CASE NO. A09-796

State of Minnesota
In Court of Appeals

TROY A. MOLDE,

Appellant,

vs.

CITIMORTGAGE, INC.,

Respondent.

RESPONDENT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

I. DID THE DISTRICT COURT PROPERLY DETERMINE CITIMORTGAGE, INC. COMPLIED WITH MINNESOTA'S FORECLOSURE PROCEDURE, INCLUDING MINNESOTA STATUTE SECTION 580.05, AND THAT THE FORECLOSURE IS VALID?

The district court determined CitiMortgage, Inc. complied with all relevant foreclosure statutes, including Minnesota Statute section 580.05.

Apposite Authority

1. Minnesota Statute section 580.05.
2. *Peaslee v. Ridgeway*, 84 N.W. 1024 (Minn. 1901).

II. DID THE DISTRICT COURT PROPERLY DETERMINE MOLDE'S DEFENSES IN RECOUPMENT DO NOT APPLY TO CITIMORTGAGE, INC.'S MORTGAGE FORECLOSURE BY ADVERTISEMENT AND THAT THERE WERE NO ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT?

The district court determined Troy Molde's defenses in recoupment do not apply because CitiMortgage, Inc. did not bring an action to recover on the relevant note, but rather foreclosed a mortgage.

Apposite Authority

1. Minnesota Statute section 336.3-301, et. seq.
2. *Imperial Elevator Co. v. Hartford Accident & Indemnity Co.*, 163 Minn. 481, 204 N.W. 531 (1925).
3. *Norwest Bank of Minnesota, N.A., f/k/a Nor-west Bank of Midland, N.A. v. Midwestern Machinery Co , et. al.*, 48 N.W.2d 875 (Minn. Ct. App. 1992).
4. *Ingle v. Angell*, 111 Minn. 63, 126 N.W. 400 (1910).

III. DID THE DISTRICT COURT PROPERLY GRANT SUMMARY JUDGMENT IN FAVOR OF CITIMORTGAGE INC'S EVEN THOUGH THE DISCOVERY PERIOD HAD NOT EXPIRED?

The district court implicitly determined Troy Molde had completed sufficient discovery and that further discovery would not change the outcome of the Motion for Summary Judgment.

Apposite Authority

1. *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 919 (Minn. Ct. App. 2003).
2. *U S Bank N.A. as Trustee on behalf of Holders of 7-1/2% Senior Convertible Notes due 2003 of Angeion Corp v. Angeion Corp.*, 615 N.W.2d 425, 433 (Minn. Ct. App. 2000).

STATEMENT OF THE CASE

Plaintiff, Troy Molde ("Molde"), commenced a district court action on or about August 4, 2008 challenging the foreclosure of a mortgage. On January 22, 2009, the parties brought cross motions for summary judgment before the Honorable Timothy J. McManus. On February 25, 2009, Judge McManus issued an Order Denying Molde's Motion for Summary Judgment and Judgment ("AAP-081 – AAP-083.)[1] This Order was filed on February 26, 2009 and again on March 2, 2009. (Id.) The Order not only denied Molde's Motion for Summary Judgment, but granted Plaintiff, CitiMortgage, Inc.'s ("CMI"), Motion for Summary Judgment (Id.) Molde then filed this appeal.

STATEMENT OF THE FACTS

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"). (Id. at 027 – 049.) Simultaneously with the execution of the Note, Molde executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. as nominee for Winstar Mortgage Partners, Inc. ("Mortgage"). (Id. at 027 – 049.) 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:

[1] AAP refers to Appellant's Appendix.

Lot 6, Block 6, Crossroads 1st Addition, Dakota County, Minnesota ("Property"). (Id.) The Mortgage was subsequently assigned to Defendant, CMI, on or about November 9, 2007. (Id. at 050 – 051.) The Assignment of Mortgage was recorded in the office of the Dakota County Recorder on November 13, 2007 as Document No. 2555672. (Id.)

Molde fell behind on his payments on the Mortgage and the loan was referred to the law firm of Wilford & Geske, P.A. ("W&G") to foreclose on the Property. (Affidavit of Christina M. Weber, dated December 23, 2008 ("Weber Affidavit"), ¶ 2.) A foreclosure sale on the Property was held on January 4, 2008. (AAP-056 – AAP-064.) CMI was the successful bidder at that sale, purchasing the Property for $358,839.26. (Id.) 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"). (Id.) Molde did not redeem the Property from the foreclosure sale and CMI became the lawful fee owner of the Property on or about July 5, 2008. (Id.)

ARGUMENT

It is clear the district court's grant of summary judgment in favor of CMI is appropriate. There are no material issues of fact present in this case and CMI is entitled to judgment as a matter of law. CMI conducted a foreclosure of the Property in accordance with Minnesota law. The documents evidencing this were properly executed and recorded pursuant to statute. Further, Molde's defenses in recoupment are inapplicable in this situation because CMI did not enforce any obligations under a

negotiable instrument, i.e. a note, and the Uniform Commercial Code is irrelevant. For these reasons, the Court should uphold the lower court's decision and affirm summary judgment in favor of CMI.

I. THE DISTRICT COURT PROPERLY DETERMINED CITIMORTGAGE, INC. COMPLIED WITH MINNESOTA'S FORECLOSURE PROCEDURE, INCLUDING MINNESOTA STATUTE SECTION 580.05, AND THAT THE FORECLOSURE IS VALID.

Molde argues CMI conducted the foreclosure sale improperly because 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 ("POA") was signed by Wilford & Geske, P.A., as Attorney-in-Fact for CMI. Molde also argues that the Limited Power of Attorney signed by CMI on January 8, 2004 and recorded in the office of the Dakota County Recorder on February 17, 2004 as Document No. 2176191 ("Limited POA") is insufficient because it was not recorded on the tract index in Dakota County. Molde's interpretation of section 580.05 is incorrect.

A. CtiMortgage, Inc.'s Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage Complies with Section 580.05.

Pursuant to Minnesota Statutes section 580.05 (2008), a Power of Attorney to Foreclose Mortgage must be recorded prior to the foreclosure sale. Molde argues this means a power of attorney must be recorded "with the tract to be foreclosed." (Appellant's Brief, pg. 14.) Molde has not cited any authority for this proposition, however. The Minnesota Supreme Court has held that the power of attorney must describe the mortgage with "reasonable certainty." *Peaslee v. Ridgway, et al.*, 82 Minn.

288, 290, 84 N.W.1024, 1025 (1901). *Peaslee*, however, makes no reference to whether a legal description was contained on the power of attorney involved in that lawsuit and makes no holding as to whether a legal description is required. As such, Molde inaccurately states the holding in *Peaslee* as binding on the Court for his proposition that the POA was improperly recorded. Further, section 580.05 contains no requirement that a power of attorney contain a legal description or otherwise be recorded on the property to be foreclosed.

In fact, the POA in this case does in fact reference the Mortgage with reasonable certainty. The POA was recorded in the office of the Dakota County Recorder on November 13, 2007, prior to the foreclosure sale. (APP-054 – APP-055.) The POA includes the date of the Mortgage, the borrower's name, the name of the mortgagee, and the recording information for the Mortgage. This information certainly describes the Mortgage with reasonable certainty and fulfills the requirements of *Peaslee* and section 580.05.

Molde asserts the POA is not actually a power of attorney at all because it is signed by an officer of Wilford & Geske, P.A. as attorney-in-fact for CMI. Molde argues that because the POA is not signed by CMI, but rather by its agent, the POA does not constitute a valid power of attorney. In making this argument, Molde ignores a steadfast facet of American law; agency law. It is a well established principle in American Law that an act by an agent is an act by the principal. *Mikulay v. The Home Indemnity Co.*, 449 N.W.2d 464, 467 (Minn. Ct. App. 1990). Under this theory, Molde's argument that

the POA was not signed by the principal is incorrect. Wilford & Geske, P.A.'s signature on the POA is the signature of CMI. The POA is signed by the principal, CMI. *See id.*

B. CtiMortgage, Inc.'s Limited Power of Attorney Complies with Section 580.05.

Section 580.05 also requires that a person or entity record a document showing that someone has been given the authority to execute documents as an attorney-in-fact for the mortgagee. Molde's argument concerning the interpretation and practical application of this statute leads to an absurd result.

It is well established that the plain meaning of a statute must be used where the language of the statute is unambiguous. *Wallboard, Inc. v. St. Cloud Mall, LLC*, 758 N.W.2d 356 (Minn. Ct. App. 2008). However, if the language is ambiguous, a court must determine the intention of the legislature. *State v. Clark*, 755 N.W.2d 241, 249, (Minn. 2008); *Wallboard*, 758 at 356. Further, statutes are to be construed to avoid absurd results. *Clark*, 755 at 249 (*citing Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000)).

It is clear that the plain meaning of section 580.05 necessitates an affirmation of the district court's decision in this matter. Section 580.05 indicates that a document granting someone the authority to act on its behalf must be recorded. Id. The statute does not require that the mortgage be described or contain a legal description. Id. As such, the plain meaning of the statute is that a limited power of attorney must be recorded. No other requirements are included. Although Molde cites the *Peaslee* case for the proposition that a power of attorney to foreclose a mortgage must describe the

mortgage with reasonable certainty, he does not cite any cases that hold the same is true for a document like the Limited POA at issue here.

Even if the Court determines the statute is ambiguous and open to interpretation, Molde's interpretation leads to a cumbersome, absurd, and needless result. Molde argues the Limited POA is invalid because it was not recorded for this specific mortgage foreclosure and was not recorded with a legal description, but is rather a document allowing W&G to act as CMI's attorney-in-fact for all foreclosure related documents including the power of attorney required by section 580.05.

According to Molde's interpretation, in order for the Limited POA to be valid it would have had to have been executed and recorded shortly before or concurrently with the POA, would need to include relevant information relating to the Mortgage, and would need to be recorded against the Property. This defeats the purpose of executing a limited power of attorney, which purpose is to save time and expense during the foreclosure process. Signing a limited power of attorney allowing a law firm to execute foreclosure-related documents prevents the mortgagee from having to execute those foreclosure-related documents each and every time it forecloses a mortgage in the state of Minnesota. If Molde's interpretation is correct, two documents, the limited power of attorney and the power of attorney to foreclose, would need to be recorded for every mortgage foreclosure. This requires needless time and additional cost. This also raises a question of why an entity would ever utilize a limited power of attorney if that document had to be signed for every transaction and why the Legislature would allow the use of limited powers of attorney throughout the foreclosure process.

Because the plain meaning of section 580.05 does not require a power of attorney granting authority to act as an attorney-in-fact to include specific mortgage information or a legal description, it is clear the Limited Power of Attorney recorded in this case is valid and enforceable. Further, even if the Court determines the statute is ambiguous, Molde's interpretation leads to an absurd result, one that could not have possibly been intended by the Legislature.

Molde's arguments also ignore the practical purpose for which a power of attorney and limited power of attorney, if applicable, need to be recorded. Despite Molde's arguments, the overarching holding in *Peaslee* is that a borrower needs to be able to track information regarding his or her foreclosure. *Peaslee*, 82 Minn. at 290, 84 N.W. at 1025. The POA and Limited POA in this situation do exactly that. The POA describes the Mortgage with reasonable certainty, allows an individual to search the grantor/grantee[2] index in Dakota County and find the POA related to Molde's foreclosure. If Molde has concerns about whether W&G has the authority to sign this POA, he can locate said authority by again searching the grantor/grantee index and locating the Limited POA. Because CMI complied with Minnesota law in executing and recording both the POA and the Limited POA and because there are no material issues of fact, the district court's decision should be affirmed.

[2] Pursuant to Minnesota Statute section 386.03, the only index the County is required to keep is the grantor/grantee index. The tract index is not required by state law.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT MOLDE'S DEFENSES IN RECOUPMENT DO NOT APPLY TO CITIMORTGAGE, INC.'S MORTGAGE FORECLOSURE BY ADVERTISEMENT AND THAT THERE WERE NO ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

The district court correctly determined that a defense in recoupment cannot be raised where a holder of a note and mortgage did not sue to enforce the note, but rather enforced the mortgage obligations. (AAP – 081, Conclusion of Law #4.) Molde's reliance on the Uniform Commercial Code ("UCC") in challenging a lawfully conducted foreclosure by advertisement is entirely misplaced. Molde puts a great deal of importance on whether CMI is a holder of the relevant note, a holder in due course of the relevant note, and what the difference may mean. These labels, however, were irrelevant to the district court's determination of whether the foreclosure sale was valid and remain irrelevant today. The UCC governs the enforcement of negotiable instruments such as cahier's checks and promissory notes. The UCC does not govern the enforcement of security instruments such as mortgages, which is the document CMI enforced through its foreclosure of the Property. In fact, there are several other statutory chapters that deal with the origination and enforcement of mortgages. See Minn. Stat. Chapters 47 and 580. As such, his defenses to enforcement of the Note are inapplicable.

Molde cites several cases, which he argues support his position that summary judgment was inappropriate. None of the cases, however, actually support such a position. *See Rothensies Electric Storage Battery Co.*, 329 U.S. 296, 67 S.Ct. 271 (1946); *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695 (1935); *Imperial Elevator Co. v. Hartford Accident & Indemnity Co.*, 163 Minn. 481, 204 N.W. 531 (1925); *Ingle v.*

Angell, 111 Minn. 63, 126 N.W. 400 (1910); *Norwest Bank of Minnesota, N.A., f/k/a Norwest Bank of Midland, N.A. v. Midwestern Machinery Co., et. al.*, 48 N.W.2d 875 (Minn. Ct. App. 1992). None of these cases involve the foreclosure of a mortgage by an advertisement process such as the foreclosure conducted in this case. *See id.*

Further, Molde argues he has pled a defense of recoupment by arguing the relevant mortgage foreclosure sale should be rescinded. Molde, however, has misconstrued the doctrine of recoupment and what the party asserting the defense is actually entitled to upon sufficiently proving the defense. First and foremost, the defense of recoupment may be pled in an action to recover a debt evidenced by a note or some other negotiable instrument. Minn. Stat. § 336.3-305 (2008). It is to be used in a situation where the obligee is trying to enforce an obligation to "pay an instrument." Id. A defense in recoupment is to be used to reduce the amount owing. § 336.3-305(a)(3); see also comment 3. Although Molde uses the term recoupment in his summary judgment pleadings, Molde has not pled any facts evidencing how the debt owed to CMI should be reduced and presented any legal authority for the fact that a defense in recoupment allows a court to rescind a mortgage foreclosure sale. The purpose of the defense is not to undo a lawfully conducted foreclosure sale. Id. Rather the purpose is to offset debt that is owed to the obligor. Id.

A defense in recoupment may be relevant if the facts of this case involved an action on an obligation to pay a note. CMI, however, never instituted an action for payment on the Note. Rather, CMI instituted a foreclosure by advertisement to enforce the Mortgage and recover the real property secured by that Mortgage. (App-056 – APP-

064.) In fact, Chapter 580 of the Minnesota Statutes, the chapter allowing a foreclosure to be conducted by advertisement, specifically precludes an action to recover a debt. Minn. Stat. § 580.02(2) (2008). Under this section, a mortgagee cannot institute an action to recover a debt if it intends to foreclose a mortgage for which the debt is secured. Id.

Molde further argues he raised several issues of material fact that preclude summary judgment (Appellant's Brief at pg. 20.) Molde fails to articulate, however, how those issues affect CMI's ability to foreclose. Molde is required to set for "substantial evidence that creates a genuine issue for trial." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997) (*rehearing denied* August 5, 1997). Molde failed to do so and did not provide any argument as to how these alleged issues precluded CMI, the lawful holder of the Mortgage, from foreclosing the Mortgage.

Because CMI has not instituted an action to enforce payment on an instrument, a defense in recoupment is improper. Further, Molde has not pled a single fact evidencing how the debt he owed to CMI should be offset. Finally, Molde has not provided a single issue of material fact that is sufficient to withstand summary judgment. For these reasons, the district court's decision should be upheld.

III. THE DISTRICT COURT PROPERLY GRANTED CITIMORTGAGE INC'S MOTION FOR SUMMARY JUDGMENT EVEN THOUGH THE DISCOVERY PERIOD HAD NOT EXPIRED BECAUSE ANY FACTS MOLDE WOULD HAVE GAINED FROM ADDITIONAL DISCOVERY WOULD NOT CHANGE THE DISTRICT COURT'S DECISION.

The district court properly granted CMI's Motion for Summary Judgment despite the fact the discovery period had not closed. First, any additional information Molde

thinks he is entitled to or would have acquired during the discovery period would not have changed the outcome of the district court's decision. The information requested by Molde is completely irrelevant to a determination of whether the foreclosure was conducted in accordance with Minnesota law. Further, any information Molde sought to obtain regarding his defenses in recoupment is again irrelevant given that CMI did not enforce Molde's obligations under a note, but rather foreclosed a mortgage.

Second, Molde did not articulate for the district court nor for the Court of Appeals what information he indicates could change the outcome of the lower court's decision. Rather, Molde attaches his discovery requests to the appendix and makes a blanket statement that additional discovery is needed. (Appellant's Brief at pgs. 26 & 27.) Such an allegation is insufficient to warrant denial of summary judgment given that it is the non-moving party's burden to show a genuine issue of fact is present that warrants such a denial. *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 919 (Minn. Ct. App. 2003); *U.S. Bank N.A. as Trustee on behalf of Holders of 7-1/2% Senior Convertible Notes due 2003 of Angeion Corp. v. Angeion Corp.*, 615 N.W.2d 425, 433 (Minn. Ct. App. 2000).

Because Molde has failed to articulate how additional discovery will further his arguments and because additional discovery will, in fact, not further his arguments, the district court's decision should be upheld

CONCLUSION

For the foregoing reasons, it is clear the district court was correct in granting CMI's summary judgment motion. There are no genuine issues of material fact and CMI

is entitled to judgment as a matter of law. All applicable mortgage documents including the Assignment of Mortgage were properly executed and were of record at the time of the foreclosure. The foreclosure was conducted in accordance with Minnesota law. Further, Molde's defenses in recoupment are inapplicable because CMI did not enforce its rights under the Note, but rather foreclosed the Mortgage. As such, the UCC is inapplicable. Based upon the foregoing, CMI respectfully requests the Court affirm the lower court's decision to grant Summary Judgment in favor of CMI.

WILFORD & GESKE, P.A.

Dated: September 21, 2009

By: _____

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No. A09-796

STATE OF MINNESOTA
IN COURT OF APPEALS

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VERIFICATION CERTIFYING COMPLIANCE
WITH WORD LIMITATION REQUIREMENTS

Christina M. Weber, of the City of North St. Paul, County of Ramsey, in the State of Minnesota, being duly sworn, certifies that the brief of Respondent, CitiMortgage, Inc., does not exceed 45 pages and contains approximately 3,341 words in conformity with Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3.

The undersigned also certifies that this brief was prepared with Microsoft Word 2003.

WILFORD & GESKE, P.A.

Dated: September 21, 2009

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Subscribed and sworn to before me
this 21st day of September, 2009

_____
Notary Public

ARIEL JOAN BRADFORD
Notary Public-Minnesota
My Commission Expires Jan 31, 2014