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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1005

Matthew D. Winn, et al.,
Appellants,

vs.

Bank of New York as Successor Trustee
to JPMorgan Chase Bank,
National Association as Trustee
for the Certificate Holders Structured Asset
Mortgage II Investments, Inc., et al.,
Respondents.

Filed April 15, 2013
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV103775

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

Curtis D. Ripley, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from summary judgment in this mortgage-foreclosure dispute, appellants argue that (1) summary judgment was improper because respondents are not

entitled to judgment as a matter of law, and there are facts in dispute that preclude summary resolution; (2) the district court erred by dismissing appellants' summary-judgment motion for failing to follow the procedural requirements of Minn. R. Gen. Pract. 15.03(d); and (3) this court should not decide this appeal until the Independent Review Administrator has addressed whether appellants suffered financial injury in this case. We affirm.

FACTS

In March 2005, appellants Matthew and Lori Winn refinanced their homestead property (the property), obtaining a mortgage loan from GreenPoint Mortgage Funding, Inc. (GreenPoint). The loan was evidenced by a promissory note and secured by a mortgage on the property. The mortgage granted a security interest in the property, along with the power of sale, to respondent Mortgage Electronic Registration Systems, Inc. (MERS), as mortgagee and nominee for GreenPoint, its successors and assigns.

The mortgage was securitized, or pooled, with other mortgages and assigned to the GreenPoint MTA Trust, 2005-ARI, Mortgage Pass-Through Certificates, Series 2005-ARI (the trust). The trust is administered by a trustee pursuant to a Pooling and Servicing Agreement (PSA). The PSA governs placement of loans into the trust, servicing of the loans, and the relationships among the trustee, servicers, and other parties to the PSA.

After appellants defaulted on the loan, MERS assigned the mortgage to respondent Bank of New York as Successor Trustee to JPMorgan Chase Bank, National Association as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc., GreenPoint MTA Trust 2005-ARI, Mortgage Pass-Through Certificates, Series 2005-ARI

(Bank of New York). Bank of New York subsequently commenced foreclosure proceedings and, in July 2009, appellants received the notice of mortgage foreclosure sale, homestead designation notice, and other required foreclosure documents. The property was sold at sheriff's sale and the sheriff's certificate of sale was recorded with the Hennepin County Recorder on the same day.

Appellants failed to redeem from foreclosure, but brought an action against Bank of New York and MERS (collectively "respondents") challenging the mortgage assignment from MERS to Bank of New York and Bank of New York's standing to foreclose. Both parties then moved for summary judgment. The district court ruled that appellants "failed to comply with the procedural requirements [set forth in Minn. R. Gen. Pract. 115.03(d)] to support their motion for summary judgment, and, on that ground alone, their Motion should be denied." The district court also held that there were no genuine issues of material fact and that respondents were entitled to judgment as a matter of law. Thus, the court granted respondents' motion for summary judgment and dismissed appellants' "frivolous" amended complaint with prejudice. Appellants filed this appeal and have continued to live on the property while not having made a mortgage payment since June 2008.

D E C I S I O N

The rules governing summary judgment require a court to dismiss a claim "if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "[T]he reviewing court must view the evidence in the light most favorable to the

party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from a summary judgment, a reviewing court reviews "de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). The party opposing summary judgment must produce "substantial evidence" to show an issue of material fact. *DLH*, 566 N.W.2d at 70 (stating that "substantial evidence" refers to "legal sufficiency and not quantum of evidence"). There is no issue of material fact if 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." *Id.* at 71.

I.

Appellants argue that respondents were not entitled to judgment as a matter of law because the assignment of the mortgage from MERS to Bank of New York was invalid. Specifically, appellants contend that the mortgage assignment was defective because MERS cannot hold or assign mortgages.

We disagree. MERS's authority to assign mortgages was discussed in *Jackson v. Mortgage Elec. Reg. Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009). The supreme court in *Jackson* explained that MERS is an electronic registration system that "acts as the nominal mortgagee for the loans owned by [members of that system,]" that members of the system "include originators, lenders, servicers, and investors, [and that the system allows its members] to assign home mortgage loans [among its members] without having

to record each transfer in the local land recording offices where the real estate securing the mortgage is located." *Id.* at 490. It is because MERS internally tracks the assignments of the mortgage loans among its members while remaining the nominal mortgagee of record that transfers among MERS members need not be recorded in the local land record offices. *Id.*

The court in *Jackson* noted that this more streamlined system "improve[d] the efficiency and profitability of the primary and secondary mortgage markets," so that an originating mortgage lender may sell a mortgage loan on the secondary market to investors which could resell the loan, without the time, money and paperwork associated with recording the documents associated with each assignment. *Id.* "Once registered, MERS serves as the mortgagee of record for all loans in its system." *Id.*

The supreme court also recognized that:

> When MERS began having mortgages recorded in its name as nominal mortgagee, questions arose in certain jurisdictions as to whether MERS had the authority to act on behalf of its members. As a result of questions raised about the MERS system, the Minnesota Legislature passed an amendment to the Recording Act that expressly permits nominees to record [a]n assignment, satisfaction, release, or power of attorney to foreclose.

Id. at 491 (citations and quotations omitted). This amendment, which is frequently called "the MERS statute," provides:

> An assignment, satisfaction, release, or power of attorney to foreclose is entitled to be recorded in the office of the county recorder or filed with the registrar of titles and is sufficient to assign, satisfy, release, or authorize the foreclosure of a mortgage if:

> (1) a mortgage is granted to the mortgagee as nominee or agent for a third party identified in the mortgage, and the third party's successors and assigns;
>
> (2) a subsequent assignment, satisfaction, release of the mortgage, or power of attorney to foreclose the mortgage, is executed by the mortgagee or the third party, its successors and assigns; and
>
> (3) the assignment, satisfaction, release, or power of attorney to foreclose is in recordable form.

Minn. Stat. § 507.413(a) (2012). Therefore, under established Minnesota law, appellants' claim that MERS lacked authority to hold or assign the mortgage to another party is completely without merit.

Appellants argue that the *Jackson* decision conflicts with the Truth in Lending Act (TILA). But other than making the assertion, appellants fail to elaborate or explain how the case conflicts with TILA. It is well settled that an appellant's assignment of error based on "mere assertion" without support of legal argument or authorities "is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971); *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006) ("If the brief does not contain an argument or citation to legal authority in support of the allegations raised, the allegation is deemed waived."), *review denied* (Minn. Jan. 24, 2007). Because appellants' contention that *Jackson* conflicts with TILA is unsupported by legal argument, the issue is waived.

Appellants also contend that the mortgage assignment was invalid because the timing of the assignment violated the PSA. To support their claim, appellants focus on

the provision of the PSA that requires that an assignment generally be recorded within 180 days of the mortgages's closing date, April 29, 2005. Appellants contend that the timing was invalid because the mortgage was assigned in 2009, long after the 180 days expired.

Appellant's argument is without merit. The PSA provides in relevant part that the timing requirement applies:

> *unless* . . . MERS is identified on the Mortgage or on a properly recorded assignment of the Mortgage as the mortgagee of record solely as nominee for the Seller and its successor and assigns; provided, however, that each assignment shall be submitted for recording by the Seller . . . upon the earliest to occur of . . . the occurrence of an *Event of Default*. . . .

(Emphasis added.) Thus, under the PSA, the mortgage assignment recording need not occur within 180 days of the closing date where, among other things, the assignment is submitted for recording upon an event of default. Here, it is undisputed that the relevant assignment was recorded upon appellants' default.

Appellants further argue that summary judgment was improper because there are facts in dispute that preclude summary judgment. But appellants moved for summary judgment below, thereby asserting that no genuine issues of material fact existed on any of its claims. The supreme court has recognized that where parties have filed cross-motions for summary judgment, the appellate court may conclude that the parties have "tacitly agreed that there exist no genuine issues of material fact." *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). Thus, by moving for summary judgment below, appellants have conceded that there are no genuine issues of fact.

Moreover, by arguing on appeal that there are genuine issues of fact, appellants are presenting a new theory on appeal. It is well settled that an appellate court is not required to review new theories raised on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because appellants present a new theory on appeal, appellants' argument is waived, and we decline to consider it.

II.

Appellants challenge the district court's conclusion that their failure to follow the procedural requirements of Minn. R. Gen. Pract. 115.03(d) to support their summary judgment motion is sufficient grounds to deny the motion. As discussed above, however, the district court properly granted summary judgment in favor of respondents. Thus, we need not decide whether the denial of appellants' motion for summary judgment is an appropriate sanction for failing to comply with Minn. R. Gen. Pract. 115.03(d).

III.

After appellants filed their notice of appeal, appellants submitted a document to the Independent Foreclosure Review, an agency that was "established to determine whether eligible homeowners suffered financial injury because of errors or other problems during their foreclosure process between January 1, 2009 and December 31, 2010." Independent Foreclosure Review, https://independentforeclosurereview.com/ (last visited Feb. 12, 2013). Appellants argue that under the doctrine of exhaustion of administrative remedies, "[t]his court should allow the Independent Review Administrator the opportunity to determine if the appellants' herein have been financially

injured as a result of misrepresentations or other deficiencies during the foreclosure process." Thus, appellants argue that this court is precluded from deciding this appeal.

We disagree. Appellants did not request help from the Independent Foreclosure Review until after their notice of appeal was filed. As a result, the district court was never presented with nor considered appellants' contention that the doctrine of exhaustion of administrative remedies precludes consideration of the foreclosure issues. It is well-settled that an appellate court generally will not address arguments that were not presented to and decided by the district court. *Thiele*, 425 N.W.2d at 582. Therefore, because the issue was never presented to or decided by the district court, the issue is not properly before us. Moreover, there is nothing in the record indicating that appellants requested a stay of the appeal pending resolution of the Independent Foreclosure Review. *See Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998) (stating that parties may apply to the appellate court for a stay on the appeal to give the district court time to decide the pending post-trial motion). Accordingly, appellants have waived the issue.

Affirmed.