IN THE COURT OF APPEALS OF IOWA

No. 3-077 / 12-1454
Filed March 13, 2013

SOVEREIGN BANK,
Plaintiff-Appellee,

vs.

VERNON P. VARNER and
LYNDA K. VARNER,
Defendants-Appellants,

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., UNITED STATES OF AMERICA, STATE OF IOWA, AMERICAN EXPRESS, SELZER WERDERITSCH & ASSOCIATES and FIRST NATIONAL BANK OF OMAHA,
Defendants.

Appeal from the Iowa District Court for Johnson County, Marsha Bergan (summary judgment), Douglas Russell (foreclosure decree).

Vernon and Lynda Varner challenge the grant of summary judgment in a foreclosure action in favor of Sovereign Bank. **AFFIRMED AND REMANDED.**

Steven DeVolder of DeVolder Law Firm, Norwalk, for appellants.

James Sarcone and Kelsey J. Knowles of Belin McCormick, P.C., Todd M. Lantz of Weinhardt & Logan, P.C., Des Moines, and Kermit Anderson of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Vaitheswaran and Tabor, JJ. Mullins, J., takes no part.

TABOR, J.

Vernon and Lynda Varner challenge the grant of summary judgment in a foreclosure action in favor of Sovereign Bank. They contend Sovereign failed to make a threshold showing regarding the allegations in its foreclosure petition and that genuine issues of material fact existed at the time the court granted Sovereign's renewed motion for summary judgment.

Because the Varners did not raise any of the issues in the district court that they present on appeal, nor did the district court rule on their issues, the homeowners did not preserve error on the challenges before us. We remand the case for the district court to determine Sovereign's appellate attorney fees.

I. Background Facts and Proceedings

On February 3, 2010, Sovereign Bank filed a petition against Vernon Varner, Lynda Varner, and their creditors, seeking to foreclose on the Varners' home located at lot fourteen on Brickwood Circle Northeast in Iowa City.[1] Sovereign's petition alleges the following facts.

On August 11, 2003, the Varners made, executed, and delivered to CSMC, Inc. d/b/a Direct Mortgage Funding (CSMC) a promissory note for the principal sum of $229,600 with an adjustable rate of 6.75 percent per annum after maturity. The Varners also made, executed, and delivered to CMSC a mortgage conveying their interest in the above-listed property, recorded on August 15, 2003. Sovereign included copies of both instruments as exhibits to its

[1] In its petition Sovereign includes the following defendants as lien holders: Mortgage Electronic Registration Systems, Inc., for a $57,400 mortgage; the State of Iowa, the United States, for tax liens totaling over $300,000; American Express, for a $82,334.35 judgment plus interest; Selzer, Werderitsch, & Associates, for a $23,400 judgment plus interest; and First National Bank of Omaha, for a $15,732.94 judgment. None of these defendants were active participants in the district court or on appeal.

petition. The mortgage was eventually assigned to Sovereign Bank, though the bank did not include the assignment document as an exhibit. The Varners are now in default, and as of January 14, 2010, the balance due on the note is $229,546.46.

In the Varners' answer they largely deny Sovereign's allegations and assert several defenses.

On January 20, 2011, Sovereign moved for summary judgment. The bank's motion asserted no material fact was in genuine dispute and the Varners had no viable defense; it also referred to bank employee James McGinley's attached affidavit as proof of the veracity of the facts stated in the petition. McGinley's attached affidavit states:

> 1. That I am employed by Sovereign Bank in the foreclosure department.
> 2. That documenting mortgage payments is a regularly conducted business activity of Sovereign Bank.
> 3. That I have read the Petition for Foreclosure, Motion for Summary Judgment, and Statement of Facts believed not to be in dispute, and I know of my own personal knowledge that each and every fact therein contained is true and correct. The Defendant is in default from the May 1, 2009 Payment.
> 4. That according to the official records of Sovereign Bank kept in the ordinary course of business, as of January 10, 2011, there is a balance due on the Note and Mortgage of $253,079.58. This includes interest and advancements to said date.

In their resistance, the Varners denied Sovereign was a party in interest, alleging the notarization of the mortgage was improper. They attached their own affidavits, in which each spouse states:

> I have been given an opportunity to review Exhibit "B" to the Petition, which is a mortgage document. That document appears to contain my signature. However, I am confused by the fact that the mortgage is notarized by Janice L. Pearson, who is a notary public for the State of Illinois and who has crossed out Iowa and written in Illinois and crossed out Johnson and written in Rock Island. While I

> have difficult[y] remembering the specifics of the signing of any mortgage document, it is clear to me that I did not travel to Illinois for purposes of signing a mortgage document. On that issue my memory is very clear and confident and I would not have appeared before a notary in the State of Illinois for purposes of signing this mortgage document.

Sovereign's subsequent reply included a document showing the mortgage was assigned first from CSMC to Mortgage Electronic Registration Systems (MERS), then from MERS to Sovereign.

The district court's first summary judgment ruling found no genuine issue of material fact as to whether Sovereign was the real party in interest and holder of the Varners' mortgage: "The Varners have not set forth any specific evidentiary fact showing the existence of a genuine issue of material fact on the question of Plaintiff's ability to seek foreclosure on the mortgage, and the Varners' argument regarding Plaintiff as the real party in interest fails." The court continued: "However, the Court notes that before final judgment in favor of Plaintiff is entered, if at all, Plaintiff will be required to submit the original note, mortgage, and assignment documents, or affidavits of lost original documents, which will clearly establish Plaintiff's ownership of and right to seek foreclosure on the mortgage."

The district court ultimately denied Sovereign's motion, finding whether the mortgage and assignment documents contained defects was a contested material fact, due to the alleged invalidity of the notary public seal.

Our supreme court then decided *Freedom Financial Bank v. Estate of Boesen*, 805 N.W.2d 802, 809–10 (Iowa 2011), holding a notary's defective acknowledgement did not impact the statutory dower interest of the decedent's

wife since she did not acquire her interest in reliance of the legal title or pay valuable consideration to acquire title.

On January 18, 2012, Sovereign relied on the *Boesen* decision to renew its motion for summary judgment, arguing the holding rendered the defective notarization issue immaterial. The Varners resisted pro se.[2]

In its March 8 summary judgment ruling, the district court determined the decision in *Boesen* resolved the existing factual dispute. Because the court found no genuine issues of material fact, it granted Sovereign's motion for summary judgment. The Varners tried to appeal from the summary judgment order.

On July 9, 2012, the Iowa Supreme Court found the challenged order to be interlocutory and declined to take the appeal. Sovereign applied for default judgment against the remaining defendants and submitted an affidavit in which its attorney disclosed "[t]hat Sovereign Bank has been unable to locate the original Assignment documents." On July 30, 2012, the district court entered its decree of foreclosure in favor of Sovereign, from which the Varners now appeal.

II. Scope and Standard of Review

We review a summary judgment ruling for correction of legal error. *Nationwide Agri-Business Ins. Co. v. Goodwin*, 782 N.W.2d 465, 469 (Iowa 2010). We consider whether the moving party showed an absence of any genuine issue of material fact and established an entitlement to judgment on the merits of the case as a matter of law. *C & J Vantage Leasing Co. v. Outlook*

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[2] The Varners' attorney died unexpectedly during the course of the litigation.

Farm Golf Club, LLC, 784 N.W.2d 753, 756 (Iowa 2010); *see* Iowa R. Civ. P. 1.981(3) ("Summary judgment is properly granted when the pleadings, depositions, admissions, interrogatory answers, and any affidavits prove "that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."). In doing so we examine the evidence in the light most favorable to the nonmoving party to decide whether the moving party has met its burden. *Pavone v. Kirke*, 807 N.W.2d 828, 832 (Iowa 2011).

III. Analysis

A. Did the Varners Preserve their Claims for Appeal?

The Varners contend Sovereign failed to make an initial showing that summary judgment was appropriate as a matter of law. They also allege genuine issues of material fact remain, precluding summary judgment.

To prevail on a motion for summary judgment, a party must affirmatively establish the existence of undisputed facts that would entitle it to a particular result under our law. *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994). A moving party must first establish as an evidentiary matter the absence of any genuine issue, even if the nonmoving party fails to resist the motion. *American Telephone & Telegraph Co. v. Dubuque Commns. Corp.*, 231 N.W.2d 12, 14 (Iowa 1975); *see Mehr v. Meredith Corp*., 414 N.W.2d 339, 341 (Iowa 1987) ("In making a summary judgment decision, . . . a judge must perform 'the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). The summary disposition

should be based on evidence that a jury could not disbelieve and that would require a directed verdict for the movant. *Id.* That evidence includes admissions in the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file. *Griglione*, 525 N.W.2d at 813.

On appeal, the Varners question the authenticity of the note, mortgage, and assignment document, since none were sworn to or otherwise certified. They characterize McGinley's affidavit as "a bald statement that incorporated the conclusory allegations of the foreclosure petition with a couple of new conclusory allegations of its own." They assert because no other evidence was set forth as recognized by Iowa Rule of Civil Procedure 1.981(5), the record cannot support a summary judgment. The couple alternatively argues that even if McGinley's affidavit validated the note and mortgage, because the assignment document was submitted after the affidavit, the assignment has not been properly authenticated.

The Varners additionally argue evidence shows forgery or fraud in the legal documents generating a material issue of fact. Finally, they contest the bank's submission of an affidavit by its own attorney to establish the bank was the assignor and lost the original assignment document.

Sovereign argues the Varners failed to preserve error on any ground. The bank contends the Varners have not previously challenged McGinley's affidavit or whether Sovereign's exhibits needed to be sworn to or certified, nor have they alleged fraud or forgery in connection with the execution of the documents. Sovereign notes the Varners have not previously contested the bank attorney's affidavit of lost documents, and asserts the couple never filed a motion under

Iowa Rule of Civil Procedure 1.904(2) or otherwise brought the issues before the district court.

The Varners contend they preserved error by filing an answer to Sovereign's foreclosure petition, denying all of the bank's allegations—except for the Varners' identities and the bank's waiver of its deficiency judgment remedy. They also cite their resistances to Sovereign's original and renewed motions for summary judgment as sufficiently preserving the issues on appeal.

An issue must ordinarily be both raised and decided by the district court before we will address it on appeal. *Stammeyer v. Div. of Narc. Enforcement of Iowa Dept. of Pub. Safety*, 721 N.W.2d 541, 548 (Iowa 2006). The party objecting must inform the district court of the specific grounds for the complaint. *Schmitt v. Koehring Cranes, Inc.*, 798 N.W.2d 491, 501 (Iowa 2011). When a district court fails to rule on an issue properly raised by the party, error will be preserved only if the party originally raising the issue files a motion requesting a ruling in that regard. *Stammeyer*, 721 N.W.2d at 548.

In the context of error preservation at summary judgment, if the moving party fails to establish its claim and the district court nevertheless enters judgment, "the nonmovant must at least preserve error by filing a motion following the entry of judgment, allowing the district court to consider the claim of deficiency." *Bill Gunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197–98 (Iowa 2004). This rule of error preservation is justified by the notion that it would be fundamentally unfair to fault a district court for its failure to correctly rule on an issue it never had the opportunity to consider. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005); *see also DeVoss v. State*, 648 N.W.2d

56, 60 (Iowa 2002) ("Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable."). If the court does not rule on an issue at summary judgment and the party fails to file a motion under rule 1.904(2), we have nothing to review. *See Boesen*, 805 N.W.2d at 809.

The Varners did not challenge McGinley's affidavit before the district court. Neither did they urge the forged signature issue. Even if one could extrapolate from the Varners' resistances that they were advancing any of the arguments now on appeal, the district court did not consider them.[3] And the Varners did not file a motion under rule 1.904(2) asking the court to enlarge its findings to address those alleged deficiencies. "It is well settled a rule [1.904] motion is essential to preserve error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *Donald Newby Farms, Inc. v. Stoll*, 543 N.W.2d 289, 292 (Iowa Ct. App. 1995). Because the Varners did not preserve error on any of their appellate challenges, we affirm the rulings of the district court.

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[3] While the district court addressed the effect of a defective notary seal, nowhere did it construe the Varners' resistance as challenging their actual signatures. In the first summary judgment ruling, the court denied the bank's motion based on whether the mortgage and assignment document were defective "due to the alleged invalidity of the notary public seals." In the second ruling, the court found "the fact issue previously found to exist regarding the recording of the mortgage is resolved by the *Boesen* opinion." The court never addressed the question whether the Varners signed the mortgage, or that their signatures were forged. Nor did the court address a challenge to McGinley's affidavit or the bank's document authentication procedure.

B. Is Sovereign Entitled to Appellate Attorney Fees?

Sovereign asserts it is entitled to appellate attorney fees under the attorney fee provisions in the note and mortgage. The bank requests we either remand the case to determine the appropriate amount of fees or grant permission to file an application for attorney fees with our court.

The Varners argue because the action is for a mortgage foreclosure rather than "a monetary judgment on the purported balance owing on the note," the bank is not entitled to attorney fees.[4]

Paragraph 6 of the note dictates the consequences for a borrower's failure to pay as required. After addressing late charges for overdue payments, default, notice of default, and waiver rights of the note holder, the note includes a provision awarding attorney fees:

> (E) Payment of Note Holder's Costs and Expenses
> If the note holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Paragraph 22 of the mortgage addresses acceleration of payment and remedies for the borrower's breach. It provides: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence."

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[4] The Varners cite to Iowa Code section 654.4 (2009) in support of their argument. But that section pertains only to when a lender files separate suits, one to enforce the mortgage, and the other to enforce the note. *See* Iowa Code § 654.4 ("If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at the plaintiff's cost."). The statute does not govern the instant circumstances.

The bank's petition requests a judgment in rem against the mortgaged premises plus additional sums as "authorized by said Note and Mortgage and by Iowa law [and f]or reasonable attorney's fees upon the Note, interest and other sums advanced by the Plaintiff as set out above, and for the costs of this action."

The language reveals that Sovereign brought suit to enforce its rights under both the mortgage and the debt. A mortgagee may collect reasonable attorney fees where both documents authorize recovery and the request is raised in the petition to foreclose. *Fed. Land Bank of Omaha v. Wilmarth*, 252 N.W. 507, 511 (Iowa 1934). Moreover, where an agreement does not limit attorney fees to those incurred in district court, appellate attorney fees are also recoverable. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982); *see also Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 111 (Iowa 2011) (affirming trial attorney fees and awarding reasonable appellate attorney fees). The Varners' distinction is immaterial to bank's right to recovery.

Because we find Sovereign is entitled to appellate attorney fees and expenses, we remand for the district court to determine the proper amount. We do not retain jurisdiction.

AFFIRMED AND REMANDED.