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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1081**

Doris Ruiz,  
Appellant,

vs.

1st Fidelity Loan Servicing, LLC,  
Respondent.

**Filed March 12, 2012  
Reversed and remanded  
Larkin, Judge**

Hennepin County District Court  
File No. 27-CV-11-2667

Jonathan L. R. Drewes, Michael J. Wang, Drewes Law, PLLC, Minneapolis, Minnesota  
(for appellant)

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Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Cleary,  
Judge.

**UNPUBLISHED OPINION**

**LARKIN**, Judge

Appellant challenges the district court's award of summary judgment for  
respondent, arguing that the district court erroneously concluded that respondent's

foreclosure by advertisement was valid despite respondent's failure to strictly comply with certain statutory requirements. Because Minnesota Supreme Court precedent requires strict compliance with statutory requirements in a foreclosure by advertisement and because there are genuine issues of material fact regarding appellant's unlawful-eviction claim, we reverse and remand.

## **FACTS**

On June 30, 2005, appellant Doris Ruiz executed a mortgage on a duplex located in Minneapolis. By September 2008, appellant had failed to make payments on the underlying debt and defaulted on the mortgage. On September 21, 2009, the mortgage was assigned to respondent 1st Fidelity Loan Servicing, LLC. Respondent recorded the mortgage assignment on November 17. But the recording identified respondent as 1st Fidelity instead of 1st Fidelity Loan Servicing, LLC. Later, respondent initiated a foreclosure by advertisement.

Beginning on May 18, 2010, respondent published a notice of foreclosure sale for six consecutive weeks in a designated legal newspaper. On that same day, respondent filed a foreclosure-pendency notice with the Hennepin County Recorder and re-recorded the September 2009 mortgage assignment to accurately state respondent's legal name as 1st Fidelity Loan Servicing, LLC. A foreclosure sale was held on November 30,<sup>1</sup> and respondent purchased the property. Appellant failed to redeem the property, and the redemption period expired on January 4, 2011.

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<sup>1</sup> The foreclosure sale was originally scheduled for June 30, 2010, but appellant filed an affidavit to postpone the sale for five months in exchange for reduction of the redemption period from six months to five weeks.

After the redemption period expired, a real estate agent visited the property at respondent's request. The agent concluded that although appellant continued to occupy the lower unit of the duplex, the upper unit was vacant. The agent executed an affidavit stating that the upper unit was dark and free of typical signs of occupancy, such as items in the window.

Based on the agent's representations, respondent hired a handyman to change the locks to the upper unit. The handyman executed an affidavit stating that he changed the locks on the front and back doors. The affidavit states that he only saw a chair, a plant stand, and a few miscellaneous items in the unit; he did not observe a television, entertainment center, dishes in the kitchen, or any of the "usual items one would see in an occupied residence"; the items that were in the unit were disorganized; the counters were clear of items associated with residency such as soap dispensers; and no mail or newspapers were visible in the unit. Based on his observations, he concluded that no one resided in the upper unit.

After discovering that the locks to the upper unit had been changed, appellant called the real estate agent. The agent asserts that appellant was "quite angry" and would not allow him "to get a word in to the conversation." The agent called appellant back and left her a voicemail, offering to provide her with a key to the upper unit. Appellant did not respond to the voicemail. Instead, appellant forcibly entered the upper unit, damaging the door and doorframe in the process.

Appellant filed suit against respondent on February 3, seeking a declaration that the foreclosure sale was "null and void" because respondent failed to strictly comply with

the statutes that govern a foreclosure by advertisement. Appellant asserted three instances of inadequate compliance: failure to accurately record the September 2009 mortgage assignment prior to publication of the foreclosure notice; failure to record the foreclosure-pendency notice prior to publication of the foreclosure notice; and failure to provide appellant with a pre-foreclosure counseling notice. Appellant also asserted wrongful-eviction and quiet-title claims, seeking monetary damages on the wrongful-eviction claim and “[j]udgment quieting title to the Subject Property in [appellant]’s name” on the quiet-title claim. Respondent moved to dismiss, or in the alternative for summary judgment, all of appellant’s claims. Appellant moved for summary judgment on her invalid-foreclosure and quiet-title claims. The district court denied appellant’s motion but awarded summary judgment for respondent, dismissing all of appellant’s claims with prejudice. This appeal follows.

### **DECISION**

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.”

*DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[T]he party resisting summary judgment must do more than rest on mere averments.” *Id.*

“[Appellate courts] 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) (citation omitted). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio*, 504 N.W.2d at 761.

## I.

Appellant argues that the foreclosure is void because respondent failed to strictly comply with certain statutory requirements. Respondent argues, and the district court agreed, that respondent substantially complied with the statutes and that substantial compliance is sufficient. We disagree.

In 1910, the Minnesota Supreme Court adopted a strict-compliance standard in foreclosure-by-advertisement proceedings, stating:

Foreclosure by advertisement is purely a statutory creation. One who avails himself of its provisions must show an exact and literal compliance with its terms; otherwise he is bound to profess without authority of law. If what he does failed to comply with the requirements of the statute, it is void.

*Moore v. Carlson*, 112 Minn. 433, 434, 128 N.W. 578, 579 (1910). The supreme court has recently reiterated this strict-compliance requirement, citing *Moore* for the principle that “[u]nder Minnesota law, a foreclosure by advertisement—non-judicial mortgage foreclosure—is only valid if the party seeking to foreclose the mortgage meets certain

statutory requirements.” *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 492 (Minn. 2009). The legal question in *Jackson* was “what constitutes an assignment of a mortgage within the meaning of Minnesota’s foreclosure by advertisement statutory scheme.” *Id.* at 489. In resolving this question, the supreme court reviewed the history of Minnesota’s foreclosure-by-advertisement statutes and explained that:

Foreclosure by advertisement was developed as a non-judicial form of foreclosure designed to avoid the delay and expense of judicial proceedings. Because foreclosure by advertisement is a purely statutory creation, the statutes are *strictly construed*. We require a foreclosing party to show *exact* compliance with the terms of the statutes. If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void.

*Id.* at 494 (emphasis added) (quotations and citations omitted).

*Jackson* concluded with a statement that “[a]s a court that reviews and interprets the laws of this state, we must apply the foreclosure by advertisement statutes as they have been written by the legislature and as they have been applied and interpreted in the past.” *Id.* at 502-03. The supreme court’s statements regarding the strict-compliance standard, although dicta, are entitled to “great weight.” *In re Wylde*, 454 N.W.2d 423, 425 (Minn. 1990); see *Simons v. Shiltz*, 741 N.W.2d 907, 910 (Minn. App. 2007) (relying on dicta in a supreme court opinion), *review denied* (Minn. Feb. 19, 2008). Moreover, the statements provide no indication that the court is willing to depart from the standard that it adopted in 1910.

Despite the supreme court's recent reiteration of the strict-compliance requirement, the district court accepted respondent's arguments that substantial compliance with foreclosure-by-advertisement statutory requirements is nonetheless sufficient. The district court reasoned: "Although [appellant]'s reading of *Jackson* is technically correct, [appellant] does not take into account the entire context of decisions concerning foreclosure and real property, and that minor errors should not and do not invalidate a foreclosure."

In concluding that substantial compliance is sufficient, the district court relied on *Hudson v. Upper Mich. Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925), *Sieve v. Rosar*, 613 N.W.2d 789 (Minn. App. 2000), and *State by Spannaus v. Dangers*, 368 N.W.2d 384 (Minn. App. 1985), *review denied* (Minn. Aug. 20, 1985). This reliance was misplaced. Although language in *Hudson* is inconsistent with the strict-compliance standard, *see Hudson*, 165 Minn. at 174, 206 N.W. at 45 ("Whether a sale on the foreclosure of a mortgage pursuant to a power of sale is void or voidable by reason of an irregularity in the proceedings depends upon the nature of the irregularity."), *Hudson* does not provide a basis to reject the supreme court's much more recent reiteration of the strict-compliance standard in *Jackson*. And *Rosar* and *Dangers* are factually distinguishable and therefore not on point. *See Rosar*, 613 N.W.2d at 793 (requiring only substantial compliance to effect a valid redemption after a foreclosure sale); *Dangers*, 368 N.W.2d at 386 (requiring only substantial compliance in condemnation proceedings).

The district court also reasoned that "[i]n the foreclosure and real property context, [appellant]'s reliance on *Jackson* and the standard of strict compliance is inflexible and

does not correspond to the reality of the foreclosure process.” But the supreme court clearly requires strict compliance with the foreclosure-by-advertisement statutes, and “[t]he district court, like this court, is bound by supreme court precedent.” *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). We therefore review respondent’s foreclosure by advertisement for strict compliance with the relevant statutory requirements.

#### *Recording of the Mortgage Assignment*

Minn. Stat. § 580.02 (2010) requires that all assignments of a mortgage be recorded as “a condition precedent to the right to foreclose by advertisement.” *Jackson*, 770 N.W.2d at 497. “[P]roceedings to foreclose a real estate mortgage by advertisement shall be deemed commenced on the date of the first publication of the notice of sale.” Minn. Stat. § 541.03, subd. 2 (2010).

The mortgage in this case was assigned to respondent in September 2009, and the assignment was recorded on November 17. But this recording inaccurately stated respondent’s legal name. The notice of foreclosure sale was published on May 18, 2010. On May 18, respondent once again recorded the September 2009 mortgage assignment to correct the inaccuracy in the first recording. Appellant argues that because respondent did not accurately record the mortgage assignment prior to publishing the notice of sale, the foreclosure is invalid. Respondent counters that the November 2009 recording was sufficient and that it only re-recorded the assignment “out of an abundance of caution.” But respondent offers no legal argument or authority indicating that the first recording was legally sufficient even though it inaccurately stated the assignee’s legal name. And

the second recording was untimely under Minn. Stat. § 580.02. Because respondent failed to strictly comply with section 580.02, “the foreclosure proceeding is void.” *Jackson*, 770 N.W.2d at 494.

*Recording of the Notice of Pendency*

A person foreclosing a mortgage by advertisement shall record a notice of the pendency of the foreclosure with the county recorder or registrar of titles in the county in which the property is located before the first date of publication of the foreclosure notice but not more than six months before the first date of publication.

Minn. Stat. § 580.032, subd. 3 (2010).

Appellant argues that respondent failed to satisfy this requirement, because it recorded the notice of pendency on the first date of publication. The district court disagreed, relying on a substantial-compliance standard. The district court reasoned that “[respondent] sent the Notice of Pendency for recording on May 14, 2010 by personal courier and attempted to have the Notice of Pendency recorded prior to the first date of publication.” But the date that respondent attempted to record the notice is irrelevant. *See Jackson*, 770 N.W.2d at 494 (stating that the supreme court requires “a foreclosing party to show exact compliance with the terms of the statutes” (quotation omitted)). Because respondent failed to strictly comply with section 580.032, subd. 3, “the foreclosure proceeding is void.” *Id.*

Having concluded that respondent’s foreclosure by advertisement is void for failure to strictly comply with sections 580.02 and 580.032, we reverse the district court’s summary-judgment dismissal of appellant’s claims under these sections. And we remand

for entry of judgment for appellant on these claims, as well as on her quiet-title claim. It is therefore unnecessary to review the district court's dismissal of appellant's claim that the foreclosure is void because respondent did not provide appellant with a pre-foreclosure counseling notice under Minn. Stat. § 580.021, subd. 2 (2010).

## II.

Appellant argues that respondent wrongfully evicted her from the upper unit of the property, asserting that because the upper unit was not vacant, respondent was not authorized to change the locks to the unit. *See* Minn. Stat. § 582.031, subd. 1(a) (2010) (“If premises described in a mortgage or sheriff’s certificate are vacant or unoccupied, the holder of the mortgage or sheriff’s certificate or the holder’s agents and contractors may enter upon the premises to protect the premises from waste and trespass, until the holder of the mortgage or sheriff’s certificate receives notice that the premises are occupied.”). The district court granted summary judgment because “[a]lthough [appellant] denies that the Upper Unit was vacant, she does not adequately rebut [respondent]’s evidence. Essentially, [appellant]’s evidence is conclusory in nature, and she has not pointed to any specific, admissible facts in the record to overcome [respondent]’s assertions or the standard for summary judgment.” We disagree.

Appellant’s affidavit states: “When speaking with [respondent’s real estate agent] . . . in January 2011, I specifically told him that my family occupies both units in the duplex. . . . Upon the contractor’s entry into the property, furniture, clothes, and all normal items demonstrating occupancy would have been readily apparent to the intruding contractor.” Appellant also submitted utility bills showing gas and electricity usage at the

unit. Appellant’s affidavit is no more conclusory than the affidavits that respondent submitted in support of summary judgment. Moreover, the real estate agent’s affidavit acknowledges that appellant informed him, before respondent changed the locks, that “her family had a right to have access to both upper and lower units.” On this record, there is a genuine issue of material fact regarding whether the upper unit was “vacant or unoccupied” under Minn. Stat. § 582.031, subd. 1(a).

The district court also reasoned that “even if . . . there remains a genuine issue of material fact that is in dispute,” it could not “ignore the actions of [appellant] in this matter” in re-entering the upper unit because neither party is entitled to self-help. In arriving at this conclusion, the district court appears to have weighed the evidence, which is not permitted on summary judgment. *See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) (“It is axiomatic that on a summary judgment motion a court may not weigh the evidence or make factual determinations, but must take the evidence in a light most favorable to the nonmoving party.”). We therefore reverse the district court’s award of summary judgment to respondent on appellant’s wrongful-eviction claim and remand for further proceedings on this claim.

**Reversed and remanded.**

Dated:

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Judge Michelle A. Larkin