STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2157

Thomas R. Terres,
Appellant,

vs.

Silverius J. Schmitt,
Respondent.

Filed October 11, 2011
Affirmed
Stoneburner, Judge

Stearns County District Court
File No. 73CV097161

Thomas R. Terres, Little Falls, Minnesota (pro se appellant)

Peter Vogel, Thomas Seelen, Rosenmeier Law Office, Little Falls, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges the district court's grant of summary judgment dismissing his action to void respondent's mortgage foreclosure by advertisement. We affirm.

FACTS

Appellant Thomas Terres held himself out as a certified public accountant who prepared taxes. *State v. Terres*, Nos. A06-251, A06-1186, 2007 WL 1598746, at *1 (Minn. App. June 5, 2007), *review denied* (Minn. Aug. 21, 2007). Beginning in 1999, he encouraged his clients to invest in what turned out to be fictitious securities. *Id*. One of his victims was respondent Silverius Schmitt. Terres swindled Schmitt out of significant amounts of money over a period of years.

In February 2002, Terres gave Schmitt a mortgage on Terres's property in Albany, securing payment of $56,000 to Schmitt to dissuade Schmitt from reporting the swindle to law enforcement. Nonetheless, in December 2003, Terres was charged with numerous counts of theft and unlawful offers of securities involving several victims. He pleaded guilty to and was convicted of theft by swindle from victims including Schmitt. As a result of the conviction, Terres was incarcerated for a period of five years.

In February 2006, Terres was ordered to pay restitution in the amount of $309,298.65, including $87,827.14 to Schmitt.[1] Terres appealed the restitution order, and this court affirmed the amount as to all but $350 that is not related to this appeal. *Terres*, 2007 WL 1598746, at *3. Based on this order, restitution to Schmitt in the amount of $87,827.14 was docketed as a civil judgment against Terres.

In 2008, Schmitt attempted to foreclose the mortgage by action, but due to invalid service on Terres, Schmitt voluntarily dismissed the foreclosure action without prejudice.

[1] The amount awarded to Schmitt is consistent with his restitution affidavit and is based on $152,571 taken by Terres, less $75,790 recovered, plus interest.

The district court approved the dismissal. After Schmitt filed notice of voluntary dismissal, but before the district court issued an order of dismissal, Schmitt began a foreclosure by advertisement. The property was eventually sold by sheriff's sale. Terres was still incarcerated at this time.

On May 21, 2009, Terres sued Schmitt, alleging numerous irregularities in the foreclosure proceedings and seeking to have the mortgage foreclosure declared void. Terres only served Schmitt's attorney and never served Schmitt. Schmitt answered the complaint on June 16, 2009. On June 29, 2009, Terres moved for a default judgment on the grounds that Schmitt had failed to timely answer the complaint. The district court found that service on Schmitt was defective and denied Terres's motion.[2]

After several months of discovery, the parties filed cross-motions for summary judgment. Both parties fully participated in the hearings on the motions. The district court, in an order incorporating a detailed and thorough analysis of Terres's claims, denied Terres's motion and granted summary judgment in favor of Schmitt. This appeal followed.

D E C I S I O N

I. The district court did not err by granting summary judgment in Schmitt's favor and dismissing the case.

A. Standard of review

We review the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred

[2] Terres appealed from the district court's order denying his default-judgment motion. But this court dismissed the appeal as taken from a nonappealable order.

in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment shall be granted if 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. Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. A genuine issue of material fact does not exist when the party opposing summary judgment presents evidence that creates merely a metaphysical doubt as to a factual issue or evidence that is not sufficiently probative as to permit a reasonable person to draw a different conclusion regarding an essential element of the case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). To oppose a motion for summary judgment successfully, a party is required to "extract *specific*, admissible facts" from the record that demonstrate that a genuine issue of material fact exists. *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988).

Terres asserts that the foreclosure by advertisement is void for seven reasons, each of which was addressed by the district court. Foreclosure by advertisement is governed by Minn. Stat. §§ 580.01–.30 (2010). "Because foreclosure by advertisement is a purely statutory creation, the statutes are strictly construed. [Minnesota's courts] require a foreclosing party to 'show exact compliance' with the terms of the statutes." *Jackson v. Mortg. Elec. Reg. Sys., Inc.*, 770 N.W.2d 487, 494 (Minn. 2009) (quoting *Moore v. Carlson*, 112 Minn. 433, 434, 128 N.W. 578, 579 (1910)). If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void. *Id.*

The district court rejected each of Terres's challenges to the validity of the foreclosure by action. We address each argument below.

B. Power of attorney

Terres first argues that Schmitt's attorney lacked authority to conduct the foreclosure. Minn. Stat. § 580.05 provides that when an attorney at law is employed to conduct a mortgage foreclosure, as was the case here,

> the authority of the attorney at law shall appear by power of attorney executed and acknowledged by the mortgagee or assignee of the mortgage in the same manner as a conveyance, and recorded prior to the sale in the county where the foreclosure proceedings are had.

It is undisputed that a power of attorney, authorizing Schmitt's attorney to conduct the foreclosure, was properly executed, acknowledged, and recorded prior to the foreclosure by action. Terres argues, without analysis or citation to legal authority, that this power of attorney cannot be relied on for the subsequent foreclosure by advertisement. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating that this court declines to address allegations unsupported by legal analysis or citation). Minn. Stat. § 580.05 does not require an additional power of attorney as Terres argues. And this court declines to read into statutes provisions that the legislature purposely omits or intentionally overlooks. *Metro. Sports Facilities Comm'n v. Cnty. of Hennepin*, 561 N.W.2d 513, 516–17 (Minn. 1997).

C. Prior foreclosure by action

A foreclosure by advertisement is valid only if, among other requirements," no action or proceeding has been instituted at law to recover the debt then remaining secured

by such mortgage . . . or, if the action or proceeding has been instituted, that the same has been discontinued." Minn. Stat. § 580.02(2). The district court ruled that because the record showed that Schmitt's attempted foreclosure by action had been discontinued as of the date of Schmitt's voluntary dismissal, which was before initiation of Schmitt's foreclosure by advertisement, the requirement was met. Terres does not provide any authority or analysis to challenge this ruling. We therefore decline to address his argument that the foreclosure by action was still pending when foreclosure by advertisement was commenced, except to note that, because Schmitt never validly served Terres with the foreclosure by action, foreclosure by action was never commenced. *See Ganguli*, 512 N.W.2d at 919 n.1.

D. Notice

Terres recognizes that the notice of foreclosure by advertisement was properly published in the *Cold Spring Record*, validly commencing the proceedings. But he contends that this method of legal notice was unfair because he did not have reasonable access to the *Cold Spring Record* while he was incarcerated and therefore had no knowledge of the foreclosure. But in Minnesota, foreclosure by advertisement is a creature of statute. *Beecroft v. Deutsche Bank Nat. Trust Co.*, 798 N.W.2d 78, 82 (Minn. App. 2011) (citing Minn. Stat. § 580.02). Therefore, Terres's argument, based purely on equity, is unavailing. *See Guzman ex rel. Losoya v. US West, Inc.*, 667 N.W.2d 489, 493 (Minn. App. 2003) (stating that this court is "not empowered to overrule or disregard a legislative enactment simply because it is unfair or inequitable").

And the statutes governing foreclosure by advertisement do not require a mortgagor's actual knowledge of the foreclosure sale. Minn. Stat. §§ 580.01–.30. Again, Terres provides no legal authority to support his assertion to the contrary, and we decline to address it further. *See Ganguli*, 512 N.W.2d at 919 n.1.

E. Amount owed on the mortgage

Terres argued to the district court that the foreclosure by advertisement is invalid for failure to provide notice of the correct amount due or claimed to be due as required by Minn. Stat. § 580.04 (a)(3). The argument is based on Terres's assertion that Schmitt was obligated to apply $50,000 of the amount he recovered to the debt secured by the mortgage, such that, on the day that the notice of foreclosure by advertisement was published, the amount due on the mortgage was only $6,000 plus interest.

The district court rejected Terres's argument, citing numerous cases supporting Schmitt's argument that he was entitled to apply recovered funds to the unsecured part of Terres's restitution debt. And the district court correctly concluded that Terres could not collaterally attack the amount of the restitution judgment that established the amount of Terres's debt to Schmitt. *See Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613 (Minn. 1988) (stating that collateral estoppel applies where the issue is identical to one in prior adjudication, there was a final judgment on the merits, the estopped party was party to the prior adjudication, and the estopped party was given full and fair opportunity to be heard on the adjudicated issue).

On appeal, the only argument Terres makes regarding this issue is

> The [District] Court has decided that since the $50,000 paid by [Terres] to [Schmitt] will not be applied to the mortgage debt owed, which is the most plausible/equitable method, all the arguments by [Terres] fall. It is true that the improper application of funds paid to [Schmitt] would greatly effect [sic] these proceedings; however, [Schmitt] has applied funds issued in the past under the exact same circumstances.[3]

An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived on appeal unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)). Due to inadequate briefing, we conclude that this issue is waived on appeal.

F. Other summary-judgment arguments

Terres refers to "numerous violations of statutory law regarding provisions of Minnesota Statutes Chapters 580, 581, and 582." To the extent that Terres attempts to raise additional summary-judgment issues, he has not briefed the issues and therefore waives this court's consideration of those matters. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

II. The district court did not abuse its discretion by failing to grant Terres a default judgment.

"The decision to grant or deny a motion for a default judgment lies within the discretion of the district court, and this court will not reverse absent an abuse of that

[3] Terres refers to a cashier's check to Schmitt dated November 30, 2000, with "non-taxable return of loan princ." typed on the memo line.

discretion." *Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005). Terres argues that the district court should have granted his motion for a default judgment due to Schmitt's failure to timely answer the complaint. Minn. R. Civ. P. 12.01 provides that a "[d]efendant shall serve an answer within 20 days after service of the summons upon that defendant." But Schmitt's answer was not untimely. Terres failed to properly commence his lawsuit by personally serving Schmitt and, therefore, the 20-day period for filing an answer never began to run. The district court did not err in concluding that service on Schmitt's attorney was defective and did not start the lawsuit or trigger the 20-day deadline to answer. Therefore, the district court did not abuse its discretion by failing to grant a default judgment in Terres's favor based on the alleged untimeliness of Schmitt's answer.

III. Terres's other arguments lack merit.

Terres asserts that he "believes that [the district-court judge's] views on denying [his] request for summary judgment w[ere] biased." But Terres's belief is based only on the district court's rulings that were adverse to him. And adverse rulings are insufficient to demonstrate bias. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). Terres has failed to demonstrate that the district court was biased against him.

Terres also asserts that he was not given "a fair chance to contest the amount of restitution entered against him." But, as noted above, Terres cannot collaterally attack the restitution judgment in this action. Furthermore, the record supports the district court's finding that Terres had ample opportunity to contest the amount of restitution

owed to Schmitt in the restitution hearing and when he appealed the restitution order to this court.

Affirmed.