STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2168

M & I Marshall Ilsley Bank,
Appellant,

vs.

Michael V. DuPont, et al.,
Defendants,

Mortgage Electronic Registration Systems,
Respondent,

Clarice Von Behren,
Respondent,

and

In the Matter of the Petitioner,
Clarice K. Von Behren.

Filed September 30, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-06-14754

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

HUDSON, Judge

On appeal from summary judgment in this lien dispute, appellant argues that the district court erred in concluding that the mortgage was satisfied in November 1997, and, therefore, appellant was precluded from foreclosing on the mortgage. Appellant also contends that the district court erred in determining that appellant was barred from asserting an interest in the encumbered property because respondent Clarice Von Behren was not a good faith purchaser of the property. Because the mortgage was satisfied in November 1997 and no longer enforceable after that date, we affirm.

FACTS

In June 1991, Michael and Mary DuPont purchased a parcel of real property located at 11521 Zion Road in Bloomington (Zion Road property). The DuPonts financed their purchase of the Zion Road property and secured repayment of their loan by a first priority mortgage granted to Metro Mortgage Corp. This mortgage was recorded on September 24, 1993. Metro Mortgage Corp. subsequently assigned the mortgage to Riggs National Bank (Riggs). The assignment was recorded on April 19, 1995.

In April 1996, the DuPonts obtained a credit or equity line from Security Mortgage and Financial Services, Inc. (SMFS). The line of credit was secured by a

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

second priority mortgage dated April 26, 1996, and recorded on July 25, 1996. SMFS subsequently changed its name to M&I Home Equity Corp. of Minnesota (M&I Home Equity) on October 1, 1997, and a copy of the name-change documents was recorded on February 21, 2003.[1]

The DuPonts refinanced their home on October 31, 1997, by granting a mortgage, recorded on January 7, 1998, to Bank One, N.A. (Bank One) with an original principal amount of $180,000. Walsh Title Services (Walsh Title) conducted the closing for the DuPonts on November 5, 1997, and handled the refinancing of the Zion Road property with regard to the Bank One mortgage. As part of the closing, Michael DuPont, in conjunction with Walsh Title, executed a notice to M&I Home Equity providing that:

> [Michael DuPont] requests that the line of credit be closed and the Satisfaction of Mortgage be forwarded to Walsh Title & Real Estate Services, Inc.
>
> [Michael DuPont] also agrees to make NO ADDITIONAL DRAWS from the line of credit and certifies to Walsh Title that no intervening draws have been made that have not been included in this payoff.

Along with the notice, a check in the amount of $41,000 was enclosed. The check, payable to "M&I," was accepted and cashed by M&I Home Equity.

On November 10, 1997, Brian Rathman of M&I Loan Servicing Center sent a letter to Walsh Title advising that "[w]e received a check in the amount of $41,000.00 intended to payoff the above referenced account for Michael & Mary DuPont, however, the amount received is insufficient to pay the loan in full." Four days later, the DuPonts

[1] For clarity, the mortgage originally granted to SMFS will be referred to as the "M&I mortgage."

tendered a check to M&I Home Equity for $354.87. This check overpaid the amount owed by the DuPonts by $36.08, and contained no instructions accompanying the payment. Although M&I Home Equity cashed the $354.87 check, it failed to close the line of credit, and in May 1998, the DuPonts borrowed additional monies from M&I Home Equity, eventually accruing a balance of $99,000.

On March 15, 1999, in preparation for dissolution, M&I Home Equity assigned all of its rights, title, and interest in the M&I mortgage to appellant M&I Marshall & Ilsley Bank (appellant) by a "Loan Assignment Agreement." On the same day the "Loan Assignment Agreement" was executed, appellant and M&I Bank, FSB, executed a "Loan Servicing Agreement," which provided, among other things, that M&I Bank, FSB, would prepare and keep books and records pertaining to the home-equity loans and receive, process, and account for customer payments. The articles of dissolution dissolving M&I Home Equity were also signed on March 15, 1999, and subsequently filed with the office of the Minnesota Secretary of State on March 24, 1999.

The DuPonts eventually began experiencing financial difficulties causing the mortgage held by Bank One and the mortgage held by Riggs to go into foreclosure. On January 16, 2002, the Bank One mortgage was foreclosed by public auction with the resulting Sheriff's Certificate of Sale recorded on February 14, 2000. Similarly, the Riggs mortgage was foreclosed by public auction on February 2, 2002, with the resulting Sheriff's Certificate of Sale recorded on February 27, 2002. The period of redemption for the Riggs mortgage was twelve months, and the period of redemption on the Bank One mortgage was six months.

After becoming aware of the Zion Road property's foreclosure status, respondent Clarice Von Behren (Von Behren) purchased the interest of Bank One, becoming their assignee to all rights, title, and interest in the property. In October 2005, Von Behren obtained two mortgages totaling $732,500 from Countrywide Bank, N.A. The mortgages were secured in the name of respondent Mortgage Electronic Registration Systems (MERS), acting solely as nominee for Countywide Bank, and were recorded on November 8, 2005.

On October 18, 2004, M&I Bank, FSB, published a notice of foreclosure of appellant's mortgage, claiming that the line of credit advanced to the DuPonts was not closed, that there were monies due thereunder, and that it held a mortgage on the Zion Road property as security through the M&I mortgage. Von Behren subsequently commenced a lawsuit to stop the M&I Bank, FSB, foreclosure. In response, M&I Bank, FSB, counterclaimed for foreclosure by action and asserted that it was the owner of the M&I mortgage. At trial, the officers of M&I Bank, FSB, and appellant testified that M&I Bank, FSB, was the holder of M&I mortgage by virtue of its merger with SMFS. The district court disagreed, issuing an order on October 21, 2005, permanently enjoining M&I Bank, FSB, from foreclosing on the M&I mortgage. A few months later, on April 13, 2006, appellant accepted an assignment in recordable form of the M&I mortgage from M&I Home Equity, which had been dissolved since 1999. On May 3, 2006, the assignment was recorded.

On June 30, 2006, Von Behren initiated a proceeding subsequent to clear the certificate of title. A month later, appellant commenced an action seeking foreclosure of

the M&I mortgage and a determination of appellant's lien. Both actions involved numerous parties. The two cases were consolidated, and all of the parties moved for summary judgment. The district court concluded that there was a "myriad" of fact issues precluding summary judgment in favor of appellant, and that there were no genuine issues of material fact with regard to the relief requested by MERS and Von Behren. The district court ruled that the DuPonts's loan secured by the M&I mortgage had been paid and satisfied, and that Von Behren was a bona fide purchaser of the Zion Road property taking title free and clear of appellant's interest because appellant's assignment of the M&I mortgage was not recorded. The district court denied the appellant's motion in its entirety and granted the summary judgment motions of MERS and Von Behren. This appeal follows.

D E C I S I O N

On appeal from a grant of summary judgment, this court inquires (1) whether there exists a genuine issue of material fact; and (2) whether the district court erred in its application of the law. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). In reviewing the record for the existence of a genuine issue of material fact, the reviewing court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.* This court reviews the district court's conclusions of law de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

I

In the order granting summary judgment, the district court stated that:

> [V]on Behren's motion for summary judgment is initially based on the allegation that the [M&I] mortgage was satisfied and the line of credit was terminated in November 1997. A payoff notice enclosing a $41,000.00 check was received and accepted by M&I Bank, FSB. In a November 10, 1997 letter, M&I Bank, FSB indicated that it had received a check in the amount of $41,000.00 which was intended to pay off the above-referenced account for [the DuPonts]. The letter indicated that the amount received was insufficient to pay the loan in full. However, it is undisputed that the DuPonts, in response to the letter, tendered the remaining balance on or about November 14, 1997. The line of credit and the mortgage were satisfied as of that date. *Butch Levy Plumbing and Heating, Inc. v. Sallblad*, 267 Minn. 283, 126 N.W.2d 380 (1964).

Appellant argues that, because the district court cited *Sallblad*, a case discussing the doctrine of accord and satisfaction, the district court apparently based its decision on an accord-and-satisfaction analysis. Appellant claims that there was no accord and satisfaction because the amount in question was not in dispute. *See Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 75 (Minn. 2000). Although the district court cited *Sallblad,* nothing in the district court's language suggests that the doctrine of accord and satisfaction was the basis for the decision. There is no analysis of the law pertaining to accord and satisfaction, nor does the memorandum even mention the word "accord." Instead, the district court's memorandum presents the relevant undisputed facts and then concludes that "[t]he line of credit and the mortgage were satisfied as of that date." Thus, we conclude that the district court did not base its decision on an accord-and-satisfaction analysis, but rather, held that the M&I mortgage

was no longer enforceable after November 1997 because the mortgage had been satisfied at that time.[2]

Appellant also argues that regardless of how the district court reached its decision, the decision was erroneous because there is conflicting evidence regarding whether the mortgage was unenforceable after 1997. Specifically, appellant contends that, as a matter of banking practice, because the mortgage secured a revolving line of credit, payment satisfying the balance owed on the account does not necessarily mean that the borrower intends to close the line of credit. Thus, although the $41,000 check sent by the DuPonts and Walsh Title on November 5, 1997 was accompanied by a request to close the account, the subsequent check for $354.87 did not include this request, and in fact overpaid the account balance, suggesting that the DuPonts changed their minds and decided not to close the account. Moreover, the DuPonts subsequently borrowed approximately $99,000 on the line of credit. Appellant concludes that the DuPonts's

[2] We reject appellant's argument that because the amount in question was liquidated or undisputed, the doctrine of accord and satisfaction is inapplicable. *See Webb Bus. Promotions, Inc.*, 617 N.W.2d at 75 (stating that Minn. Stat. § 336.3-311, which codified accord and satisfaction, was intended to include the common-law elements of accord and satisfaction); *see also Sallblad*, 267 Minn. at 290, 126 N.W.2d at 385 (stating that the common-law elements of accord and satisfaction did not discriminate between liquidated and unliquidated debt); *T.B.M. Props. v. Arcon Corp.*, 346 N.W.2d 202, 203 (Minn. App. 1984) (stating that the fact that a debt is liquidated does not preclude accord and satisfaction), *review denied* (Minn. Oct. 31, 1984). But even if the district court mistakenly based its decision on an accord-and-satisfaction analysis, we can, and do, affirm the district court on the basis that the mortgage was unenforceable after November 1997 because it was satisfied at that time. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that the district court will not be reversed if it reached the right result for the wrong reason).

actions created a genuine issue of material fact regarding the status of the M&I mortgage that secured the line of credit.

Conversely, Von Behren contends that based on the undisputed facts, the M&I mortgage was no longer enforceable after November 1997, by virtue of the DuPonts's satisfaction of the remaining balance due on the mortgage, accompanied by their request to close the line of credit and have the satisfaction of mortgage forwarded to Walsh Title.

We are not persuaded by appellant's argument. It is undisputed that the M&I mortgage secured a revolving line of credit. Consistent with the statutory language pertaining to revolving mortgages, *see* Minn. Stat. § 508.555 (2006), the M&I mortgage specifically provided:

> This mortgage is given to secure an indebtedness arising from a line of credit loan agreement or a mortgage note dated April 26, 1996, in the maximum principal amount of Ninety-Nine Thousand and 00/100 Dollars ($99,000) . . . .
>
> . . . wherein the principal balance outstanding may increase or decrease from time to time pursuant to such agreement or a mortgage note, and all subsequent lien holders shall be subordinate to the full amount of the indebtedness up to such credit loan limit plus any additional charges properly added thereto.

Thus, under the terms of the mortgage, the mere satisfaction of the indebtedness on the line of credit does not extinguish the line of credit because the borrower may decide at a later date to borrow again on the line of credit. This is distinguishable from an amortized mortgage under which the law requires that once the mortgage debt has been satisfied in full, the mortgage is completely extinguished. *See Hendricks v. Hess*, 112 Minn. 252, 256, 127 N.W. 995, 997 (1910) (stating that once a mortgage debt has been paid in full,

and evidence thereof is surrendered to the mortgagor, the mortgage is completely extinguished because it was a mere incident of the debt).

However, Minnesota law also provides that: "Upon written request, a good and valid satisfaction of mortgage in recordable form shall be delivered to any party paying the full and final balance of a mortgage indebtedness that is secured by Minnesota real estate." Minn. Stat. § 47.208, subd. 1 (2006). Consistent with section 47.208, subdivision 1, the loan agreement and promissory note attached to the M&I mortgage document provide: "TERMINATION: The obligations of the Lender to make advances may be terminated by the Borrower or any of them at any time upon written notice to the Lender, and thereafter may only be reinstated with the approval of the Lender."

Moreover, it is well settled that "the party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Here, appellant's argument relies heavily on speculative averments concerning the DuPonts's actions—averments that either ignore or minimize the documented facts in the record. It is undisputed that the DuPonts granted a third mortgage to Bank One in order to refinance their debt. At the closing on the Bank One mortgage, Walsh Title issued a $41,000 check to M&I Home Equity, along with a notice signed by Michael DuPont, stating that the payment is made to satisfy the outstanding debt and requesting that the line of credit be closed and the satisfaction of mortgage be filed. In response, M&I Home Equity sent a letter to Walsh Title on November 10, 1997, which stated: "We received a check in the amount of $41,000.00 *intended to pay off the above referenced account* for [the DuPonts], however, the amount received is insufficient to pay the loan in full. Please

contact me immediately to resolve the matter." (Emphasis added.) Michael DuPont sent a check to M&I Home Equity only a few days later covering the remaining balance on the M&I mortgage, and M&I Home Equity cashed the check and applied it to the outstanding balance. The fact that the check overpaid the amount of the indebtedness does not negate the DuPonts's satisfaction of the mortgage, nor does the DuPonts's conduct months after the November payoff have any bearing on the parties' actions in November 1997. We see no genuine issue of material fact regarding the status of the M&I mortgage; M&I Home Equity should have closed the line of credit in November 1997 and filed the satisfaction of mortgage. *See* Minn. Stat. § 47.208, subd. 1. Accordingly, the district court did not err in concluding that the undisputed evidence shows that the M&I mortgage was satisfied as of November 1997, thereby precluding appellant from foreclosing on the mortgage.

II

Appellant also argues that Von Behren was not a bona fide purchaser of the Zion Road property because she had notice that appellant was the assignee of the M&I mortgage. Because we have concluded in section I that the mortgage was satisfied as of November 1997 and no longer enforceable after that date, it is not necessary to address appellant's claim. Nevertheless, in an effort to put an end to this protracted litigation, we note that even if the mortgage was enforceable after November 1997, the district court correctly applied the law in concluding that Von Behren was a bona fide purchaser of the Zion Road property.

It is undisputed that the Zion Road property is Torrens property. Minnesota adopted the Torrens system in 1901 as an alternative to abstract property ownership "to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from any and all rights or claims not registered with the registrar of titles." *Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn. 1999) (internal quotation omitted). "Under the Torrens system, title is registered through judicial proceeding." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 230 (Minn. 2008). "[I]n order to maintain the reliability of certificates of title, certain subsequent transfers of title and changes to the certificate must be made either by court order or by approval of the examiner of titles." *Hersh Props.*, 588 N.W.2d at 734.

The Torrens Act provides that while owners of Torrens property may mortgage the land with any form of legally sufficient conveyance, only the act of registering the mortgage will actually bind or affect the land; the mortgage itself only operates as a contract between the parties and as authority to the registrar to make registration. Minn. Stat. § 508.47, subd. 1 (2006). The Act also provides that "[e]very conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded . . . shall, in like manner, affect the title to registered land if filed and registered." Minn. Stat. § 508.48 (2006). The Act further provides:

> The owner of registered land may mortgage the same by deed or other instrument sufficient in law for that purpose and such mortgage or other instrument may be assigned . . . .

> Such deed, mortgage, or other instrument, and all instruments assigning . . . the same, shall be registered and take effect upon the title only from the time of registration.

Minn. Stat. § 508.54 (2006).

Appellant argues that respondents had actual notice of appellant's interest in the Zion Road property because the Certificate of Title identified that M&I Home Equity held a mortgage. Thus, appellant contends that Von Behren was not a bona fide purchaser of the property.

To support its claim, appellant cites *In re Collier*, where the supreme court held that a purchaser of Torrens property was not a good-faith purchaser because the purchaser had actual notice of a bank's interest in the property even though the bank had mistakenly failed to file its interest in the property with the Registrar of Titles. *In re Collier*, 726 N.W.2d 799, 809 (Minn. 2007). But here, unlike the purchaser in *Collier*, Von Behren had no actual notice of appellant's interest in the Zion Road property,[3] because M&I Home Equity dissolved at or about the same time it assigned the M&I mortgage to appellant. Consequently, due diligence would have revealed only that the outstanding mortgage on the Certificate of Title was held by a dissolved company. By statute, a dissolved corporation can no longer hold any assets or interests in property. *See* Minn. Stat. § 302A.7291 (2006) (requiring a corporation to distribute all remaining assets to shareholders at time of dissolution). Therefore, respondents had no actual notice of appellant's claimed interest in the Zion Road property, and the district court correctly

[3] Notably, constructive notice would be irrelevant. *Collier*, 726 N.W.2d at 806 (stating that "[The Torrens] act abrogates the doctrine of constructive notice except as to matters noted on the certificate of title.").

applied the law in concluding that appellant was precluded from asserting its interest in the property.

Affirmed.