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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-470**

Athena Holmer, et al.,
Appellants,

vs.

U. S. Bank, National Association, as trustee,
in trust for the benefit of the Holders of SerVertis Fund I Trust 2008-1,
Respondent.

**Filed January 3, 2012
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CV-10-14648

Marcus A. Jarvis, Jarvis & Associates, P.C., Burnsville, Minnesota (for appellants)

James A. Sanford, Spencer J. Seamans, Stephenson, Sanford & Thone, PLC, Wayzata,
Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Harten,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

In this mortgage-foreclosure dispute, appellant-mortgagors argue that the district court erred by dismissing their notice of lis pendens before all issues relating to the property were resolved, that this court should reconsider its order limiting the scope of appeal, and that the denial of their motion for summary judgment should be immediately appealable because the issues relating to respondent-mortgagee's standing to foreclose the mortgage have been resolved. We affirm.

FACTS

In 2007, appellants Athena Holmer and Phillip Holmer executed an adjustable-rate note in the amount of \$411,350 in favor of Lehman Brothers Bank. The note was secured by a mortgage on appellants' residential property in Brooklyn Park. Appellants executed the mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), which was operating as nominee for Lehman, the mortgagee. In September 2009, the mortgagee's interest was assigned to respondent U.S. Bank, NA, as trustee for the benefit of holders of SerVertis Fund I Trust 2008-1. When appellants defaulted on the mortgage, respondent began foreclosure proceedings by advertisement. In December 2009, respondent purchased the property at the sheriff's foreclosure sale.

One day before the expiration of the statutory redemption period, appellants filed a complaint in district court, seeking, among other remedies, damages and to set aside the foreclosure sale. Appellants alleged several claims, including that the note and mortgage amounted to contracts of adhesion; that the foreclosure process involved a fraudulent

copy of the note; that respondent was not the holder in due course of the note, so that the mortgage assignment may have been invalid and respondent lacked authority to foreclose on the mortgage; and that various federal consumer and criminal statutes were violated. Appellants also filed a notice of lis pendens. Respondent filed an answer denying the allegations and asserted a counterclaim for slander of title, alleging that the notice of lis pendens contained false statements made with reckless disregard for their truth.

Both parties filed motions to dismiss or, in the alternative, for summary judgment. In February 2011, the district court issued an order granting respondent's motion for summary judgment in part and denying appellants' motion for summary judgment. The district court concluded that no genuine issues of material fact existed as to appellants' claims relating to fraud, respondent's authority to foreclose on the note, or any statutory violations. The district court, however, denied summary judgment on respondent's counterclaim for slander of title. The district court also ordered the discharge of the notice of lis pendens. Although partial judgment was entered, the order contained no language stating that there was no just reason for delay in entering judgment to allow immediate appeal of a partial judgment under Minn. R. Civ. App. P. 104.01, subd. 1. In March 2011, after the parties stipulated to the dismissal of respondent's counterclaim, the district court issued an order and judgment dismissing that claim without prejudice.

Appellants sought relief from this court, which questioned jurisdiction because the district court's February order directing judgment did not contain the express determination that there is no just reason for delay. Upon the parties' submissions, this

court issued an additional order, ruling that the issue on appeal was limited to the order discharging the notice of lis pendens.

DECISION

I

At the outset, respondent argues that, because appellants failed to timely appeal the district court's March 2011 dismissal of its counterclaim for slander of title, the notice of lis pendens is no longer effective, and this appeal is moot. The doctrine of mootness requires appellate courts to "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). An issue may be dismissed as moot "[i]f an appellate court is unable to grant effectual relief." *Chaney v. Minneapolis Cmty. Dev. Agency*, 641 N.W.2d 328, 332 (Minn. App. 2002) (quoting *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989)), review denied (Minn. May 28, 2002). A court will not deem a matter moot if the challenged issue is capable of repetition but evades review or when collateral consequences attach to the challenged decision. *In re McCaskill*, 603 N.W.2d at 327. Mootness is "a flexible discretionary doctrine." *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quotation omitted).

A judgment is not "final," and therefore not appealable, unless "the matter is conclusively terminated so far as the court issuing the order is concerned." *Morey v. Indep. Sch. Dist. No. 492*, 268 Minn. 110, 112–13, 128 N.W.2d 302, 305 (1964). The record reflects that the March 2011 judgment dismissed without prejudice respondent's counterclaim for slander of title based on false statements in the notice of lis pendens. The district court's judgment dismissing respondent's counterclaim without prejudice is

not a final order because respondent may reassert that claim in a future lawsuit. *See In re Trusteeship of Williams*, 591 N.W.2d 743, 750 (Minn. App. 1999) (concluding that language in district court’s order dismissing claim without prejudice indicated that dismissal did not bar subsequent lawsuit on same claim). Therefore, the district court’s discharge of the notice of lis pendens may have collateral consequences, and we decline to apply the doctrine of mootness.

II

A notice of lis pendens may be filed with the county recorder in “all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought in question by either party.” Minn. Stat. § 557.02 (2010). The purpose of a notice of lis pendens is to inform purchasers and others with an interest in the property of a pending action that affects the filing party’s rights or equities in the property. *Id.*; *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 158 (Minn. 2007). The vitality of a notice of lis pendens depends on a claim of an interest in real estate. *Painter v. Gunderson*, 123 Minn. 342, 343, 143 N.W. 911, 912 (1913).

A party who “claim[s] any title or interest in or to the real property involved or affected may” seek an order discharging the notice of lis pendens “in the county in which the action is pending or in which the real property involved or affected is situated.” Minn. Stat. § 557.02. Absent disputed facts, this court reviews for legal error the basis on which a notice of lis pendens was discharged. *See, e.g., Grace Dev. Co. v. Houston*, 306 Minn. 334, 336, 237 N.W.2d 73, 75 (1975) (reviewing vendor’s lien on which notice of

lis pendens was based); *Nelson v. Nelson*, 415 N.W.2d 694, 697–98 (Minn. App. 1987) (reviewing mechanic’s lien on which notice of lis pendens was based).

The district court discharged the notice of lis pendens after concluding that appellants failed to show the existence of genuine issues of material fact as to claims that respondent had committed fraud, lacked authority to foreclose the mortgage, and violated various consumer-protection and criminal statutes. Among other arguments, appellants asserted that, when the note and mortgage were sold on the secondary market, it was unclear whether MERS received an assignment of both the mortgage and the note, and the mortgage could not be enforced without the note to provide a basis for foreclosure. The district court, however, correctly noted that, by statute, only the assignment of the mortgage interest, not the assignment of the note, must be recorded before foreclosure by advertisement. *See Jackson v. Mtg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 501 (Minn. 2009) (concluding that under Minn. Stat. § 507.413(a) (2008), nominee mortgagee was not required to record assignment of underlying indebtedness to begin foreclosure by advertisement). The district court concluded that summary judgment was appropriate because appellants produced no evidence that respondent failed to comply with the statutory requirements for a valid mortgage foreclosure by advertisement. *See* Minn. Stat. § 580.02 (2010) (stating requirements for foreclosure by advertisement); Minn. Stat. § 580.19 (2010) (stating that sheriff’s certificate of sale provides prima facie evidence of compliance with foreclosure-sale requirements).

We agree with the district court. The district court properly rejected appellants’ argument that the use of MERS created a genuine issue of material fact as to whether

respondent had authority to foreclose on appellants' property, based on the application of *Jackson*. See *Jackson*, 770 N.W.2d at 501. Appellants failed to challenge any procedural aspects of the foreclosure sale. And appellants' additional claims of fraud and violation of consumer-protection and criminal statutes would not, even if ultimately successful, relate to appellants' interest in the mortgaged property. Therefore, after summary judgment was issued on appellants' claims, because no action remained pending relating to appellants' claimed interest in the property, the district court did not err in discharging the notice of lis pendens. See Minn. Stat. § 557.02 (stating that lis pendens serves as notice of pendency of an action that affects or involves "title to, . . . interest in or lien upon, real property").

Generally, a lis pendens continues until final judgment relating to the claimed interest in the property is entered on appeal. *Aldrich v. Chase*, 70 Minn. 243, 246, 73 N.W. 161, 162 (1897). But any error by the district court in prematurely discharging the notice of lis pendens was harmless, in view of the district court's valid conclusion that summary judgment was appropriate on appellants' claims. See Minn. R. Civ. P. 61 (harmless error is to be ignored).

Appellants seek reconsideration of this court's order limiting the scope of this appeal, arguing that this court may grant additional relief under Minn. R. Civ. P. 60.02 or on its own motion. Minn. R. Civ. P. 60.02, however, applies to the district courts, not to this court, and Minn. R. Civ. App. P. 140.01 expressly states that "[n]o petition for rehearing shall be allowed in the Court of Appeals." Therefore, we reject appellants' arguments seeking review of additional issues.

Affirmed.