REL: May 1, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180849

Thomas Denault and Carol Denault

v.

Federal National Mortgage Association and Seterus, Inc.

Appeal from Jefferson Circuit Court
(CV-14-901195)

EDWARDS, Judge.

This appeal arises from a claim "in the nature of an action in ejectment," Ala. Code 1975, § 6-6-280(b), filed in the Jefferson Circuit Court ("the trial court") by the Federal National Mortgage Association ("FNMA") against Thomas Denault

and Carol Denault. In Denault v. Federal National Mortgage Ass'n, 284 So. 3d 913 (Ala. Civ. App. 2019), this court dismissed the Denaults' appeal from respective September 18, 2017, orders granting FNMA's motion for a summary judgment against the Denaults and granting a motion for a summary judgment filed by Seterus, Inc., regarding the Denaults' third-party claims against Seterus.[1] The basis for our dismissal in Denault was that the trial court had failed to enter a final judgment by fully adjudicating FNMA's damages request. On June 6, 2019, after this court issued the certificate of judgment in Denault, the trial court entered an order amending the September 2017 order in favor of FNMA by assessing damages against the Denaults in the amount of $7,502.44.[2] The Denaults appeal.

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[1]The trial court also entered a summary judgment in favor of Bank of America, N.A., regarding the Denaults' third-party claims against it. The Denaults subsequently settled their third-party claims against Bank of America.

[2]As we noted in Denault, FNMA filed a letter brief on appeal arguing that the trial court had awarded it $14,570.58 as damages, but neither the September 2017 order granting FNMA's motion for a summary judgment nor the record supported FNMA's argument. After our decision in Denault, FNMA filed a motion "request[ing] entry of [a judgment for] a sum certain of $7,502.44 on its damage claim." See discussion, supra.

Facts and Procedural History

The disputes between FNMA and the Denaults and the Denaults and Seterus arise out of a February 17, 2006, promissory note in the principal amount of $156,000 ("the promissory note") that Thomas Denault executed in favor of America's Wholesale Lender, a trade name of Countrywide Home Loans, Inc. The promissory note was to be repaid in monthly installments of $947.87. On the page where Thomas Denault's signature appears, the promissory note has an undated blank endorsement executed by David A. Spector, as the "Managing Director" of "Countywide Home Loans, Inc., ... [d]oing [b]usiness as America's Wholesale Lender."

The promissory note was secured by a mortgage ("the mortgage") executed by the Denaults and dated the same date as the promissory note. The mortgage described the mortgagee as Mortgage Electronic Registration Systems, Inc. ("MERS"), but further stated that the "Lender" was America's Wholesale Lender and that MERS was acting solely as nominee for America's Wholesale Lender and its successors and assigns. The mortgage also stated that, after recording, it was to be returned to Countrywide Home Loans, Inc. The mortgage further

stated that the Denaults "irrevocably mortgage[], grant[] and convey[]" the property at issue "to MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS, with power of sale," for purposes of foreclosure and that the Denaults understood and agreed that MERS had legal title in regard to "the interests granted by [them] in the [mortgage]." See Maiden v. Federal Nat'l Mortg. Ass'n, 69 So. 3d 860, 865 (Ala. Civ. App. 2011) ("Alabama is a 'title theory' state; thus, when a person mortgages real property, the mortgagee obtains legal title to the real property and the mortgagor retains an equity of redemption."). The mortgage provided that the promissory note and the mortgage could be sold without prior notice to the Denaults.

As we stated in Denault:

> "The loan servicer for Countrywide Home Loans, Inc., eventually merged into Bank of America[, N.A.]. It is undisputed that Bank of America, or its predecessors in interest, was the servicer of the Denaults' loan from its inception until October 1, 2012.
>
> "The Denaults made each monthly installment payment due under the terms of the promissory note and mortgage until July 6, 2012. The Denaults did not make any monthly installment payments after July 6, 2012. On July 17, 2012, MERS executed an

> assignment purporting to assign the mortgage 'together with the note(s) and obligations therein described' to Bank of America. The assignment reflected America's Wholesale Lender as the original lender .... The assignment to Bank of America was recorded in the Jefferson Probate Court.
>
> "Effective October 1, 2012, Bank of America transferred servicing of the Denaults' loan to Seterus. The Denaults did not have any contact with Bank of America after October 1, 2012.
>
> "On October 4, 2012, Bank of America executed an assignment purporting to assign the mortgage 'together with the note(s) and obligations therein described' to FNMA. The assignment reflected America's Wholesale Lender as the original lender .... The assignment further states: 'Contact [FNMA] for this instrument c/o Seterus ..., which is responsible for receiving payments.' The assignment to FNMA was recorded in the Jefferson Probate Court.
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> "On May 13, 2013, Seterus contacted Thomas Denault to discuss the status of the loan, but Seterus and Thomas Denault were unable to agree on any payment arrangement for the loan."

284 So. 3d at 915-16 (footnote omitted). We note that, in July 2012, the Denaults filed a bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Alabama.[3]

[3]Based on the record before us, it is unclear when the automatic stay in bankruptcy was lifted for purposes of the foreclosure and ejectment proceedings, but the Denaults' bankruptcy case has been closed, and no argument has been made that the foreclosure at issue in this case or FNMA's filing of this action violated the automatic stay.

On August 29, 2013, Seterus sent a letter to Thomas Denault informing him that the loan was in default for nonpayment, notifying him of the amount due under the promissory note, and demanding that he

> "bring [the] loan up-to-date ('cure this default') by payment of [$15,744.72]. In addition, your regular payment may become due by the Expiration Date [October 3, 2013]. The delinquent amount of principal continues to accrue interest.
>
> "....
>
> "IF THE DEFAULT IS NOT CURED ON OR BEFORE [OCTOBER 3, 2013], THE LOAN OWNER AND WE INTEND TO ENFORCE THE LOAN OWNER'S RIGHTS AND REMEDIES AND MAY PROCEED WITHOUT FURTHER NOTICE TO COMMENCE FORECLOSURE PROCEEDINGS. ADDITIONAL FEES SUCH AS FORECLOSURE COSTS AND LEGAL FEES MAY BE ADDED PURSUANT TO THE TERMS OF THE LOAN DOCUMENTS.
>
> "....
>
> "If you have any questions, please contact us at [telephone number omitted]. For borrowers having difficulty making their payments, we have loan specialists available Monday-Thursday 5 a.m. to 9 p.m., Friday 5 a.m. to 6 p.m., and Saturday 9 a.m. to 12 p.m. (Pacific time). Saturday hours may vary."[4]

(Capitalization in original.)

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[4]The mortgage provides that "[n]otice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise." The Denaults did not argue to the trial court, and they have not argued to this court, that notice to Thomas Denault was insufficient for purposes of any required notice to Carol Denault.

On January 14, 2014, Seterus's counsel, who also acted as counsel for FNMA, sent the Denaults a "Notice of Acceleration of Promissory Note and Mortgage" informing them that the promissory note and the mortgage were in default.[5] The January 2014 notice stated that FNMA

> "hereby accelerates to maturity the entire remaining unpaid balance of the debt, including attorney's fees, accrued interest, and other lawful charges. The amount due and payable as of the date of this letter is $160,441.97. This payoff amount will change on a daily basis. If you wish to pay off your mortgage, please call our office at [telephone number omitted] to obtain an updated figure. Additionally, if you are interested in foreclosure alternatives, please contact your servicer, Seterus, Inc. at [telephone number omitted].
>
> "We are at this time commencing foreclosure under the terms of the Mortgage, and enclosed is a copy of the foreclosure notice. Please note that the foreclosure sale is scheduled for February 26, 2014. For further information regarding this matter, please call [telephone number omitted]."

Also on January 14, 2014, Seterus's counsel sent the Denaults a copy of the publication notice for the foreclosure sale, which was afterwards published on January 15, January 22, and January 29, 2014, and a letter informing the Denaults

[5]The January 14, 2014, letter references the client as "Seterus, ... as servicer for [FNMA]," but the letter is executed by counsel "FOR: [FNMA]." Other documents reference the counsel at issue as counsel for FNMA.

who to contact if they wanted to avoid foreclosure. The publication notice stated that FNMA was selling the property at issue pursuant to "the power of sale contained in [the] mortgage" that had been assigned to FNMA and that the sale was being "made for purpose of paying the indebtedness secured by said mortgage."

The foreclosure sale was held on February 26, 2014, by an auctioneer for FNMA. FNMA was the highest bidder at the foreclosure sale and subsequently received a foreclosure deed to the property from the auctioneer; FNMA's bid was $162,393.18. Also on February 26, 2014, FNMA sent the Denaults a "Demand for Possession" pursuant to Ala. Code 1975, § 6-5-251 (requiring delivery of possession by mortgagor upon demand after foreclosure). It is undisputed that the Denaults refused to vacate the property after they received the demand for possession.

> "On March 18, 2014, FNMA filed a complaint against the Denaults asserting a claim in the nature of an action in ejectment. FNMA requested an order of possession, damages against the Denaults for wrongful retention of the property, and a declaration that the Denaults had forfeited their rights to redeem the property because they had refused to surrender possession. See Ala. Code 1975, § 6-5-251(c) (discussing forfeiture of the mortgagor's right of redemption).

> "On July 3, 2014, the Denaults filed their answer to FNMA's complaint. The answer included a general denial of the allegations in FNMA's complaint. The Denaults also asserted, as an affirmative defense, that FNMA had not received title to the property because, according to the Denaults, the foreclosure sale was void.
>
> "On February 9, 2015, FNMA filed a motion for a summary judgment. FNMA's motion for a summary judgment requested that the trial court enter an order awarding FNMA possession of the property at issue and declaring that the Denaults had forfeited their right of redemption. In support of its motion, FNMA submitted copies of various documents and an affidavit from Nathan Abeln, an authorized representative of Seterus, as servicer for FNMA. FNMA's summary-judgment motion makes no specific reference to FNMA's claim for damages for wrongful retention of the property, and the motion includes no supporting evidentiary materials as to the amount of FNMA's alleged damages for wrongful retention.
>
> "On July 26, 2015, the Denaults amended their answer to FNMA's complaint. The amendment added further affirmative defenses challenging the validity of the foreclosure sale and added third-party claims against Seterus and Bank of America."

Denault, 284 So. 3d at 917-18.

The Denaults filed a response to FNMA's motion for a summary judgment and a motion to strike Nathan Abeln's affidavit in support of the motion because, according to the Denaults, the affidavit did not comply with Rule 56(e), Ala. R. Civ. P.

"On March 9, 2016, FNMA filed a 'Motion to Escrow Funds' ('FNMA's escrow motion'). FNMA's escrow motion alleged that the Denaults had been living on the property for four years, without making any payments on their mortgage or for rent. FNMA requested that the trial court enter an order requiring the Denaults

> "'to make monthly rent payments into an escrow account of the Clerk of Court of Jefferson County, Alabama, in monthly intervals ... until such time as this case is fully adjudicated, in an amount equal to [the Denaults'] monthly mortgage payment, as well as to deposit into the Court any and all funds previously paid to and held in escrow by [the Denaults'] counsel, or otherwise set aside in any manner by [the Denaults] as monthly mortgage payments.'

"FNMA's escrow motion does not disclose what funds were being held in escrow by the Denaults' counsel, and the motion alleges that payments under the promissory note were 'currently due for the August 2012 payment and all subsequent payments.' According to FNMA's escrow motion, FNMA was

> "'entitled to use and occupancy damages from [the Denaults] pursuant to Ala. Code (1975), § 6-6-280, as mesne profits and damages for the wrongful use and occupancy of the property from the date of the foreclosure sale to the date of said judgment. Requiring [the Denaults] to deposit these monthly payments into Court would at least partially satisfy this relief as provided for under Alabama law.'

"(Emphasis added.) FNMA requested 'an Order requiring [the Denaults] to pay rent in the amount of $947.87 per month, or such other amount as deemed appropriate by the Court'; FNMA submitted no

evidentiary materials regarding the rental value of the property, but it stated in a footnote that 'Zillow [a real-estate Web site] estimates fair rental value of the Property as of the date of this filing to be $1,398/month, based on public property data and similar properties listed for rent.' See Jones-Lowe Co. v. Southern Land & Expl. Co., 18 So. 3d 362, 368 (Ala. 2009) ('"'[M]otions and arguments of counsel are not evidence.' Williams v. Akzo Nobel Chemicals, Inc., 999 S.W.2d 836, 845 (Tex. App. 1999). '[S]tatements in motions are not evidence and are, therefore not entitled to evidentiary weight. Singh v. Immigration & Naturalization Serv., 213 F.3d 1050, 1054 n.8 (9th Cir. 2000)."' (quoting Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000))). FNMA requested that the payments to be made by the Denaults be held in an interest-bearing escrow account 'until such time as all claims involved in this litigation have been fully and finally resolved.' '[FNMA] further request[ed] that it be permitted to stake a claim to the proceeds at the end of this litigation as provided for under Ala. Code (1975), § 6-6-280, should [FNMA] prevail on its ejectment claim.'

"On May 4, 2016, the Denaults filed a response to FNMA's escrow motion. The Denaults noted that they had 'filed an answer ... and disputed that [FNMA] had valid title due to a defective and void foreclosure sale and deed.' The Denaults argued that,

> "'[w]hile [FNMA] would have the right to recover mesne profits based upon the fair rental value of the property in the event that the Court ultimately determines that the [Denaults] have improperly remained in possession, at this time, there is no basis to make an interim ruling which would in effect grant an award of interim damages to [FNMA] while this matter is being litigated and without the Court having had the

> opportunity to hear any evidence in support of or in opposition to [FNMA's] rights to such an award.'
>
> "On May 5, 2016, the trial court entered an order granting FNMA's escrow motion 'in part.' That order required Thomas Denault to 'begin making payments of $500.00 per month beginning June 1, 2016, to the Clerk of Court of Jefferson County for said funds to be held in escrow in an interest bearing account until final adjudication of this matter.'"

Denault, 284 So. 3d at 918-19.

Seterus filed a motion for a summary judgment regarding the Denaults' claims against it; in support of its motion for a summary judgment, Seterus filed copies of various documents, including an affidavit from Umeka Jackson, the custodian of foreclosure records for Seterus, and the Denaults' deposition testimony. Likewise, Bank of America, N.A., filed a motion for a summary judgment regarding the Denaults' third-party claims against it, along with supporting evidence, including an affidavit from Ansheen Littlejohn, an officer of Bank of America. See note 1, supra.

The Denaults filed a response to the pending summary-judgment motions of FNMA, Seterus, and Bank of America. In support of their reponse, the Denaults attached the same documents they had filed with their initial response to FNMA's

motion for a summary judgment, and the Denaults also incorporated by reference the evidentiary submissions that Seterus and Bank of America had submitted in support of their respective motions for a summary judgment. The Denaults contended that genuine issues of material fact existed regarding the validity of the foreclosure sale and that FNMA, Seterus, and Bank of America had failed to submit admissible evidence in support of their respective summary-judgment motions and, thus, were not entitled to judgments as a matter of law.

After holding a hearing on the motions for a summary judgment, on September 18, 2017, the trial court entered separate orders granting Seterus's and Bank of America's respective motions for a summary judgment as to the Denaults' claims against them and granting FNMA's motion for a summary judgment on its claims against the Denaults. The September 2017 order granting FNMA's motion for a summary judgment states that FNMA had made a prima facie showing regarding its entitlement to eject the Denaults from the property and that the Denaults had failed to submit "substantial evidence" to establish a genuine issue of material fact, as required by

Alabama law. Denault, 284 So. 3d at 920. The September 2017 order granting FNMA's motion for a summary judgment provided, in part:

> "'3. Final judgment is hereby entered in favor of [FNMA] and against [the Denaults] on [FNMA's] ejectment claim brought pursuant to Ala. Code 1975, § 6-6-280.
>
> "'4. Possession of the real property set out below ... is hereby awarded to [FNMA] and any lawful sheriff of the County of Jefferson is hereby ordered to restore possession of the real property to [FNMA].
>
> "'[legal description omitted]
>
> "'5. [The Denaults] have forfeited their right of redemption.
>
> "'6. [FNMA] is entitled to all payments, plus interest, previously paid into this Court by the Denaults. The Clerk of Court is directed to release all funds paid into the Court by the [Denaults], to be made payable to [FNMA] and delivered to its counsel of record ... within 30 days of this Order.'"

284 So. 3d at 920. As we noted in Denault, however,

> "[t]he September 2017 order granting FNMA's motion for a summary judgment includes no finding of fact regarding FNMA's damages arising from the Denaults' alleged wrongful retention of the property, the amount that the Denaults had paid to the Jefferson Circuit Clerk, or what interest had accrued on any such payments."

284 So. 3d at 921.

The Denaults filed a motion, purportedly pursuant to Rule 59, Ala. R. Civ. P., and the trial court held a hearing on that motion. However, the trial court did not enter an order granting or denying the Denaults' motion, and the Denaults, presuming that their motion had been denied by operation of law pursuant to Rule 59.1, Ala. R. App. P., filed the appeal that we dismissed in Denault. After our dismissal in Denault, FNMA filed a motion for the entry of a final judgment regarding its request for damages. That motion noted that the September 2017 order granting FNMA's motion for a summary judgment stated that FNMA was entitled to "all payments, plus interest, previously paid into [the trial court] by the Denaults." FNMA requested that the trial court enter a judgment for "a sum certain of $7,502.44 on [FNMA's] damage claim." As noted above, the trial court entered the June 2019 order granting FNMA's motion for the entry of a final judgment. The June 2019 order states that the trial court had "ordered [the Denaults] to escrow a fair and reasonable amount of $500.00 per month to the Clerk of Court of Jefferson County beginning June 1, 2016, until the final adjudication of this matter" and that the $7,502.44 requested by FNMA "comprised

... the $500 monthly payment, plus interest accrued thereon, [that had been] ordered to be paid from June 2016 to September 2017 when this Court's Final Order for possession and an award of such damages was issued." The trial court directed the clerk of court "to release this sum certain in the amount of $7,502.44, made payable to [FNMA] and delivered to their counsel of record."

After the entry of the June 2019 order, the Denaults appealed to this court. We transferred the appeal to the supreme court for lack of appellate jurisdiction; the supreme court then transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

"Appellate review of a summary judgment is de novo," Coleman v. BAC Servicing, 104 So. 3d 195, 200 (Ala. Civ. App. 2012), and "[t]he standard of review applicable to a summary judgment is the same as the standard for granting the motion," McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).

> "A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the

> moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present 'substantial evidence' creating a genuine issue of material fact ...."

Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994). "Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)." Peterson v. City of Abbeville, 1 So. 3d 38, 40 (Ala. 2008).

Analysis

Regarding the Denaults' appeal from the summary judgment entered in favor of Seterus, we pretermit any discussion of the issues argued by the Denaults. As Seterus notes in its appellate brief, one of the grounds on which the trial court based the September 2017 order granting Seterus's motion for a summary judgment was that the Denaults' claims against

Seterus were barred under the doctrine of judicial estoppel because the Denaults had failed to disclose those contingent claims as an asset in their bankruptcy schedules.[6] The Denaults did not argue to the trial court that it would err by applying the doctrine of judicial estoppel as a bar to the Denaults' claims against Seterus or that the trial court did err by applying that doctrine as a bar to their claims. Also, the Denaults have not addressed on appeal the trial court's application of the doctrine of judicial estoppel as a bar to their claims against Seterus. Accordingly, the summary judgment in favor of Seterus must be affirmed. See, e.g., Soutullo v. Mobile Cty., 58 So. 3d 733, 739 (Ala. 2010) ("[A] fortiori, a challenge to the judgment is waived where, as here, the trial court actually states two grounds for its judgment, both grounds are championed by the appellee, and the appellant simply declines to mention one of the two

[6]Seterus argued in its motion for a summary judgment that the Denaults had filed for bankruptcy protection in July 2012, that their bankruptcy case continued until March 2015, and that they never amended their bankruptcy schedules to include their contingent claims against Seterus as an asset, although their bankruptcy trustee unsuccessfully had attempted to reopen their bankruptcy case in December 2016 to add an unrelated claim as an asset of the Denaults' bankruptcy estate.

grounds."); Biz Distribution Co. v. Crystal Fresh, Inc., 59 So. 3d 717, 719 (Ala. Civ. App. 2010).

Regarding the summary judgment in favor of FNMA, the Denaults make six arguments on appeal. The Denaults' first argument is that genuine issues of material fact exist regarding whether FNMA properly foreclosed the mortgage. Specifically, the Denaults argue that genuine issues of material fact exist regarding whether FNMA complied with paragraph 22 of the mortgage by providing them with a proper notice of intent to accelerate the promissory note. See Ex parte Turner, 254 So. 3d 207, 209–13 (Ala. 2017) (holding that a foreclosure sale "failed" because of a deficient notice that did not inform the mortgagors of their right to bring a court action challenging the foreclosure, as required by the terms of the mortgage); Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168, 172-73 (Ala. 2012) (holding that a lender failed to comply with the requirements of the mortgage when the lender provided notice that it was accelerating a loan without first providing notice of intent to accelerate). Paragraph 22 of the mortgage states:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any

> covenant or agreement in this Security Instrument. ... The notice shall ... inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

According to the Denaults, a genuine issue of material fact exists regarding whether the August 29, 2013, letter sent by Seterus on behalf of FNMA satisfied the requirements of paragraph 22 because that letter references "the right to bring a court action or assert in the foreclosure proceedings the nonexistence of a default or any other defense to acceleration and sale." (Emphasis added.) The Denaults contend that, because the foreclosure at issue was pursuant to a power of sale, the reference to "foreclosure proceedings" resulted in their not being properly informed of their rights and that, "[a]t best[,] [the reference to such foreclosure proceedings] is confusing while at worst it is completely inaccurate information."

The August 29, 2013, letter informed the Denaults of their right to bring a court action, as required by paragraph 22 of the mortgage, and the superfluous language of which the Denaults complain is in the disjunctive. Also, the Denaults refer us to no specific evidence that would support the

conclusion that a genuine issue of material fact existed regarding whether they may have been misled by that language. See Rule 28(a)(10), Ala. R. Civ. App.; see also Thomason v. Redd, 565 So. 2d 259, 260 (Ala. Civ. App. 1990) ("It is not the duty of this court to search the record to determine whether it contains evidence to support contentions made by a party.").[7] Accordingly we reject the Denaults' argument

[7]In their appellate brief, the Denaults also assert that they "never received the notices required by [their] mortgage contract regarding acceleration and sale. (C. 1083-1182)." FNMA submitted substantial evidence indicating that it had sent those notices, and the pages of the record on appeal referenced by the Denaults include most of the evidentiary materials that Bank of America submitted in support of its motion for a summary judgment, including most of the deposition testimony of Thomas Denault, all of the deposition testimony of Carol Denault, Littlejohn's affidavit and its supporting materials (copies of the promissory note, the mortgage, and the assignments of the mortgage), a printout from the Alabama Secretary of State's Web site reflecting that America's Wholesale Lender was a registered trade name of Countrywide Home Loans, Inc., from April 26, 1996, through April 26, 2006, and correspondence from Bank of America to Thomas Denault. The referenced pages also include a "Joint Motion to Continue Trial Date," an "Order Setting Dates for Hearing on Motions for Summary Judgment and Jury Trial," and part of the Denaults' response to the motions for a summary judgment filed by FNMA, Seterus, and Bank of America, but not including any supporting evidentiary materials. We construe this argument as the Denaults' counsel's invitation for this court to review 100 pages of the record for a specific statement by the Denaults denying the receipt of the notices at issue. However, we will not perform the Denaults' counsel's job. See Thomason, supra.

regarding the August 29, 2013, letter, and, for similar reasons, we reject the Denaults' argument that FNMA failed to provide them with proper "notice of default, intent to accelerate, acceleration, and foreclosure sale date in accordance with the notice provisions contained in [the] mortgage contract."[8]

As part of their first argument, the Denaults further contend that genuine issues of material fact exist regarding whether FNMA had the right to foreclose because, according to the Denaults, FNMA failed to establish that it was the owner and holder of the promissory note when the foreclosure sale occurred. See Ala. Code 1975, § 35-10-12 ("Where a power to sell lands is given in any mortgage, the power is part of the security and may be executed by any person ... who, by assignment or otherwise, becomes entitled to the money thus

[8]At times, the Denaults frame their arguments as regarding a matter of law, assuming that the evidentiary materials provided to the trial court support their position. The merits of such an argument would depend on either undisputed facts in support of the Denaults' argument or the existence of a genuine issue of material fact that might be resolved in favor of the Denaults for purposes of their argument. However, the Denaults have failed to demonstrate the factual predicate necessary to the success of such arguments.

secured."); see also Harris v. Deutsche Bank Nat'l Trust Co., 141 So. 3d 482, 491 (Ala. 2013). The Denaults argue that

> "neither [FNMA's] own summary judgment motion nor the affidavit filed in support thereof provide any evidence that [FNMA] was the 'holder of the [n]ote' or in physical possession of the [n]ote at the time the foreclosure sale occurred such that is would have the authority under Alabama Code [1975, §] 35-10-12[,] to foreclose."

The Denaults correctly note in their appellate brief that this court has reversed a summary judgment when a promissory note was endorsed in blank and the foreclosing entity submitted no evidence indicating that it had possession of that note or a written assignment of that note. See Gray v. Federal Nat'l Mortg. Ass'n, 143 So. 3d 825, 831 (Ala. Civ. App. 2014). However, Jackson's affidavit, which the Denaults themselves incorporated by reference for purposes of supporting their response to the motions for a summary judgment filed by FNMA, Seterus, and Bank of America, averred that she had reviewed Seterus's records and that the promissory note "was endorsed in blank, and [FNMA] was the owner and holder of the [n]ote throughout the foreclosure process, up to and including the February 26, 2014, foreclosure sale date." See Perry v. Federal Nat'l Mortg.

Ass'n, 100 So. 3d 1090, 1095 (Ala. Civ. App. 2012) ("A blank indorsement allows a party to transfer a note merely by possession."). Also, Jackson averred that the promissory note and the assignments of the mortgage and the promissory note to Bank of America and then to FNMA that were attached to her affidavit were true and correct copies of those documents. Those documents likewise are evidence that supports FNMA's contention that it was the owner and holder of the promissory note when the foreclosure sale occurred. See Williams v. Wells Fargo Bank, N.A., 218 So. 3d 816, 824 (Ala. Civ. App. 2016) (affirming a summary judgment when deposition testimony regarding the foreclosing lender's business records established that the lender had possession of the indorsed promissory note). The Denaults have not adequately directed us to any evidence that would be sufficient to support the conclusion that a genuine issue of material fact existed regarding whether FNMA was the owner and holder of the promissory note when the foreclosure sale occurred.[9] See,

[9]The Denaults' arguments that a genuine issue of material fact exists regarding whether America's Wholesale Lender is a nonentity, rather than a doing-business name of Countrywide Home Loans, Inc., and that MERS's assignment of the promissory note and the mortgage on behalf of Countrywide Home Loans, Inc., was therefore void, also are without necessary factual

e.g., O'Conner v. Furman, 248 So. 3d 975, 980 (Ala. Civ. App. 2017) ("'[T]he unsworn statements, factual assertions, and arguments of counsel are not evidence.' Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005)."); see also Thomason, supra.

The Denaults' second argument, the first part of their third argument, and their fourth argument are essentially reframings of their first argument (or depend on the success of that argument) regarding whether genuine issues of material fact precluded the entry of a summary judgment in favor of FNMA.[10] We see no need to discuss those arguments in detail,

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support and adequate legal argument and, thus, without merit. As FNMA notes in its appellate brief, the Denaults' nonentity argument regarding America's Wholesale Lender repeatedly has been rejected. See, e.g., Johnson v. Nationstar Mortg., LLC, 470 S.W.3d 754, 757–58 (Mo. Ct. App. 2015) ("[T]he plain language of the Note and accompanying endorsement-in-blank unambiguously identifies America's Wholesale Lender (or, alternatively, Countrywide d/b/a America's Wholesale Lender) as the valid and authorized original holder of the Note. Accordingly, Countrywide was lawfully entitled to negotiate the Note ...."); see also Bank of New York Mellon v. Magby, 140 N.E.3d 1098, 1102 (Ohio Ct. App. 2019), and cases discussed therein.

[10]The Denaults' fourth argument is directed to the summary judgment in favor of Seterus, which is due to be affirmed, as discussed supra, and to the summary judgment in favor of FNMA. Regarding the latter, the Denaults' fourth argument is that "[t]he trial court erred by granting a summary judgment since the Denaults established a breach of contract claim against

and we reject those arguments for the reasons stated above. The second part of the Denaults' third argument is that Abeln's affidavit did not comply with Rule 56(e), Ala. R. Civ. P., and thus that FNMA

> "failed to provide any proper evidence supporting three ... material facts ...: (1) that it provided the Denaults with a proper notice of default, acceleration, and sale as required by the mortgage contract, (2) that it held the [promissory] [n]ote o[n] the date of the foreclosure, and (3) that i[t] had proper authority to foreclose."

We have reviewed Abeln's affidavit and question the merits of the Denaults' argument. See, e.g., Coleman, 104 So. 3d at 201. However we pretermit discussion of this argument because, as noted above, the Denaults incorporated Jackson's affidavit in support of their arguments in response to the summary-judgment motions filed by FNMA, Seterus, and Bank of America; also, the Denaults did not file a motion to strike Jackson's affidavit in the trial court, and the Denaults have

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[FNMA] for failure to give proper notice as required by the mortgage." We construe this argument as regarding a purported affirmative defense to FNMA's claims. The Denaults attempted to file counterclaims against FNMA, but the trial court entered an order on September 23, 2015, granting FNMA's motion to strike those claims. The Denaults have not argued that the trial court erred when it struck their counterclaims against FNMA.

not challenged Jackson's affidavit on appeal. See Walker v. North Am. Sav. Bank, 142 So. 3d 590, 598 (Ala. Civ. App. 2013) (stating that the failure to file a motion to strike results in a failure to preserve a Rule 56(e) objection for purposes of appellate review). Jackson's affidavit and its supporting documents addressed the material facts that are the subject of the second part of the Denaults' third argument (as quoted above) and supported FNMA's contention that it had given proper notices to the Denaults, that FNMA was the holder of the promissory note when the foreclosure sale occurred, and that FNMA had the authority to foreclose the mortgage. Accordingly, we reject the second part of the Denaults' third argument.

The Denaults' fifth argument is that the trial court erred by denying the Denaults' motion to strike Abeln's affidavit. As noted above, however, the Denaults did not file a motion to strike Jackson's affidavit, which addresses the same matters as Abeln's affidavit, and they incorporated Jackson's affidavit in their response to the summary-judgment motions filed by FNMA, Seterus, and Bank of America. Under the circumstances, any error in the trial court's denial of

the Denaults' motion to strike Abeln's affidavit was harmless. See, e.g., Pipeline Technic, L.L.C. v. Mason, 6 So. 3d 1176, 1181 (Ala. Civ. App. 2008) (stating the general rule that an error regarding the admission of cumulative evidence is harmless error).

The Denaults' sixth argument is that the trial court erred by entering the June 2019 order without providing the Denaults with an opportunity to respond, without conducting a hearing, and without FNMA's submission of any evidence supporting the $7,502.44 damages award to FNMA. We pretermit discussion of the former two issues because the Denaults' contention regarding the lack of evidence to support the damages award is clearly correct and requires reversal of the June 2019 order.

As reflected in the discussion of the facts and procedural history above, FNMA filed a motion for the entry of a final judgment regarding its request for damages. FNMA requested that the trial court enter a judgment for "a sum certain of $7,502.44 on [FNMA's] damage claim," purportedly an amount equal to "all payments, plus interest, previously paid into [the trial court] by the Denaults." However, FNMA made

no evidentiary submission in conjunction with its motion for the entry of a final judgment that would support the conclusion that it had suffered damages in the amount of $7,502.44 as a result of the Denaults' wrongful retention of the property, and FNMA had previously submitted no evidence regarding its motion for escrow or its motion for a summary judgment that supports the conclusion that FNMA had suffered that amount of damages for wrongful retention. See quotes from Denault, supra.

In an action in the nature of an action in ejectment under Ala. Code 1975, § 6-6-280(b), "[t]he plaintiff may recover ... mesne profits and damages for waste or any other injury to the lands, as the plaintiff's interests in the lands entitled him to recover, to be computed up to the time of the verdict." See Black's Law Dictionary 41 (11th ed. 2019) (defining an "action for mesne profits" as "[a] lawsuit seeking damages suffered by a landowner ... whereby the plaintiff may recover for both the use of the land during the wrongful occupation and the costs of ejectment"). FNMA, not the Denaults, had the burden of proof as to each element of FNMA's wrongful-retention claim at trial. Accordingly, FNMA

had the burden of presenting evidence establishing the amount of mesne profits and damages to which FNMA might be entitled as a result of the Denaults' wrongful retention of the property. See Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006) (quoting Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994)) ("'The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law.'"); see also Jones-Lowe Co. v. Southern Land & Expl. Co., 18 So. 3d 362, 367 (Ala. 2009); Denmark v. Mercantile Stores Co., 844 So. 2d 1189 (Ala. 2002). The record is devoid of any such evidence, as the Denaults correctly argue. Accordingly, the June 2019 order is due to be reversed regarding the amount of damages awarded to FNMA for the Denaults' wrongful retention of the property.

Conclusion

Based on the foregoing, the summary judgment in favor of Seterus and against the Denaults is affirmed. The summary judgment in favor FNMA and against the Denaults likewise is affirmed, except regarding the amount of damages awarded to

FNMA. Because FNMA presented no evidence that would support the conclusion that the damages it incurred from the Denaults' wrongful retention of the property equaled $7,502.44, that part of the summary judgment in favor of FNMA is reversed, and the cause is remanded for a determination of FNMA's damages.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.