STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2325

Janet Oppong-Agyei, et al.,
Appellants,

vs.

Chase Home Finance, LLC,
Respondent,

EMC Mortgage Corporation, et al.,
Defendants,

Usset, Weingarden & Liebo, P. L. L. P.,
Respondent.

Filed July 8, 2013
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-CV-11-3026

William B. Butler, Butler Liberty Law, Minneapolis, Minnesota (for appellants)

W. Anders Folk, Phillip J. Ashfield, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondent)

Gerald G. Workinger, Jr., Usset, Weingarden & Liebo, PLLP, Minneapolis, Minnesota (for respondent Usset, Weingarden & Liebo, PLLP)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Rodenberg, Judge.

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

CONNOLLY, Judge

Appellants, mortgagors of eight properties on which the mortgages were foreclosed, challenge the summary judgment granted to respondents, the mortgagees that foreclosed the mortgages, arguing that genuine issues of material fact exist as to their claims. Because we see no genuine issues of material fact precluding summary judgment, we affirm.

FACTS

The eight mortgages at issue here involve properties belonging to individual appellants or groups of appellants: (1) Janet Oppong-Agyei and Ellen Annang (the Oppong-Agyei/Annang mortgage); (2) Sylvia Marier-Urroz (the Marier-Urroz mortgage) (3) Trena and Daniel Koenig (the Koenig mortgage); (4) Michael and Julie Yakin (the Yakin mortgage); (6) William Rice (the Rice mortgage); (5) Nancy Smith and Keith Jackson (the Smith/Jackson mortgage); (7) William Bigelow (the Bigelow mortgage); and (8) Patrick Schmeichel (the Schmeichel mortgage). All the mortgages are in default, but not all have been foreclosed upon.

In May 2011, appellants brought this action alleging claims against respondents Chase Home Finance, LLC (Chase); EMC Insurance Corporation (EMC); U.S. Bank N.A.; and Mortgage Electronic Registration Systems (MERS). JP Morgan Chase Bank N.A. (JP Morgan) is the successor in interest by merger to Chase and EMC. Some claims were also alleged against respondent Usset, Weingarden & Liebo law firm (UWL), which was retained by Chase to foreclose some of the mortgages.

Respondents moved for dismissal under Minn. R. Civ. P. 12. Following a hearing, the district court dismissed eight claims and dismissed UWL as a defendant in two other claims.[1] Respondents moved for summary judgment on the remaining claims. Following a hearing, the district court issued a summary judgment dismissing those claims. Appellants challenge the grant of summary judgment, arguing that genuine issues of material fact precluded dismissal of their claims: (1) slander of title, (2) lack of standing, (3) failure to hold notes in due course, (4) fraudulent representations, (5) negligent misrepresentation, (6) negligence, (7) conversion, (8) civil conspiracy, and (9) unjust enrichment.

D E C I S I O N

This court reviews a grant of summary judgment de novo, determining whether any genuine issues of material fact preclude summary judgment and whether the district court properly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

I. Slander of Title

A slander-of-title claim requires (1) a false statement about real property that another person owns or has an interest in; (2) publication of that statement; (3) malice; and (4) special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279-80 (Minn. 2000). Appellants attempted to stop or void the foreclosures of their properties by alleging a slander-of-title claim against respondents MERS, Chase, and U.S. Bank; they also allege slander of title against respondent UWL. They argue that genuine issues of material fact

[1] No appeal was filed from this judgment.

preclude summary judgment dismissing their slander-of-title claim. Because the mortgages involve different facts, each mortgage will be considered separately.

A. The Oppong-Agyei/Annang Mortgage

In September 2007, the Oppong-Agyei/Annang mortgage and note were executed in favor of JP Morgan; the mortgage was recorded on October 8, 2007. On December 11, 2008, JP Morgan assigned the mortgage to Chase. On December 23, 2008, that assignment was recorded as document 2628100, and a notice of pendency of foreclosure proceedings was recorded as document 2628101. The mortgage went into default after the last payment was made in December 2009. In September 2010, Chase, the recorded holder of the mortgage, began foreclosure of the Oppong-Agyei/Annang property, retaining UWL; in November 2010, Chase purchased the property at a foreclosure sale.

JP Morgan, although it had already assigned the mortgage to Chase and therefore had no interest in it, assigned it to MERS in November 2010; this assignment, recorded in December 2010, was ineffective. *See Sander v. Stenger*, 117 Minn. 424, 427-28, 136 N.W. 4, 5 (1912) (noting that, when, although assignment was recorded and appeared in the notice, "it was apparent that [the assignor] had no interest to assign. . . . [C]learly neither [the assignment's] existence of record, nor the fact that the notice referred to it, in any way affected the right to foreclose the mortgage under the power of sale").

Appellants argue that "there is a genuine issue of material fact concerning the validity of this [2010] assignment." But the 2010 assignment had no legal effect, because JP Morgan, having assigned its interest to Chase in 2008, had no interest to assign in

2010. As the district court concluded, "[Chase] was the record owner of the [Oppong-Agyei/Annang] mortgage at the time of the foreclosure sale . . . ."

Appellants rely on *Ruiz v. 1st Fidelity Loan Servicing, LLC*, 829 N.W.2d 53, 57 (Minn. 2013) (holding that "the plain meaning of [Minn. Stat. §] 580.02(3) requires all assignments of the mortgage to be recorded before the mortgagee has the right to engage in the process of foreclosure by advertisement"). But *Ruiz* is distinguishable; in that case, the mortgagee-by-assignment began foreclosure proceedings, then recorded another assignment and a notice of pendency. *Id.* at 55 (citing *Ruiz v. 1st Fidelity Loan Servicing, LLC*, A11-1081, 2012 WL 762313, at *2-4 (Minn. App. Mar. 12, 2012), *aff'd*, 829 N.W.2d 53, 59 (Minn. 2013). Here, after the mortgagee-by-assignment (Chase) had begun foreclosure proceedings, an entity having no interest in the mortgage (JP Morgan) assigned it and recorded the assignment. Appellants do not explain what genuine issue of material fact could exist with regard to the validity of an assignment purporting to transfer the assignor's nonexistent interest to a third party.

B. The Marier-Urroz Mortgage

In April 2006, a note and mortgage were executed in favor of Chase Bank USA (Chase USA). The mortgage was recorded in May 2006. Two assignments of the mortgage were recorded: in June 2008, a May 2008 assignment from Chase USA to U.S. Bank, and in June 2009, a June 2009 assignment from U.S. Bank to itself as trustee for JP Morgan, as document A9379235; a notice of pendency of proceedings was filed the same day as document A9379236. The mortgage went into default after the last payment in

June 2010, and U.S. Bank, the recorded mortgagee, purchased the property at a foreclosure sale in November 2010.

There were also four unrecorded assignments of the Marier-Urroz mortgage. Appellants argue that they void the foreclosure sale.[2] Two of these assignments did not identify an assignee and are therefore without effect. *See Casserly v. Morrow*, 101 Minn. 16, 20, 111 N.W. 654, 656 (1907) (concluding that, when "no assignee was named in the instrument [i.e., the assignment of a mortgage] . . . the instrument was a blank, and a nullity, until the blank was legally filled, leaving the title and right to foreclose in the mortgagee"). Another of the unrecorded assignments would not void the foreclosure sale because the assignor did not have record title to the mortgage at the time of the assignment. *See Sander*, 117 Minn. at 427-28, 136 N.W. at 5 (when assignor "had no

[2] As a threshold matter, we note that appellant Marier-Urroz was not a party to any of the unrecorded assignments and therefore lacks standing to pursue a claim based on them. While Minnesota state appellate courts have not addressed this issue, the federal district court has addressed it. *See, e.g.*, *Novak v. JP Morgan Chase Bank, N.A.*, No. 12-0589, 2012 WL 3638513, at *6 (D. Minn. Aug. 23, 2012) ("[P]laintiffs lack standing to challenge the assignment: they are not parties to the assignment and any dispute would be between the assignor and assignee."); *Sovis v. Bank of New York Mellon*, No. 11-2253, 2012 WL 733758, at *5 (D. Minn. Mar. 6, 2012) ("Plaintiff was not a party to the final assignment of mortgage which conferred upon [the assignee] the right to foreclose on the debt. Even assuming Plaintiff were able to show that [previous assignors] had no authority to assign their interests in the mortgage, the party sustaining injury as a result of the improper assignment would be [the assignors], not Plaintiff. . . . [A]ny injury to Plaintiff in losing her home pursuant to a foreclosure sale is not fairly traceable to any of the disputed assignments of mortgage . . . . [She] has not demonstrated a causal nexus between the mortgage assignments and any economic harm she suffered."); *Gerlich v. Countrywide Home Loans, Inc.*, No. 10-4520, 2011 WL 3920235, at *2 (D. Minn. Sept. 7, 2011) (concluding that, when plaintiff alleged that defendant "unlawfully foreclosed on his home pursuant to an invalid Assignment of Mortgage . . . the mortgage assignment, standing alone, caused Plaintiff no injury.").

interest to assign . . . [the assignment] . . . in [no] way affected the right to foreclose the mortgage under the power of sale.").

Finally, because U.S. Bank as trustee for JP Morgan was the record owner of the mortgage when foreclosure proceedings began in 2009, the last unrecorded assignment, a 2006 assignment from Chase USA to Chase, was between two entities unconnected with the mortgage in 2009 and would not void the foreclosure sale in 2010. Again, *Ruiz* is distinguishable: here, the foreclosing entity, U.S. Bank as trustee for JP Morgan, was the mortgagee owner of record and had no connection to the unrecorded assignments. "The purpose of the statutory recording requirements is to ensure that a mortgagor has notice and an opportunity to redeem." *Beecroft v. Deutsche Bank Nat'l Trust Co.*, 798 N.W.2d 78, 83 (Minn. App. 2011) (citing *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 495 (Minn. 2009)). "Before a mortgage assignee . . . can foreclose by advertisement, its title to the mortgage must appear of record in such manner that evidence extraneous to the record will not be needed to put the title of the assignee of the mortgage beyond reasonable question." *Id.* (quotations omitted). The unrecorded assignments of the Marier-Urroz mortgage did nothing to prevent the mortgagor from having notice and an opportunity to redeem; the title of U.S. Bank as trustee for JP Morgan to the Marier-Urroz mortgage when foreclosure proceedings began was "beyond reasonable question."

Appellants have not shown a prima facie slander-of-title claim in regard to the Marier-Urroz mortgage.

C. The Koenig Mortgage

The Koenig note and mortgage were executed in February 2006, in favor of Winstar Mortgage Partners, which endorsed the note in blank. Chase took possession of the note; when JP Morgan succeeded Chase, it acquired and continues to have possession of the note. The mortgage was recorded and registered with MERS in March 2006. The mortgage went into default after the last payment in October 2008. In February 2011, MERS assigned the Koenig mortgage to Chase, and the assignment was recorded. A foreclosure sale was scheduled for April 2011, but it did not occur because of this action.

As to this mortgage, appellants argue that "[t]here is a genuine issue of material fact as to whether the Notice of Pendency contained materially false information concerning the mortgagee" because an unrecorded assignment of the mortgage resulted in Chase being only the servicer, not the mortgagee, and the foreclosure was begun on behalf of Chase. But evidence shows that MERS assigned the mortgage to Chase and recorded the assignment in February 2011; Chase was the holder of the mortgage at the relevant time.

D. The Yakin Mortgage

In May 2006, the Yakin note and mortgage were executed in favor of Wells Fargo Bank, N.A. (Wells Fargo). The mortgage was sold into a trust; the note was endorsed in favor of EMC Mortgage Corp., which continued to hold it. The mortgage was recorded in June 2006, then assigned to EMC in February 2007; that assignment was recorded in June 2007. EMC, the recorded mortgagee, purchased the property at a foreclosure sale in March 2011.

EMC was represented as the mortgagee on the Notice of Pendency and the Sheriff's Certificate. Although the assignment to EMC was duly recorded, appellants argue that the assignment could not have occurred because the lender had previously made an unrecorded assignment of the mortgage to a trust. But the language of the trust agreement was not evidence of an assignment, while the facially valid record of the assignment to EMC was evidence of an assignment. Appellants have not raised a genuine issue of material fact as to whether EMC was the mortgagee. "Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment." *Beecroft*, 798 N.W.2d at 82 (citing Minn. R. Civ. P. 56.05).[3]

E. The Rice Mortgage

In April 2007, the Rice note was executed in favor of CTX Mortgage Company (CTX). CTX endorsed the note in blank; JP Morgan had possession of the mortgage and the note. The Rice mortgage was recorded in May 2007, and it was also registered with MERS. In May 2010, after the last payment, the mortgage went into default. MERS assigned the mortgage to Chase, and the assignment was recorded in November 2010. Chase began foreclosure proceedings, hiring ULW for that purpose. The sale, scheduled for January 2011, was cancelled because of this action. In 2011, Chase merged into JPMorgan Chase.

It is not clear what false statement appellants allege as the basis for a slander-of-title claim about the Rice mortgage. The assignment to Chase was recorded as document

[3] In any event, as respondents note, the slander-of-title claim was not brought against EMC but only against Chase, MERSCORP, and MERS.

4801409, and the notice of pendency proceeding was recorded as document 4801410. Appellants allege that there is an issue of fact as to whether Chase made a false statement when it said it had the right to foreclose because the mortgage and note are now owned by Freddie Mac, "which requires that the mortgages it owns [to] be foreclosed in its name." But in 2010, Chase was the servicer of the mortgage, and appellants also state that "[t]he Seller/Servicer Guide requires the loan servicer to foreclose in its own name." Appellants fail to make a prima facie slander-of-title claim in regard to the Rice mortgage.

F. The Smith/Jackson Mortgage

In October 2006, the note was executed in favor of Bear Stearns Residential Mortgage Corporation (BSRMC) and the mortgage was executed in favor of Bear Stearns. BSRMC endorsed the note in favor of EMC; EMC endorsed it in favor of Wells Fargo. In June 2007, the mortgage was recorded and registered with MERS, which remained the mortgagee of record; the note was placed into a securitized trust of which EMC was the master servicer. The mortgage went into default after the last payment was made in March 2011. In April 2011, EMC transferred the servicing obligations to JP Morgan, which held possession of the note.

Neither JP Morgan nor EMC recorded any documents concerning the property. Slander of title requires publication of a false statement about real property. *See Paidar*, 615 N.W.2d 276, 279-80. Appellants argue that "letters of default and acceleration . . . contained materially false information" but there is no indication that the letters were

published. Therefore, the slander-of-title claim with respect to the Smith/Jackson mortgage was properly dismissed.

G. The Bigelow Mortgage

In February 2007, the Bigelow note and mortgage were executed in favor of Washington Mutual Bank (WMB). The mortgage was recorded in March 2007, and the note was placed in a securitized trust, with WMB as the servicer. WMB was closed in September 2008, and the FDIC was appointed as receiver. WMB's portfolio of loans, including its interest in Bigelow's loan, was transferred to JP Morgan. The mortgage went into default after the last payment was made in January 2011.

Appellants allege that "there is a genuine issue of material fact as to whether the servicer made materially false statements in the Notice of Default and Acceleration letter that it sent to Bigelow." A claim of slander of title requires publication. *Id.* Absent publication, appellants have not alleged a prima facie case of slander of title as to the Bigelow mortgage.

H. The Schmeichel Mortgage

In July 2007, the Schmeichel note and mortgage were executed in favor of Chase USA. Chase USA transferred the note and mortgage to JP Morgan, which retained possession of the note. The mortgage was recorded in August 2007. The mortgage went into default after the last payment in June 2010. The assignment of the Schmeichel mortgage to JP Morgan was filed in October 2011.

Appellants allege only that "[Chase] has, in correspondence to [the mortgagor], identified itself as the 'lender' with respect to the Schmeichel mortgage." Again, a claim

of slander of title requires publication. *Id.* As with the Smith/Jackson and Bigelow mortgages, absent publication, appellants have not alleged a prima facie claim of slander of title as to the Schmeichel mortgage.

I. Slander-of-Title Claims Against ULW

ULW began the foreclosure proceedings on the Oppong-Agyei/Annang, Koenig, and Rice properties. Appellants did not retain ULW and are therefore third parties to any claim involving ULW. An attorney acting within the scope of employment is not liable to third parties absent fraud, malice, or the commission of an intentional tort. *Melrose Floor Co. v. Lechner*, 435 N.W.2d 90, 91 (Minn. App. 1989); *see also Schuler v. Meschke*, 435 N.W.2d 156, 162-63 (Minn. App. 1989) (holding that attorney is not liable to a third party for negligence or recklessness), *review denied* (Minn. Apr. 19, 1989).

The recorded documents indicated that Chase was the owner of the three mortgages when ULW began proceedings to foreclose. ULW was entitled to rely on those records, which indicated that Chase was entitled to foreclose. Appellants show no fraud, malice, or intentional tort on the part of ULW. Nor do they show any causal connection between their damages (attorney fees) and ULW's acts, an essential element of a slander-of-title claim. *See Paidar*, 615 N.W.2d at 279-80.

The district court did not err in dismissing the slander-of-title claims against ULW; nor did it err in dismissing the claims against respondents-mortgagees.

II. Standing

Appellants argue that there is a genuine issue of material fact as to whether respondents had standing to begin the foreclosure by advertisement. Appellants concede

that their claim is "inelegantly pled" but argue that they have a right to seek a determination of respondents' rights to foreclose. But appellants present no legal support for their view that a mortgagor may challenge a mortgagee's standing to proceed with foreclosure, and this view, while not addressed by Minnesota's state courts, has been repeatedly rejected by its federal court. *See, e.g.*, *Peterson v. Citimortgage, Inc*., No. 11-2385, 2012 WL 1971138, at *2, n.3 (noting that mortgagor's claim that mortgagees lacked legal standing to foreclose did not "raise[] a claim under Minnesota law"), *aff'd*, 704 F.3d 548 (8th Cir. 2013); *Murphy v. Aurora Loan Servs., LLC*, No. 11-2750, 2012 WL 104543 at *3 (noting that mortgagor's claim that mortgagee did not have legal standing to foreclose mortgages is not a cause of action in Minnesota), *aff'd in part and rev'd in part on other grounds*, 699 F.3d 1027 (8th Cir. 2012).

III. Failure to Hold Notes

> Our case law establishes that a party can hold legal title to the security instrument without holding an interest in the promissory note. The cases demonstrate that an assignment of only the promissory note, which carries with it an equitable assignment of the security instrument, is not an assignment of legal title that must be recorded for purposes of a foreclosure by advertisement. In essence, any disputes that arise between the mortgagee holding legal title and the assignee of the promissory note holding equitable title do not affect the status of the mortgagor for purposes of foreclosure by advertisement. Thus, we hold that even though an assignment of the promissory note with no accompanying assignment of the security instrument constitutes a mere equitable assignment of the mortgage, it does not by operation of law need to be recorded to meet the requirements necessary to commence a foreclosure by advertisement.

Jackson, 770 N.W.2d at 500-01 (citations omitted).[4]

Appellants argue that their claim that "[r]espondents are not holders in due course of [a]ppellants' notes and are not entitled to enforce the notes or mortgages through foreclosure" should not have been decided on summary judgment, but they allege no genuine issue of material fact. In light of *Jackson*, respondents were clearly entitled to judgment on this issue as a matter of law. *See* Minn. R. Civ. P. 56.03 (providing that summary judgment shall be entered if there "is no genuine issue as to any material fact and . . . either party is entitled to a judgment as a matter of law").

IV. Fraudulent Representations

Appellants claim that respondents made fraudulent representations. This claim requires: (1) a false representation of a past or existing material fact that the party making the representation could have known; (2) the representation was made with knowledge of its falsity or with the party not knowing whether it was true or false; (3) the representation was made with the intent to induce another to act in reliance on it; (4) the representation did cause another to act in reliance on it; and (5) the other party suffered pecuniary damage as a result of the reliance. *Flynn v. Am. Home Prods. Corp*., 627 N.W.2d 342, 349 (Minn. App. 2001).

[4] Appellants do not address *Jackson* on appeal, although they appear to have addressed it in opposing summary judgment. The district court noted that "While [appellants] attempt to distinguish *Jackson* from their circumstances, a fair reading of *Jackson* compelled the prior dismissal of the claims asserted by [appellants] related to their theory that [respondents] may not foreclose the mortgages unless they possess the original promissory notes."

Appellants do not specify any fraudulent representations: they state that the representations "include statements made in recorded documents; documents sent to clients and by representing that they were entitled to enforce appellants' notes (accelerate the debt and demand payment)." But the statements made in the recorded documents were not fraudulent, and respondents were entitled to enforce appellants' notes.[5]

As to the documents sent to clients, appellants do not specify what pecuniary damage any client suffered by relying on the alleged fraudulent representations. Thus, appellants did not make a prima facie case of fraudulent representation, and the district court did not err in dismissing the claim.

V. Negligent Misrepresentation

A negligent misrepresentation claim requires (1) a breach of the duty to take reasonable care in conveying information concerning a pecuniary transaction by providing false information, (2) another party's reasonable reliance on that information, and (3) that the reliance be the proximate cause of the other party's damages. *Id.* at 350-51. Appellants allege that there is a genuine issue of material fact as to whether respondents provided false information to appellants when they said they "had the right to declare a default and accelerate appellants' debts." But appellants provide no facts indicating that the information was false. This claim was properly dismissed.

[5] Appellants again ignore *Jackson*, 770 N.W.2d at 500-01, in asserting that respondents' representation that they were entitled to enforce appellants' notes was fraudulent.

VI. Negligence

This claim is based on appellants' view "that [r]espondents have a duty to [a]ppellants to insure that they have possession of the original note or are otherwise entitled to enforce the original note prior to commencing foreclosure by advertisement." The supreme court explicitly rejected this view in *Jackson*, 770 N.W.2d at 500-01 (holding that there is no legal requirement that a party possess a note prior to commencing foreclosure). Respondents were entitled to judgment on this claim as a matter of law, and summary judgment was properly granted.

VII. Conversion

This claim is also based on appellants' view that "[r]espondents have not, and likely cannot, show that they were entitled to enforce the notes under the UCC or under the terms of the notes" and that "the only entity entitled to demand payment or receive payment is the note holder." But respondents were entitled to enforce the notes because they were the mortgagees of the properties securing the notes. *See id.* Again, respondents were entitled to judgment on this claim as a matter of law, and summary judgment was properly granted.

VIII. Conspiracy

Appellants argue that there are genuine issues of material fact concerning whether respondents engaged in the underlying torts of fraud, negligence, and conversion and concerning whether respondents conspired. But each of the torts appellants claim is based on respondents' alleged lack of entitlement to enforce the notes, ignoring the fact that, under Minnesota law, respondents were entitled to enforce the notes. Thus, because

respondents were entitled to judgment as a matter of law on the underlying tort claims, they are entitled to it on the conspiracy claim.

IX. Unjust Enrichment

Appellants argue that "there is a genuine issue of material fact as to whether respondents were unjustly enriched by appellants' payments because "[u]nder the UCC [r]espondents do not have the right to enforce any of the notes based on whether they can produce a copy of the note not endorsed to them." This argument too is defeated by *Jackson.*

Appellants have not shown that any genuine issue of material fact precludes the grant of summary judgment or that they are entitled to judgment as a matter of law on any of their claims.

Affirmed.