

State of Minnesota
In Court of Appeals

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent,

vs.

PETER NEDASHKOVSKIY, NADEZHDA NEDASHKOVSKIY,
JOHN DOE AND MARY ROWE,

Appellants.

RESPONDENT'S BRIEF AND APPENDIX

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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).

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
STANDARD OF REVIEW.....	5
ARGUMENT.....	6
I. APPELLANTS ARE NOT ENTITLED TO A STAY OF THE EVICTION ACTION.....	8
A. The District Court Properly Exercised its Discretion by Ruling that a Stay of the Eviction Proceedings was Not Warranted Under the Circumstances.....	8
B. Appellants' Due Process Rights Were Not Violated by the District Court's Denial of Appellants' Motion to Stay the Eviction Action.....	9
C. <i>Bjorklund</i> does Not Mandate An Automatic, Unconditional Stay of Eviction Proceedings Merely Because a Separate Action Exists.....	12
CONCLUSION.....	22
INDEX TO RESPONDENT'S APPENDIX.....	23

TABLE OF AUTHORITIES

	<u>PAGE</u>
U.S. CONSTITUTION:	
U.S. Const. amend. V	10
U.S. Const. amend. XIV, § 1	10
U.S. SUPREME COURT CASES:	
<i>Cleveland Bd. Of Educ. v. Loudermill</i> , 470 U.S. 532, 542 (1985).....	10
MINNESOTA STATE CASES:	
<i>Alsides v. Brown Institute, Ltd.</i> , 592 N.W.2d 468 (Minn. Ct. App. 1999)	20
<i>Amresco v. Stange</i> , 631 N.W.2d 444 (Minn. Ct. App. 2001)	15
<i>Berg v. Wiley</i> , 226 N.W.2d 904 (Minn. 1975)	15
<i>Berg v. Wiley</i> , 264 N.W.2d 145 (Minn. 1978)	6
<i>Bjorklund v. Bjorklund Trucking, Inc.</i> , 753 N.W.2d 312 (Minn. Ct. App. 2008)	4, 6, 11-12 13, 14, 15, 16
<i>Cimarron Village v. Washington</i> , 659 N.W.2d 811, 817 (Minn. Ct. App. 2003)	5-6
<i>Contos v. Herbst</i> , 278 N.W.2d 732 (Minn. 1979)	10
<i>County of Blue Earth v. Turtle</i> , 593 N.W.2d 258 (Minn. Ct. App. 1999)	6
<i>Dahlberg v. Young</i> , 42 N.W.2d 570 (Minn. 1950)	15
<i>Dahlberg Bros. v. Ford Motor Co.</i> , 137 N.W.2d 314 (Minn. 1965)	16, 17, 21
<i>Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc.</i> , 603 N.W.2d 336 (Minn. Ct. App. 1999)	20
<i>Doerr v. Warner</i> , 76 N.W.2d 505 (Minn. 1956)	9
<i>Federal Land Bank of St. Paul v. Obermoller</i> , 429 N.W.2d 251 (Minn. Ct. App. 1988)	15
<i>Fraser v. Fraser</i> , 642 N.W.2d 34 (Minn. Ct. App. 2002)	15
<i>Hinden v. American Bank of the North</i> , No. A09-404, 2009 WL 4573909, *1 (Dec. 8, 2009) (unpublished)	19
<i>Johnny's, Inc. v. Njaka</i> , 450 N.W.2d 166 (Minn. Ct. App. 1990)	20
<i>McNeill v. Dakota County State Bank</i> , 522 N.W.2d 381 (1994)	18-19
<i>Milbank Ins. Co. v. Johnson</i> , 544 N.W.2d 56 (Minn. Ct. App. 1996)	6
<i>Minneapolis Cmty. Dev. Agency v. Smallwood</i> , 379 N.W.2d 554, 555 (Minn. Ct. App. 1985)	5-6

MINNESOTA STATE CASES (CONT.):

	<u>PAGE</u>
<i>Minneapolis Federation of Teachers, AFL-CIO,</i> <i>Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1,</i> 512 N.W.2d 107 (Minn. Ct. App. 1994)	17
<i>Minnesota Mutual Life Insurance v. Anderson,</i> 410 N.W.2d 80 (Minn. Ct. App. 1987)	13
<i>Morse v. City of Waterville,</i> 458 N.W.2d 728 (Minn. Ct. App. 1990)	17
<i>Mutual Trust Life Ins. Co. v. Berg,</i> 246 N.W. 9 (Minn. 1932)	15
<i>Nexus v. Swift,</i> 785 N.W.2d 771 (Minn. Ct. App. 2010)	10
<i>Northern State Power v. Lyon Food Prods.,</i> 229 N.W.2d 521 (Minn. 1975)	6
<i>Obst v. Microtron, Inc.,</i> 588 N.W.2d 550 (Minn. Ct. App. 1999)	6
<i>Pickerign v. Pasco Marketing, Inc.,</i> 228 N.W.2d 562 (Minn. 1975)	17
<i>Real Estate Equity Strategies, LLC v. Jones,</i> 720 N.W.2d 352 (Minn. Ct. App. 2006)	6
<i>Rice Park Properties v. Robins, Kaplan, Miller & Ciresi,</i> 532 N.W.2d 556 (Minn. 1995)	13
<i>Thomey v. Stewart,</i> 391 N.W.2d 533 (Minn. Ct. App. 1986)	15

MINNESOTA STATUTES & RULES:

Minn. Stat. § 58.13 (2010)	20, 21
Minn. Stat. § 325D.44 (2010)	20
Minn. Stat. § 504B.001 (2010)	6, 14-15
Minn. Stat. § 504B.181 (2010)	7, 8
Minn. Stat. § 504B.285 (2010)	6
Minn. Stat. § 504B.345 (2010)	7
Minn. Stat. § 504B.371 (2010)	5
Minn. Stat. § 513.33 (2010)	18
Minn. Stat. § 580.12 (2010)	4
Minn. Stat. § 580.19 (2010)	6-7
Minn. R. App. P. 108 (2010)	5
Minn. R. Civ. P. 3.01 (2010)	8-9
Minn. R. Civ. P. 52.01 (2010)	6
Minn. R. Civ. P. 65.03 (2010)	17

OTHER FEDERAL CASES:

<i>DePree v. Saunders,</i> 588 F.3d 282 (5th Cir. 2009)	10
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OTHER AUTHORITIES:

PAGE

Is Freddie Mac a government agency?,
<http://www.freddiemac.com/investors/faq.html#fmlocat> 10

STATEMENT OF THE ISSUES

I. WERE APPELLANTS ENTITLED TO A STAY OF THE EVICTION ACTION PENDING RESOLUTION OF THEIR SEPARATE DISTRICT COURT ACTION?

The district court held in the negative, determining that Appellants were not entitled to a stay of the eviction action because they failed to name, serve, or obtain jurisdiction over Respondent in their separate district court action.

Most Apposite Authority:

- *Bjorklund v. Bjorklund Trucking, Inc.*, 753 N.W.2d 312 (Minn. Ct. App. 2008);
- *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965);

STATEMENT OF THE CASE

Appellants Peter and Nadezhda Nedashkovskiy (“**Appellants**”) bring this appeal from the above-captioned eviction action out of the Tenth Judicial District Court, County of Anoka, Minnesota, presided over by the Honorable Daniel A. O’Fallon. (Appellants’ App. (“**App.**”) at 14.)¹ The appeal arises from Judge O’Fallon’s denial of Appellants’ Motion to Stay the eviction proceedings pending resolution of their separately-filed district court action and order for restitution of the property at issue to Respondent Federal Home Loan Mortgage Corporation (“**Freddie Mac**”).² (*Id.* at 7-13, 14.)

Freddie Mac commenced this eviction action seeking possession of real property located at 89 117th Avenue NW, Coon Rapids, Anoka County, Minnesota after the foreclosure of a Mortgage given by Appellants. (App. at 16-20.) At the November 1, 2010 eviction hearing, Appellants moved the court for a stay of the eviction proceedings pending the resolution of a separate district court action, merely because the separate action was file-stamped before the eviction action was initiated. (*Id.* at 9:6-13.) The district court denied Appellants’ Motion and issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment in Eviction granting the immediate restitution of the property to Freddie Mac. (*Id.* at 15.) In denying Appellants’ Motion, the district court relied on the fact that Appellants had failed to name Freddie Mac or obtain jurisdiction over it in their separate district court

¹ Appellants’ unnumbered Appendix will be assigned consecutive numbers herein, excluding the pages in the Appendix marked only with exhibit numbers.

² Despite Appellants’ references to Federal National Mortgage Association (“FNMA”) in their Brief, commonly known as Fannie Mae, the correct Plaintiff/Respondent in this action is in fact Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac.

action and that the action could therefore have no impact on Freddie Mac in the eviction action. (*Id.* at 11:23-12:7; 12:15-21.) Further, the district court found that, based on the undisputed allegations of the Complaint in Eviction, Appellants failed to challenge the allegations in the eviction complaint and failed to redeem from the foreclosure, resulting in Freddie Mac becoming the fee owner of the property, and entitled to immediate possession. (*Id.* at 12:2-7; 15.)

STATEMENT OF FACTS

This action involves the real property located at 89 117th Avenue NW, Coon Rapids, Anoka County, Minnesota, legally described as:

Lot 7, Block 1, Bridgewater, Anoka County, Minnesota

(“**Property**”). (App. at 1, ¶ 2.) On April 7, 2004, Appellants gave a Mortgage encumbering the Property to Mortgage Electronic Registration Systems, Inc. as nominee for Discover Mortgage Corporation, which Mortgage was recorded by the Anoka County Recorder on May 10, 2004 as Document No. 1921281.0 (“**Mortgage**”). (Respondent’s App. (“**R. App.**”) at 12.) The Mortgage was assigned to Wells Fargo Bank, N.A. (“**Wells Fargo**”) on March 17, 2007, which Assignment of Mortgage was recorded by the Anoka County Recorder on March 28, 2007 as Document No. 1991980.025. (App. at 30-31.)

Appellants subsequently defaulted under the terms of the Mortgage by failing to make monthly payments as they came due. (App. at 33.) As a direct result, Wells Fargo initiated foreclosure proceedings in or around October 2009. (*Id.*) The Sheriff’s foreclosure sale was held on March 12, 2010 and the Property was sold to Wells Fargo subject to a six-month

redemption period. (App. at 17, ¶ 3.) The redemption period expired on September 12, 2010 and Wells Fargo became the fee owner of the Property. (*See id.*) *See also* Minn. Stat. § 580.12. On September 27, 2010, Wells Fargo conveyed the Property to Freddie Mac by virtue of a Quit Claim Deed, which Deed was recorded on September 28, 2010 by the Anoka County Recorder as Document No. 2017725.003. (App. at 4-5.)

On September 24, 2010, Appellants filed an action in Anoka County District Court naming only Wells Fargo, Mortgage Network, Inc., and Discover Mortgage Corporation as defendants (“**District Court Action**”). (*Id.* at 1.) Freddie Mac was not included as a defendant in the District Court Action and to date has yet to be made a party to that suit. (*Id.*) Contrary to applicable law, the District Court Action Complaint alleges the existence of an oral loan modification contract between Appellants and Wells Fargo, in addition to violations of the Deceptive Trade Practices Act and various statutory standards of conduct provisions. (*Id.* at 23-28.) Upon information and belief, none of the defendants to the District Court Action has been served with the Summons and Complaint.

On October 19, 2010, Freddie Mac commenced the above-captioned action (“**Eviction Action**”) by filing the Complaint in Eviction and affecting personal service of the Summons and Complaint in Eviction on Appellants. (App. at 2; R. App. at 15-17.) The matter was set for hearing on November 1, 2010. (App. at 16.) At the hearing, Appellants brought a Motion to Stay the Eviction Action, citing this Court’s decision in *Bjorklund v. Bjorklund Trucking, Inc.*, 753 N.W.2d 312, 318 (2008) for the proposition that because the District Court Action was technically filed prior to the Eviction Action, the eviction proceedings

automatically must be stayed pending the outcome of the District Court Action. (App. at 9:6-13.) The district court denied Appellants' Motion in the exercise of its judicial discretion, relying in part on Appellants' failure to name Freddie Mac in the District Court Action. (*Id.* at 11:23-12:3.) The district court issued Findings of Fact, Conclusions of Law and Order for Judgment and Judgment, finding that Appellants failed to vacate the Property after expiration of the redemption period and ordering immediate possession of the Property to Freddie Mac ("Eviction Order"). (*Id.* at 15.) The Writ of Recovery of Premises was issued on November 1, 2010 and executed by the Anoka County Sheriff's Office shortly thereafter. (*Id.* at 2.) A lockout of the Property was scheduled with the Anoka County Sheriff's Office for November 10, 2010.

On or about November 5, 2010, Appellants filed their Notice of Appeal, appealing from the Eviction Order. (App. at 14.) On November 8, 2010, Appellants filed an *ex-parte* Motion for Stay of Eviction Judgment. (*Id.* at 1; R. App. at 18.) The Motion was heard on November 10, 2010 and denied on several bases, including Appellants' failure to provide a *supersedeas* bond as required by Rule 108 of the Minnesota Rules of Civil Procedure or to post bond under Minnesota Statutes section 504B.371 (2010), and failure to provide proof of service of the Motion on Freddie Mac or to cite authority that would allow the Motion to be heard *ex parte*. (R. App. at 19-20.) The lockout was completed on November 10, 2010.

STANDARD OF REVIEW

On appeal of an eviction proceeding, a district court's findings of facts may not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01 (2010); *Cimarron Village v.*

Washington, 659 N.W.2d 811, 817 (Minn. Ct. App. 2003) (citing *Minneapolis Cmty. Dev. Agency v. Smallwood*, 379 N.W.2d 554, 555 (Minn. Ct. App. 1985)); *County of Blue Earth v. Turtle*, 593 N.W.2d 258, 260 (Minn. Ct. App. 1999). A “clearly erroneous” finding is one that is “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Milbank Ins. Co. v. Johnson*, 544 N.W.2d 56, 59 (Minn. Ct. App. 1996) (quoting *Northern State Power v. Lyon Food Prods.*, 229 N.W.2d 521, 524 (Minn. 1975)). Generally, a *de novo* standard is employed in reviewing a district court’s legal analysis and conclusions. *Obst v. Microtron, Inc.*, 588 N.W.2d 550, 553 (Minn. Ct. App. 1999).

With respect to a court’s decision on a motion to stay, however, “[g]enerally, whether to stay a proceeding is discretionary with the district court, [and] its decision on the issue will not be altered on appeal absent an abuse of that discretion.” *Bjorklund v. Bjorklund Trucking, Inc.*, 753 N.W.2d 312, 318 (Minn. Ct. App. 2008) (quoting *Real Estate Equity Strategies, LLC v. Jones*, 720 N.W.2d 352, 358 (Minn. Ct. App. 2006)).

ARGUMENT

I. FREDDIE MAC WAS ENTITLED TO POSSESSION OF THE PROPERTY.

Minnesota Statute section 504B.285 subd 1 (2010) provides that a party 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 foreclosure of a mortgage. Eviction proceedings are summary in nature and generally the only issue for determination by the court is whether the facts alleged in the complaint are true. Minn. Stat. § 504B.001 (2010); *Berg v. Wiley*, 264

N.W.2d 145, 149-50 (Minn. 1978). A Sheriff's Certificate of Sale is "*prima facie* evidence that all requirements of the 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 and assigns, after the time for redemption therefrom has expired." Minn. Stat. § 580.19 (2010). If an eviction court finds for the plaintiff, the court is required to immediately enter judgment that the plaintiff shall have recovery of the premises. Minn. Stat. § 504B.345 subd 1(a) (2010).

Freddie Mac's Complaint in Eviction alleges that, pursuant to the foreclosure of the Mortgage, the Property was sold to Wells Fargo at Sheriff's Sale on March 12, 2010, subject to a six-month redemption period, which redemption period expired with no redemption having been made by Appellants. (App. at 17, ¶ 3.) A copy of the Sheriff's Certificate of Sale and Foreclosure Record was attached to the Complaint in Eviction. (*Id.*; R. App. at 1-14.) After the expiration of the redemption period, Wells Fargo became the fee owner of the Property and deeded the Property to Freddie Mac. (App. at 17, ¶¶ 3, 4.) A copy of the Quit Claim Deed to Freddie Mac was attached to the Complaint in Eviction. (*Id.* at 4-5; R. App. at 17, ¶ 3.) The Complaint in Eviction further alleged that Appellants were still in possession of the Property despite the transfer of ownership (App. at 18, ¶ 5) and that Freddie Mac has fully complied with the notice requirements of Minnesota Statute section 504B.181 (App. at 18, ¶ 6). The district court made specific findings on the record regarding Appellants' failure to redeem from the foreclosure and Freddie Mac's resulting fee ownership of the Property, entitling it to immediate possession of the Property. (App. at 12:2-7.)

Appellants' counsel was asked more than once whether there existed any dispute as to these facts as alleged in the Complaint in Eviction and no denial was forthcoming. (App. at 9:25-10:4; 10:15-17.) Likewise, Appellants did not contest the allegations that they remained in possession of the Property after the redemption period expiration, or that Freddie Mac complied with the notice obligations of Minnesota Statutes section 504B.181. (See App. 9-13.) As a result, the district court found in favor of Freddie Mac and ordered the immediate restitution of possession of the Property to Freddie Mac. (App. 15.) The district court's findings of fact in this regard cannot be clearly erroneous because Appellants offered no evidence or argument to contradict the allegations of the Complaint in Eviction or the *prima facie* evidence presented in the Sheriff's Certificate of Sale, even despite being specifically asked whether they had any dispute to these allegations. Thus, the district court's findings and Eviction Order must be affirmed.

II. APPELLANTS ARE NOT ENTITLED TO A STAY OF THE EVICTION ACTION.

A. The District Court Properly Exercised its Discretion by Ruling that a Stay of the Eviction Proceedings was Not Warranted Under the Circumstances.

Additionally, the district court denied Appellants motion to stay the eviction proceedings based on the fact that Appellants failed to name Freddie Mac in the District Court Action and thus the District Court Action would have no jurisdiction over Freddie Mac. (App. at 11:23-12:3.) Appellants admit they failed to obtain jurisdiction over Freddie Mac in the District Court Action filed on September 24, 2010. (Appellants' Br. At 4, 5.) The Minnesota Rules of Civil Procedure provide that a civil action is not commenced, and a

defendant is not subject to the jurisdiction of the court, until the summons and complaint are personally served upon the named defendant in accordance with the Rules. Minn. R. Civ. Pro. 3.01 (2010); *Doerr v. Warner*, 76 N.W.2d 505 (Minn. 1956). It is undisputed that Appellants did not name Freddie Mac in their Complaint, nor did they serve the Complaint on Freddie Mac. Appellants assert that they were only made aware of Freddie Mac's ownership interest in the Property at the November 1, 2010 eviction hearing; however the Complaint in Eviction, clearly stating Freddie Mac's interest, as well as the Quit Claim Deed from Wells Fargo to Freddie Mac attached to the Complaint in Eviction, were personally served on Appellants on October 19, 2010 – nearly two weeks prior to the eviction hearing. (R. App. at 15-17.) Since that time, Appellants have taken no steps to amend the District Court Action Complaint to include Freddie Mac, nor have they made any efforts to prosecute that action, including, upon information and belief, any efforts to even serve the named defendants.³ (App. at 1.) Thus the district court properly held that Appellants are not entitled to a stay of the Eviction Action based solely on the existence of a separate action that can have no binding effect Freddie Mac. As such, the district court's decision must be affirmed.

B. Appellants' Due Process Rights Were Not Violated by the District Court's Denial of Appellants' Motion to Stay the Eviction Action.

Appellants additionally argue on appeal that the district court's denial of their Motion to Stay the Eviction Action pending an outcome in the District Court Action allowed Freddie

³ Appellants' counsel has failed to commence similar actions in five other cases initiated by Appellants' counsel in which the district court action is filed after the expiration of the foreclosure redemption period and prior to the commencement of an eviction action. In each of these actions, with one exception, counsel has altogether failed to serve the named defendants or otherwise take any actions to prosecute the suit.

Mac to deprive Appellants of their property interest without due process of law. This argument, however, is fundamentally flawed both because Freddie Mac is not a governmental body, and because Appellants had fair notice and an opportunity to be heard.

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that no citizen shall be deprived of property by the State without due process of law. “The threshold requirement of any due-process claim is that the government has deprived a person of a constitutionally protected liberty or property interest.” *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. Ct. App. 2010) (citing *DePree v. Saunders*, 588 F.3d 282, 289 (5th Cir. 2009) (emphasis added). “Due process requires that deprivation of property be preceded by notice and an opportunity to be heard.” *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *see also, Contos v. Herbst*, 278 N.W.2d 732, 742 (Minn. 1979) (“The notice must be of such nature as reasonably to convey the required information But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.” (Citation omitted)).

Though Freddie Mac is a government sponsored enterprise, it was federally chartered by Congress as a private corporation to “serv[e] a public purpose.” *Is Freddie Mac a government agency?*, <http://www.freddiemac.com/investors/faq.html#fmlocat>. The very purpose of due process rights is to protect individuals from infringement by their government; however Freddie Mac is not a governmental body against which a due process claim may be made. Moreover, even if Appellants’ due process claim met this threshold, which it does not, Appellants cannot reasonably argue that they did not have notice of the

Eviction Action and Freddie Mac's ownership of the Property or an opportunity to be heard. Further, they had more than sufficient time to bring an appropriate motion seeking injunctive relief in the District Court Action filed over a month earlier. Again, Appellants were personally served with the Eviction Summons and Complaint on October 19, 2010 specifically stating that Freddie Mac became the fee owner of the Property by Deed from Wells Fargo. (R. App. at 15-17.) A copy of the Quit Claim Deed was attached to the Complaint. (App. at 17, ¶ 33.) Appellants had nearly two weeks between service of the Complaint in Eviction and the Eviction Hearing on November 1, 2010 to amend their District Court Action Complaint and seek injunctive relief from the district court.⁴ Yet they failed to do so. Then, even after the Eviction Hearing and denial of their Motion to Stay, Appellants had another ten days until the eviction lockout was scheduled to occur on November 10, 2010 in which to take the appropriate action. Yet they did not. Rather they brought another Motion to Stay pending this appeal, but failed to comply with the basic service and bonding requirements clearly set by statute. (R. App. at 19-20.) To date, Appellants have still not amended the District Court Action Complaint to add Freddie Mac as a necessary party. (App. at 2.) As such, Appellants' due process argument must necessarily fail.

⁴ In light of this chronology of events, Appellants' further argument that they were taken by surprise by Freddie Mac's defense to the Motion for Stay at the Eviction Hearing – namely, citing Appellants' failure to name Freddie Mac in the District Court Action – is untenable. Freddie Mac cannot be accused of engaging in subterfuge simply because Appellants or their counsel did not review the eviction pleadings and attachments.

C. *Bjorklund* does Not Mandate An Automatic, Unconditional Stay of Eviction Proceedings Merely Because a Separate Action Exists.

Despite Appellants failures to name, serve and obtain jurisdiction over Freddie Mac in the District Court Action, Appellants argue that this Court’s ruling in *Bjorklund v. Bjorklund Trucking, Inc.* nevertheless mandates a stay of the Eviction Action pending the outcome of the District Court Action. Appellants state that the basis of their appeal is that they “had no notice of FNMA [sic] as a necessary party in its [sic] original complaint” because ownership of the Property was transferred to Freddie Mac after the District Court Action Complaint was filed. (Appellant Br. at 5.) In other words, Appellants are seeking a determination that the district court’s denial of the Motion to Stay was an abuse of discretion simply because a separate district court action exists – regardless of the nature or scope of that action, the likelihood of the success on the merits in the District Court Action, the fact that Appellants have not name the correct parties, and the fact that they have made no attempt to obtain jurisdiction over the parties to that action. Appellants misinterpret the *Bjorklund* Court’s reasoning and overlook the basic concept that a court must exercise judicial discretion when faced with a request for injunctive relief.

1. *Bjorklund* Requires the Exercise of Judicial Discretion in Determining a Stay Based on the Unique Circumstances of the Case.

In *Bjorklund*, this Court considered an appeal from an eviction action initiated in Scott County, Minnesota. *Bjorklund Trucking, Inc.* (“**BTI**”) had commenced litigation in Wright County, Minnesota in October 2005 against its former owner, Harold *Bjorklund* (“**Bjorklund**”), asserting title ownership to the real property on which its facilities in Scott

County and Wright County were located. After Bjorklund had been properly served with the summons and complaint and had served and filed his answer and counterclaims to the suit, he initiated the eviction action against BTI in Scott County in December 2005. The eviction court determined that its scope of inquiry was limited to consideration and resolution of the parties' possessory rights only, but additionally determined that evidence of BTI's ownership claims – which had been asserted in the first-filed Wright County case – was essential to BTI's defense of the eviction action. The eviction matter was tried to a jury and the jury returned a verdict in favor of Bjorklund against BTI. BTI immediately appealed. Subsequent to the eviction jury verdict, Bjorklund moved for a ruling in the Wright County case that BTI was collaterally estopped from asserting its counterclaims against Bjorklund as a result of the Scott County eviction trial verdict.

In analyzing the “first-filed rule,” the *Bjorklund* Court confirms that it is not a rigid, mechanical rule, but rather a flexible principle to be applied within the district court's broad discretion based on considerations of judicial economy, comity between courts, cost and convenience to the litigants, and the possibility of conflicting resolutions of the same dispute. 753 N.W.2d at 318. The *Bjorklund* Court reviewed and discussed two similar cases – *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556 (Minn. 1995) and *Minnesota Mutual Life Insurance v. Anderson*, 410 N.W.2d 80 (Minn. Ct. App. 1987) – and specifically concluded that neither case categorically mandates a stay when other litigation is pending. 753 N.W.2d at 318 (“*Anderson*, like *Rice Park*, affirmed an exercise of discretion; it did not mandate a stay.”) Thus the mere fact that a separate action is “first-filed” is not

dispositive of how a district court should exercise its discretion. As such, the *Bjorklund* Court's holding – that the district court abused its discretion by not granting a stay of the eviction proceedings during the pendency of an alternative civil action involving counterclaims and defenses that were “necessary to the fair determination of the eviction action” – is, in fact, based on the unique factual circumstances with which the court was presented. *Id.* at 318-19.

Implicit in the *Bjorklund* decision is the notion that a court must actually exercise discretion before it can be found to have abused discretion. The court in *Bjorklund* ruled that refusing to grant a stay, but simultaneously refusing to allow the defenses to be asserted as the trial proceedings, constituted an abuse of discretion because it left BTI with no effective forum in which to raise the defenses. Thus, the *Bjorklund* court clearly mandated the exercise of discretion by the trial court. Appellants in the instant case suggest, however, that the district court below was not entitled to exercise any discretion, and instead, was required to automatically impose a stay of all proceedings in the Eviction Action.

2. Due to the Limited Scope of Inquiry in Eviction Proceedings, Discretion Would Have More Properly Been Exercised in the District Court Action.

The *Bjorklund* Court recognized that “existing caselaw provides very little guidance to the district court on exercising its discretion to stay or expand the scope of an eviction proceeding when other litigation is pending that would resolve the issue of possession.” 753 N.W.2d at 319. Minnesota Statute section 504B.001 defines an eviction action as “a summary court proceeding to remove a tenant or occupant from or otherwise recover

possession of real property.” The public policy behind such summary proceedings is “to prevent parties from taking the law into their own hands.” *Mutual Trust Life Ins. Co. v. Berg*, 246 N.W. 9, 10 (Minn. 1932).

Generally, it is well-settled that an eviction action merely determines the right to present possession of real property and does not adjudicate the legal or equitable ownership rights of the parties. *Dahlberg v. Young*, 42 N.W.2d 570 (Minn. 1950); *see also*, *Federal Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 257 (Minn. Ct. App. 1988); *Thomey v. Stewart*, 391 N.W.2d 533, 536 (Minn. Ct. App. 1986). Eviction proceedings are thus an improper forum for litigating claims other than the right to immediate possession of the premises, (*Berg v. Wiley*, 226 N.W.2d 904, 907 (Minn. 1975)), and the courts must maintain a limited scope of inquiry by precluding defendants from bringing or arguing counterclaims related to title (*Amresco v. Stange*, 631 N.W.2d 444, 445 (Minn. Ct. App. 2001)).

The *Bjorklund* Court cited to both *Amresco*, 631 N.W.2d at 445-46, and *Fraser v. Fraser*, 642 N.W.2d 34, 40 (Minn. Ct. App. 2002), in reconfirming that where a possessor of property is able to litigate claims and defenses in a separate action, it is inappropriate for those claims and defenses to be asserted in an eviction action, specifically noting that within the scope of the separate action the property possessor would have the right and opportunity to bring a motion enjoining the eviction proceedings during pendency of the separate action (*Bjorklund*, at 318 (citing *Fraser*, 642 N.W.2d at 40)).

Thus, the *Bjorklund* Court appears to recognize that a district court is the preferable forum for exercising discretion if the defenses and counterclaims are available in a separate

district court action. Based on the greater jurisdiction of the district courts, as opposed to a court limited in its scope of inquiry to determining possessory rights, a district court with its full array of jurisdictional powers is the better forum for considering requests for injunctive relief. The district courts are better positioned to consider the *Dahlberg* factors and Rule 65 of the Minnesota Rules of Civil Procedure, which mandates the imposition of reasonable safeguards to protect the nonmoving party from harm. The district courts are also best suited to avoid inconsistent rulings when considering the moving party's likelihood of success on the merits of claims already before the district court and imposing reasonable bonding requirements, which again will protect the other party from frivolous claims and harm that would result from the injunction. *See Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965).

Appellants' argument for an automatic entitlement to a stay of the Eviction Action merely based on the existence of a the District Court Action seems to misuse this court's *Bjorklund* decision in an effort to retain exclusive possession and control over real property without making any showing that their underlying lawsuit has merit, that they can satisfy any of the *Dahlberg* factors, or that they are willing or able to protect Freddie Mac against loss in the event that their defenses and claims are later dismissed. In the instant case, particularly based on the lack of merit of their claims in the District Court Action, Appellants' request for injunctive relief would have been the better suited in the District Court Action.

3. Appellants Have No Likelihood of Succeeding on the Merits of Their District Court Action and Have Not Been Required to Post Bond.

The purpose of seeking temporary injunctive relief is to maintain the *status quo* of the parties until the case can be decided on its merits. *Pickerign v. Pasco Marketing, Inc.*, 228 N.W.2d 562, 564 (Minn. 1975). In order to obtain such extraordinary relief, a movant must meet a high burden of established entitlement to it. *Dahlberg Bros.*, 137 N.W.2d at 321-22; *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990). Most importantly, a movant must prove that he is likely to succeed on the merits of the underlying case. *Minneapolis Federation of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994). If the movant is able to meet his burden, and injunctive relief is warranted, the law provides for the protection of the non-movant's interests and mitigation of the prejudice to the non-movant by requiring the movant to post a security bond. Minn. R. Civ. Pro. 65.03 ("no temporary restraining order or temporary injunction shall be granted except upon the giving of a security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.")

Here, the allegations asserted by Appellants in their District Court Action Complaint are wholly unsupported by fact or law and therefore have no chance of being successful. Appellants first claim that a loan modification contract somehow existed with Wells Fargo because the parties had attempted to negotiate a workout of the defaulted loan several months prior to the initiation of foreclosure proceedings, and because Appellants made payments

after the Note matured on May 1, 2009. The claim that these actions create a loan modification contract is patently incorrect, however, and contrary to well-established law in Minnesota.

First and foremost, the Minnesota Statute of Frauds regarding credit agreements specifically states “A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.” Minn. Stat. § 513.33, subd. 2 (2010). The term “credit agreement” is defined as “an agreement to lend or forbear repayment of money, goods or things in action, to otherwise extend credit, or to make any other financial accommodation.” *Id.* subd. 1. The modification agreement alleged by Appellants is clearly a “credit agreement” because it is an agreement to make “financial accommodation” regarding Appellants’ severe default under the Note. *Id.* Also, Appellants do not, and cannot, allege that there was a written agreement between them and Wells Fargo. (App. at 27, ¶ 33.) Wells Fargo attempted to work with Appellants to have them reviewed and qualified for a loan modification in February through June of 2009, but Appellants repeatedly failed to cooperate with Wells Fargo’s necessary document requests. (*Id.* at 33-34.) As a result, the negotiations failed, Appellants were sent notice advising them of such, and no modification agreement ensued. (*Id.* at 33-34, 36-38.) Indisputably, no written modification agreement exists, so Appellants’ claims that rely upon an oral agreement will be dismissed as a matter of law.

Additionally, the fact that Appellants allegedly made payments after the Note’s maturity date is irrelevant based on this Court’s decisions in *McNeill v. Dakota County State*

Bank, 522 N.W.2d 381 (1994) and *Hinden v. American Bank of the North*, No. A09-404, 2009 WL 4573909, *1 (Dec. 8, 2009) (unpublished). *McNeill* held that where a secured lender provides notice to a defaulting borrower demanding payment in full, setting a deadline to cure the default, and stating the consequences of a failure to cure, the lender's prior acceptance of late payments – even after maturity of the debt obligation – does not result in a waiver of the lender's right and ability to foreclose, provided no payments are accepted after the cure deadline. 522 N.W.2d at 384-85 (“The focus is on whether or not [the borrower] made a late payment after [the cure deadline], and whether or not the bank here accepted such a payment.”). *Hinden* further held that where a bank does not accept a late payment after the cure deadline and clearly states the consequences of the borrower's failure to fully cure the debt, it does not have a duty to provide any further notice to the borrower before exercising its remedies under the terms of the security agreement. 2009 WL 4573909, at *3.

Indisputably, Wells Fargo sent Appellants notice of the default on September 1, 2009, stating the amount required to be paid in full by October 1, 2009, and further stating “failure to cure this default in a timely manner will result in [Wells Fargo] foreclosing upon the real estate securing this note.” (App. at 37.) Appellants assert that they made only partial payments until September 2009. (*Id.* at 26, ¶ 21.) Nowhere in their Complaint do Appellants claim they at any time paid the debt in full or made any payments after the October 1, 2009 deadline to cure. (*Id.* at 23-28.) As a result, Wells Fargo was well within its rights to initiate foreclosure of the Mortgage. As a matter of law, Appellants' claim to the contrary is meritless.

To the extent Appellants' attempt to bring a cause of action under the Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44,⁵ such claim must be immediately disregarded as Minnesota law does not provide for a private cause of action for damages under this section. *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 476 (Minn. Ct. App. 1999); *Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc.*, 603 N.W.2d 336, 339-40 (Minn. Ct. App. 1999); *Johnny's, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn. Ct. App. 1990). Thus, Appellants cannot succeed on this claim.

Lastly, with respect to Appellants' claims under Minn. Stat. §§ 58.13(5), (6) and (16), Appellants' Complaint fails to state any supportive facts and the claims therefore cannot be maintained. Minnesota Statute section 58.13(5) requires that mortgage servicers "perform in conformance with its written agreements with borrowers . . ." Again, Appellants' specifically admit there was no written agreement regarding a loan modification. (App. at 27, ¶ 33.) Further, Appellants state no facts to support a claim that any of the defendants named in the District Court Action failed to perform in conformance with the Note and Mortgage. Minnesota Statute section 58.13(6) prohibits servicers from charging a fee for "a product or service where the product or service is not actually provided . . ." Similarly, Appellants have no basis for a claim under this section. Appellants' payments of monthly principle, interest, tax and insurance amounts until September 2009 were no more than partial payments on the total amount that became immediately due and payable upon maturity. To

⁵ In their District Court Action Complaint, Appellants cite to Minn. Stat. § 53.13(9) in Count One: Deceptive Trade Practices; however such a statutory section does not exist. Thus, for purposes of argument, it will be assumed that Appellants intend to make a claim under the Uniform Deceptive Trade Practices Act, § 325D.44.

the extent Appellants allege that the “product or service” Wells Fargo failed to provide was a loan modification, there were no fees charged for this “product or service.”⁶ Lastly, Minnesota Statute Section 58.13 (16) requires servicers to comply with record keeping and notification requirements in regards to certain, finite actions – change in licensing data, notice of bankruptcy petitions, documentation and resolution of complaints, trust account records for mortgage originators, and general record retention. There can be no dispute that Appellants fail to state any facts whatsoever to support a claim that any of the named defendants failed to do any of the above.

As a result, all of the allegations of Appellants’ District Court Action Complaint are either unsupported by the facts cited or fail as a matter of law or both. And again, the mere fact that the District Court Action Complaint was file-stamped prior to the Eviction Action Complaint does not dictate the outcome of the district court’s exercise of discretion in determining whether Appellants are entitled to a stay of the eviction proceedings.

The district court below properly exercised its discretion by refusing to impose a stay of the Eviction Action for all of the reasons actually relied upon by the district court, and additionally based on consideration of the *Dahlberg* factors, all of which unavoidably lead to the conclusion that Appellants could not succeed on the merits of the District Court Action claims, and could not post a bond or other security to protect Freddie Mac from harm. Therefore, though some of these considerations were not necessarily discussed openly on the

⁶ Cf. App. at 25, ¶ 9 and App. at 26, ¶ 21 – the amounts allegedly paid after the Note’s maturity are identical to the monthly payments that were due under the terms of the Note.

record below, the court nevertheless arrived at the correct decision in denying Appellants' Motion to Stay, and its decision should be affirmed.

CONCLUSION

Based upon the above arguments, Freddie Mac respectfully requests that the Court affirm the district court's denial of Appellants' Motion for Stay of Eviction Proceedings.

WILFORD & GESKE, P.A.

Dated: 1/18/2011

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

Federal Home Loan Mortgage Corporation,

Respondent,

Court of Appeals No.: A10-7489

v.

Peter Nedashkovskiy, Nadezhda Nedashkovskiy,
John Doe and Mary Rowe,

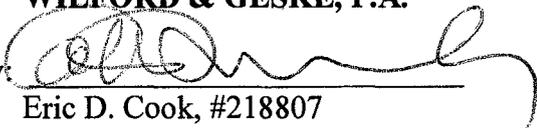
Appellants.

**VERIFICATION CERTIFYING COMPLIANCE
WITH WORD LIMITATION REQUIREMENTS**

Caitlin R. Dowling, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, certifies that the brief of Federal Home Loan Mortgage Corporation does not exceed 14,000 words or 30 pages in conformity with Federal Rule of Appellate Procedure 32(a)(7).

Dated: January 18, 2011

WILFORD & GESKE, P.A.

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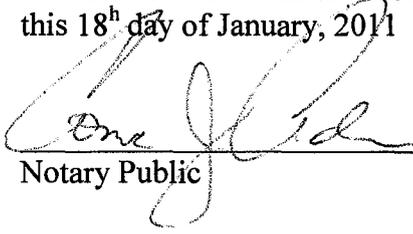
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Loan Mortgage Corporation

Subscribed and sworn to before me
this 18th day of January, 2011


Notary Public

