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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0569**

Nationwide Advantage Mortgage Company,
Respondent,

vs.

Lisa A. Pehlke, et al.,
Appellants.

**Filed November 12, 2013
Affirmed
Chutich, Judge**

Anoka County District Court
File No. 02-CV-13-1306

Kalli L. Ostlie, Shapiro & Zielke, LLP, Burnsville, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

On appeal from summary judgment granted to respondent bank in this eviction proceeding, appellants assert that the district court erred in denying their motion to dismiss the complaint for failure to state a claim on which relief could be granted and in

granting summary judgment. Because the district court properly granted summary judgment to the bank, we affirm.

FACTS

In October 2001, appellants David and Betty Pehlke, husband and wife, and Lisa Pehlke, their daughter, executed a mortgage on a home in Ramsey in favor of Prime Mortgage Corporation. On the same day, Prime Mortgage Corporation assigned its interest to Nationwide Home Mortgage Company, later known as Nationwide Advantage Mortgage Company (Nationwide), and this assignment was then recorded. The mortgage was later modified in September 2004 and recorded two months later. The mortgage was modified again in December 2010 and recorded six months later.

Foreclosure proceedings on the property began in October 2011, and on August 10, 2012, Nationwide bought the property at a sheriff's sale. Nationwide recorded the sheriff's certificate of sale with the Anoka County Recorder on August 13, 2012. The Pehlkes did not redeem during the six-month redemption period.

On March 8, 2013, Nationwide brought this eviction action against Lisa, David, and Betty Pehlke, and John Doe and Mary Roe. In their answer, the Pehlkes challenged Nationwide's right to possession and title and asserted that Nationwide failed to state a claim on which relief could be granted, the foreclosure sale is void, and Nationwide is not a real party in interest.

The Pehlkes moved to dismiss the complaint for failure to state a claim on which relief could be granted, and Nationwide moved for summary judgment. After a hearing

on the summary judgment motion, the district court denied the Pehlkes' motion to dismiss and granted Nationwide's motion for summary judgment. This appeal followed.

D E C I S I O N

I.

The Pehlkes contend that the district court erred in denying their motion to dismiss the complaint for failure to state a claim. We decline to review this issue.

An order denying a motion to dismiss is typically not appealable. *See* Minn. R. Civ. App. P. 103.03. On appeal from a final judgment, we “may review any order involving the merits or affecting the judgment.” Minn. R. Civ. App. P. 103.04. But an order denying a motion to dismiss “does nothing more than retain the action for trial.” *Indep. Sch. Dist. No. 84 v. Rittmiller*, 235 Minn. 556, 557, 51 N.W.2d 664, 664 (1952). Because the district court's denial of the dismissal motion does not involve the merits or affect the judgment here, we decline to consider its determination on the sufficiency of the pleadings.

II.

The Pehlkes next argue that the district court erred in granting summary judgment to Nationwide. Because no genuine issues of material fact exist and Nationwide is entitled to summary judgment, we disagree.

“We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). “[T]he

reviewing court must view 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). Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. When a motion for summary judgment is made and supported, the nonmoving party “may not rest upon the 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.

An eviction action is “a summary court proceeding to remove a tenant or occupant from or otherwise recover possession of real property by the process of law.” Minn. Stat. § 504B.001, subd. 4 (2012). To prevail on an eviction claim, a plaintiff must prove that (1) the mortgage was foreclosed, (2) the time for redemption expired, (3) the defendant is holding over the property, and (4) the plaintiff is entitled to the premises. Minn. Stat. § 504B.285, subd. 1(1)(ii) (2012). A “sheriff’s certificate of sale . . . [is] prima facie evidence that all the requirements of law in that behalf have been complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale . . . after the time for redemption therefrom has expired.” Minn. Stat. § 580.19 (2012).

To support its motion for summary judgment, Nationwide submitted a copy of the assignment of the mortgage from Prime Mortgage Corporation, transferring its interest to Nationwide; a copy of the “notice of pendency of proceeding and power of attorney to foreclose mortgage;” and the sheriff’s certificate of sale. These documents show that

Nationwide foreclosed on the mortgage and that Nationwide is entitled to the premises. The Pehlkes do not dispute whether the redemption period expired or whether Nationwide is entitled to the property.

Instead, the Pehlkes dispute whether they are “holding over the property.” But the Pehlkes do not offer any evidence to show that the property was vacant of people and personal belongings. At the summary judgment hearing, the Pehlkes’ counsel submitted an affidavit of Lisa Pehlke. Her affidavit states that David and Betty Pehlke, her parents, “do not live in the property” and “are not in possession of the Premises” and that Lisa is “not unlawfully detaining possession of the premises from [Nationwide].” The Pehlkes’ counsel stated at the hearing that David and Betty Pehlke have never lived in or occupied the property and that “they’re not in unlawful possession.” He did not make a specific argument as to where Lisa Pehlke was living and did not further explain what he meant by his statement that “the Defendants aren’t in possession of the property.”

The Pehlkes did not adequately show that a genuine issue of material fact exists. The affidavit from Lisa Pehlke is conclusory and does not “set out that specific facts are in existence which create a genuine issue for trial.” *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) (internal quotations omitted); *see also Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977) (“[T]o successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.”).

The Pehlkes' argument at the summary judgment hearing rests on "mere averments" and general statements of fact; it does not provide specific facts that create a genuine issue for trial. See Minn. R. Civ. P. 56.05; *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). In addition, other documents in the record contradict the Pehlkes' claim that they were not holding over: Lisa Pehlke was personally served with the complaint at the property, and the Pehlkes requested in their answer, filed just five days before the summary judgment hearing, that the district court "stay any writ for seven days due to substantial hardship in moving as property is a primary residence and due to weather."

In sum, because no genuine issue of material fact exists, the district court properly granted summary judgment in Nationwide's favor.

Affirmed.