

**No. A09-796**

**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

---

Troy A. Molde,

*Appellant,*

v.

CitiMortgage, Inc.,

*Respondent.*

---

**APPELLANT'S BRIEF**

---

CHRISTENSEN LAW OFFICE PLLC

Carl E. Christensen #350412  
1422 West Lake Street, Suite 216  
Minneapolis, MN 55408  
(612) 823-4016  
carl@clawoffice.com

WILFORD & GESKE, P.A.

Christina Weber, #034963X  
8425 Seasons Parkway, Suite 105  
Woodbury, MN 55125  
(651) 209-3300  
cweber@wilfordgeske.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS**.....2

**TABLE OF AUTHORITIES**.....3

**STATEMENT OF LEGAL ISSUES**.....5

**STATEMENT OF FACTS** .....6

**BACKGROUND**.....6

**PROCEDURAL HISTORY** .....8

**ARGUMENT** .....9

I. STANDARD OF REVIEW ..... 10

II. THE DISTRICT COURT ERRED BY FINDING THAT CITIMORTGAGE’S  
POWER OF ATTORNEY TO FORECLOSE CONFORMED WITH THE STATUTORY  
FILING REQUIREMENTS OF MINNESOTA’S FORECLOSURE BY  
ADVERTISEMENT STATUTE..... 12

*The District Court Erred in Ruling that CitiMortgage Had Properly Recorded A Power  
of Attorney Pursuant to Minn. Stat. § 580.05.* ..... 13

*Minnesota Foreclosure Law is Unambiguous and the Courts Must Strictly Construe It*  
..... 17

III. THE COURT ERRED IN FINDING THAT THERE WERE SIGNIFICANT  
ISSUES OF MATERIAL FACT RELATED TO CITIMORTGAGE’S ASSERTIONS  
THAT IT THAT IT OWNED THE DEBT UNDERLYING MOLDE’S NOTE, THAT IT  
WAS THE PROPER PARTY TO FORECLOSE, AND THAT IT WAS A HOLDER IN  
DUE COURSE. .... 19

IV. THE COURT ERRED GRANTING SUMMARY JUDGMENT FOR  
CITIMORTGAGE BECAUSE MOLDE HAD NOT COMPLETED DISCOVERY .....26

**CONCLUSION**.....27

**WORD COUNT COMPLIANCE CERTIFICATE**.....29

## TABLE OF AUTHORITIES

### Cases

<i>Abdallah Inc. v. Martin</i> , 242 Minn. 416, 65 N.W.2d 641 (1954) .....	10
<i>Affiliated Banc Group v. Zehringer</i> , 527 N.W.2d 585 (Minn. App. 1995).....	9
<i>Betlach v. Wayzata Condominium</i> , 281 N.W.2d 328 (Minn. 1979).....	10
<i>Blackowiak v. Kemp</i> , 546 N.W.2d 1 (Minn. 1996), 528 N.W.2d 247 (Minn. App. 1995) .	9
<i>Deutsche Bank Nat’ Trust Co. v. Campbell</i> , 2008 WL 5220543 (N.Y. Sup. Dec. 16, 2008)	
at *1 .....	21
<i>Geraci v. Eckankar</i> , 526 N.W.2d 391 (Minn. App. 1995).....	10
<i>Graybow-Daniels Co. v. Pinotti</i> , 255 N.W.2d 405, 407 (Minn. 1977).....	17
<i>Hauser v. Mealey</i> , 263 N.W.2d 803 (Minn. 1978).....	10, 22
<i>Hudson v. Upper Michigan Land Co.</i> , 206 N.W. 44, 45 (Minn. 1925) .....	17
<i>Hutt Consultants v. Construction Maintenance</i> , 526 N.W.2d 62 (Minn. App. 1995) .....	10
<i>Imperial Elevator Co. v. Hartford Accident &amp; Indem. Co.</i> , 163 Minn. 481, 484, 204 N.W.	
531, 532 (1925).....	23
<i>In re Proposed Locke Lake Project</i> , 528 N.W.2d 875 (Minn. App. 1995).....	9
<i>Ingle v. Angell</i> , 111 Minn. 63, 64-65, 126 N.W. 400, 400 (1910) .....	23
<i>Jostens v. Northfield Ins. Co.</i> , 527 N.W.2d 116 (Minn. App. 1995).....	9
<i>Kern v. Auto. Owners Ins. Co.</i> , 526 N.W.2d 409 (Minn. App. 1995).....	10
<i>Lahr v. American Family Mut. Ins. Co.</i> , 528 N.W.2d 257 (Minn. App. 1995).....	9
<i>Martinez v. Minnesota Zoological Gardens</i> , 526 N.W.2d 416 (Minn. App. 1995).....	10
<i>Metropolitan Prop v. Transit Comm’n</i> , 526 N.W.2d 628 (Minn. App. 1995) .....	9
<i>Minneapolis St. P &amp; S Ste MRR v. St. Paul Mercury Indem Co.</i> , 268 Minn. 390, 129	
N.W.2d 777 (1964).....	10
<i>Moore v. Carlson</i> , 128 N.W. 578, 578 (Minn. 1910).....	17
<i>Norwest Bank Minn., N.A. v. Midwestern Machinery Co.</i> , 481 N.W.2d 875, 879 (Minn.	
App. 1992) .....	24
<i>Peaslee v. Ridgeway</i> , 84 N.W. 1024, 1025 (Minn. 1901) .....	13, 17
<i>Pennington County Bank v. First State Bank of Moorhead</i> , 10 Minn. 263, 267, 125 N.W.	
119, 121 (Minn. 1910) .....	21
<i>Petition of Brainerd Nat’l Bank</i> , 383 N.W.2d 284, 289 n.7 (Minn. 1986) .....	18
<i>Ramsey County v. Wilson</i> , 526 N.W.2d 384 (Minn. App. 1995) .....	10
<i>Rathbun v. W T Grant Co.</i> , 300 Minn. 223, 219 N.W.2d 641 (1974).....	11
<i>Rothensies v. Electric Storage Battery Co.</i> , 329 U.S. 296, 299 (1946).....	23
<i>Sheasgreen Holding Co. v. Dworsky</i> , 231 N.W. 395, 395 (Minn. 1930).....	16, 17
<i>Singh v. State Farm Mut. Auto. Ins. Co.</i> , 523 N.W.2d 348 (Minn. App. 1994).....	10, 22
<i>Spencer v. Annan</i> , 4 Minn. 542, 543 (1860).....	17
<i>Unborn Child v. Evans</i> , 310 Minn. 197, 245 N.W.2d 600 (1976) .....	10
<i>Whisler v. Findeisen</i> , 280 Minn. 454, 160 N.W.2d 153 (1968).....	11

Statutes

Minn. Stat. § 336.1-201(19)(2008) .....21  
Minn. Stat. § 336.3-301 (2008) .....20  
Minn. Stat. § 336.3-302 (2008) .....20  
Minn. Stat. § 336.3-306 (2008) .....20  
Minn. Stat. § 336.3-308 (2008) at comment 2 .....24, 25  
Minn. Stat. § 508.57 (2008) .....25  
Minn. Stat. § 523.01 (2008) .....14  
Minn. Stat. § 580 .....13  
Minn. Stat. § 580.05 (2008) .....passim

## STATEMENT OF LEGAL ISSUES

(1) Does a power of attorney need to be recorded against the tract to be foreclosed to comply with the statutory foreclosure by advertisement procedure codified at Minn. Stat. § 580.05 (2008)?

The lower court ruled that “the Limited POA and POA” were signed and recorded in conformity with Minnesota law without directly answering the question before it.

Apposite Legal Authority: Minn. Stat. § 580.05 (2008); *Peaslee v. Ridgeway*, 84 N.W. 1024, 1025 (Minn. 1901); *Sheasgreen Holding Co. v. Dworsky*, 231 N.W. 395, 395 (Minn. 1930).

(2) In deciding a summary judgment motion, may the court find that compliance with the foreclosure by advertisement statute precludes a party from raising defenses, affirmative defenses, and counterclaims related to the status of the purported holder of the note?

The lower court ruled that CitiMortgage was the holder of the Note and Mortgage, that it was entitled to enforce the Note and Mortgage, and that its foreclosure was “otherwise conducted in accordance with Minnesota law and [was] valid in all respects.”

Apposite Legal Authority: Minn. Stat. § 580 *et seq.*; Minn. Stat. § 336.3-308 (2008).

(3) May the court ignore defenses brought under Article 3 of the UCC because the foreclosing party is not collecting on the note but, rather, foreclosing on the mortgage?

The lower court ruled that Molde’s defenses in recoupment were not valid because CitiMortgage did not bring an action to recover payment on the Note, but, rather, only sought to foreclose the Mortgage.

Apposite Legal Authority: Minn. Stat. § 580 *et seq.*; Minn. Stat. § 336.3-308

(2008); *Norwest Bank Minn., N.A. v. Midwestern Machinery Co.*, 481 N.W.2d 875, 879 (Minn. App. 1992).

## **STATEMENT OF FACTS**

### BACKGROUND

Troy A. Molde's ("Molde") home is located on certain real property at \_\_\_\_\_, legally described as Lot 6, Block 6, Crossroads 1st Addition, Dakota County, Minnesota (hereinafter, the "Home" or "Property") (Compl. ¶ 4, AAP – 002.) Molde has owned his home since September 7, 2004. (*Id.* ¶ 5, AAP – 002).

On or about 2004, CitiMortgage, Inc. ("CitiMortgage") filed a Limited Power of Attorney, dated January 8, 2004, which was recorded in the office of the Dakota County Recorder on March 23, 2004 as Document No. 2176191<sup>1</sup> ("Limited POA"). (Order Findings ¶ 7, AAP- 082; the Limited POA is attached to this memorandum at AAP – 052.) In this Limited POA, CitiMortgage asserts that Wilford & Geske, P.A. ("Wilford & Geske") is its true and lawful Attorney and "in its name, place and stead for its use and benefit, to execute, endorse and acknowledge all documents customarily and reasonably necessary and appropriate for the foreclosure of all mortgage for properties located in the State of Minnesota, including the execution of a Power of Attorney to Foreclose Mortgage." (*Id.*)

---

<sup>1</sup> CitiMortgage also proffered another Limited POA at a previous eviction hearing, identified during the first eviction hearing, as document No. 2188083. For the purposes of this appeal, Molde does not address this other Limited POA because it does not raise additional questions of law.

On or about September 22, 2006, Molde executed and delivered a note in the principal amount of \$343,000.00 to Winstar Mortgage Partners, Inc. ("Note"). (Order Findings ¶ 1, AAP – 081; the Note is attached to this memorandum at AAP - 023.) Simultaneously with the execution of the Note, Molde executed and delivered a mortgage to Winstar Mortgage Partners, Inc. ("Mortgage"). (Order Findings ¶ 2, AAP 081; the Mortgage is attached to this memorandum at AAP - 027.) The Mortgage was recorded in the office of the Dakota County Recorder on October 6, 2006 as Document No. 2466581 and encumbers property legally described as Lot 6, Block 6, Crossroads 1st Addition, Dakota County, Minnesota. ("Property" or "Home") (Order Findings ¶ 3; AAP – 081; *see* Mortgage at AAP - 027.)

In 2007, the loan was referred to the law firm of Wilford & Geske, to foreclose on the Property. (Order Findings ¶ 6, AAP – 082.)

In November 2007, Mortgage Electronic Registration Systems, Inc. purportedly assigned Mortgage (recited to as "MORTGAGE DOCUMENT #2466581(A)") to CitiMortgage by Assignment of Mortgage, dated November 9, 2007, recorded November 13, 2007 as Document No. 2555672. (Order Findings ¶ 5, AAP – 082; assignment is attached to this memorandum at AAP - 050.) The Mortgage Assignment purports to be an assignment of Mortgage, recited to as Document No. 2466581(A), from Mortgage Electronic Registration Systems to CitiMortgage, executed by James A. Geske, Vice President of Mortgage Electronic Registration Systems, Inc. (*See id.*)

On the same date as the Mortgage Assignment, CitiMortgage Inc. filed a Notice of Pendency and Power of Attorney to Foreclose Mortgage (“Attorney-in-Fact<sup>2</sup>”), dated November 9, 2007 and recorded in the office of the Dakota County Recorder on November 13, 2007 as Document No. 2555673 and signed by Wilford & Geske, as Attorney-in-Fact for CitiMortgage. (Order Findings ¶ 8, AAP – 082; the Notice of Pendency and Power of Attorney to Foreclose is attached to this memorandum at AAP - 054.)

A foreclosure sale on the Property was held on January 4, 2008. (Order Findings ¶ 8, AAP - 082) CitiMortgage was the successful bidder at that sale, bidding \$358,839.26. (Order Findings ¶ 10, AAP - 082.) A Sheriff’s Certificate of Sale and Foreclosure Record evidencing the sale of the Property was recorded in the office of the Dakota County Recorder on January 4, 2008 as Document No. 2564584 (“Sheriff’s Certificate”). (Order Findings ¶ 11, AAP – 082; the Sheriff’s Certificate is attached to this memorandum at AAP - 056.)

#### PROCEDURAL HISTORY

Molde’s redemption period ran on July 4, 2008. CitiMortgage commenced an eviction action against Molde on July 22, 2008. On September 23, 2008, the parties entered into a stipulation on the eviction file, Case No. 19WS-CV-08-959, to stay that

---

<sup>2</sup> The district court referred to the “Notice of Pendency of Proceeding and Power of Attorney to Foreclose” in the shortened form of “POA.” Because Molde contends that it is not a Power of Attorney because it is not signed by the principal, he will refer to it as “Attorney-in-Fact” and not “POA.” *See, infra*, pp. 14 - 16.

matter pending the outcome of this Civil matter. Molde also agreed to make payments toward a bond pursuant to the eviction settlement.

On January 22, 2009 the parties came before the District Court, Judge Timothy J. McManus, for cross-motions for summary judgment. The Court denied Molde's motion for summary judgment and granted CitiMortgage's motion for summary judgment in its order dated February 25, 2009 and entered March 2, 2009. Appellant Molde filed this appeal on May 1, 2009.

### **ARGUMENT**

Appellant Troy A. Molde ("Molde") appeals the district court's order denying his motion for summary judgment on his declaratory judgment claim because Respondent CitiMortgage Inc.'s ("CitiMortgage") foreclosure by advertisement did not follow Minnesota's Foreclosure by Advertisement procedure and is, therefore, void.

Appellant Molde also appeals the district court's order granting Respondent CitiMortgage's motion for summary judgment because Molde raised significant issues of material fact questioning whether CitiMortgage owned the debt underlying the foreclosed mortgage interest, whether it was the proper party to bring the foreclosure, and whether CitiMortgage was a holder or took the mortgage note obligation from a holder. Additionally, Molde had not concluded discovery at the time of the summary judgment hearing, making the Court's holding premature.

On Molde's motion for summary judgment, this Court should reverse the lower court and grant Molde's declaratory judgment action to void CitiMortgage's foreclosure

because CitiMortgage had not properly recorded a power of attorney pursuant to Minnesota's Foreclosure by Advertisement Statute.

On CitiMortgage's motion for summary judgment, this Court should reverse the lower court and deny CitiMortgage's motion for summary judgment because Molde raised significant issues of material fact related to CitiMortgage's assertions that it owned the debt underlying Molde's note, that it was the proper party to foreclose, and that it was a holder in due course.

Alternatively, this Court should reverse the lower court and deny CitiMortgage's motion for summary judgment because Molde had not completed discovery.

#### I. STANDARD OF REVIEW

In considering Molde's appeal, the Court should examine the record and the lower court's ruling to see whether there were any genuine issues of material fact and whether the lower court erred in its application of the law. On appeal from a summary judgment, the function of the appellate court is limited to determining whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *In re Proposed Locke Lake Project*, 528 N.W.2d 875 (Minn. App. 1995); *Lahr v. American Family Mut. Ins. Co.*, 528 N.W.2d 257 (Minn. App. 1995); *Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996), 528 N.W.2d 247 (Minn. App. 1995); *Affiliated Banc Group v. Zehringer*, 527 N.W.2d 585 (Minn. App. 1995); *Jostens v. Northfield Ins. Co.*, 527 N.W.2d 116 (Minn. App. 1995); *Metropolitan Prop v. Transit Comm'n*, 526 N.W.2d 628 (Minn. App. 1995); *Martinez v. Minnesota Zoological Gardens*, 526 N.W.2d 416 (Minn.

App. 1995); *Kern v. Auto. Owners Ins. Co.*, 526 N.W.2d 409 (Minn. App. 1995); *Geraci v. Eckankar*, 526 N.W.2d 391 (Minn. App. 1995); *Ramsey County v. Wilson*, 526 N.W.2d 384 (Minn. App. 1995); *Hutt Consultants v. Construction Maintenance*, 526 N.W.2d 62 (Minn. App. 1995) ; *Singh v. State Farm Mut. Auto. Ins. Co.*, 523 N.W.2d 348 (Minn. App. 1994); *Betlach v. Wayzata Condominium*, 281 N.W.2d 328 (Minn. 1979). See *Minneapolis St. P & S Ste M RR v. St. Paul Mercury Indem Co.*, 268 Minn. 390, 129 N.W.2d 777 (1964).

The appropriate framework under which to examine Molde's and CitiMortgage's motions is to construe the facts to favor the non-moving party. In cases involving summary judgment, the evidence must be viewed in the light most favorable to the one against whom the motion for summary judgment was granted. *Singh*, 523 N.W.2d 348; *Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978) (because action was dismissed by district court on summary judgment, facts asserted by plaintiff must be taken as true for purposes of appeal); *Abdallah Inc. v. Martin*, 242 Minn. 416, 65 N.W.2d 641 (1954). For purposes of reviewing a summary judgment, the appellate court presumes that all genuinely disputed issues of fact may be resolved in favor of the party against whom the judgment was rendered. *Unborn Child v. Evans*, 310 Minn. 197, 245 N.W.2d 600 (1976).

In reviewing Molde's appeal to the lower court's summary judgment order, this Court is not bound by the lower court's findings. Findings of fact in a summary judgment proceeding are not entitled to the respect that an appellate court is required to give findings made by a court acting without a jury pursuant to rule 52.01 of the rules of civil procedure, and a party on appeal need not overcome the "clearly erroneous"

standard to be successful on appeal. *Rathbun v. W T Grant Co.*, 300 Minn. 223, 219 N.W.2d 641 (1974); *Whisler v. Findeisen*, 280 Minn. 454, 160 N.W.2d 153 (1968).

II. THE DISTRICT COURT ERRED BY FINDING THAT CITIMORTGAGE'S POWER OF ATTORNEY TO FORECLOSE CONFORMED WITH THE STATUTORY FILING REQUIREMENTS OF MINNESOTA'S FORECLOSURE BY ADVERTISEMENT STATUTE

In denying Molde's motion for summary judgment, the district court found that CitiMortgage had filed its power of attorney to foreclose in conformity with Minnesota Law: Molde respectfully asserts that the district court erred in its application of the law.

The basic legal question presented to the court is simple: does a power of attorney need to be recorded against the tract to be foreclosed to comply with the statutory foreclosure by advertisement procedure codified at Minn. Stat. § 580.05 (2008)? Molde respectfully asserts that it does.

In his summary judgment memo, Molde asserts that the Limited POA, document 2176191 (AAP – 052) was not recorded against his property but, rather, as a miscellaneous document in the Dakota County Recorder's Office. Molde asserted that searching his property tract index would not uncover this Limited POA. (Transcript, p. 7.)

*The District Court Erred in Ruling that CitiMortgage Had Properly Recorded A Power of Attorney Pursuant to Minn. Stat. § 580.05.*

CitiMortgage did not file a proper power of attorney document to avail itself of the statutory foreclosure by advertisement privilege. For an attorney to avail herself of the foreclosure by advertisement statute, she must file and record a power of attorney “in the manner as a conveyance” and if appearing as an attorney-in-fact, the attorney’s authority “shall likewise be evidenced by recorded power”:

When an attorney at law is employed to conduct such foreclosure, the authority of the attorney at law shall appear by power of attorney executed and acknowledged by the mortgagee or assignee of the mortgage in the same manner as a conveyance, and recorded prior to the sale in the county where the foreclosure proceedings are had. If such attorney be employed on behalf of such mortgagee or assignee by an attorney in fact, the attorney's authority shall likewise be evidenced by recorded power.

Minn. Stat. § 580.05. Molde respectfully asserts that neither CitiMortgage’s Limited POA or Attorney-in-Fact fulfill the requirements of this statute.

CitiMortgage’s Limited POA, document no. 2176191, is not recorded against Molde’s Property and, therefore, does not fulfill the statutory requirement for the filing and recording of a power of attorney pursuant to the foreclosure by advertisement statute. In the answer to Molde’s civil matter, CitiMortgage stated that it had complied with the foreclosure by advertisement statute:

The Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage, dated November 9, 2007 and recorded on November 13, 2007 as Document No. 2555673 was validly executed by Wilford & Geske, P.A. as attorney-in-fact for CitiMortgage pursuant to a Limited Power of Attorney executed by CitiMortgage on January 8, 2004, and recorded in the office of the Dakota County Recorder on February 17, 2008 as Document No. 217691.

(Def. Ans. ¶ 50, AAP – 018 – AAP – 019.) However, CitiMortgage filed the Limited POA referenced in the Answer, Document No. 217691 as a miscellaneous document with the Dakota County recorder’s office. It did not file that document against the tract index associated with Molde’s Home. CitiMortgage’s Answer implies that Minn. Stat. § 580 does not require it to record a power of attorney with the tract to be foreclosed. It suggests that its Limited POA, a sort of “blanket” power of attorney that would generally apply to all property in Dakota County, fulfills the foreclosure by advertisement statute for any and all tracts in Dakota County. This is not the law in Minnesota: a mortgagee or assignee must record a power of attorney document *with* the tract to be foreclosed to fulfill the statute and to avail itself of the privilege of the foreclosure by advertisement statute. A power of attorney must describe the mortgage to be foreclosed with “reasonable certainty”:

The main object to be accomplished by the statute requiring the execution and record of a power of attorney authorizing the foreclosure of a mortgage upon real property, as a condition precedent to such foreclosure, is protection of the mortgagor and subsequent lienholders in making redemption. The statute makes no special provisions as to the form and contents of the power of attorney. Any power, therefore, properly executed, whatever its form, which will furnish the protection contemplated by the statute, and which described the mortgage with reasonable certainty, is sufficient.

*Peaslee v. Ridgeway*, 84 N.W. 1024, 1025 (Minn. 1901): *Peaslee*, after over 100 years, is still good law. The Court should not allow CitiMortgage to go against the foreclosure by advertisement statute and *Peaslee* merely for its convenience.

The court erroneously concluded that the Notice of Pendency and Power of Attorney to Foreclose Mortgage, dated November 9, 2007 and recorded in the office of

the Dakota County Recorder on November 13, 2007 as Document No. 2555673, was a power of attorney. This document, referred to in short form by the court as “POA” is not a power of attorney because it is executed by James Geske, attorney for Wilford & Geske and counsel for CitiMortgage. This Notice of Proceeding is not a power of attorney because a principal of CitiMortgage did not execute it. A power of attorney is validly executed when it is dated and signed by the *principal*. Minn. Stat. § 523.01 (2008) (emphasis added). The document CitiMortgage refers to as the “Power of Attorney,” recorded with at the Dakota County Recorder’s Office as Doc. No. 2555673, is not executed by the principal, CitiMortgage. It is only executed by the principal’s attorney (See “Notice of Pendency of Proceeding and Power of Attorney to Foreclose,” attached at AAP - 054.) Therefore, it is not a valid power of attorney document. It is actually an attorney-in-fact document.

Additionally, the purported power of attorney, which is really an attorney-in-fact document, also does not relate or refer back to the Limited POA in a manner that “likewise” evidences the attorney’s recorded power as required by Minn. Stat. § 580.05. The statute is clear that an attorney-in-fact statement is only legal if it is “likewise” evidenced by recorded power. *Id.* The word “likewise” refers to the preceding language regarding the power of attorney in Minn. Stat. § 580.05. There are two possible interpretations of “likewise” in the statute. Either the statute is stating that the attorney-in-fact document must substantially conform to the requirements of a power of attorney document (i.e. be executed and acknowledged by the principal—the mortgagee or assignee of the mortgage). Or the statute is stating that the attorney-in-fact document

must relate back to a power of attorney “by recorded power” in the tract (i.e. analogous to chain of title). CitiMortgage’s document, signed by James Geske purportedly giving James Geske’s law firm the power to foreclosure, does not fulfill either of these definitions of “likewise” “evidenced by recorded power.” Therefore, it is neither a sufficient alternate nor sufficient substitute for the Power of Attorney requirement in Minn. Stat. § 580—the Foreclosure by Advertisement Statute.

In its findings of fact, the District Court makes conclusionary statements of law regarding the propriety of CitiMortgage’s foreclosure that are not supported by any factual findings and that do not squarely address the legal question before it. The Court finds as fact that CitiMortgage’s foreclosure is “valid” without addressing whether it fulfills the requirements of Minn. Stat. § 580.05: “CitiMortgage filed a Limited Power of Attorney, dated January 8, 2004, which was recorded in the office of the Dakota County Recorder on March 23, 2004 as Document No. 2176191 and was *valid and enforceable* at the time the Mortgage was foreclosed in early 2008” (emphasis added). (Order Findings ¶7, AAP - 082.) The Court also finds as fact that the Attorney-in-Fact fulfills Minnesota Statute without specifying which discreet part of the statute it fulfills or addressing how it relates back to the power of attorney: “*In accordance with Minnesota Statute*, a Notice of Pendency and Power of Attorney to Foreclose Mortgage, dated November 9, 2007 and recorded in the office of the Dakota County Recorder on November 13, 2007 as Document No. 2555673 (“POA”) was signed by Wilford & Geske, P.A., as Attorney-in-Fact for [CitiMortgage]” (emphasis added). (Order Findings ¶ 8, AAP - 082.) The court’s order does not address how CitiMortgage recorded its Notice of Pendency and

Power of Attorney to Foreclose Mortgage in accordance with Minnesota law if it was signed by its attorney-in-fact James Geske and not a principal of CitiMortgage. Specifically, the order is silent on how the proffered and recorded attorney-in-fact document fulfilled Minn. Stat. § 580.05.

As a matter of law, Molde is entitled to summary judgment because CitiMortgage has not complied with Minn. Stat. § 580.05, making CitiMortgage's foreclosure void. Failure to properly file a power of attorney invalidates and voids the sheriff's sale. *Sheasgreen Holding Co. v. Dworsky*, 231 N.W. 395, 395 (Minn. 1930). Here, Defendant's Attorney-in-Fact does nothing to resuscitate the defective power of attorney, nor is it legally sufficient to stand in as a power of attorney. Because the power of attorney was not recorded pursuant to Minn. Stat. § 580.05, the Court should void the foreclosure and set aside the sheriff's sale certificate.

*Minnesota Foreclosure Law is Unambiguous and the Courts Must Strictly Construe It*

In Minnesota, foreclosure by advertisement is a *privilege*, not a right. It is a purely statutory remedy, and thus each of the statutory requirements must be satisfied to effectuate a valid foreclosure. *Sheasgreen*, 231 N.W. at 396 ("The proceeding is inherently of such character that a strict compliance with the statute is necessary.").

In exchange for providing mortgage lenders with access to a streamlined, non-judicial foreclosure process that is significantly less expensive and time consuming than its judicial counterpart, the Minnesota Supreme Court has always mandated strict compliance with the statutory requirements:

When the holder of a mortgage, instead of proceeding to foreclosure by judicial proceedings, . . . resorts to the power contained in the mortgage, thus taking the remedy in his own hands, by an *ex parte* proceeding, it is but reasonable that he should be kept strictly within the terms of the power, and held to a rigid observance of all the requirements of the Statutes [that] regulate its exercise . . . .

*Spencer v. Annan*, 4 Minn. 542, 543 (1860). Fifty years later, the Court reinforced this mandate for strict construction of the foreclosure statutes – and strict liability for failure to abide by them:

Foreclosure by advertisement is purely a statutory creation. One who avails himself of its provisions must show an exact and literal compliance with its terms; otherwise he is bound to profess without authority of law. If what he does failed to comply with the requirements of the statute, it is void.

*Moore v. Carlson*, 128 N.W. 578, 578 (Minn. 1910); *see also Graybow-Daniels Co. v. Pinotti*, 255 N.W.2d 405, 407 (Minn. 1977) (recognizing that foreclosure statutes and their strict requirements have been virtually unchanged since the late 1800s, and that early cases are still good law); *Hudson v. Upper Michigan Land Co.*, 206 N.W. 44, 45 (Minn. 1925) (holding that “when the mortgagee elects to foreclose by advertisement, all the essential requisites of the statute must be complied with, and that a clear departure therefrom vitiates the proceeding”); *Peaslee*, 84 N.W. at 1026 (voiding a foreclosure by advertisement because the mortgagee stated the wrong page of the record book wherein the mortgage was recorded); *Sheasgreen*, 231 N.W. at 396 (holding that the foreclosing mortgagee’s failure to record a power of attorney voided a foreclosure by advertisement). The Minnesota Supreme Court has further explained this preference for strict construction of the statute by noting that anything less “would endanger the predictability

essential in the rules governing real estate transactions.” *Petition of Brainerd Nat’l Bank*, 383 N.W.2d 284, 289 n.7 (Minn. 1986).

This Court should not allow CitiMortgage to loosely comply with the Foreclosure by Advertisement Statute for its expediency. The lower court suggests that foreclosing parties may take shortcuts when foreclosing by not recording a proper power of attorney against the title: “Due to the number of foreclosures Wilford & Geske handles for CitiMortgage, CitiMortgage granted Wilford & Geske the power to sign foreclosure related documents on CitiMortgage’s behalf. This power is evidenced by a Limited Power of Attorney . . .” (Order Findings ¶ 7, AAP - 082.) Indeed, CitiMortgage testified that it intended the Limited POA to eliminate the need for the principal to sign the power of attorney for each property. *See* Summary Judgment Transcript, p. 22 – 23. However, for more than 100 years, the Minnesota Supreme Court has consistently held that the foreclosure by advertisement statute must be strictly construed and that failure to adhere to its requirements renders the foreclosure void. Molde respectfully asks the Court to follow the well-established law and void CitiMortgage’s foreclosure and sheriff’s sale.

**III. THE COURT ERRED IN FINDING THAT THERE WERE SIGNIFICANT ISSUES OF MATERIAL FACT RELATED TO CITIMORTGAGE’S ASSERTIONS THAT IT THAT IT OWNED THE DEBT UNDERLYING MOLDE’S NOTE, THAT IT WAS THE PROPER PARTY TO FORECLOSE, AND THAT IT WAS A HOLDER IN DUE COURSE.**

Molde asserts that the lower court’s grant of CitiMortgage’s summary judgment motion was inappropriate because he had raised significant issues of material fact questioning whether CitiMortgage owned the debt underlying the foreclosed mortgage

interest, whether it was the proper party to bring the foreclosure, and whether CitiMortgage was a holder or took the mortgage note obligation from a holder.

In his pleadings, affidavits, and otherwise in the record, Molde raised and alleged numerous facts that raised a genuine issue of material fact regarding CitiMortgage's assertion that it was the holder of the note or had taken from a holder by foreclosing on Molde's property. These facts are as follows: (1) CitiMortgage's agent is the assignor and the assignee of the mortgage (*see*, Pl's Am. Verified Compl. at ¶¶ 12 – 18, AAP – 003 – AAP - 004); (2) CitiMortgage purportedly purchased a non-performing loan and immediately foreclosed (*see*, Pl's Am. Verified Compl. at ¶¶ 10-18, AAP – 003 – AAP - 004); (3) Molde alleges that around May 2007, he stopped receiving statements (*see*, Pl's Am. Verified Compl. at ¶ 10, AAP - 003); (4) the prior servicer of the subject mortgage loan, GMAC, stated that they sold the servicing rights to CitiMortgage, effective May 1, 2007 (*see*, Molde Affidavit at AAP - 067); (5) Molde alleges that he did not receive a default notice from CitiMortgage for the subject loan (*see*, Pl's Am. Verified Compl. at ¶ 10, AAP – 003; Molde Affidavit at AAP - 067); (6) CitiMortgage's employees on numerous occasions admitted that CitiMortgage did not have anything on file for Molde or his property (*see* Pl's Am. Verified Compl. at ¶¶ 24-34, AAP – 005 – 006; Molde Affidavit at AAP – 067; Dobbins Affidavit at AAP - 069); (7) Molde did not receive any response to his written correspondence (*see* Molde Affidavit at AAP – 067 – AAP – 068); (8) Molde did not receive any response to his RESPA qualified written request from CitiMortgage, but he did receive a response from the prior loan servicer, GMAC,

for the subject Mortgage loan (*See* Molde Affidavit at AAP – 068; GMAC RESPA Qualified Written Request Response at AAP - 071.)

Molde's factual assertions, above, create an issue of material fact to whether CitiMortgage is subject to his defenses to the payment obligation created by the note. The Uniform Commercial Code, Article 3, is the appropriate law under which to evaluate a negotiable instrument and a purported holder's right to enforce. U.C.C. codified at Minn. Stat. § 336 *et seq.* A person or entity is entitled to enforce that instrument if she is the holder of that instrument. Minn. Stat. § 336.3-301 (2008). If she is a holder in due course, she takes that instrument free of all contrary claims of ownership and virtually any defense to the payment liability that it represents. Minn. Stat. § 336.3-306 (2008). The facts that Molde asserted to the trial court sufficiently alleged that CitiMortgage was not a holder in due course. A holder in due course is one who is (1) a holder, (2) of a negotiable instrument, (3) who took the instrument in an ordinary transaction, (4) for value, (5) in good faith, and (6) without notice that it is overdue, dishonored, part of a series in default, forged, altered, or subject to a claim or defense. Minn. Stat. § 336.3-302 (2008). Here, Molde has made numerous allegations that CitiMortgage is not a holder in due course and is subject to Molde's defenses, affirmative defenses, and counterclaims under the instrument. Principally, Molde has alleged that CitiMortgage has not taken the instrument in good faith or in an ordinary transaction.

First, Molde has alleged that James Geske's presence as the Vice-President of Mortgage Electronic Registration Systems ("MERS"), the assignee of the security instrument and as counsel for CitiMortgage suggests improper conduct or, at worst,

malfesance. *Compare* Assignment, AAP - 050 with Notice of Pendency of Proceeding and Power of Attorney to Foreclose, AAP - 054. In an affidavit in support of CitiMortgage's motion for summary judgment, Geske asserts that he holds the positions of Vice President of Wilford & Geske and Vice President of MERS. (*See* Geske Affidavit, AAP - 065.) This seemingly self-dealing transaction implies that CitiMortgage has not taken the security instrument in good faith. Good faith is "honesty in fact in the conduct or transaction concerned." Minn. Stat. § 336.1-201(19)(2008). "To establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinarily prudent man upon inquiry." *Pennington County Bank v. First State Bank of Moorhead*, 10 Minn. 263, 267, 125 N.W. 119, 121 (Minn. 1910). In New York, a Judicial Foreclosure state, Judge Scheck found that when the foreclosing party's agent was the assignor and assignee of the security instrument, and the foreclosing party had purportedly purchased a non-performing note just before foreclosure, there was enough doubt on the face of the pleadings for the court to rule against the foreclosing party when proceeding in default. In *Deutsche Bank Nat' Trust Co. v. Campbell*, the Court found that an assignment from MERS as nominee of First Franklin Bank to Deutsche Bank suggested simultaneous representation by an attorney, giving rise to a presumption of a conflict of interest. *Deutsche Bank Nat' Trust Co. v. Campbell*, 2008 WL 5220543 (N.Y. Sup. Dec. 16, 2008) at \*1. (Case attached at AAP - 076.) While the New York court found that the assignment was invalid because Deutsche Bank had not demonstrated through a power of attorney how the agent was vested with the authority to assign the mortgage, *Id.*, at \*2 - \*3, the Court states in *dicta*

that even if Deutsche Bank could cure the assignment defect, it would have “to address the conflict of interest of both the assignor of the instant mortgage, MERS, and the assignee of the instant mortgage, Deutsche Bank.” *Id.*, at \*4.

Second, CitiMortgage represented on multiple occasions that it did not own Molde’s loan. CitiMortgage told Molde that they did not own his loan when he contacted them in response to their letters. (*See* Molde Affidavit at AAP – 067). Also, CitiMortgage made similar representations to Molde’s HUD-certified foreclosure prevention counselor. (*See* Dobbins Affidavit at AAP - 069.) Dobbins’ contact at CitiMortgage asserted that CitiMortgage was not the senior lien holder. (*Id.*) CitiMortgage’s employee also searched for Molde’s loan by name, address, account number, and social security number and was unable to find anything for Molde. If CitiMortgage has asserted that it did not own Molde’s loan during the time that he had title to secured property, then the Court should allow him to inquire into the basis for those assertions. The CitiMortgage employee’s lack of knowledge of Molde’s loan suggests that it was not part of an ordinary transaction. Moreover, it again strongly implies that CitiMortgage was not acting honestly in its representations to Molde and, therefore, was not acting in good faith.

The lower court did not apply the correct standard for evaluating Molde’s factual assertions when granting CitiMortgage’s motion for summary judgment. The appropriate standard is to view the facts in the light most favorably to the non-moving party. *Singh*, 523 N.W.2d 348; *Hauser*, 263 N.W.2d 803. Although Molde raised sufficient facts to challenge CitiMortgage’s holder in due course status, the lower court inappropriately

found that “[t]he Note and Mortgage were subsequently assigned to Defendant CitiMortgage” (Order Findings ¶ 4, AAP - 081) and because CitiMortgage was the holder of the Note and Mortgage, it was entitled to enforce the Note and Mortgage. (Order Conclusions ¶¶ 1, 2; AAP - 083.) Its entitlement under the Note and Mortgage does not defeat Molde’s power to assert defenses to the instrument under the U.C.C.

Also, the lower court erred by holding that Molde could not bring his defenses under the note because CitiMortgage was enforcing the security instrument and not collecting on the debt. It misappreciated Molde’s defenses in recoupment as a set-off: “Molde’s ‘Defenses in Recoupment’ are not valid because CMI did not bring an action to recover payment on the Note, but rather sought only to foreclose the Mortgage.” (Order Conclusions ¶ 4, AAP - 083.) “Set-off and counterclaim are usually used interchangeably. But recoupment is something essentially different . . . .” *Imperial Elevator Co. v. Hartford Accident & Indem. Co.*, 163 Minn. 481, 484, 204 N.W. 531, 532 (1925). Recoupment is defense arising out of some feature of the transaction upon which the plaintiff’s action is grounded. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (citing *Bull v. United States*, 295 U.S. 247, 262 (1935)). A recoupment defense is appropriate when something about the underlying obligation is inequitable. Although recoupment is limited to breaches of contract in the same transaction underlying the plaintiff’s claim, it is not limited to the particular aspect of the transaction on which the plaintiff’s claim is based. *Cf. Ingle v. Angell*, 111 Minn. 63, 64-65, 126 N.W. 400, 400 (1910) (allowing recoupment based on nonintersecting subsets of the same transaction as plaintiff’s claim). Rather, recoupment is available “as long as the two

claims arise from the same transaction and can be adjusted in the same proceeding.” *Norwest Bank Minn., N.A. v. Midwestern Machinery Co.*, 481 N.W.2d 875, 879 (Minn. App. 1992) (quotation omitted), *rev. denied* (Minn. May 15, 1992). As detailed above, Molde asserted ample evidence that CitiMortgage had not taken the Note in good faith or in an ordinary transaction. By bringing this defense, Molde has effectively switched the burden to CitiMortgage to prove that it has taken the instrument in good faith or in an ordinary transaction. “If a defense or claim in recoupment is proved, the right to payment of the payment is subject to the defense or claim, except to the extent that the plaintiff has rights of a holder in due course [that] are not subject to the defense or claim.” Minn. Stat. § 336.3-308(b) (2008). Under section 336.3-308, if the holder of the note claims the rights of a holder in due course against the defense or claim in recoupment, the note holder has the burden of proof on that issue. Minn. Stat. § 336.3-308 (2008) at comment 2. The entitlement to enforce the instrument does not foreclose the claim or defense of recoupment. *Id.* at comment 1. Because the entitlement to enforce the instrument does not foreclose the claim or defense of recoupment, the lower court’s holding that he could not bring his defenses is clearly in error.

Molde also asserts that the lower court erred in its holding that he could not bring his defenses under the note merely because CitiMortgage had followed the foreclosure by advertisement process. Even if CitiMortgage had followed the foreclosure by advertisement statute, compliance with that statute merely creates the *power* to foreclose, not the *right* to foreclose. The lower court allowed the *ex parte* foreclosure by advertisement process to prohibit Molde from raising his defenses, affirmative defenses,

and counterclaims to the foreclosure under Minn. Stat. § 336.3-308(b) as a Plaintiff in this action. Because there is not a sufficient manner by which to raise a defense under the note in the non-judicial foreclosure process, it is appropriate that Molde brings his defenses, affirmative defenses, and counter-claims under the note as a declaratory judgment action. In addition, CitiMortgage's purported compliance with the foreclosure with advertisement process should not empower CitiMortgage to prevent a defense under Article 3 of the UCC. Whatever presumptions compliance with the foreclosure by advertisement statute creates, they are only presumptions to the extent of the mortgagee's or assignee's *power* to foreclosure. It does not create a *right* to foreclose. Following the foreclosure by advertisement statute gives rise to, or "authorizes," the non-judicial foreclosure. *See* Minn. Stat. § 508.57 (2008). There is no case in Minnesota that states that following the foreclosure by advertisement statute confers status upon the mortgagee or assignee immune from defenses arising under Article 3 of the UCC as a matter of law.

#### IV. THE COURT ERRED GRANTING SUMMARY JUDGMENT FOR CITIMORTGAGE BECAUSE MOLDE HAD NOT COMPLETED DISCOVERY

The Appellate Court should reverse the lower courts grant of CitiMortgage's summary judgment because Molde had not completed discovery. The Motion for Summary Judgment occurred on January 22, 2009. The deadline for discovery was April 2, 2009. (*See* Scheduling Order, AAP – 021.) Molde received CitiMortgage's responses to his first set of interrogatories on or about December 18, 2008. (*See* CitiMortgage's Responses to Molde's First Set of Interrogatories, AAP – 092.) For the most part,

CitiMortgage's responses were evasive, incomplete, or non-responsive. (*See id.*) Counsel met and conferred on January 12, 2009 and CitiMortgage stated it would supplement. (*See* Letter from Molde's Counsel, AAP – 099.) CitiMortgage's Amended Responses arrived by fax on February 3, 2009. (*See* CitiMortgage's Amended Responses to Molde's First Set of Interrogatories, AAP – 100.) These are the only substantive responses to Molde's discovery requests; however, they were after the summary judgment motion. When the nonmoving party has been allowed only minimal discovery and the information that party needs to survive summary judgment is in the moving party's sole possession, summary judgment may be premature. *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. App. 2000). Therefore, Molde is entitled to discovery on its claims. Furthermore, the court should have not granted summary judgment for CitiMortgage before Molde was able to conduct discovery.

### CONCLUSION

Molde has demonstrated with the recorded documents that the lower court erred by holding that CitiMortgage's foreclosure followed the statutory foreclosure by advertisement process. On Molde's motion for summary judgment, this Court should reverse the lower court and grant Molde's declaratory judgment action to void CitiMortgage's foreclosure because CitiMortgage had not properly recorded a power of attorney pursuant to Minnesota's Foreclosure by Advertisement Statute. This Court should also order the lower court to for relief consistent with its order, including that the sheriff's sale of the Home be set aside because of the invalid foreclosure, that all recorded

conveyances or assignments of the Home by CitiMortgage subsequent to the tolling of the redemption period are invalid and void; that Molde be restored the title holder in fee; and for such other and further relief as to the district court appears just and equitable, including an order awarding Plaintiff his costs and disbursements.

On CitiMortgage's motion for summary judgment, this Court should reverse the lower court and deny CitiMortgage's motion for summary judgment dismissing Molde's action because Molde raised significant issues of material fact related to CitiMortgage's assertions that it owned the debt underlying Molde's note, that it was the proper party to foreclose, and that it was a holder in due course.

Alternatively, this Court should reverse the lower court and deny CitiMortgage's motion for summary judgment because Molde had not completed discovery.

**CHRISTENSEN LAW OFFICE PLLC**



---

Carl E. Christensen #350412  
Attorney for Appellant  
1422 West Lake Street, Suite 216  
Minneapolis, MN 55408  
carl@clawoffice.com  
(612) 823-4016

**WORD COUNT COMPLIANCE CERTIFICATE**

The undersigned certifies that the principal brief of Troy Molde in case number A09-796 meets the length limits established by Minn. R. Civ. App. P. 132, subd. 3(a). The words in the attached brief, exclusive of the table contents, tables of citations, addendums, and appendix do not exceed 45 pages and is approximately 6,3,65 words.

The undersigned also certifies that this brief was prepared with Microsoft Word 2008 for Mac.

**CHRISTENSEN LAW OFFICE PLLC**

A handwritten signature in black ink, appearing to read 'Carl E. Christensen', written over a horizontal line.

Carl E. Christensen #350412  
Attorney for Appellant  
1422 West Lake Street, Suite 216  
Minneapolis, MN 55408  
carl@clawoffice.com  
(612) 823-4016