STATE OF MINNESOTA
IN COURT OF APPEALS
A10-190

In re the Matter of the Petition of Deutsche Bank Trust Company Americas,
as Trustee, petitioner,
Respondent,

vs.

John G. Souza,
Appellant.

Filed October 12, 2010
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-ET-CV-09-44

Kristine M. Spielgelberg Nelson, Shapiro Nordmeyer & Zielke, Burnsville, Minnesota; and

Michael J. Steinlage, Paula Duggan Vraa, Hilary J. Loynes, Larson King, LLP, St. Paul, Minnesota (for respondent)

John G. Souza, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a district court order directing issuance of a new certificate of title in the name of the assignee of a sheriff's certificate, pro-se appellant argues that

(a) the mortgagee's nominee lacked standing to foreclose the mortgage, (b) there were irregularities in the proceedings, and (c) a summary-judgment hearing was premature. We affirm.

FACTS

The Mortgage Electronic Registration System (MERS), as nominee for mortgagee Homecomings Mortgages, foreclosed, by advertisement, on registered (Torrens) land that John Souza previously mortgaged to Homecomings. MERS bought the property at the sheriff's sale and assigned its sheriff's certificate to Deutsche Bank Trust Company of Americas (DB). When Souza did not redeem the property from foreclosure, DB petitioned for a new certificate of title in its name. Souza moved to dismiss DB's petition, and DB moved for summary judgment. Two days after a hearing on the parties' motions, the supreme court released *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009), which addresses MERS's function as a mortgagee's nominee. By order of November 30, 2009, the district court denied Souza's motion to dismiss, granted DB's motion for summary judgment, and directed the registrar of titles to issue a new certificate of title in DB's name.[1] Souza, acting pro se, appeals.

D E C I S I O N

Souza's arguments to this court do not allege prejudice from what he asserts were errors in this proceeding. Thus, even if he has correctly identified errors by the district

[1] Judgment was not entered on the order, but an appeal may be taken to this court "from any order relating to registered land after its original registration." Minn. Stat. § 508.29(4) (2008). It is undisputed that an order directing issuance of a new certificate of title in DB's name is an order "relating to registered land after its original registration."

court, reversal is not required. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, appellant must show both error and prejudice); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that a district court will not be reversed if it reached correct result for wrong reason). We will, however, exercise our discretion to address aspects of Souza's arguments. *Cf.* Minn. R. Civ. App. P. 103.04 (allowing appellate courts to address issues in interest of justice).

On appeal from a summary judgment, appellate courts review de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law; in doing so, appellate courts view the evidence in the light most favorable to the party against whom summary judgment was granted. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009). To survive a summary-judgment motion, the nonmoving party must present "sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cnty*, 108 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted). "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). When a sheriff's certificate issues, that certificate is "prima facie evidence" both that "all the requirements of law" have been satisfied and that, after the time to redeem the property from the foreclosure sale has expired, fee title is in "the purchaser at such sale [or] the purchaser's heirs or assigns." Minn. Stat. § 580.19 (2008).

I.

Souza appears to assert that the foreclosure is defective because MERS failed to adequately prove the existence of a debt on the property. But Souza does not deny that he bought the property, that he mortgaged it to Homecomings, and that he defaulted on the mortgage. Under these circumstances, it is not apparent how the existence of the debt could be in doubt. And Souza does not dispute that Homecomings is a member of MERS, that MERS foreclosed the mortgage as nominee of Homecomings and bought the property at the sheriff's sale, and that MERS assigned the sheriff's certificate to DB. Also, on November 9, 2009, the district court ordered DB to provide the court and Souza with "documentation of [DB's] claim . . . that [Souza] was in default of the terms of the mortgage." In response, DB's attorney submitted an affidavit, and attached to the affidavit was "a true and correct copy of [Souza's] payment history regarding his mortgage." That payment history, which Souza does not assert is incorrect, suggests that the last payment that Souza made on the mortgage was posted on December 17, 2007, and that the payment may have been reversed due to insufficient funds.

Because Souza does not dispute the critical facts that he mortgaged the property to a MERS member, that he defaulted on the mortgage, and that MERS foreclosed the mortgage, the gist of his complaint, apparently, is not that the facts forming the basis for the district court's ruling were incorrect, but that these facts were documented in a manner that did not satisfy Souza, apparently because the promissory note associated with the mortgage and/or the assignments of the note by Homecomings through MERS were not produced in the district court. If so, this is a recasting of his argument to the

district court that MERS had to produce the original promissory note associated with the mortgage and/or the assignments of that note in order to show that MERS had standing or authority to foreclose the mortgage. *Jackson* rejected that argument. 770 N.W.2d at 501.

II.

Noting that he received the copy of the payment history for his mortgage on November 25, 2009, that November 26, 2009, through November 29, 2009, was the Thanksgiving weekend, and that the district court ruled for DB on November 30, 2009, Souza argues that he was not afforded an opportunity to challenge the contents of the payment history. But Souza does not deny that he mortgaged the property, does not deny that he defaulted on his mortgage, and does not deny that the payment history is accurate. Nor does he explain why the uncontradicted payment history is insufficient to show that he defaulted on his mortgage. He simply asserts that he was not given an opportunity to challenge the contents of the payment history. This argument does not require reversal. *See Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002) (stating that summary judgment cannot be avoided by "unverified and conclusory allegations or by postulating evidence that might be developed at trial"); *see also* Minn. R. Civ. P. 56.05 (stating that party opposing summary judgment "must present specific facts showing that there is a genuine issue for trial"); *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 258 (Minn. 1977) (stating that general averment is insufficient to avoid summary judgment).

If Souza is arguing that DB's attorney, who submitted the affidavit and exhibit showing Souza's payment history, lacked personal knowledge of that payment history, Souza's argument is not properly before this court. Generally, appellate courts address

only questions presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The district court ordered DB to provide documentation of Souza's mortgage default. During the two weeks between the order and counsel's submission of his affidavit, Souza did not argue to the district court that DB was the wrong entity to produce evidence, did not argue that he did not default on his mortgage, and did not state that he wanted an opportunity to challenge any proof of his default. Nor, after the district court made its ruling, did Souza go back to the district court and make any of these arguments. Thus, both the wrong-person and the lack-of-opportunity-to-challenge prongs of Souza's argument are being raised for the first time on appeal and run afoul of *Thiele*.[2]

III.

Souza appears to argue that he was not given an adequate opportunity to conduct discovery before summary judgment was granted. Under Minn. R. Civ. P. 56.06, a party opposing a summary-judgment motion may move the district court to deny or continue

[2] Souza also argues that there should have been an identification of the party holding the "equitable right to the collateral." This appears to be an allusion to the distinction between the legal and equitable title to a mortgage discussed in *Jackson*. 770 N.W.2d at 497-501. Souza's allusion to this distinction between the holders of the legal and equitable interests in the collateral is addressed by *Jackson*'s observation that "any disputes that arise between the mortgagee holding legal title [to the mortgage] and the assignee of the promissory note holding equitable title [to the mortgage] do not affect the status of the mortgagor for purposes of foreclosure by advertisement." 770 N.W.2d at 501. Thus, there is a distinction between the legal and equitable rights to exercise a mortgagee's right to foreclose a mortgage. Any dispute that may occur between the owners of those legal and equitable mortgagee's rights regarding who is entitled to the collateral involves the holders of those mortgagee's rights, not the mortgagor. Since Souza is the mortgagor and does not hold a mortgagee's interests in his mortgage, he lacks standing to make an argument based on the distinction.

the motion because the nonmoving party should be permitted to conduct additional discovery. After addressing what must be included in an affidavit supporting a motion to continue a summary judgment and noting that whether to rule on a summary-judgment motion without allowing additional discovery is discretionary with the district court, this court stated that a party opposing summary judgment "did not submit an affidavit pursuant to rule 56.06" and that "[h]is failure to submit such an affidavit, by itself, justifies the district court's decision to rule on the motion without granting relief under rule 56.06." *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010).

Souza did not move for a continuance under rule 56.06, and did not file an affidavit under that rule. The district court did not abuse its discretion by not granting a continuance that was neither formally requested nor adequately supported. Also, the district court's November 9, 2009 order affirmatively indicated that the information that Souza was seeking was unlikely to be helpful in deciding this case. Because Souza's discovery requests are not in the record, exactly what he was seeking is unclear. It appears, however, that he was seeking the identity of the holder of the equitable right to foreclose the mortgage; i.e., the holder of the promissory note associated with his mortgage. If so, this was simply an attempt to get MERS to produce the note and its various assignments, something that MERS was designed to make unnecessary. *See Jackson*, 770 N.W.2d at 489-90 ("holding that transfers of the underlying indebtedness do not have to be recorded to [foreclose] a mortgage by advertisement").

IV.

The requirements for published notice of a foreclosure sale and for service of notice of a foreclosure sale on persons "in possession" of the foreclosed property, "if" that property is "occupied," are set out in Minn. Stat. § 580.03 (2008). It is undisputed that published notice occurred here. It is also undisputed that two persons on the property were timely served with notice of the sale. The crux of Souza's challenge to the adequacy of service of this notice appears to go to whether the persons who were served with the notice were occupants under Minn. Stat. § 580.03. If those persons were occupants, they were entitled to, and were served with, notice. If they were not occupants, they were not entitled to notice, but how service of those persons prejudiced Souza is neither apparent nor explained. *See Midway Ctr. Assocs.*, 306 Minn. at 356, 237 N.W.2d at 78 (holding that, to prevail on appeal, appellant must show both error and prejudice). If what Souza is arguing is that, under Minn. Stat. § 580.03, he should have been given the notice required to be served on occupants, he is incorrect. It is undisputed that Souza did not occupy the premises. And Minn. Stat. § 580.03 requires only that notice be served on those who occupy the premises. *See Varco-Pruden Bldgs. v. Becker & Sons Constr., Inc.*, 361 N.W.2d 457, 459 (Minn. App. 1985) (upholding finding that a fee owner purportedly using a 10' x 22' office on its own 116,000 square foot rental property was not entitled to notice under Minn. Stat. § 580.03 where the district court's finding that the owner was not "in possession" under Minn. Stat. § 580.03 was not clearly erroneous).

Affirmed.