

A12-1618

3

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.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Legal Issues	1
I. Is a limited power of attorney which states that documents may only be executed by an attorney-in-fact if the documents are required or permitted under the terms of related servicing agreements of any effect without the related servicing agreements?.....	1
II. Is the authority of an agent a question of fact for the jury?	1
Statement of the Case	3
Statement of Facts	3
Argument	5
I. A limited power of attorney which states that documents may only be executed by an attorney-in-fact if the documents are required or permitted under the terms of a related servicing agreement is of no effect without the related servicing agreement.	5
A. Statutory requirements for foreclosure by advertisement through an attorney hired by an attorney-in-fact.	6
B. The scope of powers of attorney are defined by the terms and conditions imposed on the agent by the principal.....	8
C. The limited power of attorney from U.S. Bank to Chase precludes action absent additional authority under related servicing agreements.....	9
II. The authority of an agent is a question of fact for the jury.....	11
Conclusion	11

TABLE OF AUTHORITIES

Cases

<i>Duluth News Tribune v. Smith</i> , 169 Minn. 356, 211 N.W. 322 (1926).....	9, 11
<i>Gaspord v. Washington County Planning Commission</i> , 312 Minn. 591, 252 N.W.2d 590 (1977).....	12
<i>Gulbrandson v. Empire Mut. Ins. Co.</i> , 251 Minn. 387, 87 N.W.2d 850 (1958).....	2, 12
<i>Jackson v. Mortgage Electronic Registration Systems, Inc.</i> , 770 N.W.2d 487 (Minn. 2009)	8
<i>Kelly v. Oslon</i> , 272 Minn. 134, 136 N.W.2d 621 (1965).....	1, 9
<i>Molde v. CitiMortgage, Inc.</i> , 781 N.W.2d 36 (Minn. App. 2010)	7, 8
<i>Moore v. Carlson</i> , 112 Minn. 433, 120 N.W. 570 (1910).....	9
<i>Rheinbeyer v. First National Bank</i> , 276 Minn. 194, 150 N.W.2d 37 (1967)	11
<i>Sheasgreen Holding Company v. Dworski</i> , 181 Minn. 79, 231 N.W. 395 (Minn. 1930) ...	7
<i>St. Paul Fire and Marine v. Bierwerth</i> , 285 Minn. 310, 175 N.W.2d 136 (1969)	1, 9
<i>Wolfson v. Boris</i> , 295 N.W.2d 562 (Minn. 1980).....	7

Statutes

Minn. Stat. § 580.05.....	5, 6, 7, 8, 10, 11
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STATEMENT OF LEGAL ISSUES

I. IS A LIMITED POWER OF ATTORNEY WHICH STATES THAT DOCUMENTS MAY ONLY BE EXECUTED BY AN ATTORNEY-IN-FACT IF THE DOCUMENTS ARE REQUIRED OR PERMITTED UNDER THE TERMS OF RELATED SERVICING AGREEMENTS OF ANY EFFECT WITHOUT THE RELATED SERVICING AGREEMENTS?

The issue was argued in the trial court by the Embrees in response to Defendant Bank's motion for summary judgment.

The trial court ruled that the limited power of attorney relied upon by U.S. Bank granted authority to recover debt, without addressing the argument that the power of attorney was of no effect in the absence of the related servicing agreements. The ruling was made in the decision of July 27, 2012 granting Respondent U.S. Bank's motion for summary judgment.

The issue was preserved for appeal by the Embrees filing their notice of appeal timely.

The most apposite cases on this issue are *Kelly v. Oslon*, 272 Minn. 134, 136 N.W.2d 621 (1965) and *St. Paul Fire and Marine v. Bierwerth*, 285 Minn. 310, 175 N.W.2d 136 (1969).

II. IS THE AUTHORITY OF AN AGENT A QUESTION OF FACT FOR THE JURY?

The issue was not argued by the parties. The trial court granted Respondent U.S. Bank's motion for summary judgment, stating that the limited power of attorney extended to any lawful means to recover debt and that there were no genuine issues of material fact. The ruling was made in the decision of July 27, 2012.

The issue was preserved for appeal by the Embrees filing their notice of appeal timely.

The most apposite case is *Gulbrandson v. Empire Mut. Ins. Co.*, 251 Minn. 387, 87 N.W.2d 850 (1958).

STATEMENT OF THE CASE

This case deals with the statutory propriety of an attempted mortgage foreclosure by advertisement. The case was filed in Sherburne County District Court. The trial judge assigned was the Honorable Robert B. Varco. Plaintiffs David C. Embree and Kristie M. Embree are the homeowners who took out the mortgage. U.S. Bank National Association, as trustee for structured asset investment loan trust, mortgage pass-through certificates, series 2006-BNC3, asserted that it had been assigned the mortgage the Embrees had taken out on the property and that the mortgage was in default. U.S. Bank moved for summary judgment claiming that there were no issues of fact with respect to the statutory propriety of their mortgage foreclosure by advertisement. Summary judgment was granted to U. S. Bank and this appeal followed.

STATEMENT OF FACTS

On June 27, 2003, U.S. Bank National Association signed a Limited Power of Attorney. Appellants' Addendum, hereinafter Add., at 11-12. The Limited Power of Attorney appointed Chase Manhattan Mortgage Corporation "Attorney-In-Fact" to execute and acknowledge certain documents "provided however, that the documents described below may only be executed and delivered by such Attorneys-In-Fact if such documents are required or permitted under the terms of the related servicing agreements." Add. at 11. The Limited Power of Attorney further stated that "no power is granted hereunder to take any action that would be adverse to the interests of the Trustee of the Holder." Add. at 11. The Limited Power of Attorney stated that it was 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." Add. at 11.

The Limited Power of Attorney referenced no specific mortgages, notes or servicing agreements. Add. at 11-12.

The Limited Power of Attorney was recorded in the office of the Sherburne County Recorder on November 26, 2003 as document number 533813. Add. at 11.

The Embrees purchased their home on March 24, 2005. Add. at 01. It is legally described as Lot 6, Block 1, Belmont Grove, Sherburne County, Minnesota. Add. at 01.

The Embrees granted a mortgage to BNC Mortgage, Inc. secured by their home on May 18, 2006. Add. at 13-16. The mortgage was recorded with the Sherburne County Recorder on September 27, 2006 as document number 632659. Add. at 13. Mortgage Electronic Registration Systems (MERS) is identified as the mortgagee and as acting as the nominee for the lender BNC Mortgage, Inc. and its successors in the mortgage. Add. at 14. By assignment dated September 8, 2009, MERS assigned the Embree mortgage to U.S. Bank National Association, trustee for Lehmann Brothers-structured asset investment loan trust sail 2006-BNC3. Add. at 17-18. In an assignment dated September 23, 2010, U.S. Bank National Association, trustee for Lehmann Brothers-structured asset investment loan trust sail 2006-BNC3 assigned the Embree mortgage to U.S. Bank National Association, as trustee for structured asset investment loan trust, mortgage pass-through certificates, series 2006-BNC3. Add. at 19.

A Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage by Corporation in connection with the Embree home was recorded on October 13, 2010. Add. at 20-22. The Notice of Pendency recited that Chase Home Finance, LLC, as Attorney-In-Fact for U.S. Bank National Association, as trustee for structured asset investment loan trust, mortgage pass-through certificates, series 2006-BNC3, employed the law firm of Peterson, Fram and Bergman to foreclose the mortgage. Add. at 20. The law firm proceeded with a foreclosure by advertisement. Add. at 23-25. A foreclosure sale occurred on December 6, 2010 and a Sheriff's Certificate of Sale was recorded on that same date with the Sherburne County Recorder. Add. at 23.

ARGUMENT

I. A LIMITED POWER OF ATTORNEY WHICH STATES THAT DOCUMENTS MAY ONLY BE EXECUTED BY AN ATTORNEY-IN-FACT IF THE DOCUMENTS ARE REQUIRED OR PERMITTED UNDER THE TERMS OF A RELATED SERVICING AGREEMENT IS OF NO EFFECT WITHOUT THE RELATED SERVICING AGREEMENT.

The primary issue in this case is whether a limited power of attorney relied upon by U.S. Bank in support of its foreclosure by advertisement of the Embree home is sufficient to satisfy the requirements of Minn. Stat. § 580.05. The Embrees claim that the limited power of attorney signed and first recorded in 2003 does not on this record grant to U.S. Bank authority to foreclose the Embree mortgage. U.S. Bank asserts that the 2003 limited power of attorney is sufficient to satisfy the statutory requirement for recorded authority to foreclose the Embree mortgage, a mortgage that was not granted until 2006, and not assigned to Respondent U.S. Bank until 2010.

This brief will first discuss the statutory requirements for mortgage foreclosures by advertisement through attorneys in fact under Minn. Stat. § 580.05. The brief will then discuss the failure of U.S. Bank in this case to satisfy those statutory requirements.

A. Statutory Requirements for Foreclosure by Advertisement through an Attorney hired by an Attorney-In-Fact.

Minn. Stat. § 580.05 sets forth what is required in a mortgage foreclosure by advertisement when an attorney at law is hired to conduct the foreclosure sale. It reads as follows:

Attorney to Foreclose; Record of Power

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

The statute requires the placing of record in the county where the foreclosure proceedings are had, prior to the foreclosure sale, the documents that establish the authority of the individuals acting on behalf of the entity claiming the right to foreclose the mortgage. A foreclosure sale prior to the documents granting proper authority to proceed with the sale being placed of record is void. *Sheasgreen Holding Company v. Dworski*, 181 Minn. 79, 231 N.W. 395 (Minn. 1930).

The statutory scheme requiring written authority parallels the requirement under the statute of frauds that voids contracts for sale of land by agents unless the agent has

written authority to contract for the principal. *Wolfson v. Boris*, 295 N.W.2d 562 (Minn. 1980).

The history of Minn. Stat. § 580.05 was considered and discussed at length in the case of *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36 (Minn. App. 2010). In *Molde*, a law firm was acting as attorney-in-fact for CitiMortgage, Inc. The authority for the law firm to act on behalf of CitiMortgage had been recorded four years prior to the foreclosure sale in the county where the foreclosure proceedings were had, but did not appear in the county's tract index. In ruling that the foreclosure in that instance was proper, the Court found that the recording of the authority of the law firm to act as attorney-in-fact for CitiMortgage was necessary, but was accomplished by the recording in the county where the foreclosure proceedings were held four years before the foreclosure sale.

The Court in *Molde* discussed the statutory history of Minn. Stat. § 580.05, the language of which has been nearly constant since its codification in 1905. The history of the statute makes it absolutely clear that where an attorney-in-fact for a mortgagor or assignor is involved and a law firm is being hired to handle the foreclosure, two documents must be of record in the county where the foreclosure proceeding is occurring: (1) authority from the mortgagee or the assignee granting the attorney-in-fact power to act in the foreclosure, and (2) authority signed by the attorney-in-fact, in the form of a power of attorney, authorizing the law firm that is going to handle the foreclosure to proceed with the foreclosure. The authorities have to be placed of record with the county recorder prior to the sheriff's sale.

The foreclosure of mortgages by advertisement statutes in Minnesota prescribe mandatory requirements which must be met for a party to proceed under the statutes. *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009). Because foreclosure by advertisement is a purely statutory creation, the statutes are strictly construed. *Jackson*, supra. A foreclosing party is required to show exact compliance with the terms of the statutes. *Jackson*, supra; see also *Moore v. Carlson*, 112 Minn. 433, 120 N.W. 570 (1910).

In this case, Chase Home Finance, LLC attempted to act as attorney-in-fact for Respondent U.S. Bank in connection with the foreclosure by advertisement of the Embree home through a limited power of attorney that predates the Embree mortgage. If the document relied upon by Chase Home Finance, LLC as the basis for its authority to foreclose the Embree mortgage does not grant Chase authority to foreclose the Embree mortgage, the requirements of Minn. Stat § 580.05 have not been met and the foreclosure is void.

B. The Scope of Powers of Attorney are Defined by the Terms and Conditions Imposed on the Agent by the Principal.

A power of attorney is the designation of agency by a principal. *Duluth News Tribune v. Smith*, 169 Minn. 356, 211 N.W. 322 (1926). The authority of an agent is limited by the terms and conditions imposed on the agent by the principal. *Kelley v. Olson*, 272 Minn. 134, 136 N.W.2d 621 (1965). An agent may not go beyond the scope

of his or her authority. *St. Paul Fire & Marine Ins. Co. v. Bierwerth*, 285 Minn. 310, 175 N.W.2d 136 (1969).

C. The Limited Power of Attorney from U.S. Bank to Chase Precludes Action Absent Additional Authority under Related Servicing Agreements.

The limited power of attorney upon which U.S. Bank relies in connection with the foreclosure of the Embree mortgage is the document signed June 27, 2003 between U.S. Bank and Chase Manhattan Mortgage Corporation. It is captioned "LIMITED POWER OF ATTORNEY". It describes how it is limited. It states that the documents described in the limited power of attorney may only be executed and delivered by the attorneys in fact if "such documents are required or permitted under the terms of the related servicing agreements". The limited power of attorney gives no authority to act outside of the scope defined by the servicing agreements. Additionally, the limited power of attorney states that "no power is granted hereunder to take any action that would be adverse to the interests of the Trustee of the Holder".

No action can occur under the June 27, 2003 limited power of attorney in the absence of the servicing agreements. The limited power of attorney grants to U.S. Bank no authority to foreclose the Embree mortgage in the absence of servicing agreements related to the Embree loan requiring or permitting foreclosure.

U.S. Bank did not record and has not produced any servicing agreements related to the Embree loan. The trial court could therefore not properly rule that as a matter of law U.S. Bank had the authority to foreclose the Embree mortgage.

The analysis can be taken a step further. The statutory requirement of Minn. Stat. § 580.05 is only met when the authority of the attorney in fact is placed of record with the local county recorder prior to the foreclosure sale. Because no related servicing agreements were recorded with Sherburne County prior to the foreclosure sale of the Embree home, the proper authority is not of record as required by Minn. Stat. § 580.05. The foreclosure sale is, consequently, void.

The limited power of attorney also states that it “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.” This is the only reference in the limited power of attorney to the loans to which it applies, and the reference is to the loans then “held” by U.S. Bank. There is no reference to loans to be acquired in the future. There is no reference to loans acquired in the future by Chase Manhattan Mortgage Corporation’s successors.

Powers of attorney are strictly construed. *Duluth News Tribune v. Smith*, 169 Minn. 356, 211 N.W. 322 (1926). The nature and extent of authority granted in powers of attorney is determined primarily by the actual language used. *Rheinbeyer v. First National Bank*, 276 Minn. 194, 150 N.W.2d 37 (1967). On its face, the 2003 limited power of attorney therefore could not apply to the Embree loan, a loan generated in 2006,

nor to actions by Chase Home Finance, LLC acting as an attorney in fact in 2010 on a mortgage assigned to U.S. Bank in 2008 and 2009.

II. THE AUTHORITY OF AN AGENT IS A QUESTION OF FACT FOR THE JURY.

The authority of an agent is generally a question of fact for the jury. *Gulbrandson v. Empire Mutual Insurance Company*, 251 Minn. 387, 87 N.W.2d 850 (1958). At a minimum, the limited power of attorney creates factual issues as to whether or not U.S. Bank 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.

Summary judgment is proper only when there is no genuine issue of material fact in dispute and where a determination of the applicable law will resolve the controversy. *Gaspord v. Washington County Planning Commission*, 312 Minn. 591, 252 N.W.2d 590 (1977). Consequently, it was improper for the trial court to grant summary judgment to Respondent U.S. Bank.

CONCLUSION

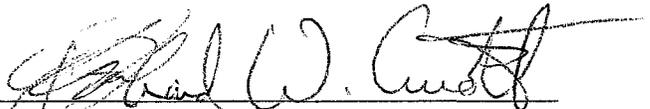
Summary Judgment was improperly granted. Respondent U.S. Bank has not shown that the 2003 Limited Power of Attorney U.S. Bank granted to Chase Manhattan Mortgage Corporation has any relevancy to the Embree mortgage. U.S. Bank has not shown authority for Chase to act through servicing agreements connected with the Embree loan. Without proper recorded authority, Chase Home Finance, LLC did not have the statutory authority under Minn. Stat. § 580.05 to hire a law firm to foreclose the

Embree mortgage. This case should be remanded back to the trial court for trial or other appropriate proceedings.

Respectfully submitted,

CUROTT & ASSOCIATES, LLC

Dated: October 10, 2012



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FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA

IN COURT OF APPEALS

CASE TITLE:

David C. Embree and Kristie M. Embree,

Appellant,

CERTIFICATION OF BRIEF LENGTH

vs.

APPELLATE COURT CASE NUMBER: A12-1618

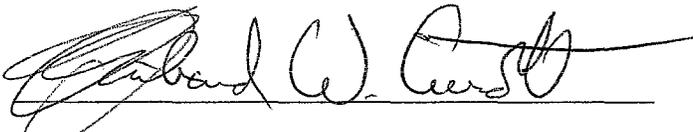
U.S. Bank National Association, as trustee for
structured asset investment loan trust, mortgage
pass-through certificates, series 2006-BNC3,

Respondent.

I hereby certify that this brief conforms to the requirements of
Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a monospaced
proportional font. The length of this brief is 2624 words. This brief was prepared using Microsoft
Office Word 2007.

DATED: October 10, 2012

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A handwritten signature in black ink, appearing to read "Richard W. Currott", written over a horizontal line.

SIGNATURE