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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0972**

U. S. Bank, N. A.,
Respondent,

vs.

Scott A. Byrkit,
Appellant,

Kelly Ann Byrkit, et al.,
Defendants,

and

Scott Alan Byrkit,
Appellant,

vs.

U. S. Bank, N. A.,
Respondent,

Wilford & Geske, P. A., et al.,
Respondents.

**Filed February 11, 2013
Affirmed in part as modified and reversed in part
Schellhas, Judge**

Chisago County District Court
File No. 13-CV-11-1140

Brian L. Vander Pol, Michael D. Stinson, Dorsey & Whitney LLP, Minneapolis,
Minnesota (for respondent U.S. Bank)

Scott A. Byrkit, North Branch, Minnesota (pro se appellant)

David R. Mortensen, Wilford Geske & Cook, P.A., Woodbury, Minnesota (for respondents Wilford & Geske, et al.)

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this mortgage-foreclosure dispute, appellant challenges various orders of the district court. We affirm in part as modified and reverse in part.

FACTS

In October 2011, respondent U.S. Bank N.A. sued appellant Scott Byrkit (Byrkit) and defendant Kelly Byrkit (the Byrkits). In its complaint, the bank alleged that, on October 11, 2000, the Byrkits obtained fee title to real estate, commonly known as 13894 – 375th St., North Branch, Minnesota 55056 (the property); that, on May 1, 2007, the Byrkits executed a \$604,000 promissory note in favor of the bank and executed a mortgage to secure the note in favor of Mortgage Electronic Registration Systems Inc. (MERS), as nominee for the bank; that MERS recorded the mortgage on May 16, 2007; that the bank is the holder of the mortgage, as assignee, through an assignment recorded on June 23, 2010; that the Byrkits purportedly transferred their interest in the property to the Scott A. Byrkit and Kelly A. Byrkit Living Trust by a quitclaim deed recorded on July 28, 2010; and that the Byrkits recorded three documents that are “fraudulent and unenforceable, were drafted and recorded without the consent of [the bank], and have no basis in law or fact.”

The documents that the bank alleges are fraudulent and unenforceable are (1) a document attached to the above-referenced quitclaim deed, purporting to “remove and/or discharge [the bank], its undersigned counsel, and MERS as mortgagees, agents, or assigns, etc. with regards to the Mortgage and to release their resulting interest in the Property” and to “bar and estop [the bank] and its counsel from enforcing [the bank]’s rights and remedies under the Note and Mortgage”; (2) a power of attorney recorded on July 28, 2010, purportedly from the bank’s chief executive officer, “granting [the Byrkits] the authority to ‘take charge of and manage’ their mortgage loan”; and (3) a “Certificate of Satisfaction Full Reconveyance” recorded on September 29, 2010, purportedly satisfying the mortgage. The bank requested in its complaint that the district court declare the bank’s mortgage to be “prior, paramount and superior to all other liens or interests on, in or against the Property, including any lien interest the Byrkits may claim or assert,” and that the court declare the document attached to the quitclaim deed, the purported power of attorney, and the purported certificate of satisfaction to be null and void and unenforceable against the property.

In November 2011, the bank moved for judgment on the pleadings or, alternatively, summary judgment. The Byrkits did not respond to the motion, but, in December, Byrkit asserted counterclaims against the bank and third-party claims¹ against respondents Wilford & Geske, P.A.; Lawrence Wilford; and James Geske (law firm)—the bank’s legal counsel. In his counterclaims and third-party complaint, Byrkit

¹ Byrkit referred to his third-party claims as counterclaims, and thereafter the district court and parties continued to refer to them as counterclaims. Because the claims against the bank’s legal counsel are third-party claims, we refer to them as such.

(1) alleged that the bank lacked “the necessary legal standing requirements to have held a foreclosure sale” and requested “an emergency temporary restraining order . . . and preliminary injunctive relief”; (2) claimed that the bank and law firm made false statements and recorded false documents that resulted in a “fraudulent Notice of Sale”; (3) alleged that the bank and law firm “perverted the foreclosure process against [Byrkit] for personal gain” by “extorting money based on a sham foreclosure action where [the bank and law firm] are not the real party [sic] in interest” in an “attempted illegal foreclosure sale” even though the bank and law firm were not “in possession of the bifurcated original genuine Note and Mortgage, and are not otherwise entitled to payment” and “not ‘persons entitled to enforce’ the security interest on the Property”; (4) requested “[e]njoin[ment]” or the “set[ting] aside” of “[t]he fraudulent foreclosure sale”; (5) claimed that the bank and law firm committed slander of title by “noticing a foreclosure sale without proof of claim”; and (6) claimed that Byrkit is “the rightful owner of legal title to the Property” and that the bank “threatens to obtain legal title to the Property by means of an unjustified, unlawful and fraudulent foreclosure sale” and requested “an order establishing a constructive trust . . . , appointing [the] [b]ank as trustee with a fiduciary duty to hold whatever interest it claims in trust for [Byrkit].”

In February 2012, with substitute legal counsel, the law firm moved for dismissal with prejudice of Byrkit’s third-party claims, and the bank moved for judgment on the pleadings and dismissal with prejudice of all of Byrkit’s claims and requested “all relief sought in [the] [b]ank’s Complaint.” In March, the bank moved to stay all discovery, pending resolution of the bank’s and law firm’s dispositive motions, and

requested that a motion hearing be scheduled on March 20. Byrkit responded to the bank's and law firm's motions by filing and serving a notice of voluntary dismissal of his claims on March 16, noting that he was dismissing his claims "without prejudice" and that he "reserve[d] the right to re-file said counter-claim once [Byrkit] has completed pre-complaint discovery for the purposes of stating said amended counterclaim with specificity and particularity per the Minn. R. Civ. P."

Notwithstanding Byrkit's voluntary dismissal, on March 20, 2012, the district court conducted a hearing on the bank's and law firm's dispositive motions and the bank's motion to stay discovery. Neither of the Byrkits attended the hearing, and the court concluded the hearing by stating, "Okay. In this case since there is no opposition to the Motion, I will grant the requests. . . . I'm granting both of the Motions and I will sign the proposed orders," and the court filed an order on March 20, erroneously stating that the Byrkits appeared at the hearing and granting the law firm's motion to dismiss with prejudice. On March 21, the court filed an order, granting the bank's motion for judgment on the pleadings, dismissing with prejudice Byrkit's counterclaims, granting to the bank all relief it sought in its complaint, and including the following language in its order: "LET JUDGMENT BE ENTERED ACCORDINGLY." The district court did not address Byrkit's March 16 voluntary dismissal in either the March 20 order or the March 21 order. The district court administrator entered judgment in favor of the bank on March 21. Byrkit immediately moved for relief from the March 21 judgment.² At a

² We note that Byrkit's motion for relief erroneously states that the district court granted a motion for judgment on the pleadings for the law firm. Rather, the court only granted

hearing on April 23, Byrkit presented argument to the court and asked, “[H]ow can the Court have a hearing on March 20th, 2012, on a counterclaim when the said counterclaim was voluntarily withdrawn by me, Scott Byrkit, four days before the hearing with ample notice to the court and all parties?” On April 24, the district court ordered that the March 20 order “be corrected to state that . . . Byrkit . . . did not appear at the . . . Hearing,” but the court otherwise denied Byrkit’s request for relief from the March 21 judgment.

This appeal follows. Byrkit appeals from the March 21, 2012 judgment, seeking review of the March 20, 2012 order, which dismissed his third-party claims against the law firm; the March 21, 2012 order, which dismissed his counterclaims against the bank; and the April 24, 2012 order, which denied his motion for relief from the March 21, 2012 judgment.

D E C I S I O N

Byrkit argues that, following his voluntary dismissal of his claims against the bank on March 16, 2012, the district court erroneously dismissed his claims with prejudice on March 21.

Jurisdiction, Scope of Appeal, and Mootness

As a threshold matter, we first address a jurisdictional argument made by the bank. The bank argues that this court “lacks appellate jurisdiction to consider” “the portion of the [March 21] Judgment granting [the] [b]ank declaratory relief” because “Byrkit did not

judgment on the pleadings in regard to the bank’s motion. The law firm had moved only to dismiss Byrkit’s counterclaims.

submit [that portion] for appellate review.” And the bank points to Byrkit’s statement of the case in which he described the “claims, defenses, issues litigated and result” as only “Counter-Plaintiff Voluntarily Dismissed Case” and “Dismissal Order was in Error.” But “the statement of the case is not a jurisdictional pleading,” *Kovensky v. Larry’s Autos Unlimited*, 813 N.W.2d 812, 812 (Minn. 2012), and “the statement of the issues contained in an appellant’s statement of the case does not limit the reviewability of issues on appeal,” *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 110 n.2 (Minn. App. 1995), *review denied* (Minn. Mar. 29, 1995). The bank also argues that Byrkit’s statement in his appeal notice that he appealed “from order(s) of the court entered on March 20, 2012 and April 24, 2012, dismissing Counter-Plaintiff’s Complaint” rendered his notice insufficient to appeal from the March 21 judgment regarding the district court’s declaratory-relief grants to the bank. (Emphasis added.) We disagree.

Appellate courts “should . . . liberal[ly] constru[e]” procedural rules to “effectuate” their purpose of “secur[ing] the just, speedy, and inexpensive determination of every action.” *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 511 (Minn. 2006) (quoting Minn. R. Civ. P. 1); *see In re Welfare of S.M.E.*, 725 N.W.2d 740, 742 (Minn. 2007) (noting that supreme court’s policy includes “preserv[ing] the right to appeal”); *Kelly v. Kelly*, 371 N.W.2d 193, 195 (Minn. 1985) (noting that “[t]his court . . . has repeatedly held that notices of appeal are to be liberally construed in favor of their sufficiency”). “A notice of appeal is not insufficient due to clerical errors or defects which could not have been misleading.” *Kelly*, 371 N.W.2d at 196.

Here, the district court's March 21 order dismissed Byrkit's claims against the bank with prejudice and granted the bank's request for declaratory relief. Although Byrkit has expressly noticed appeal only "from order(s) of the court entered on March 20, 2012 and April 24, 2012," we liberally construe his appeal notice to include the March 21 judgment, entered on the basis of the March 21 order, because Byrkit noticed appeal from the April 24 order, in which the district court denied his request for relief from the March 21 judgment. *Cf. Bush Terrace Homeowners Ass'n, Inc. v. Ridgeway*, 437 N.W.2d 765, 770 (Minn. App. 1989) ("[A] motion to vacate by its nature asks the trial court to reassess its final judgment."), *review denied* (Minn. June 9, 1989). Because we construe Byrkit's notice of appeal to include the March 21 judgment, we review the March 20, March 21, and April 24 orders as being within our scope of review because this court, "on appeal from a judgment[,] may review any order involving the merits or affecting the judgment." Minn. R. Civ. App. P. 103.04; *see Bush Terrace*, 437 N.W.2d at 770 (reviewing district court's denial of motion to vacate under rule 103.04, concluding that "an order denying the motion [to vacate] will . . . involve the merits or affect the judgment entered").

In light of our liberal construction of appeal notices, we conclude that no reasonable likelihood exists that Byrkit's appeal notice misled the bank to believe that his challenge to the March 20 and April 24 orders was not also a challenge to the March 21 judgment.

The bank argues that Byrkit has waived his right to challenge the district court's grants of declaratory relief to the bank in its March 21 order and March 21 judgment by

failing on appeal to brief the issues. We agree. “It is well-established that failure to address an issue in brief constitutes waiver of that issue.” *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006). Byrkit’s assertion on appeal that the district court “allowed the bank to get away [with] criminal behavior in the face of a National mortgage crisis with implications of fraud and other malfeasance” and Byrkit’s reference to “foreclosure mills” possibly committing “repeated fraud upon the court” are insufficient to challenge the district court’s declaratory-relief grants on appeal. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.”); *see also McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (declining to address issues appellant “alludes to” because “he fails to address them in the argument portion of his brief”).

The bank and law firm jointly argue that Byrkit’s appeal is moot because the claims voluntarily dismissed by Byrkit, regardless of the district court’s subsequent dismissal with prejudice, are compulsory counterclaims and that Byrkit therefore cannot bring them in a subsequent action and any relief that this court might grant to Byrkit would be ineffectual. The law firm also argues that this appeal is moot with respect to Byrkit’s third-party claims against it because “an agent—which Byrkit expressly claims [the law firm] to be . . . —cannot be liable for an act the principal (i.e. [the] [b]ank) is authorized to take” and the law firm “cannot be liable for any actions it took in the scope of its legal representation of [the] [b]ank.”

On the facts before us, we decline to apply the mootness doctrine, which is a “flexible discretionary doctrine.” *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quotation omitted). An appellate court will “generally dismiss a matter as moot when an event occurs that makes . . . an award of effective relief impossible.” *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) (quotation omitted). Here, on appeal, this court may grant Byrkit the relief he requests—modifying the district court’s dismissal of his claims with prejudice to a dismissal without prejudice.

Merits of Appeal

Byrkit argues that the district court erred by (1) dismissing his claims *with prejudice* in its March 20 order, March 21 order, and resulting March 21 judgment, notwithstanding his voluntary dismissal of those claims on March 16 *without prejudice*, and (2) denying him relief from the March 21 judgment in its April 24 order. We agree that the court erroneously dismissed Byrkit’s claims *with prejudice* following his voluntary dismissal of those claims *without prejudice*. We also agree that the court erred in its April 24 order by denying Byrkit any relief³ from the March 21 judgment. But we disagree that the district court erred by denying Byrkit complete relief from the March 21 judgment.

Voluntary-dismissal motions are governed by Minnesota Rules of Civil Procedure rule 41, and, generally, “[t]his court will not reverse a district court’s decision on a rule 41 motion unless the district court abuses its discretion.” *Butts ex rel. Iverson v.*

³ We do not consider the district court’s clerical correction to the March 20 order about the Byrkits’ attendance at the hearing to constitute relief from the March 21 judgment.

Evangelical Lutheran Good Samaritan Soc’y., 802 N.W.2d 839, 841 (Minn. App. 2011), *review denied* (Minn. Oct. 26, 2011). An appellate court also reviews for an abuse of discretion “a district court’s decision to deny relief under Rule 60.02.” *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001).

The law firm argues that Byrkit’s voluntary-dismissal notice was ineffective because he noticed dismissal without court order and his notice was precluded by the bank’s November 23, 2011 summary-judgment motion, even though the bank filed that motion almost one month *before* Byrkit asserted and filed his claims on December 22, 2011. The law firm argues that the bank’s summary-judgment motion “is effectively an affirmative response to the . . . claims even though their chronological order is reversed” “because Byrkit’s . . . claims and [the b]ank’s underlying claims rely on the same operative facts.” The law firm argues that its argument is “consistent with the purpose of Rule 41,” relying on the following comment to rule 41.01: “[T]he right to dismiss without prejudice ought to be limited to a fairly short period after commencement of the action when prejudice to opponents is likely to be minimal.” Minn. R. Civ. P. 41.01, 1993 advisory comm. cmt. These arguments are unpersuasive.

Under rule 41.01, if a party has not previously dismissed “an action based on or including the same claim[s],” a party need not obtain an “order of the court” to voluntarily dismiss that party’s claims “without prejudice” when the party files a notice of voluntary dismissal “*before* service by the adverse party of an answer or of a motion for summary judgment.” Minn. R. Civ. P. 41.01(a)–(b) (emphasis added). Here, Byrkit filed and served his notice of voluntary dismissal on March 16, 2012, before the bank or

law firm filed any answer or summary-judgment motion regarding Byrkit's claims, noting that he was doing so "without prejudice." An appellate court "will not disregard the letter of the law under the pretext of pursuing its spirit." *Rohmiller v. Hart*, 811 N.W.2d 585, 589 (Minn. 2012). And the letter of rule 41.01 permits a party who has not previously dismissed that party's claims to voluntarily dismiss that party's claims without court order and without prejudice when that party files a notice of voluntary dismissal "before service by the adverse party of an answer or of a motion for summary judgment." Minn. R. Civ. P. 41.01(a)–(b) (emphasis added).

We conclude that the bank's summary-judgment motion, filed nearly one month before Byrkit asserted and filed his claims and nearly four months before Byrkit noticed dismissal of his claims, did not preclude Byrkit's voluntary dismissal of his claims without court order and without prejudice. We further conclude that the district court abused its discretion when it dismissed Byrkit's third-party claims against the law firm in its March 20 order and Byrkit's counterclaims against the bank in its March 21 order, after Byrkit noticed his March 16 voluntary dismissal without prejudice. We therefore conclude that the district court abused its discretion in its April 24 order when it declined to grant Byrkit partial relief from the March 21 judgment by amending the March 20 order, March 21 order, and resulting March 21 judgment to reflect that Byrkit's counterclaims against the bank and third-party claims against the law firm are dismissed without prejudice. *See* Minn. R. Civ. P. 60.02(f) (permitting district court to "relieve a party . . . from a final judgment . . . [or] order . . . or grant such other relief as may be just" based on "[a]ny . . . reason justifying relief from the operation of the judgment").

Accordingly, we (1) reverse in part the district court's April 24 order denying Byrkit's motion for relief from the March 21 judgment insofar as it pertains to his counterclaims against the bank and third-party claims against the law firm, (2) reverse the district court's March 20 order dismissing Byrkit's third-party claims against the law firm, (3) reverse in part the district court's March 21 order insofar as it pertains to the dismissal of Byrkit's counterclaims against the bank, (4) modify the March 21 judgment to reflect that Byrkit's counterclaims against the bank and third-party claims against the law firm are dismissed without prejudice, and (5) otherwise affirm the March 21 order, March 21 judgment, and April 24 order.

For clarity, we specifically note that we are affirming the district court's grant of declaratory relief to the bank in the court's March 21 order and March 21 judgment.

Affirmed in part as modified and reversed in part.