STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1748

Bank of America, N. A.,
Respondent,

vs.

Brandon R. Kent, et al.,
Appellants.

Filed August 5, 2013
Affirmed
Bjorkman, Judge

Sherburne County District Court
File No. 71-CV-12-208

Karla M. Vehrs, Lindsey E. Middlecamp, Lindquist & Vennum LLP, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk, Judge.

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

BJORKMAN, Judge

Appellants challenge the judgment dismissing this quiet-title action on the pleadings. We affirm.

FACTS

On October 16, 2006, appellants Brandon and Julie Kent granted a mortgage on their real property to Mortgage Electronic Registration Systems Inc. (MERS) as nominee for Decision One Mortgage Company (Decision One). The mortgage was not initially recorded. On April 16, 2009, Rolf Lindberg, a title officer at Stewart Title Guaranty Company, recorded an affidavit pursuant to Minn. Stat. § 507.29 (2008) in Sherburne County on behalf of Decision One. The affidavit states that the Kents granted a mortgage to Decision One and that the original mortgage was lost, misplaced, or otherwise unavailable for recording. A copy of the mortgage was attached to the affidavit. On October 5, 2011, MERS assigned the mortgage to respondent Bank of America N.A. (BOA). The assignment was recorded in Sherburne County on October 17.

On February 3, 2012, BOA brought this quiet-title action, seeking a declaration that the mortgage (1) encumbers the Kents' property; (2) was recorded on April 16, 2009; and (3) is a valid and enforceable contract between the Kents and BOA. BOA also sought a declaration that Bruce Creek Nursery Inc. does not have a lien on the property and does not have priority over the mortgage.[1]

In their answer, the Kents deny that the mortgage was lost, that the Lindberg affidavit is valid, and that BOA holds the mortgage by virtue of the assignment recorded on October 17, 2011. The Kents also assert the following affirmative defenses: (1) BOA lacks standing to obtain possession of the Kents' homestead and is not a real party in

[1] BOA obtained a default judgment against Bruce Creek Nursery from which no appeal was taken.

interest; (2) BOA does not have an ownership interest over the Kents' indebtedness and cannot assert ownership over the security interest securing the indebtedness; (3) BOA paid no consideration for the assignment and is not a real party in interest; (4) BOA cannot show an injury in fact and lacks standing; and (5) the doctrines of waiver, failure of consideration, and payment and release bar BOA's claims. The Kents subsequently served interrogatories, document requests, and requests for admission on BOA.

BOA moved for judgment on the pleadings and a protective order staying discovery. In opposing the motion, the Kents submitted a two-page document that purports to have been downloaded from MERS's website on an unknown date that identifies BOA as a servicer of the loan and HSBC Bank USA National Association as the investor; excerpts from the prospectus of the HSI Asset Securitization Corporation Trust 2007-HEI; excerpts from a pooling-and-servicing agreement (PSA) for the trust; and MERS's membership rules. BOA then filed an affidavit that attached a limited-document-search report listing the documents recorded against the Kents' real property since October 16, 2006.

During a hearing on May 24, 2012, the district court granted the protective order and allowed the Kents 30 days to provide supplemental factual information to support their affirmative defenses. The Kents did not submit additional information; and the district court extended the deadline to July 26, 63 days after the hearing. The Kents again failed to submit supplemental material regarding their defenses. On July 30, the district court granted judgment on the pleadings in favor of BOA. This appeal follows.

D E C I S I O N

Judgment on the pleadings is appropriate when "the defendant relies on an affirmative defense or counterclaim which does not raise material issues of fact." *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (quotation omitted). When the answer denies material allegations in the complaint or material questions of fact exist, judgment on the pleadings should not be granted. *See Chilson v. Travelers Ins. Co.*, 180 Minn. 9, 12, 230 N.W. 118, 119 (1930); *In re Trusts Created by Hormel*, 543 N.W.2d 668, 671 (Minn. App. 1996).

When deciding a motion for judgment on the pleadings, the district court may consider documents and statements incorporated into the pleadings by reference. *See Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000) (limiting review of order for dismissal to documents and statements referred to in complaint). But if matters outside the pleadings are submitted to and not excluded by the district court, the district court must treat the proceeding as a motion for summary judgment, and the parties must have a reasonable time to submit materials pertinent to the motion. Minn. R. Civ. P. 12.03.

As an initial matter, we consider whether the district court treated BOA's motion as a request for judgment on the pleadings or summary judgment. Although the order states that the district court granted judgment on the pleadings, both parties submitted documents outside the pleadings with respect to BOA's motion. And at the conclusion of the motion hearing, the district court invited the Kents to submit additional factual material to support their affirmative defenses. On this record, we conclude that the

district court treated the proceeding as a motion for summary judgment and construe the order as a grant of summary judgment.

I. The district court did not err by granting summary judgment in favor of BOA.

On appeal from summary judgment, we review de novo whether there are genuine issues of material fact and whether the district court correctly applied the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). The party opposing summary judgment "may not rest upon mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. A genuine issue of material fact does not exist when the nonmoving party merely presents evidence that creates a metaphysical doubt as to a fact issue and that is not sufficiently probative of the nonmoving party's claim to permit reasonable persons to draw different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The Kents assert that genuine issues of material fact preclude summary judgment. We disagree and address the three components of BOA's quiet-title claim in turn.

A. Existence of a mortgage

BOA first sought a declaration that a valid mortgage encumbers the Kents' real property. The complaint attaches a copy of a mortgage between the Kents and MERS as nominee for Decision One. The Kents admit in their answer that they granted a mortgage to MERS as nominee for Decision One and that the copy of the mortgage attached to the complaint is true and correct. Accordingly, there is no fact issue as to the existence of the mortgage.

B. Recording of the mortgage

BOA next sought a declaration that the mortgage was recorded on April 16, 2009. In support of its motion, BOA submitted Rolf Lindberg's affidavit that was recorded in Sherburne County on April 16, 2009. The affidavit identifies the parties to the mortgage—the Kents and Decision One—and attaches a copy of the mortgage.

A sworn affidavit that relates to the identification of any person, corporation, or other legal entity that is a party to an instrument affecting title to real estate is recordable in the office of the county recorder where such instrument is recorded. Minn. Stat. § 507.29. In actions involving the instrument, the affidavit is prima facie evidence of the facts stated therein. *Id.*

The Kents do not dispute that Lindberg recorded his affidavit pursuant to section 507.29. Rather, they contend that the affidavit is invalid because it was not based on personal knowledge. We are not persuaded. Apart from their bald assertion that Lindberg lacked personal knowledge of the information contained in his affidavit, the Kents point to no evidence that contradicts the facts stated in the affidavit. The Kents admit that they gave a mortgage to Decision One and that the instrument Lindberg recorded with his affidavit is a true and correct copy of the mortgage. In short, the Kents did not produce competent evidence to challenge the prima facie evidence that the mortgage they gave to Decision One was recorded on April 16, 2009.[2]

[2] At oral argument, the Kents argued for the first time that recording the Lindberg affidavit did not serve to record the mortgage under Minn. Stat. § 507.24 (2012). Because the Kents did not raise this argument in the district court or in their principal brief, it has been waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating

C. Contract between the parties

Finally, BOA sought a declaration that the mortgage is an enforceable contract between the Kents and BOA. BOA submitted a copy of the recorded assignment of mortgage. The assignment identifies Decision One as the original lender and indicates that MERS assigned the mortgage to BOA "[f]or value received."

The Kents argue that there is a genuine issue of material fact as to whether BOA or another entity holds the mortgage. We disagree. The Kents acknowledge that they granted a mortgage to MERS as nominee for Decision One. They point to undated information downloaded from the MERS website that lists BOA as the servicer of the loan and HSBC Bank USA as the investor to support their assertion that BOA is not a party to the contract. But this information does not identify the mortgage holder or explain the nature of HSBC Bank USA's investment. The mere fact that the information lists BOA as the loan servicer at an unspecified point in time does not create an issue of material fact as to whether BOA currently holds the mortgage.

The Kents next assert that the chain of title was broken because the PSA shows the mortgage was previously assigned to Deutsche Bank National Trust Company. We are not persuaded. A PSA is an agreement to deliver, assign, set over, or convey the mortgage loans in the PSA to the trustee, Deutsche Bank. But it does not demonstrate that this mortgage was assigned to Deutsche Bank. Nor does it show that MERS is no

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that an appellate court will not consider matters not presented to the district court); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

longer the nominal holder of the mortgage.[3] BOA further submitted a copy of the assignment in which MERS conveyed the mortgage to BOA. And the limited-document-search report that BOA filed shows that this was the only recorded assignment of the mortgage. The Kents' speculation that the mortgage was assigned to Deutsche Bank at some point in time does not create a genuine issue of material fact that is sufficient to withstand summary judgment. *See Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (holding that speculation is insufficient to create a genuine issue of material fact).

Finally, the Kents presented no evidence to support their affirmative defenses that BOA paid no consideration for the assignment or that the doctrines of waiver, equitable estoppel, or payment and release bar BOA's claims.[4] And their assertion that BOA has no ownership interest over the Kents' indebtedness is essentially a show-me-the-note claim. Such claims are premised on the theory that a party cannot foreclose under Minnesota law unless it holds both the mortgage and the note. Minnesota courts have repeatedly rejected this argument. *JPMorgan Chase Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 604-05 & nn.3-4 (Minn. App. 2012); *see also Jackson*, 770 N.W.2d at 500-

[3] MERS is an electronic registration system that acts as the nominal holder of its members' mortgages. *Jackson v. Mortg. Registration Sys., Inc.*, 770 N.W.2d 487, 490 (Minn. 2009). MERS allows its members to internally assign mortgage loans while MERS remains the mortgagee of record, eliminating the need to record assignments of mortgages between MERS members. Therefore, although the PSA purports to assign the mortgage loans to Deutsche Bank, it does not show that MERS is no longer the nominal holder of the mortgage.

[4] The Kents' affirmative defenses that BOA lacks standing, is not a real party in interest, and cannot show an injury in fact relate to their arguments that the assignment is invalid.

01. On this record, the district court did not err by granting summary judgment in favor of BOA.

II. The district court did not abuse its discretion by not permitting the Kents to conduct discovery.

A district court may refuse to grant judgment or continue a summary-judgment proceeding to permit discovery when it appears from the affidavits that a party cannot present facts necessary to oppose the summary-judgment motion. Minn. R. Civ. P. 56.06. In determining whether to grant a continuance for discovery, the district court examines whether the party (1) was diligent in seeking discovery and (2) has a good-faith belief that the requested discovery will produce material facts and is not a mere "fishing expedition." *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982). We review a district court's decision whether to continue a summary-judgment proceeding for discovery for abuse of discretion. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 346 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). "[I]f the discovery would not assist the district court or change the result of the summary judgment motion, the district court does not abuse its discretion by granting the summary judgment motion without granting the continuance." *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 400 (Minn. App. 2010).

Because the Kents diligently sought discovery, we focus our analysis on whether the Kents had a good-faith belief that the requested discovery would produce information material to the motion. Our careful review of the record shows they did not. First, many of the discovery requests relate to their show-me-the-note theory, which has no legal

merit. For example, the Kents requested "[a]ll documents evidencing [BOA] was the Note Holder" and "[a]ny Mortgage Loan Schedules and Trustee Certificates evidencing that the Note was transferred to [BOA]." Because the Kents cannot defeat BOA's claims under a show-me-the-note theory, their discovery requests related to this theory are not material to the summary-judgment motion. *See Jackson*, 770 N.W.2d at 500-01; *JPMorgan Chase Bank*, 821 N.W.2d at 603-04 & nn.3-4. And the Kents' other discovery requests seek information relevant to their affirmative defense that the mortgage was previously assigned to an entity other than BOA. The Kents have the burden to produce evidence to establish their affirmative defenses. *See Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 779 n. 6 (Minn. 2004). Their failure to do so, even after receiving an additional 63 days to submit information, speaks to their motivation in seeking discovery. They hoped to find support for an affirmative defense on which they have the production burden. On this record, we conclude that the district court did not abuse its discretion by not granting a continuance to conduct discovery.[5]

Affirmed.

[5] The Kents also requested documents showing that Ben Peck, a MERS assistant secretary, had authority to assign the mortgage on behalf of MERS. In *Jackson*, the supreme court stated that to complete an assignment of mortgage, "MERS instructs its members to have someone on their own staff become a certified MERS officer with authority to sign on behalf of MERS. This procedure allows the member that owns the indebtedness to assign or foreclose the mortgage loan in the name of MERS[.]" 770 N.W.2d at 491. Accordingly, even if Peck was also a BOA employee, it would not necessarily invalidate the assignment of the mortgage. The Kents did not produce any evidence that Peck lacked authority to assign the mortgage on behalf of MERS.