**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-0498**

Magreth Mutua, et al.,
Appellants,

vs.

Deutsche Bank National Trust Company,
Respondent,

Shapiro & Zielke, LLP,
Respondent.

**Filed December 30, 2013**
**Affirmed; motion denied**
**Hooten, Judge**

Hennepin County District Court
File No. 27-CV-11-24139

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

Charles F. Webber, Faegre Baker Daniels LLP, Minneapolis, Minnesota; and

Jared D. Kemper, Dykema Gossett PLLC, Minneapolis, Minnesota; and

Ernest F. Peake, Patrick J. Lindmark, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., Minneapolis, Minnesota; and

Fredrick S. Levin (pro hac vice), Los Angeles, California (for respondent Deutsche Bank)

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

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

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

**HOOTEN**, Judge

Appellants challenge the dismissal of their actions against respondent bank to quiet title and for a declaratory judgment to determine whether respondent bank had the right to foreclose on appellants' properties. Appellants also challenge the dismissal of their slander-of-title action against respondent bank and respondent law firm that handled the foreclosures. Because appellants have failed to state a claim on which relief can be granted, we affirm.

## FACTS

Appellants Magreth and Peter Mutua, John and Diane Perusse, and Robert and Laura Pigozzi each executed a promissory note and a mortgage-security instrument on their separate properties in the mid-2000s. Each mortgage-security instrument was the subject of subsequent recorded assignments involving different financial entities. These mortgage-security instruments were eventually assigned to respondent Deutsche Bank National Trust Company which foreclosed by advertisement the mortgage-security instruments of the Perusses in 2010 and the Mutuas and Pigozzis in 2011. Respondent Shapiro & Zielke, LLP was the law firm that handled the Pigozzis' foreclosure.

Appellants, in an amended complaint, alleged four counts against respondents: (1) a quiet-title action against Deutsche Bank; (2) a declaratory judgment to resolve whether Deutsche Bank violated certain pooling and service agreements, and whether Deutsche Bank had the right to foreclose on appellants' properties; (3) a slander-of-title action

against Deutsche Bank and Shapiro; and (4) a declaratory judgment to resolve whether Deutsche Bank's power to sell was operative.

Deutsche Bank moved to dismiss the claims brought by the Mutuas and the Perusses. The district court granted the motion in July 2012, finding that appellants failed to state a claim on which relief can be granted. *See* Minn. R. Civ. P. 12.02(e). In January 2013, the district court granted Deutsche Bank's and Shapiro's motion to dismiss the Pigozzis' claims, also under rule 12.02(e). This appeal follows.[1]

**D E C I S I O N**

We review de novo the district court's dismissal of a case under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We consider "the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id.* (quotation omitted). "[W]hen the complaint refers to

[1] By "request" filed almost two months after the nonoral dispositional conference occurred in this appeal, the Pigozzis, under Minnesota Rule of Evidence 201, asked this court to take judicial notice of certain "facts and law governing the legal ownership of this loan and affecting the validity of this foreclosure." This court received no response to the "request." Unless the appellate rules provide otherwise, an application for relief from this court is to be made by motion. Minn. R. Civ. App. P. 127. Even if we read the "request" as a motion, we still must deny it. The crux of the "request" seems to ask that this court draw a legal conclusion about the effect of New York State law regarding trusts on contracts involved in this dispute. But legal questions are not properly the subject of judicial notice under rule 201 which governs only the judicial notice of adjudicative facts. Moreover, the legal question of the impact of New York's trust law was neither presented to nor considered by the district court, and we decline to address that question now. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court generally considers only matters argued to and considered by the district court). Under these circumstances, we deny the Pigozzis' "request" that we take judicial notice of these matters.

[a] contract and the contract is central to the claims alleged," the contract may be considered in its entirety. *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are a matter of public record may also be considered. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000) (refusing to strike documents which were matters of public record).

"[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). To survive a motion to dismiss, the plaintiff must "provide more than labels and conclusions." *Id.*; *see also Hebert*, 744 N.W.2d at 235 ("We are not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim."). Rather than a "formulaic recitation of the elements of a cause of action," a complaint must set forth "[f]actual allegations [that are] enough to raise a right to relief above the speculative level" and sufficient to state a plausible, rather than just a conceivable, claim to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965 (2007).[2]

**I.**

Appellants first challenge the dismissal of their quiet-title action. Under Minn. Stat. § 559.01 (2012):

[2] Federal caselaw is relevant and helpful because rule 12.02(e) is similar to its federal analogue, rule 12(b)(6) of the Federal Rules of Civil Procedure. *See T & R Flooring, LLC v. O'Byrne*, 826 N.W.2d 833, 836 (Minn. App. 2013) (referencing federal caselaw for guidance on Minn. R. Civ. P. 52.02).

> Any person in possession of real property personally or through the person's tenant, or any other person having or claiming title to vacant or unoccupied real property, may bring an action against another who claims an estate or interest therein, or a lien thereon, adverse to the person bringing the action, for the purpose of determining such adverse claim and the rights of the parties, respectively.

In their amended complaint, appellants summarily claim that they are in possession of their respective properties and that Deutsche Bank's mortgage liens are invalid. Their only argument in this appeal is that these summary allegations are sufficient to overcome a motion to dismiss. We disagree.

Adopting appellants' position would mean that quiet-title claims will never be dismissed when merely the two facts of possession and invalid mortgage lien are alleged, without regard for how these facts would give rise to an entitlement to relief. This result undermines the court's duty to determine "whether the complaint sets forth a legally sufficient claim for relief." *See Hebert*, 744 N.W.2d at 229. Beyond the summary facts alleged, appellants must present more than just labels or conclusions in their complaint to survive a motion to dismiss.

Appellants submitted five theories to the district court in support of their allegation that Deutsche Bank's liens are invalid.[3] But, as the district court explained in its well-reasoned memoranda, these theories are merely labels and legal conclusions without sufficient factual and legal support. Because appellants do not challenge the district

[3] The five theories are: (1) the mortgages are not properly perfected; (2) Deutsche Bank is not a note-holder; (3) Deutsche Bank is not entitled to receive payments on appellants' notes; (4) the assignments of the mortgages were not executed by authorized individuals; and (5) the assignments of the mortgages are invalid.

court's rejection of these theories on this basis, we decline to review the district court's determination that appellants' quiet-title action included only labels and legal conclusions. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).

Appellants also argue that the Minnesota Rules of Civil Procedure do not apply to quiet-title claims under Minn. Stat. § 559.01. They cite Minn. R. Civ. P. 81.01, which provides that the "rules do not govern pleadings, practice and procedure . . . listed in Appendix A insofar as they are inconsistent or in conflict with the rules." Appendix A lists "Chapter 559" as "excepted from [the] rules insofar as they are inconsistent or in conflict with" the rules. Minn. R. Civ. P. App. A. But appellants make no arguments as to how section 559.01 specifically is "inconsistent or in conflict" with the Minnesota Rules of Civil Procedure. Nor do we see any inconsistencies—a litigant can certainly plead a sufficient quiet-title action under the Minnesota rules.

**II.**

Appellants next challenge the dismissal of their declaratory-judgment action to determine the terms of certain pooling and service agreements (PSAs), resolve whether Deutsche Bank violated these PSAs, and determine whether Deutsche Bank had the right to foreclose on appellants' properties. For every mortgage-security instrument, the district court found that, in compliance with Minn. Stat. § 580.02(3) (2012), the amended complaint and public record show that the original mortgage-security instrument and every assignment from the original lender to Deutsche Bank were recorded. But appellants seem to argue that, based on the existence of certain PSAs and the absence of

the recording of all of the promissory note assignments, there must be other unrecorded assignments of the mortgage-security instruments.

PSAs are publicly available documents filed with the U.S. Securities and Exchange Commission. They are created in loan-securitization transactions to transfer various assets into a trust and for the servicing of those assets, including services such as the processing and posting of payments. Appellants are not parties to any of the PSAs in question. But they contend that the PSAs contain an agreement to assign both the promissory notes and the mortgage-security instruments. And because these alleged assignments of the notes do not appear in the public records, appellants claim that unrecorded assignments of the mortgage-security instruments must exist. We conclude that the district court did not err in dismissing this action.

We first note that appellants misstate what is in the PSAs. During the hearing on the motion to dismiss the Mutuas' and Perusses' claims, counsel for appellants asserted:

> I think [respondent Deutsche Bank's counsel] was getting kind of cute with the term of mortgage loan and saying that really just means mortgage [note] rather than the full package, note and mortgage. I think pretty clearly mortgage loan means note and mortgage is enough in many, many pooling and servicing agreements I've reviewed . . . .

And, in their principal brief submitted to this court, appellants, citing the PSAs, alleged as fact that "New Century Credit Corporation . . . sold and transferred all of its rights and title to the mortgage loans (*including the mortgages and the notes*)." (Emphasis added.) But the New Century Home Equity Loan Trust 2005-4 PSA, section 2.03(iii), on which

appellants alleged the unrecorded assignment of the Mutuas' mortgage-security instrument, assigned only "the Mortgage Loans released from the Lien of."

Appellants also stated as fact that "Morgan Stanley ABS Capital I Inc. . . . sold and transferred all of its rights and title to the mortgage loans (*including the mortgages and the notes*)." (Emphasis added.) But the Morgan Stanley ABS Capital I Inc. Trust 2006-NC4 PSA, section 2.01(b), on which appellants alleged the unrecorded assignment of the Perusses' mortgage-security instrument, assigned interest in the "Trust Fund." "Trust Fund" is defined to include "the Mortgage Loans," as well as other assets not relevant in this case. "Mortgage Loan includes . . . the Scheduled Payments, Principal Prepayment," and other proceeds. And the term "mortgage" is separately defined as the "deed of trust or other instrument . . . securing a Mortgage Note."

These PSAs, accordingly, both distinguish promissory notes from the mortgage-security instruments and show the contemplated assignments of only the promissory notes. Although on review of a motion to dismiss, we must construe all reasonable inferences in favor of the nonmoving party, the existence of unrecorded assignments of the security instruments to appellants' properties is not a reasonable inference—and is instead pure speculation—from the mere existence of the PSAs and an assignment or non-assignment of the associated promissory notes. Because Minn. Stat. § 580.02(3) requires the recording of only a security instrument, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 501 (Minn. 2009), any alleged failure to record the promissory notes under the PSAs do not give rise to a claim on which relief can be granted. Moreover, appellants are not parties to or third-party beneficiaries of the PSAs.

Accordingly, they may not seek a declaratory judgment regarding the validity or effect of the PSAs. *See Karnatcheva v. JPMorgan Chase Bank, N.A.*, 704 F.3d 545, 547 (8th Cir. 2013) (holding "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").

Finally, appellants rely on *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013), and *Hathorn v. Butler*, 73 Minn. 15, 75 N.W. 743 (1898). But this reliance is unavailing. *Ruiz* and *Butler* stand for the undisputed proposition that any assignments of mortgage-security instruments must be recorded before the commencement of a foreclosure proceeding. *Ruiz*, 829 N.W.2d at 57–58; *Hathorn*, 73 Minn. at 20, 75 N.W. at 744. But these cases do not address the requirements for pleading an alleged failure to record assignments of mortgage-security instruments, so they are inapposite.

**III.**

Appellants argue that they sufficiently pleaded a slander-of-title action against Shapiro. To state a claim for slander of title, a plaintiff must allege facts showing that: (1) there was a false statement concerning the real property owned by the plaintiff; (2) the false statement was published to others; (3) the false statement was published maliciously; and (4) the publication of the false statement caused the plaintiff special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279–80 (Minn. 2000). "The filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander of title." *Id.* at 280.

Here, appellants' allegation of falsity is based on their speculative assertion that Deutsche Bank must have failed to record all of the assignments of mortgage-security instruments because all of the promissory note assignments were not recorded. According to appellants, these alleged unrecorded security instruments "and the fact that Shapiro made multiple attempts to correct the record suggests that it may have had at least some knowledge of the defects in the chain of title." But attempts to correct the record cannot be equated with maliciousness. And, appellants have not sufficiently pleaded falsity when they have failed to state a section 580.02(3) claim on which relief can be granted. Therefore, the district court did not err by dismissing this slander-of-title action

**IV.**

Finally, appellants claim that Deutsche Bank violated Minn. Stat. § 580.05 (2012) by failing to record a document stating that Carrington Mortgage Services, LLC was authorized to act as attorney-in-fact for Deutsche Bank when the assignment of the Mutuas' mortgage-security instrument was executed. We decline to consider this argument because appellants failed to raise it before the district court. *See Thiele*, 425 N.W.2d at 582.

**Affirmed; motion denied.**