STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1917

Wil A. Ofori, et al.,
Appellants,

vs.

Wells Fargo Bank, N.A.,
as Trustee for Structured Asset Securities
Corporation Mortgage Pass-Through
Certificates, Series 2005-NC2, et al.,
Respondents.

Filed July 8, 2013
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-11-11679

Marcus Anton Jarvis, Jarvis & Associates, P.C., Burnsville, Minnesota (for appellants)

Curtis D. Ripley, Leonard, Street and Deinard, Professional Association, Minneapolis, Minnesota (for respondents)

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

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

HUDSON, Judge

Appellant mortgagors challenge the district court's summary judgment on their claims relating to foreclosure of their residential mortgage. Because the district court did

not err by concluding that appellants failed to show a material factual issue based on a legally cognizable claim relating to the mortgage foreclosure, we affirm.

FACTS

In February 2005, appellants Wil A. Ofori and Comfort Lartey-Ofori purchased residential property in Champlin. To finance the purchase, New Century Mortgage Corporation issued a $360,000 note, which was secured by a mortgage on appellants' property. In May 2005, New Century transferred the note to a mortgage-backed security trust for securitization: the Structured Asset Securities Corporation Mortgage Pass-Through Certificate Series 2005-NC2 Trust. New Century retained legal title to the mortgage, and after the trust was closed in 2005, respondent Wells Fargo, as trustee, continued to manage the mortgage interests contained in the trust assets. In July 2005, servicing rights on the mortgage were transferred to Chase Home Finance, LLC, whose successor-in-interest is JPMorgan Chase Bank, N.A. (Chase). Chase was given power of attorney to perform acts in connection with servicing of the mortgage.

In 2008, appellants defaulted on the loan. Although they attempted to work out a loan modification with Chase in 2008, they remained unable to pay, and Chase issued a notice of acceleration and intent to foreclose. In February 2009, New Century assigned its interest in the mortgage and note to the trust. Wells Fargo, acting as trustee, initiated foreclosure proceedings but agreed to suspend them while appellants attempted to work out a loan modification with Chase in 2009 and 2010. Ultimately those efforts were unsuccessful, and in 2010 Wells Fargo reinitiated the foreclosure process. Wells Fargo

complied with the requirements for foreclosure and purchased the property at a sheriff's sale in November 2010.

On the last day of the redemption period, appellants commenced this action, seeking a declaration that respondents had no legal rights in the note or mortgage and lacked standing to foreclose on the property because the assignment of the original lender's interest did not comport with requirements of the trust documents, specifically the included pooling and servicing agreement (PSA). Appellants were also seeking loan modification through a then-existing federal program, the Independent Foreclosure Review process.

Wells Fargo moved for summary judgment.[1] The district court granted summary judgment, concluding that there were no genuine issues of material fact and that the theories asserted in appellants' complaint were unsupported by Minnesota law. This appeal follows.

D E C I S I O N

This court reviews de novo the district court's grant of summary judgment to determine whether genuine issues of material fact exist and whether the district court erred in its application of the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013); Minn. R. Civ. P. 56.03. A reviewing court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But a party cannot defeat a motion for summary

[1] Unidentified respondents Does 1-10 have not participated in this action in district court or on appeal.

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). Summary judgment is proper if "the issues presented are so frivolous and so insubstantial that it would be futile to try them." *A & J Builders Inc. v. Harms*, 288 Minn. 124, 133, 179 N.W.2d 98, 103 (1970).

Appellants first claim that summary judgment is inappropriate until the case has been reviewed under the former Independent Foreclosure Review program. That program arose from a consent order with federal bank regulators by which homeowners could request an independent review of their mortgage foreclosure process if foreclosure occurred in 2009 and 2010 on mortgages held by certain mortgage lenders. *See* Independent Foreclosure Review, *Frequently asked questions and answers*, https://independentforeclosurereview.com/faqs.aspx (last visited June 25, 2013). But that process expressly did not prevent homeowners from simultaneously pursuing relief in district court. *See id*. Respondent also argues that this issue is moot because in 2013, federal banking regulators announced the termination of that program pursuant to a new settlement with major banks. *See id.*[2] We agree. The doctrine of mootness requires appellate courts to "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). An issue may be dismissed as moot "[i]f an appellate court is unable to grant effectual relief." *Chaney v. Minneapolis Cmty. Dev.*

[2] Although this announcement occurred after this appeal was filed, this court may take judicial notice of public records and has "the inherent power to look beyond the record where the orderly administration of justice commends it." *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010) (quotation omitted).

Agency, 641 N.W.2d 328, 332 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. May 28, 2002). Because this court cannot order the relief of an administrative remedy under a program that no longer exists, the doctrine of mootness precludes appellants from obtaining relief because that administrative remedy was not exhausted.

Appellants also argue that the assistant vice president of Chase who signed affidavits on behalf of Chase was unqualified to do so because he had no personal knowledge of the relevant facts. But appellants did not present this issue to the district court, and we therefore decline to address it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will not generally address issues not raised and considered by the district court). Even if we were to consider this issue, we see no genuine issue of material fact because the assistant vice president was an employee of Chase, who was appointed as attorney-in-fact in connection with servicing the mortgage, and he would normally have access to information relating to the mortgage and its assignment as part of those duties.

Appellants also raise issues relating to breach of the provisions of the PSA, which is contained in the trust documents. But to have standing to raise a claim, a party must have suffered an injury as a result of the alleged illegal conduct of another, and that injury must be capable of being redressed in court. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 176 (Minn. App. 2012). "[C]ourts in Minnesota have . . . uniformly held that mortgagors do not have standing to request declaratory judgments regarding these types of trust agreements because the mortgagors are not parties to or beneficiaries of the agreements." *Karnatcheva v. JPMorgan Chase Bank, N.A.*, 704 F.3d

545, 547 (8th Cir. 2013). Because appellants were not parties to or beneficiaries of the PSA, they lack standing to request a declaratory judgment based on its alleged breach.

Appellants also challenge the 2009 assignment of the mortgage and note to Wells Fargo as trustee, arguing that it did not comply with delivery requirements for a gift to a trust under New York law, which governs the PSA. Even if appellants had standing to raise this issue, it is uncontested that New Century was the mortgagee of record at the time of the assignment and that the assignment complied with Minnesota law. Thus, any failure to comply with the terms of the PSA is irrelevant. *See* Minn. Stat. § 580.02 (2008) (stating requirements for foreclosure by advertisement). Therefore, appellants' argument does not present an issue of material fact to defeat summary judgment. *See JPMorgan Chase Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 603 (Minn. App. 2012) (stating that "for summary judgment purposes, . . . a material fact is one of such a nature as will affect the result or outcome of the case") (quotation omitted).

Appellants additionally allege that the Minnesota Supreme Court's decision in *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009), does not establish the validity of the assignment to the trust. In *Jackson*, the supreme court held that Mortgage Electronic Systems, Inc. (MERS), acting as nominal mortgagee, was not required to record the promissory note associated with the mortgage before a valid foreclosure by advertisement could be commenced. *Id*. at 495–96. Appellants appear to maintain that, because *Jackson* dealt with a recording issue, it is not dispositive on the validity of an assignment. But appellants' argument is inapposite. The trust held legal

title to the mortgage at the time of foreclosure, and Wells Fargo as trustee had the right to institute foreclosure proceedings under Minnesota law. *See* Minn. Stat. § 580.02.

Appellants finally argue that *Jackson* may conflict with possible plaintiffs' remedies available under the federal Truth in Lending Act (TILA) or the Real Estate Settlement Procedures Act (RESPA). Although the supreme court in *Jackson* articulated a possible concern that some federal remedies may be foreclosed because mortgagors may not learn the identity of a lender within the time set by the statute of limitations, 770 N.W.2d at 502, appellants have cited no authority to implicate such a concern in this case. Notably, appellants' complaint alleged no TILA or RESPA violations. Although appellants appear to argue that their request for review under the Independent Foreclosure Review process was analogous to requesting relief under TILA or RESPA, the district court did not consider this issue, and we also decline to do so. *Thiele*, 425 N.W.2d at 582.

Affirmed.