STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1142

Jay Novak, et al.,
Respondents,

vs.

TMST Home Loans, Inc.,
Appellant.

Filed April 8, 2013
Affirmed
Ross, Judge

Washington County District Court
File No. 82-CV-11-2101

Gregory M. Miller, Siegel Brill, P.A., Minneapolis, Minnesota, and

Earl H. Cohen, Brian N. Niemczyk, Hellmuth & Johnson, PLLC, Edina, Minnesota (for Novak respondents)

Daniel S. McGrath, Steingart, McGrath & Moore, Edina, Minnesota; (for Jungbauer respondents)

Rebecca F. Schiller, Reiter & Schiller, P.A., St. Paul, Minnesota, and

Katherine M. Melander, Stephen F. Buterin, Heley, Duncan & Melander, PLLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

ROSS, Judge

Mortgage Electronic Registration Systems (MERS) assigned to mortgage company TMST Home Loans a mortgage recorded later than a mortgage held by private lenders Jay and Jennifer Novak. The Novaks commenced a foreclosure action naming the mortgage debtors and MERS but not TMST. TMST learned of the foreclosure and intervened only after the Novaks prevailed in a summary judgment decision that deemed their mortgage superior. TMST appeals from the district court order denying its motion to reopen the mortgage-priority judgment, arguing that the Novaks' failure to name TMST as a party denied it the opportunity to conduct discovery that might produce evidence that TMST's mortgage has priority on an equitable-subrogation theory. Because TMST did not meet its burden of showing a reasonable defense on the merits, we affirm the district court's order.

FACTS

Walter and Amy Jungbauer borrowed $200,000 from their friends, Jay and Jennifer Novak, to fund High Point, a struggling business venture. In addition to receiving a promissory note and personal guarantees, the Novaks secured the loan with a mortgage on the Jungbaeurs' Washington County home—a mortgage the Novaks recorded on August 19, 2005. Two weeks after the Novaks recorded their mortgage, the Jungbauers obtained a loan from Bremer Bank, secured by a mortgage held by Mortgage Electronic Registration Systems (MERS). The Jungbauers used the Bremer Bank

proceeds to extinguish two pre-existing mortgages, but not the Novak mortgage. MERS assigned its mortgage interest to TMST Home Loans in November 2009.

The Jungbauers eventually defaulted on the loan secured by the Novak mortgage, and the Novaks began a foreclosure action in April 2011. The Novaks named and served High Point, the Jungbauers, and MERS, but not TMST. Only the Jungbauers filed an answer to the foreclosure complaint, and neither High Point nor MERS appeared in court. After discovery, the district court granted summary judgment to the Novaks. It found the Jungbauers to be in default and held that the Novaks were entitled to foreclose. It awarded a deficiency judgment against the Jungbauers and, most relevant here, it determined that the Novaks' mortgage was "prior and superior to any interest in the Real Property held by Defendants."

TMST first heard of the Novaks' foreclosure action after the district court entered its priority judgment. TMST tried but failed to settle through negotiations with the Novaks, and it then intervened and filed a motion to vacate the district court's judgment under rule 60.02 of the Minnesota Rules of Civil Procedure.

The district court conducted a hearing at which TMST argued that the district court should vacate the judgment because it had decided the mortgage priority without considering TMST's interest. It contended that the Novaks' failure to name TMST as a party had denied it the opportunity to conduct discovery that might have revealed facts that could undermine the Novaks' claim to first priority despite the order of recording. The district court denied TMST's motion, ruling that TMST had made "no showing [of a]

reasonable defense on the merits," reasoning that TMST's "whole argument comes down to maybe we can find something. And that's not a showing at all."

TMST appeals.

D E C I S I O N

TMST argues that the district court erred by refusing to reopen the judgment and allow TMST to conduct discovery. We will reverse a district court's decision whether to reopen a judgment only where the district court abuses its discretion by misapprehending the law or relying on facts not supported by the record. *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 173 (Minn. App. 2009). We view the record in the light most favorable to the district court's decision." *Imperial Premium Fin., Inc. v. GK Cab Co.*, 603 N.W.2d 853, 857 (Minn. App. 2000). The district court's discretion as to whether to reopen a judgment is guided by the factors set forth in *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). *Palladium Holdings*, 775 N.W.2d at 173. *Finden* instructs district courts to apply "a liberal policy conducive to the trial of causes on their merits," reopening judgments if a defendant has a reasonable defense on the merits, has a reasonable excuse for failing to answer, has acted with due diligence after receiving notice of the entry of the judgment, and shows that no substantial prejudice will result to the other party. 268 Minn. at 271, 128 N.W.2d at 750.

The Novaks concede that TMST has a reasonable excuse for its initial failure to answer and that it acted with due diligence once it received notice. The concession is well-founded on the record. The parties disagree primarily about whether TMST has

shown a reasonable defense on the merits and secondarily about whether TMST has shown that the Novaks would suffer no prejudice from reopening the judgment.

TMST argues that it has shown a reasonable defense on the merits because, if it is allowed discovery, it could present the defense of equitable subrogation against the Novaks' mortgage-priority claim. The argument lacks support. Equitable subrogation allows a party that discharges a debt to be "substituted to the rights and position of the prior creditor" when it has "acted under a justifiable or excusable mistake of fact" in discharging the prior debt and "injury to innocent parties will otherwise result." *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 279 (Minn. 2010). "A reasonable defense on the merits is one that, if established, provides a defense to the plaintiff's claim." *Palladium*, 775 N.W.2d at 174 (citation omitted). So to show the district court that it had a reasonable defense on the merits to justify reopening the judgment, TMST had to demonstrate first that a justifiable or excusable mistake of fact caused Bremer Bank's decision to lend the Jungbauers the money secured by the MERS mortgage, which MERS later assigned to TMST. But TMST did not point the district court to any justifiable or excusable mistake of fact. The Novaks recorded their mortgage two weeks before Bremer Bank gave the Jungbauers the loan. Bremer Bank and MERS had constructive notice of the Novak mortgage. *See* Minn. Stat. § 507.32 (2004) ("The record . . . of any instrument properly recorded shall be taken and deemed notice to parties.").

TMST asks us to speculate that "[b]ack in 2005, many counties were experiencing significant backlogs between the time an instrument affecting real property was filed and

when the recording information was posted for the public" and that this sort of delay might have occurred in Washington County, providing a reasonable excuse for Bremer Bank's failure to detect the Novaks' mortgage. But TMST offers no evidence that Washington County experienced any delays at all, or that any delays in Washington County were the type that would have resulted in the Novak recording not being publicly knowable. TMST argues that its inability to engage in discovery is the reason it could provide no evidence supporting its theory. The argument fails because TMST gave the district court no reason to suppose that formal discovery would have made any difference. It needed but failed to establish that discovery was necessary for it to find the evidence of equitable subrogation. And even on appeal it does not explain why it could not have gathered the evidence on its own during the three months between its intervention and the hearing on its motion to vacate. TMST's argument would be more persuasive if, for example, it had provided some evidence that it had unsuccessfully contacted the county recorder either through a formal Government Data Practices Act request (*see* Minn. Stat. § 13.03 (2010) (requiring prompt disclosure of requested government data)), or through an informal inquiry of county staff, to expose evidence of a relevant delay. Washington County is not a party, and TMST did nothing to establish that county officials would provide the missing evidence only under judicial compulsion. TMST submitted no affidavits to support its hypothesis of even general statewide delays, let alone to establish a link between the alleged general delays and the activity in Washington County in August 2005.

TMST's reasoning is not without logic—if evidence of recording delays in Washington County exists and those delays effectively hid the Novak mortgage from Bremer Bank, TMST would at least have the foundation on which to build an equitable-subrogation argument. But its assertion to the district court, and its continued assertion on appeal, raises only an unsupported possibility that the Novak mortgage might not have been publicly posted when the Jungbauers obtained the Bremer Bank loan and that Bremer Bank failed to notice the mortgage despite diligent efforts. Since equitable subrogation is not available "when the parties' equities are equal or rights are unclear," *Citizens State Bank*, 786 N.W.2d at 279, we hold that the district court did not abuse its discretion when it ruled that TMST failed to show a reasonable defense on the merits.

TMST cites *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 140 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990), apparently to argue that the weakness of its defense theory is not fatal to its motion to reopen the judgment given the strength on the other *Finden* factors. *See also Guillaume & Assocs., Inc. v. Don-John Co.*, 371 N.W.2d 15, 19 (Minn. App. 1985) ("[T]he relative weakness of one [*Finden*] factor should be balanced against the strong showing on the other three factors."). But TMST has not made merely a weak showing, it has made no showing. Even a weak showing requires more than an unverified allegation. *Grady v. Maurice L. Rothschild & Co.*, 145 Minn. 74, 75, 176 N.W. 153, 154 (1920). The district court accurately described TMST's defense theory of discovery as "maybe we can find something." And it accurately held that this amounted to "no showing on the reasonable defense on the merits" and "not a

showing at all on that factor." The district court did not abuse its discretion by refusing to reopen the judgment after TMST intervened.

Affirmed.