

NO. A12-0045

State of Minnesota
In Court of Appeals

JPMorgan Chase Bank, N.A.,

Respondent,

vs.

Trevor Erlandson, Melissa Erlandson, 94 Roselawn,
MERS as nominee for Homecomings Financial, LLC,
John Doe, and Mary Roe,

Appellants.

BRIEF AND APPENDIX OF APPELLANTS

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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 ISSUES

1. Whether the District Court erred when it granted summary judgment to Respondent, confirming its previous order directing the Sheriff of Ramsey County to sell the real property owned by Appellants?

Holding Below:

On May 10, 2011, the District Court granted a Respondent's motion for summary judgment directing the Sheriff of Ramsey County to sell the property. On July 12, 2011, the court modified its May 10, 2011, order following a motion to vacate, though it confirmed the portion of the earlier order directing the Sheriff to sell the property. On December 18, 2011, the court issued an order confirming the Sheriff's sale and granted summary judgment to Respondent, holding that the foreclosure by Respondent was appropriate.

Apposite Cases and Statutes:

Minn. Stat. § 336.3-201(a)

Minn. Stat. § 336.3-203

In re Banks, 457 B.R. 9 (8th Cir. 2011)

Hill v. Edwards, 11 Minn. 22, 1865 WL 995 (Minn. 1865)

Hayes v. Midland Credit Co., 173 Minn. 554 (Minn. 1928)

STANDARD OF REVIEW

Summary judgment is only appropriate if there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. “Upon review of summary judgment, [the Appellate Court] must determine whether any genuine issues of material fact exist and whether the trial erroneously applied the law. All doubts and factual inferences must be resolved in favor of the nonmoving party.” *Wagner v. Schwegmann’s South Town Liquor, Inc.*, 485 N.W.2d 730, 733 (Minn. App. 1992) (citations omitted). Summary judgment is not appropriate if reasonable persons may reach differing conclusions regarding the evidence. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957).

STATEMENT OF THE CASE

This matter came on before the Honorable John H. Guthmann, Ramsey County District Court. This case concerns the appeal of a foreclosure by action brought pursuant to Minn. Chap. 581. The District Court's Order Confirming Sale and Dismissing Remaining Claims was granted on December 19, 2011, and judgment was entered on December 20, 2011. (APP20; APP19.)

Respondent commenced this foreclosure by action matter in Ramsey County in August of 2010. Respondents were granted summary judgment on May 13, 2011. (APP1.) Appellants' counsel did not appear at the summary judgment hearing or otherwise defend against the motion. (*Id.*) Upon receipt of the judgment in the mail, Appellants obtained new counsel and moved to vacate the judgment.

The court granted the motion to vacate in part, holding that Respondent was entitled to sell the property at foreclosure, but precluded from collecting under the promissory note. (APP7.) The court concluded that foreclosure was appropriate because the assignment of the mortgage to Respondent was of record, and because Appellants conceded that they had defaulted in their payments. (*Id.*) The court then determined that there was a genuine issue of material fact as to whether Respondent had the right to enforce the note because it did not present evidence that the note had been endorsed in its favor. (*Id.*)

Appellants then brought a motion to amend their Answer to the Complaint. Appellants' motion was granted and Appellants amended their answer to include defenses to the foreclosure, including lack of standing. (APP17.)

Respondents brought a second motion for summary judgment and a motion to confirm the sheriff's sale. (APP20.) Respondent withdrew its claim for a deficiency on the note but argued that it owned the note in any event. (*Id*) A hearing was held on the motion on December 1, 2011. Appellants argued that the remedy of foreclosure is a remedy granted to the entity that owns the debt and that because there was a genuine issue of fact as to whether the note had been properly assigned to Respondent, the foreclosure sale was improper. (*Id*) The court held that Appellants had not raised any issue of genuine fact and that summary judgment was appropriate. (*Id.*) This appeal followed.

STATEMENT OF FACTS

On or about November 27, 2006, the Appellants executed a mortgage and note in favor of Homecomings Financial, LLC. Defendant Mortgage Electronic Registrations Systems, (“MERS”) was designated as the “nominee” of the lender, HF. (APP29.)

The Note identifies the lender as Homecomings Financial, LLC. (APP56.) The note does not reference MERS. (*Id.*) On or about June 22, 2010, MERS purported to assign the mortgage, along with the note, to Respondent. (APP54.) The Assignment was not made for value; the document recites that it was given for the sum of \$1.00. (*Id.*)

Respondent brought a foreclosure by action claim in August of 2010. (APP1.) On May 24, 2011, Appellants received a Notice of Entry of Judgment in the mail, granting summary judgment to Respondent. (*Id.*) Appellants brought a motion to vacate the judgment in June 2011. (*Id.*) The court vacated the judgment in part and affirmed it in part. (*Id.*) The court concluded that Respondent could foreclose under the mortgage, but that Respondent could not enforce the note because it had not shown that it owned the note. (*Id.*) Though Respondent argued that it possessed the note, the court concluded that the note, expressly payable to Homecomings Financial, LLC and not Respondent, could not be enforced by Respondent. (*Id.*) The note could only be enforced by Respondent if Respondent had obtained it by negotiation. (*Id.*) *See* Minn. Stat. § 336.3-201. Negotiation requires transfer of the note and endorsement. *Id.*

As the court noted, the note in the instant case is payable to Homecomings Financial, LLC. (APP56.) It was then endorsed without recourse to Residential Funding Company LLC by Homecomings Financial, LLC. (*Id.*) Respondent produced an

allonge, signed in blank and without recourse, by Residential Funding Company, LLC that was not attached to the note. (APP64.) The allonge was later stapled to the note by Respondent's counsel. (Trans. pg. 6.) The allonge contains an endorsement in blank, without recourse, from Residential Funding Company. (APP64.) It is unclear why the endorsement was done via allonge rather than on the face of the original note.

At the motion hearing on December 1, 2011, counsel for Respondent conceded that the note had not been in the possession of Respondent at the time the foreclosure action was commenced. (Trans. pg. 5-6). Counsel admitted that the note was not located until approximately a month prior to the December 1 hearing. (Trans. pg. 6).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT AND CONFIRMED THE SHERIFF'S SALE

A. There Is A Genuine Issue Of Material Fact As To Whether The Note Was Assigned To Plaintiff.

A promissory note given as evidence of a debt is a negotiable instrument. A negotiable instrument may be transferred or assigned. Minn. Stat. § 336.3-104, cmt. A note is assigned or transferred when it is endorsed and physically transferred to the assignee or transferee. Minn. Stat. § 336.3-201(a). An instrument that is endorsed in blank may be negotiated by possession. Minn. Stat. § 336.3-205(b). The endorsement must be affixed to the note. *See NAB Asset Adventure II v. Lenertz*, 1998 WL 422207 (Minn. App. July 28, 1998) (allonge or endorsement must be affixed to the note). Thus a loose, separate allonge is not a valid endorsement. *Id.*

The right to enforce the note does not occur until the note is transferred. Minn. Stat. § 336.3-203. In addition to a valid endorsement, the note must be physically transferred in order that the bearer have the right to enforce the note. *Id.* Respondent concedes that it was not able to locate the note until more than a year after it commenced foreclosure proceedings. (Trans. pg 6-7). The note is mechanically signed.

Here, Respondent has produced a note bearing an endorsement without recourse from Homecomings Financial, LLC to Residential Funding Company, LLC. At some point an allonge was created. The allonge is undated, and does not appear to have been attached to the note. While possession of a properly executed allonge, endorsed in blank and actually attached to the note, may indicate that Respondent is entitled to enforce the

note, the evidence that Respondent has produced is insufficient as a matter of law to show that the note was assigned or transferred to JPMorgan Chase Bank, N.A.

Because the allonge is apparently unattached, it does not constitute an appropriate endorsement of the note. Further, even if the allonge was appropriately attached, there is no indication as to when the allonge was executed or when Respondent obtained possession of the note or allonge. There is no evidence that supports Respondent's argument that a valid negotiation of the note has occurred. There is therefore a genuine issue of material fact as to whether the Respondent was entitled to enforce the note at the time it commenced this action.

B. There Is A Genuine Issue Of Fact As To The Validity Of The Foreclosure Sale.

Respondent argued at the motion hearing that because it is waiving its right to a deficiency, the validity of the alleged note assignment and its right to enforce the note is irrelevant. All that remained, according to Respondent, was to confirm the Sheriff's sale. Respondent was wrong. Foreclosure is a remedy granted the entity that owns the debt. Contrary to Respondent's argument, it was not entitled to foreclose on the property and bid in a debt that it was not owed.

1. The Note Holder Is The Only Entity Entitled To Enforce The Rights Contained In The Mortgage.

Respondent argued that ownership of the note is irrelevant so long as it does not pursue a deficiency. This is an incorrect statement of the law. Despite Respondent's desire to the contrary, the Minnesota Supreme Court in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009), did not hold that ownership of

the note was irrelevant in foreclosure actions and did not resolve the problems attendant to foreclosure by an entity not entitled to enforce the note. The court in *Jackson* did not address the issue of whether the foreclosing entities held the notes secured by the mortgages.

Jackson did not resolve or specifically address the claims Appellants brought in this case: whether the note can be enforced by an entity who is neither agent for the note holder, nor who holds the note. Three issues are presented by this problem and are raised by the Appellants here in their claims but were left unresolved by the Minnesota Supreme Court in *Jackson*.

First, disputes between the mortgagees and the promissory note holders expose the mortgagors to possible future liability *for the note*:

[A]ny disputes that arise between the mortgagee holding legal title and the assignee of the promissory note holding title do not effect the status of the mortgagor for purposes of foreclosure by advertisement.

Jackson, 770 N.W.2d at 501. In other words, the status of the mortgagor at the commencement of the foreclosure is that his indebtedness is possibly to two *different* entities.

Minnesota statutory distinctions between holder of the “mortgage debt” and holder of the “promissory note” corroborate the Plaintiffs’ concerns about exposure to foreclosure abuse. Minn. Stat. § 580.255 refers to satisfaction of the “mortgage debt,” not the “note”:

The amount received from foreclosure sale under this chapter is full satisfaction of the mortgage debt, except as provided in section 582.30.

Minn. Stat. § 580.30 further allows “a person holding a mortgage may obtain a deficiency judgment against the mortgagor...,” but does not refer specifically to the holder of the note. In a post-foreclosure action brought by a bona fide purchaser of the promissory note, it is not clear whether a court would interpret Minn. Stat. § 580.255 relating to “full satisfaction of the mortgage debt” to bar the promissory note holder’s action against the original mortgagor who has already lost the house due to the foreclosure sale.

Second, the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* (2006), does not allow rescission claims against the loan servicer. Thus, at the end of the foreclosure proceedings, the mortgagor, by operation of state law, loses any possible federal remedies against the promissory note holder. Because it is by operation of state law, the mortgage proceeding may possibly violate the mortgagor’s federal and state constitutional rights to due process:

We share plaintiffs concern over the possibility that our decision today may foreclose federal remedies that are otherwise available to homeowners.

Jackson, 770 N.W.2d at 502. As the *Jackson* court reflected *and did not reach* “[w]ere it before this court, we might be inclined to interpret the TILA language differently than the Ninth Circuit did [in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-63 (9th Cir. 2002)]. But we are not faced with interpreting TILA....” *Id.* Oddly, the court recognized the problems of mortgagors identifying the promissory note holder, but was silent on the resolution of the exposure. *Id.* (citing Christopher L. Peterson, *Predatory Structured Finance*, 28 *CARDOZO L. REV.* 2185, 2265-68 (2007)).

Third, Appellants challenge the misguided notion suggested by the *Jackson* court that the availability of counseling as a prerequisite to foreclosure is sufficient to cure the possible future liability exposure of the mortgagor:

These legislative efforts *may help* homeowners to better navigate the possible legal pitfalls outlined by the plaintiffs.

Jackson, 770 N.W.2d at 502 (emphasis added). Appellants' allegations suggest that the Minnesota Supreme Court's hope of help has not been realized.

As the Eighth Circuit observed in *In re Banks*, 457 B.R. 9 (Bankr. 8th Cir. 2011), where the note was not produced, the question remains as a material fact as to who can enforce the note. Not surprisingly, the Court referenced *Jackson* for the proposition that once the note is produced, the final disposition of the foreclosure proceedings may proceed (not referring to the *commencement of the proceedings* which is a wholly different and settled matter):

As Kondaur admits, and is apparent from the copy of the note attached to its proof of claim, the promissory note the Debtors executed in favor of NCMC has not been specifically endorsed to Kondaur; it is endorsed in blank. Accordingly, it is a "bearer" note, which requires actual possession of the note to enforce or negotiate it. [See Minn. Stat. § 336.3–205(b).] The Debtors raised the issue of whether Kondaur is the proper party to enforce the note and cast further doubt on Kondaur's standing by introduction of the Corrective Assignment. Unfortunately, there is nothing in the record evidencing the location of the note. Kondaur's counsel represented at oral argument before this Court that Kondaur has possession of the note, but its failure to produce the note prior to or at the hearing on its motion to dismiss (treated as a motion for summary judgment) precluded a determination that Kondaur has the right, as a matter of law, to enforce the promissory note.

At oral argument, Debtors' counsel conceded that there is a valid mortgage on the property and that production of the note most likely will remove the

final hurdle to Kondaur's pending motion for relief and Kondaur's motion to dismiss the adversary proceeding. [*Jackson*, 770 N.W.2d at 494.]

In re Banks, 457 B.R. at 12.

There is a genuine issue of material fact as to whether the parties to the foreclosure action are all of the parties in interest. As previously noted, ultimately, if the mortgage is foreclosed but the promissory note holder is not in unity (present at the same time of the disposition) with the mortgage holder, a mortgagor is exposed to a possible unintended future liability because the full liability of the note *has not been extinguished*. In short, the party who owns the note is not vested with the entity with the mortgage for a *complete and therefore valid* foreclosure proceeding to occur. Like a complaint, if the real parties of interest are not involved (and discovery allows for additional parties to be added), the complete adjudication of the parties' rights may not occur. This fact leaves the Appellants open to a lawsuit brought by a note holder based on a purportedly unsatisfied note.

In a recent U.S. District Court decision for the District of Massachusetts, *Oratai Culhane v. Aurora Loan Services of Nebraska*, Civ. No. 11-11098, slip op. at 28 (D. Mass. Nov. 28, 2011), the court recognized the above outlined dilemma: ““Were a mortgagee without an interest in the debt able to exercise the power of sale, the note would be left outstanding as a valid obligation of the mortgagor to its holder.”” *Id.* (citing *Cooperstein v. Bogas*, 317 Mass. 341, 344 (1944) (recognizing double liability as a concern in a reach and apply case)). “The holder of the note could attempt to collect on the note after the mortgage was foreclosed subjecting the mortgagor to double liability.”

Adamson v. Mortgage Electronic Registrations Systems, Inc., 29 Mass. L. Rptr. 33, 2011 WL 4985490 at * 9 (Super. Ct. 2011); see *Residential Funding Co., LLC v. Saurman*, Nos. 290249, 291443, slip op. at 9 (Mich. Ct. App. Apr. 21, 2011) (available at <http://coa.courts.mi.gov/documents/OPINIONS/FINAL/COA/20110421.C290248.94.290248.OPN>PDF>) (“[I]f [a mortgagee who does not hold the note] were permitted to foreclose on the properties, the borrowers obligated under the note would potentially be subject to double-exposure for the debt. That is, having lost their property to [the mortgagee], they could still be sued by the note holder for the amount of the debt because [the mortgagee] does not have the authority to discharge the note.”) See also *Livonia Props Holdings, LLC v. 12840-12976 Farmington R. Holdings, LLC*, 339 F. App’x 97, 102 (6th Cir. 2010) (suggesting that where the foreclosing entity does not own the indebtedness, the borrower is at risk of double liability on the loan); *Tate v. BAC Home Loan Servicing, LP*, No. 10-13257, 2011 WL 3957554 at * 4 (E.D. Mich. Aug. 5, 2011) (same); *Stein v. U.S. Bancorp*, No. 10-14026, 2011 WL 740537, at *11 (E.D. Mich. Feb. 24, 2011) (same); *5-Star Mgmt., Inc. v. Rogers*, 940 F.Supp. 512, 520 (E.D.N.Y. 1996) (“To allow the assignee of a security interest to enforce the security agreement would expose the obligor to a double liability, since a holder in due course of the promissory note clearly is entitled to recover from the obligor.”) (quoting *In re Hurricane Resort Co.*, 30 B.R. 258, 261 (Bankr. S.D. Fla. 1983)). Under *Culhane*, once the court factually found the note and mortgage in the same entity as required under Massachusetts’s common law prior to foreclosure, it granted Aurora summary judgment. *Culhane*, at 57-58.

The court in the instant case recognized that the entity holding the note was the only entity entitled to enforce the note. (APP7.) However, the court did not go far enough. The court erred when it concluded that Respondent could foreclose in the absence of a right to enforce the note. Foreclosure is a remedy for a default under the terms of the note. It is a remedy that belongs to the note holder. A foreclosure does not protect the Appellants from further action on the note if the note is held by an entity different than the foreclosing entity.

This is a different argument than that presented in the *Jackson* matter. There, the court concluded that ownership of the note and mortgage may be separated, and the legal title holder was the entity that could, under the foreclosure by advertisement statutes, commence the foreclosure. 770 N.W.2d at 501. Appellants do not dispute that the ownership interests may be split, nor do Appellants dispute that a mortgage and its assignments are the only thing that need be recorded. But Appellants do take issue with the district court's conclusion that a foreclosure is something other than an enforcement of the debt evidenced by the note.

“A conveyance by a mortgagee, intended to pass his interest as an *estate*, and not as a *security*, is wholly inoperative.” *Hill v. Edwards*, 11 Minn. 22, 1865 WL 995, at *3 (Minn. 1865). “The conveyance by the mortgagee of his interest in the land, without an assignment of the debt, is a nullity. The debt, and the mortgage securing its payment, are inseparable. The latter is an incident to the former, and is upheld **by it, and by it only.**” *Id.* (emphasis added). “Where a note secured by a mortgage is indorsed and transferred to a purchaser without a formal assignment of the mortgage, the security follows the note

as an incident thereof. Such transfer of the note operates as an equitable assignment of the mortgage.” *Hayes v. Midland Credit Co.*, 173 Minn. 554, 556 (Minn. 1928). There is no great mystery in these courts holdings; it has been the law in Minnesota for more than 150 years that a foreclosure is merely an enforcement of the underlying note. The ability to enforce the debt lies with the owner of the debt, regardless of the legal title to the mortgage.

Because there was a genuine issue of material fact as to whether the note was validly assigned to Respondent, summary judgment and confirmation of the Sheriff’s Sale was inappropriate. Respondent had no right to foreclose on the Appellant’s property unless it was entitled to enforce the note.

2. The Note And Mortgage Require Unity Of The Note And The Mortgage.

The note and mortgage account for this potential for double liability by reserving the remedy of the power of sale to a single entity. A foreclosure must be in compliance with the terms of the mortgage documents. The foreclosure in this case did not comply with those documents because the power of sale was not invoked consistent with the terms of the note and mortgage.

It is not accurate that so long as the mortgage and all assignments are recorded, nothing more is required to foreclose by advertisement. The foreclosing entity must have the contractual right to do so and that contractual right is derived from the mortgage and note.

The foreclosure statutes do not require that the note or assignments of the note be recorded; it does not follow, however, that the note and its ownership are completely irrelevant. The purpose of the mortgage document is to secure payment to the note owner. A mortgagee cannot, therefore act contrary to the stated purpose of the mortgage and foreclose without reference to the note owner's authority. The power of sale is a remedy reserved to the note holder for non-payment; it thus follows that the mortgagee cannot act without either owning the note or without the authorization of the entity entitled to invoke the power of sale, the note holder. The ownership of the note is thus not irrelevant.

The note and mortgage in this case provides that payments are due under the note (not under the mortgage) to the lender. (APP29; APP56.) The only entity entitled to payments, according to the terms of the note, is the lender. (APP56.)

The note may be assigned by the lender, but the assignee who steps into the shoes of the lender is the entity who takes the note by assignment AND is entitled to receive payment on the note. (*Id.*) Thus, the lender, or its assignee, is the "note holder" and the only entity entitled to receive payments.

The purpose of the mortgage is to "secure to the Lender the repayment of the Loan." (APP29.) Because the "note holder" is the only entity entitled to receive payments, the purpose of the mortgage and the purpose of the remedies therein are to protect the note holder, not MERS or the legal title holder of the mortgage (unless, of course the legal title holder also holds the note or is an agent of the note holder). (APP29; APP56.) The plain language of the mortgage reserves the power of sale to the

lender, who is also the note holder (because the lender – and its assigns – is the entity entitled to receive payments under the note):

If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale....

(APP29 at ¶ 22.)

Similarly, the note reserves the remedies contained in the mortgage, including the power of sale, to the note holder or lender:

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the “Security Instrument”), dated the same date as this note, **protects the Note Holder** from possible losses that might result if I do not keep the promises that I make in this note. The Security Instrument describes how and under what conditions I may be required to make immediate payment under this note.

(APP56 at ¶ 11) (emphasis added).

Acceleration of the debt is a condition precedent to exercising the power of sale.

(Id.) Acceleration is a remedy that may only be exercised by the Note Holder under the plain terms of the note and of the mortgage because the note holder is the only entity entitled to receive payment. *(Id.)* Thus, both the security instrument and the note reserve the remedies of acceleration and subsequent sale to the Note Holder.

Thus, a default in payment must occur, the note holder must accelerate the debt, and only then can the note holder exercise the power of sale. This is the only way, under the clear terms of the note and the mortgage, that a default can occur by which the power of sale contained in the mortgage becomes operative.

It is not accurate that so long as the mortgage and all assignments are recorded, nothing more is required to foreclose by advertisement. That is not the only requirement under the terms of the statute. The foreclosing entity must have the contractual right to exercise the power of sale and that contractual right is derived from the mortgage and note.

Here, there is a genuine issue of material fact as to whether Respondent is the note holder or is entitled to otherwise enforce the note. Respondent cannot show that it was authorized to foreclose on the Appellants' property because there is an issue of fact as to whether the note was properly endorsed by the note holder, Residential Funding Company, LLC. Even if the court finds that the endorsement is adequate, there is no evidence indicating when the endorsement occurred or when Respondent took possession of the note and allonge. To exercise the remedy of foreclosure, Respondent clearly must hold the note at the time it commenced the foreclosure because it must be authorized by the note and the mortgage to accelerate the debt and exercise the power of sale. Summary judgment is inappropriate under these circumstances.

3. A Creditor Is The Only Entity Entitled To Make A Credit Bid At A Foreclosure Sale.

A lender or note holder is entitled to make a credit bid, up to the amount of the entire indebtedness, at a foreclosure sale. *Kleinman v. Neubert*, 172 N.W. 315, 317 (Minn. 1919); 59A CJS Mortgages § 812. The purpose of this rule is to avoid the inefficiency of requiring the creditor to tender cash that would be immediately returned to it. *Id.* If the high bidder is not the note holder or the lender, the purchaser must pay cash

or its equivalent. 6A Minn. Prac. § 49.19. No one, other than the entity that is owed the debt, can bid in the debt.

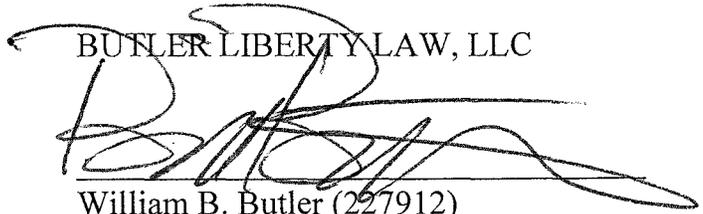
Here, there is no evidence that Respondent paid cash or its equivalent for the Appellants' property. Indeed, Respondent appears to concede at the motion hearing that it bid in the debt that it was not owed. (Trans. pg. 10). Because Respondent cannot show that it is the note holder or that it is entitled to collect anything under the note, it could not do this. The sale that Respondent sought to confirm, therefore, is void on its face. This court should reverse the District Court and remand this case for further proceedings.

CONCLUSION

Respondent did not conclusively establish that it is the note holder. Because only the note holder is may enforce the debt evidenced by the note, summary judgment was inappropriate. Under these circumstances, there is a genuine issue of material fact as to whether Respondent was entitled to foreclose and as to whether the Sheriff's Sale should have been confirmed. This court should reverse the District Court's order granting summary judgment to Respondent.

Dated: February 21, 2012

BUTLER LIBERTY LAW, LLC

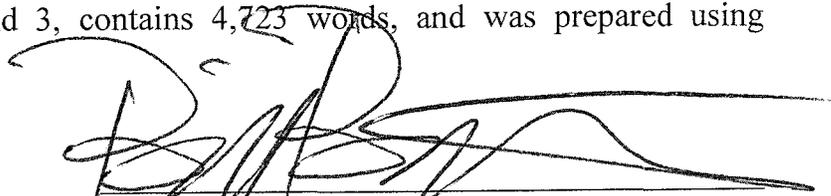


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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. P. 132.01, subds. 1 and 3, contains 4,723 words, and was prepared using Microsoft Word 2010.

A handwritten signature in black ink, appearing to read 'William B. Butler', written over a horizontal line.

William B. Butler