreclosure, we will continue the foreclosure process while we evaluate your loan for the [HAMP]. However, no foreclosure sale will be conducted and you will not lose your home during the [HAMP] evaluation. If we do not receive your documents by May 30, 2011[,] the hold on a foreclosure sale will be released and foreclosure proceedings will resume.

Important – Do not ignore any foreclosure notices.

On May 11, 2011, the property was sold by the sheriff at a public auction to BAC for \$260,617.97. BAC filed the Sheriff’s Certificate with the Hennepin County Office of the Registrar of Titles on May 18, 2011. The Forseths did not redeem the property, and they continued to occupy the property after their six-month period of redemption expired on November 11, 2011. *See* Minn. Stat. § 580.23, subd. 1 (2012).

In December 2011, BOA, “as successor by merger to BAC,” transferred its interest in the property by quit claim deed to respondent Federal National Mortgage Association (Fannie Mae). The quit claim deed was recorded on December 28, 2011. Fannie Mae brought this eviction action on the same day.

In March 2012, Fannie Mae moved for summary judgment. The Forseths moved to join BOA in the eviction proceeding, arguing that, because they dispute that BOA ever acquired title to the property, Fannie Mae took nothing under the quit claim deed. The Forseths also asserted that the eviction proceeding is an *in rem* proceeding such that all parties claiming any interest to the property must be joined. After a hearing on the parties’ motions, the district court denied the Forseths’ motion to join BOA and granted Fannie Mae’s motion for summary judgment. This appeal followed.

D E C I S I O N

A district court’s summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). “On an appeal from summary judgment, the role of the reviewing court is to review the record

for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the [district] court erred in its application of the law.” *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The reviewing court may not weigh the evidence or make factual determinations, but it must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

A motion for summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.” *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). A party opposing summary judgment, however, “may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05.

An eviction proceeding is a “summary court proceeding to remove a tenant or occupant from or otherwise recover possession of real property by the process of law.” Minn. Stat. § 504B.001, subd. 4 (2012). A person entitled to the premises may recover possession by eviction when any person holds over real property after the expiration of the time for redemption on the foreclosure of a mortgage. Minn. Stat. § 504B.285, subd. 1(1) (2012). An eviction proceeding “merely determines the right to present possession

and does not adjudicate the ultimate legal or equitable rights of ownership possessed by the parties. It is not a bar to an action involving the title.” *Dahlberg v. Young*, 231 Minn. 60, 68, 42 N.W.2d 570, 576 (1950). “[G]enerally the only issue for determination [in an eviction proceeding] is whether the facts alleged in the complaint are true.” *Cimarron Vill. v. Washington*, 659 N.W.2d 811, 817 (Minn. App. 2003).

If parties to an eviction proceeding have equitable or other disputes that are beyond the narrow scope of summary process set out in chapter 504B, and if it is possible to litigate those questions in a noneviction proceeding, it is not appropriate to litigate those questions in the eviction proceeding. *Bjorklund v. Bjorklund Trucking, Inc.*, 753 N.W.2d 312, 318 (Minn. App. 2008) (quoting *Fraser v. Fraser*, 642 N.W.2d 34, 40-41 (Minn. App. 2002)), *review denied* (Minn. Sept. 23, 2008). This general prohibition on litigating noneviction matters in eviction proceedings applies specifically to alleged defects in a mortgage foreclosure that underlies an eviction. *See Amresco Residential Mortg. Corp. v. Stange*, 631 N.W.2d 444, 444-46 (Minn. App. 2001) (holding that because appellants had noneviction arenas in which to litigate noneviction claims, litigating those claims in an eviction proceeding was inappropriate).

On expiration of the statutory redemption period, a registered certificate of sale (sheriff’s certificate) “shall operate as a conveyance to the purchaser or the purchaser’s assignee of all the right, title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage, without any other conveyance.” Minn. Stat. § 580.12 (2012).

Every sheriff's certificate of sale made under a power to sell contained in a mortgage shall be prima facie evidence that all the requirements of law in that behalf have been complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale, the purchaser's heirs or assigns, after the time for redemption therefrom has expired.

Minn. Stat. § 580.19 (2012).

To succeed on the summary-judgment motion in this eviction action, Fannie Mae needed only to show that (1) a foreclosure of the mortgage on the property occurred; (2) the time for redemption had expired; (3) Fannie Mae is entitled to possession of the property, and (4) the Forseths held over the property. *See* Minn. Stat. § 504B.285, subd. 1(1).

The Forseths do not dispute that they (1) defaulted on the mortgage, (2) did not redeem within the redemption period, and (3) maintained possession of the property after expiration of that period. The sheriff's certificate of sale is prima facie evidence that a foreclosure occurred, that a foreclosure sale was held, that BAC was the successful bidder at that sale, and that BOA, as successor by merger to BAC, is entitled to possession of the property.

The quit claim deed transferred BOA's interest to Fannie Mae. The Forseths did not rebut this evidence and therefore did not establish that there was a genuine issue of material fact for trial. The district court did not err by granting Fannie Mae's motion for summary judgment. *See* Minn. R. Civ. P. 56.05

The Forseths claim that Fannie Mae cannot prove compliance with the rules of foreclosure by advertisement and therefore is not entitled to possession of the property.

Specifically, they argue that there is a genuine issue of material fact as to whether Fannie Mae strictly complied with Minn. Stat. § 580.02 (2012), and that the foreclosure is void if the statutory requirements¹ are not met. Although the Forseths assert that they “presented evidence that the Forseth mortgage had been sold to a Fannie [Mae] trust and that as a result of the sale, there *likely* were mortgage assignments that had not been recorded,” which would constitute a failure to comply with Minn. Stat. § 580.02(3), they presented no evidence that any mortgage assignments were not recorded. A party opposing summary judgment “must present specific facts showing that there is a genuine issue for trial” and that a party “may not rest upon the mere averments or denials of the adverse party’s pleading.” Minn. R. Civ. P. 56.05. The Forseths’ argument that the foreclosure by advertisement might not comply with the statute is based on speculation unsupported by facts.

¹ A foreclosure by advertisement includes the following requirements:

(1) that some default in a condition of such mortgage has occurred, by which the power to sell has become operative;

(2) that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage . . . ;

(3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded . . . ; and

(4) before the notice of pendency . . . is recorded, the party has complied with [the provision requiring notification of the opportunity for “foreclosure prevention counseling services” in certain circumstances].

Minn. Stat. § 580.02. The statute is subject to strict construction. *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 494 (Minn. 2009).

The Forseths also argue that, even if Fannie Mae made a prima facie showing that it is entitled to evict them from the property, they are entitled to present evidence to the district court that either no default in the mortgage occurred or that the notice of sale was defective. They specifically challenge the sheriff's certificate "by showing it is defective due to non-compliance with Minn. Stat. § 580.02." They argue that they "intended to offer evidence through the signatory on the sheriff's certificate" that (1) the officer had no knowledge of the facts alleged in the certificate, (2) he cannot testify to the truth of those facts, (3) the law firm representing BAC prepared the certificate and the officer only signed it, (4) the law firm provided all the facts in the certificate, (5) no money was paid at the foreclosure sale, and (6) the officer has no knowledge as to whether the Forseths ever owed BAC any money.

As Fannie Mae points out, however, the sheriff's certificate is admissible evidence regardless of the signing officer's availability to testify. *See* Minn. R. Evid. 803(14) ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office."). And, as Fannie Mae also correctly notes, "[t]he act of the sheriff or deputy in conducting the sale is purely ministerial[, and h]e has no interest in the matter whatsoever." *Kantack v. Kreuer*, 280 Minn. 232, 238, 158 N.W.2d 842, 846 (1968). Because the sheriff's certificate complies with the requirements in

Minn. Stat. § 580.12, it is “prima facie evidence that all the requirements of law . . . have been complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale, . . . after the time for redemption therefrom has expired.” Minn. Stat. § 580.19. The Forseths’ argument that they were deprived of an opportunity to rebut Fannie Mae’s prima facie showing through testimony of the signing officer lacks merit because the knowledge, or lack thereof, of the signing officer is irrelevant to the validity of the certificate.

The Forseths also argue that the district court should have denied summary judgment because they asserted equitable defenses in their opposition to the motion. As discussed above, however, “generally the only issue for determination [in an eviction proceeding] is whether the facts alleged in the complaint are true.” *Cimarron Vill.*, 659 N.W.2d at 817. The Forseths do not claim that there is no other forum in which they can assert their challenges to ownership or title, therefore they have not shown that they cannot assert those claims in this eviction proceeding. *See Fraser*, 642 N.W.2d at 41 (“[O]nly if the eviction action presents the only forum for litigating these claims would it be appropriate for the district court to entertain them in that action”); *Amresco*, 631 N.W.2d at 445-46. This is because “[u]sing the alternate procedure instead of expanding the eviction proceeding accords with the appellate courts’ prior determinations that the district court should uphold the summary nature of eviction proceedings.” *Amaresco*, 631 N.W.2d at 446. An eviction proceeding “merely determines the right to present possession and does not adjudicate the ultimate legal or equitable rights of ownership possessed by the parties.” *Dahlberg*, 231 Minn. at 68, 42 N.W.2d at 576. The district

court properly declined to consider the Forseths' challenges to Fannie Mae's title in this eviction action.

The Forseths also attempt to challenge Fannie Mae's right to title through a "show-me-the-note" argument. A "show-me-the-note" argument is one in which an appellant argues that, "as a prerequisite to the foreclosure of a mortgage, the foreclosing entity must show either that it owns *both* the mortgage being foreclosed *and* the note associated with that mortgage, or that it is acting on behalf of one who does." *JPMorgan Chase Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 604 (Minn. App. 2012). The Forseths claim, without presenting any evidence or legal authority, that "[t]here is no evidence [that] BAC held the Note and therefore no evidence [that] BAC complied with Minn. Stat. § 580.02." A "show-me-the-note" claim is a challenge to foreclosure, not eviction, and we rejected this argument in *Erlandson*.² *See id.* at 607, 609 (holding that "[t]he holder of legal title to a mortgage can foreclose its mortgage by action regardless of whether it also holds the note associated with the mortgage"). The Forseths' argument is both without merit and procedurally inappropriate in this eviction action.

² William B. Butler, the Forseths' attorney, has asserted a "show-me-the note" argument numerous times in district and appellate courts of the Eighth Circuit, all of which have rejected the argument. Butler has been sanctioned multiple times for repeatedly bringing the argument in federal court. *See Mustafa v. Bank of Am., N.A.*, No. 12-590, 2012 WL 3612083 at *3 (D. Minn. Aug. 21, 2012) (assessing sanctions of attorney fees and other expenses incurred in litigating the case); *Blaylock v. Wells Fargo Bank, N.A.*, no. 12-693, 2012 WL 2529197 at *7-9 (D. Minn. June 29, 2012) (assessing sanctions of \$75,000 plus attorney fees for continuing to "file and litigate frivolous, meritless foreclosure cases after three distinct judges in this District have sanctioned him"); *Murphy v. Aurora Loan Servs., LLC*, 859 F. Supp. 2d 1016, 1022-26 (D. Minn. 2012) (assessing \$50,000 in attorney fees as sanctions); *Welk v. GMAC Mortg., LLC*, 850 F. Supp. 2d 976, 1006-07 (D. Minn. 2012) (assessing sanctions of \$50,000 plus attorney fees).

The Forseths also argue that the district court erred by denying their motion to join BOA as a party to the eviction proceeding. A person may be joined as a party in an action if

(a) in the person's absence complete relief cannot be accorded among those already parties, or (b) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (1) as a practical matter impair or impede the person's ability to protect that interest or (2) leave any one already a party subject to a substantial risk or incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

Minn. R. Civ. P. 19. But this argument is another inappropriate attempt to assert a challenge to the foreclosure in the eviction proceeding. The district court did not err or abuse its discretion by denying the joinder motion. *See Fraser*, 642 N.W.2d at 40-41 (if parties to an eviction proceeding have disputes beyond the question of eviction, those issues must be litigated independently of the eviction proceeding); *Amresco*, 631 N.W.2d at 445-46 (same). The Forseths' challenge to Fannie Mae's standing, which includes their argument that Fannie Mae is not the real party in interest, is likewise based on their assertion that the foreclosure was defective, and the district court did not err or abuse its discretion by failing to address this claim in the eviction action.

Affirmed.