

NO. A12-1618

State of Minnesota
In Court of Appeals

David C. Embree and Kristie M. Embree,
Appellants,

vs.

U.S. Bank National Association, as trustee for structured
asset investment loan trust, mortgage pass-through
certificates, series 2006-BNC3,

Respondent.

BRIEF AND ADDENDUM OF RESPONDENT

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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 ISSUES

1. Whether the District Court properly held that no genuine issue of material fact exists regarding Respondent's compliance with Minnesota Statutes section 580.05?

Description of How the Issue was Raised Below, Trial Court Holding And Description of How the Issue Was Preserved For Appeal:

Based on the evidence submitted in connection with Respondent's Motion for Summary Judgment, the District Court properly held that no genuine issue of material fact exists with respect to whether Respondent complied with Minnesota Statutes section 580.05, as it was undisputed that: (1) Respondent executed and recorded a limited power of attorney in Sherburne County prior to the foreclosure sale that authorized its attorney-in-fact, Chase Home Finance LLC, successor by merger to Chase Manhattan Mortgage Corporation, to foreclose on the mortgage and (2) Chase Home Finance LLC properly executed and recorded a notice of pendency of proceeding and power of attorney to foreclose authorizing the law firm of Peterson, Fram and Bergman to foreclose on the mortgage.

Apposite Authority:

Minn. Stat. § 580.05

Molde v. CitiMortgage, Inc., 781 N.W.2d 36 (Minn. Ct. Add. 2010)
Duluth News Tribune v. Smith, 211 N.W. 322 (Minn. 1926)

2. Whether Appellants' challenge to Chase Home Finance LLC's authority to act as Respondent's attorney-in-fact under a limited power of attorney was waived because Appellants failed to raise the issue below and also failed to introduce any evidence creating a disputed issue of material fact?

Description of How the Issue was Raised Below, Trial Court Holding And Description of How the Issue Was Preserved For Appeal:

This issue was not argued by the parties below and was therefore not preserved for appeal.

Apposite Authority:

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)
Roby v. State, 547 N.W.2d 354 (Minn. 1996)
Gradjelick v. Hance, 646 N.W.2d 225 (Minn. 2002)

STATEMENT OF THE CASE

This appeal is from an order granting summary judgment in favor of Respondent U.S. Bank National Association, as trustee for structured asset investment loan trust, mortgage pass-through certificates, series 2006-BNC3 (“U.S. Bank”). In December 2010, U.S. Bank foreclosed by advertisement a mortgage on real property located in Sherburne County owned by Appellants David C. Embree and Kristie M. Embree (collectively, the “Embrees”). The Embrees commenced this action to challenge the validity of the foreclosure and restrain U.S. Bank from evicting them following the expiration of their right of redemption. U.S. Bank moved to dismiss the Embrees’ Complaint in its entirety. In an order dated November 15, 2011, the District Court dismissed all of the Embrees’ causes of action, save those under Minn. Stat. § 580.01, *et seq.* and for injunctive relief. U.S. Bank subsequently moved for summary judgment on the Embrees’ remaining claims. The District Court granted U.S. Bank’s motion for summary judgment on July 27, 2012. This appeal followed.

STATEMENT OF FACTS

On May 18, 2006, David C. Embree borrowed \$450,415 from BNC Mortgage, Inc. (“BNC”), in exchange for which the Embrees granted a mortgage on the real property located at Zimmerman, Minnesota (the “Property”). (U.S. Bank Add. at 2, ¶2) The mortgage designated Mortgage Electronic Registration Systems, Inc. (“MERS”) as mortgagee and nominee for BNC and BNC’s successors and assigns. (*Id.*) The mortgage was recorded on

September 27, 2006, in the Sherburne County Recorder's Office as Document No. 632659 (the "Mortgage"). (*Id.*)

On November 26, 2003, U.S. Bank caused a limited power of attorney to be recorded in the Sherburne County Recorder's Office as Document No. 533813 (the "Power of Attorney"). (*Id.* at 2-3, ¶6; 13.)¹ The Power of Attorney appoints Chase Manhattan Mortgage Corporation ("Chase Manhattan") as U.S. Bank's attorney-in-fact for mortgage loans held by U.S. Bank in its capacity as trustee and authorizes Chase Manhattan to collect debts belonging to U.S. Bank by use any lawful means for the recovery of such debt. (*Id.* at 3, ¶6; 13) On January 1, 2005, Chase Manhattan Mortgage Corporation and Chase Home Finance LLC ("Chase Home") merged, with Chase Home as the surviving entity. (*Id.* at 3, ¶7.)

On September 8, 2009, MERS assigned the Mortgage to U.S. Bank National Association, Trustee for Lehman-Brothers-Structured Asset Investment Loan Trust Sail 2006-BNC3 (the "First Assignment"). (*Id.* at 10.) The First Assignment was recorded on September 22, 2009, in the Sherburne County Recorder's Office as Document No. 680334. (*Id.*) U.S. Bank National Association, Trustee for Lehman Brothers-Structured Asset Investment Loan Trust Sail 2006-BNC3 subsequently assigned the Mortgage to U.S. Bank (the "Second Assignment"). (*Id.* at 12.) The Second Assignment was recorded on October 13, 2010, in the Sherburne County Recorder's Office as Document No. 720608. (*Id.*)

¹ The same limited power of attorney was recorded in the Office of the Registrar of Titles, Sherburne County, Minnesota on November 21, 2007, as Document No. 41142 (U.S. Bank Add. at 2-3, ¶6.)

The Embrees defaulted on the Mortgage in August 2009. (*Id.* at 4, ¶12.) As evidenced by the records of Chase Home, the servicer of the Mortgage, the Embrees failed to remit the payment due on August 1, 2009, and did not make any payments thereafter. (*Id.*) Due to the Embrees' default under the Mortgage, Chase Home initiated a foreclosure by advertisement on behalf of U.S. Bank. (*Id.* at 3, ¶9.) To that end, Chase Home filed a notice of proceeding and power of attorney to foreclose, authorizing the law firm of Peterson, Fram and Bergman to foreclose the Mortgage (the "Notice of Pendency"). (*Id.* at 15.) The Notice of Pendency was recorded on October 13, 2010, in the Sherburne County Recorder's Office as Document No. 720607. (*Id.*) U.S. Bank ultimately purchased the Property at a foreclosure sale on December 6, 2010. (*Id.* at 4, ¶11, 18-19.)

In its July 27, 2012, Order, the District Court detailed the history of the Embrees' Mortgage and its foreclosure by advertisement and framed the issue currently before this Court:

In this case, [the Embrees] do not dispute that they executed a mortgage securing their property, that they have not made a payment since 2009, and that there is no other action to recover the remaining debt. The mortgage and all of the assignments have also been recorded. After the mortgage with MERS as mortgagee was recorded in 2006, MERS recorded in 2008 its assignment of the mortgage to U.S. Bank National Association, Trustee for Lehman Brothers-Structured Asset Investment Loan trust Sail 2006-BNC3. In 2010, U.S. Bank National Association, Trustee for Lehman Brothers-Structured Asset Investment Loan trust Sail 2006-BNC3 recorded its assignment of the mortgage to [U.S. Bank]. The sheriff's certificate of sale, which is prima facie evidence that all legal requirements were met, was recorded in December 2010, and in any event, the record shows that proper and timely notice of the foreclosure sale was provided to [the Embrees].

However, [the Embrees] assert that the foreclosure sale was void because [U.S. Bank] failed to comply with Minn. Stat. § 580.05. [The Embrees] contend that there was nothing recorded in Sherburne County before the sheriff's sale which gave Chase Home the authority to act on behalf of [U.S. Bank]. Yet in 2003 and in 2007, a limited power of attorney was recorded in Sherburne County appointing Chase Manhattan Mortgage Corporation—which later merged with Chase Home—to act as [U.S. Bank's] attorney-in-fact.

(U.S. Bank's Add. at 7-8) (internal citations omitted).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT U.S. BANK COMPLIED WITH MINN. STAT. § 580.05.

A. Standard of Review.

On appeal from summary judgment, an appellate court reviews *de novo* whether any genuine issue of material fact exists and whether the district court erred in its application of the law. *Riverview Muir Doran, LLC v. JADT Dev. Group LLC*, 790 N.W.2d 167, 170 (Minn. 2010). A motion for summary judgment will be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03.

A party cannot defeat a motion for summary judgment with “unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). A party opposing summary judgment must do more than show that there is some “metaphysical

doubt” as to the material fact and must not rest on mere averments. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997). “Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.” *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Therefore, to oppose a motion for summary judgment successfully, a party is required to “extract *specific, admissible facts*” from the record that demonstrate that a genuine issue of material fact exists.” *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. Ct. Add. 1988).

B. No Genuine Issue of Material Fact Exists Regarding Whether U.S. Bank Complied With Minn. Stat. § 508.05.

As noted by the Embrees, the “primary issue in this [appeal] is whether [the Power of Attorney] relied upon by U.S. Bank in support of its foreclosure by advertisement” complies with Minn. Stat. § 580.05. (Embrees’ Brief at p. 5.) Minn. Stat. § 580.05 sets forth the requirements for establishing the authority of an attorney to conduct a foreclosure by advertisement. The first such requirement is that the “authority of the attorney at law shall appear by a power of attorney executed and acknowledged by the mortgagee or assignee of the mortgage in the same manner as a conveyance, and recorded prior to the sale in the county where the foreclosure proceedings are had.” Minn. Stat. § 580.05. When a notice of pendency of proceeding and power of attorney to foreclose is executed by an attorney-in-fact, Minn. Stat. § 580.05 requires the attorney-in-fact’s authority to “likewise be evidenced by recorded power.” Minn. Stat. § 580.05.

The Embrees do not dispute the following uncontroverted facts, which establish that U.S. Bank complied with Minn. Stat. § 580.05:

- U.S. Bank recorded the Power of Attorney on November 26, 2003. (U.S. Bank Add. at 2-3 ¶9; 13).
- The Power of Attorney appoints Chase Manhattan as U.S. Bank's attorney-in-fact. (*Id.*)
- Chase Manhattan merged into Chase Home on January 1, 2005, and Chase Home was the surviving entity. (*Id.* at 3, ¶7.)
- Chase Home recorded the Notice of Pendency on October 13, 2012, which resulted in the December 6, 2010, foreclosure. (*Id.* at 3, ¶9; 4, ¶11; 15.)

Instead, the Embrees attempt to create an issue of material fact related to U.S. Bank's compliance with Minn. Stat. § 580.05 in two ways. First, the Embrees claim, based on nothing more than their own speculation, that Chase Home may not be authorized under the terms of the servicing agreement referenced in the Power of Attorney to foreclose on the Mortgage. Second, the Embrees argue, without citation, that because the Power of Attorney was executed and recorded prior to the date the Mortgage was recorded, and because it does not specifically mention the Mortgage, it cannot authorize Chase Home to foreclose.

For the reasons discussed below, neither of these arguments have any merit, nor should they compel this Court to reverse the District Court's summary judgment in favor of U.S. Bank.

1. Bank Was Not Required to Record or Produce Any Additional Documents Related to the Power of Attorney.

The Embrees' principal argument on appeal is that the foreclosure sale is void because U.S. Bank did not "record and has not produced any servicing agreements related to the Embree loan." (U.S. Bank Add. at 10.) Yet the Embrees failed to produce any evidence creating a genuine issue of material fact regarding Chase Home's authority to foreclose on U.S. Bank's behalf under the Power of Attorney or otherwise. (*See* Embrees' Brief.)

Indeed, the servicing agreement that is central to the Embrees' argument is simply not in the record before either this Court or the District Court. (*See generally*, Record.) If the Embrees wished to challenge Chase Home's authority to foreclose, they were required to "extract *specific*, admissible facts" from the record that demonstrate that a genuine issue of material fact exists." *Kletschka*, 417 N.W.2d at 754. Rather than doing so, the Embrees have done nothing more than present unverified and conclusory allegations about an unspecified servicing agreement between U.S. Bank and Chase Home. At best, these allegations create a "metaphysical doubt" as to Chase Home's authority to foreclose the Mortgage and are therefore simply not sufficient to defeat U.S. Bank's motion for summary judgment. *See Hance*, 646 N.W.2d at 230; *DLH, Inc.*, 566 N.W.2d at 70-71.

Moreover, the Embrees cite no legal authority to support their claim that U.S. Bank was required to record a "servicing agreement" in order to foreclose by advertisement. (*See generally*, Embrees' Brief.) Allegations unsupported by legal

analysis or citation are properly disregarded by this Court. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919, n.1 (Minn. Ct. Add. 1994). In fact, under the plain language of Minn. Stat. § 580.05, no such requirement exists and this Court should decline to read into that statute a provision that the legislature purposely omitted or intentionally overlooked. *See Metro. Sports Facilities Comm'n v. Cnty. of Hennepin*, 561 N.W.2d 513, 516-17 (Minn. 1997).

The Embrees' arguments related to the servicing agreement are therefore nothing more than mere speculation. It is well-established that such speculation, without some concrete evidence, is not enough to avoid summary judgment. *Hangsleben*, 505 N.W.2d at 328.

2. The Power of Attorney is Not Limited in Scope in a Manner that Excludes the Embrees' Mortgage.

The Embrees also claim that because the Power of Attorney was recorded prior to the date they executed the Mortgage and does not specifically identify the Mortgage, it cannot authorize Chase Home to foreclose. (*See* Embrees' Brief at 10-11.) In order to address the Embrees' claims, it is necessary to review the language used by U.S. Bank in the Power of Attorney. *See Rheinberger v. First Nat'l Bank of Saint Paul*, 150 N.W.2d 37, 41 (Minn. 1967) ("The nature and extent of the authority granted by a power of attorney must be determined primarily by consideration of the actual language used in the instrument") (citing *Duluth News Tribune v. Smith*, 211 N.W. 322 (Minn. 1926)).

The Power of Attorney appoints Chase Manhattan as U.S. Bank's attorney-in-fact and grants Chase Manhattan the authority to "execute and acknowledge in writing [...] all documents reasonably necessary and appropriate for the tasks described in the items (1) through (4)" in the Power of Attorney. (U.S. Bank Add. at 13.) The Power of Attorney describes the first such task as follows:

1. Demand, sue for, recover, collect and receive each and every sum of money, debt, account and interest (which is now, or hereafter shall become due and payable) belonging to or claimed by U.S. Bank National Association, and to use or take any lawful means for recover by legal process or otherwise.

(Id.)

The Embrees' argument focuses on language in the Power of Attorney that appears before the four tasks. Specifically, the Embrees argue that a clause in the Power of Attorney that explains why the Power of Attorney was issued limits the scope of the authority granted. (Embrees' Brief at 10). That clause states:

This Power of Attorney is being issued in connection with Chase Manhattan Mortgage Corporation's responsibilities to service certain mortgage loans (the "Loans") held by U.S. Bank in its capacity as Trustee.

(U.S. Bank Add. at 13.) The Embrees maintain that this explanatory clause limits the scope of the Power of Attorney such that it only applies to mortgage loans held by U.S. Bank at the time the Power of Attorney was executed in 2003. (Embrees' Brief at 10.) The Embrees' argument misses the mark.

The explanatory clause before the four, specific tasks outlined in the Power of Attorney does not have any bearing on the scope of the authority conferred on Chase Manhattan. Rather, the Power of Attorney clearly delineates the tasks that

Chase Manhattan is authorized to undertake on U.S. Bank's behalf. (U.S. Bank Add. at 13.) Those tasks include the authority to "execute [...] all documents customarily and reasonably necessary to" recover or collect "each and every sum of money, debt, account, and interest (which now is, or hereafter shall become due and payable) belonging to or claimed by U.S. Bank." (*Id.*) (emphasis added).

Thus, by its express terms, the Power of Attorney confers authority on Chase Manhattan² to execute the documents necessary to recover all debts belonging to U.S. Bank that are then due (*i.e.*, at the time the Power of Attorney was executed) and those debts that become due after the Power of Attorney is executed ("or hereafter become due and payable"). (*Id.*) Where, as here, "the parties intention is apparent from the language in the power of attorney, that intention should prevail." *Duluth News Tribune*, 211 N.W. at 322-23.

This conclusion is bolstered by the Court's holding in *Molde v. CitiMortgage*, 781 N.W.2d 36 (Minn. Ct. Add. 2010). In that case, this Court held that an attorney-in-fact, who acted under the authority of a limited power of

² The Embrees do not dispute the District Court's determination that on "January 1, 2005, [Chase Manhattan] and Chase Home merged, with Chase Home as the surviving entity." (U.S. Bank Add. at 3, ¶7.) As a result of the merger, Chase Manhattan's rights and privileges under the limited power of attorney were transferred to Chase Home on that date. *Loving & Associates, Inc. v. Carothers*, 619 N.W.2d 782, 785-86 (Minn. Ct. App. 2000) ("holding that obligations and entitlement of a corporation do not cease to exist when the legal identity that embodies them changes, but instead are transferred to the surviving organization by operation of law.") (internal citations omitted); Minn. Stat. § 302A.641, subd. 2. (d) (providing that when a merger becomes effective "the surviving organization [...] possesses all the rights [and] privileges [...] of each of the constituent organizations.")

attorney recorded prior to the mortgage it sought to foreclose, did not violate Minn. Stat. 585.05. *See Molde*, 781 N.W.2d at 44-43 (holding that limited power of attorney recorded in 2004 conferred authority on attorney-in-fact to initiate foreclosure by advertisement of mortgage recorded in 2006 through notice of pendency and power of attorney to foreclose mortgage).

The Embrees' second argument related to the fact that the Power of Attorney does not specifically identify their Mortgage is also unavailing. This Court recently noted there is no legal authority to support a claim that a power of attorney must identify by name each mortgage for which it grants powers to the attorney-in-fact. *See Beercroft v. Deutsche Bank Nat'l Trust Co.*, 798 N.W.2d 78, 86, n.3 (Minn. Ct. Add. 2011) (noting no legal authority appears to exist to support claim that a power of attorney must identify each mortgage for which it grants powers to the attorney-in-fact).

II. THE EMBREES FAILED TO PRESERVE THEIR ARGUMENT THAT CHASE HOME'S AUTHORITY IS A QUESTION OF FACT FOR THE JURY AND ALSO FAILED TO INTRODUCE ANY EVIDENCE CREATING A DISPUTED MATERIAL FACT.

In Section II of their Brief, the Embrees argue that the "limited power of attorney creates factual issues as to whether or not U.S. Bank [sic] had the authority to act under servicing agreements connected with the Embree mortgage, or to act on loans not held by U.S. Bank in 2003." (Embrees' Brief at p. 11.) By the Embrees' own admission, this issue was "not argued by the parties" below. (*Id.* at 1.) Arguments not raised below are waived. *See, Roby v. State*, 547

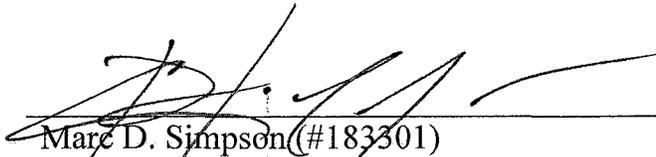
N.W.2d 354, 357 (Minn. 1996); *see also*, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (holding that the court of appeals generally does not review issues not raised below). Accordingly, this Court should not consider the Embrees' argument that Chase Home's authority is a question of fact for the jury.

Even if the Embrees had preserved this argument, they failed to offer any evidence creating a disputed issue of material fact. (*See* Embrees' Brief at p. 11.) The Embrees make the bald assertion that the Power of Attorney "creates factual issues," but fail to identify what those issues are or how the "issues" were created. (*Id.*) Because the Embrees cannot defeat a motion for summary judgment with "unverified and conclusory allegations or by postulating evidence that might be developed at trial," this Court should affirm the District Court's order granting U.S. Bank's motion for summary judgment. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). There is simply nothing in the record suggesting that Chase Home was acting outside of the scope of its authority granted in any servicing agreement with U.S. Bank. Indeed, the servicing agreement is not even in the record before either this Court or the District Court.

CONCLUSION

Based on the foregoing, U.S. Bank respectfully requests that the Court affirm the District Court's order granting summary judgment in its favor.

Dated: November 9, 2012



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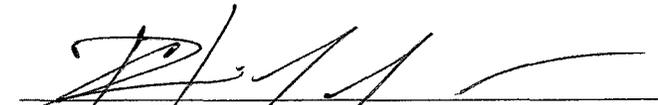
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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the Table of Contents and Table of Authorities, contains 3,598 words as confirmed by the Word Count feature of Microsoft Word 2003, which word-processing program was used to prepare this brief. This brief also complies with the typeface requirements of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure as the printed material appears in 13-point proportional font.

Dated: November 9, 2012



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