STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1926

Patrick Wollmering, et al.,
Appellants,

vs.

JPMorgan Chase Bank, N. A., et al.,
Respondents,

Usset, Weingarden and Liebo, P. L. L. P.,
Respondent.

Filed July 22, 2013
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-11-2383

William Bernard Butler, Butler Liberty Law, LLC, Minneapolis, Minnesota (for appellants)

Phillip James Ashfield, William Anders Folk, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondents JPMorgan, et al.)

Gerald G. Workinger, Jr., Usset Weingarden & Liebo, PLLP, Minneapolis, Minnesota (for respondent Usset, Weingarden and Liebo)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

PETERSON, Judge

Appellants-mortgagors challenge the summary-judgment dismissal of their action challenging the validity of mortgage interests asserted by respondents, arguing that (1) fact issues exist regarding whether respondents' purported interests in appellants' properties were invalidated by unrecorded mortgage assignments; and (2) the district court erred in concluding that the evidence presented by appellant-mortgagors was speculative. We affirm.

FACTS

Appellants are six homeowners who obtained loans to purchase their homes. Appellants executed promissory notes in favor of the lenders and mortgages to secure the loans. The mortgages named respondent Mortgage Electronic Registration Systems (MERS) as the mortgagee, as nominee for the lenders and their successors. The supreme court has explained that

> MERS is an electronic registration system that was created in the aftermath of the 1993 savings and loan crisis. MERS does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members. The MERS system is designed to allow its members, which include originators, lenders, servicers, and investors, to assign home mortgage loans without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located. MERS members pay subscriber fees to register on the MERS system, as well as other fees on each loan registered and each transaction conducted.

Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 490 (Minn. 2009). Respondents JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, and EMC Mortgage Corporation were involved in assignments of appellants' loans and mortgages. Respondent Usset, Weingarden and Liebo, P.L.L.P., is a law firm retained by respondents to foreclose on three of appellants' mortgages.

Wollmering mortgage

In 2004, appellants Patrick and Jacqueline Wollmering obtained a loan to purchase a home in Scott County. The Wollmerings executed a promissory note in favor of GreenPoint Mortgage Funding, Inc., and a mortgage in favor of MERS, as nominee for GreenPoint and its successors. The mortgage was recorded in Scott County on September 21, 2004. In December 2004, the Wollmerings' loan was sold to Structured Asset Mortgage Investments II, Inc. Bear Stearns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2004-13 (the Wollmering Trust). The Wollmering Trust is subject to a pooling-and-servicing agreement (PSA) among Structured Asset Mortgage Investment II Inc. (the depositor), JPMorgan Chase Bank, N.A. (the trustee), Wells Fargo Bank, N.A. (the master servicer and securities administrator), and EMC Mortgage Corporation.

The parties dispute what is required by section 2.01 of the PSA. Section 2.01 states:

> (a) [Structured Asset] concurrently with the execution and delivery of this Agreement, sells, transfers and assigns to the Trust without recourse all its right, title and interest in and to (i) the Mortgage Loans identified in the applicable Mortgage Loan Schedule . . .; (vii) the rights with respect to the GreenPoint Servicing Agreement as assigned to

> [JPMorgan Chase] on behalf of the Certificateholders by the Assignment Agreement . . . .
>
> (b) In connection with the above transfer and assignment, [Structured Asset] hereby deposits with [JPMorgan Chase], as its agent, with respect to (I) each Mortgage Loan . . .:
>
> (i) the original Mortgage Note, endorsed without recourse to the order of [JPMorgan Chase] and showing an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to [JPMorgan Chase] . . .;
>
> (ii) the original Mortgage and, if the related Mortgage Loan is a MOM Loan, noting the presence of the MIN[1] and language indicating that such Mortgage Loan is a MOM loan, which shall have been recorded . . .;
>
> (iii) *unless the Mortgage Loan is a MOM Loan*, a certified copy of the assignment . . . to "JPMorgan Chase Bank, N.A., as Trustee", with evidence of recording with respect to each Mortgage Loan in the name of [JPMorgan Case] thereon (. . . or for Mortgage Loans with respect to which the related Mortgaged Property is located in a state other than Maryland, Tennessee, South Carolina, Mississippi and Florida . . . shall be in recordable form)[.]
>
> (iv) all intervening assignments of the Security Instrument, if applicable and only to the extent available to [Structured Asset] with evidence of recording thereon. . . .

(Emphasis added.) The PSA defines a "MOM loan" as "[w]ith respect to any Mortgage Loan, MERS acting as the mortgagee of such Mortgage Loan, solely as nominee for the originator of such Mortgage Loan and its successors and assigns, at the origination thereof." Section 2.01 also requires:

> [Structured Asset] shall cause, at its expense, the assignment of the Security Instrument to [JPMorgan Chase] to be recorded not later than 180 days after the Closing Date unless . . . MERS is identified on the Mortgage or on a properly

[1] MIN is "[t]he Mortgage Identification Number for Mortgage Loans registered with MERS on the MERS System."

> recorded assignment of the Mortgage as the mortgagee of record solely as nominee for [Structured Asset] and its successor and assigns; provided, however, that each assignment shall be submitted for recording by [Structured Asset] in the manner described above . . . upon . . . the occurrence of an Event of Default[.]

The Wollmerings defaulted on their loan in December 2008. In April 2009, MERS assigned the Wollmering mortgage to JPMorgan Chase as trustee for the Wollmering trust. JPMorgan Chase recorded the mortgage assignment on May 1, 2009, and initiated a foreclosure-by-advertisement proceeding, which was dismissed pending litigation.

Bakke/Fink mortgage

In 2006, appellants Kim Bakke and Craig Fink obtained a loan to purchase a home in Cass County. Bakke and Fink executed a promissory note in favor of Mortgage and Investment Consultants and a mortgage in favor of MERS as nominee for Mortgage and Investment Consultants and its successors. The mortgage was recorded in Scott County on February 15, 2006. Mortgage and Investment Consultants assigned the Bakke/Fink loan to SouthStar Funding, and, in June 2006, the Bakke/Fink loan was sold to Structured Asset Mortgage Investments II Trust (Bakke/Fink trust), and a PSA was executed naming JPMorgan Chase as trustee. The Bakke/Fink PSA has essentially the same terms as the Wollmering PSA. Bakke and Fink defaulted in May 2009, and the loan was referred to a law firm for collection, but this action was initiated before a foreclosure proceeding was commenced.

Jasorka mortgage

In 2005, appellant Kenneth Jasorka obtained a loan to purchase a home in Hennepin County. Jasorka executed a promissory note in favor of MIT Lending and a mortgage in favor of MERS as nominee for MIT and its successors. The mortgage was recorded in Hennepin County on June 30, 2005. The promissory note was assigned to JPMorgan Chase, but the record does not show whether that was a direct assignment from MIT or whether there were intervening assignments. Jasorka defaulted in February 2010. MERS assigned the mortgage to Chase Home Finance, and Chase Home Finance recorded the assignment and initiated a foreclosure-by-advertisement proceeding, which was dismissed pending litigation.

Rashid mortgage

In 2009, appellant Hassan Rashid obtained a loan to purchase a home in Hennepin County. Rashid executed a promissory note in favor of The Business Bank and a mortgage in favor of MERS as nominee for The Business Bank. The mortgage was recorded in Hennepin County on January 16, 2009. The Business Bank assigned the note to JPMorgan Chase. Rashid defaulted in December 2009. MERS assigned the mortgage to Chase Home Finance, and Chase Home Finance recorded the assignment and initiated a foreclosure-by-advertisement proceeding. Chase Home Finance bought the Rashid property at the foreclosure sale and sold it to Federal National Mortgage Association (Fannie Mae).

Procedural history of this litigation

Appellants brought this lawsuit against respondents, alleging the following 16 counts: count I – the mortgages are invalid and unenforceable; count II – slander of title; count III – respondents are not holders in due course of the original notes; count IV – due-process violation; count V – respondents do not have legal standing to foreclose mortgages; count VI – respondents are not real parties in interest; count VII – fraud; count VIII – negligent misrepresentation; count IX – unjust enrichment; count X – declaratory judgment that original notes are void as negotiable instruments; count XI – equitable estoppel; count XII – private attorney general enforcement of Minn. Stat. §§ 357.18, 508.02, 508A.82; count XIII – third-party beneficiary; count XIV – accounting; count XV – demand to exhibit the original note; and count XVI – discharge of obligation. Underlying all of these claims is the assertion that, "[b]ecause [respondents] do not have physical possession of the Original Notes and do not have valid, clear legal title to the Original Notes, [respondents] cannot exercise the legal right to foreclose the Mortgages."

The district court denied respondents' motion to dismiss and allowed appellants to conduct discovery. Following completion of discovery, respondents moved for summary judgment on all counts. Appellants moved for summary judgment on counts I and II. Appellants opposed summary judgment only as to counts I, II, VII, and VIII. In opposing summary judgment, appellants broadened their theory of the case to argue that respondents lacked an interest in the mortgages because there were unrecorded mortgage assignments. The district court granted summary judgment for respondents. This appeal

followed. Usset filed a notice of related appeal but did not file a brief because appellants raised no issues concerning the law firm in their brief.

D E C I S I O N

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether any genuine issues of material fact exist and whether the district court erred in applying the law. *McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn. 2013). The evidence is viewed "in the light most favorable to the party against whom summary judgment was granted." *Id.*

Appellants rely on cases from the 1800s that address the defendant's burden of proof in a quiet-title action. *See, e.g.*, *Barber v. Evans*, 27 Minn. 92, 93, 6 N.W. 445, 446 (1880). Appellant's complaint, however, did not allege a quiet-title count. Notwithstanding appellants' failure to allege a quiet-title count, there are recorded assignments of the Wollmering mortgage to JPMorgan Chase, which initiated the foreclosure actions against the Wollmerings, and of the Jasorka and Rashid mortgages to Chase Home Finance, which initiated the foreclosure action against Jasorka and initiated and pursued the foreclosure action against Rashid. Appellants do not dispute that they were in default on the promissory notes or that the promissory notes were secured by the mortgages. Appellants argue that, when MERS assigned the Wollmering mortgage to JPMorgan and when Bakke and Fink defaulted in 2009, MERS no longer had an interest

in those properties because the PSAs governing the trusts required that multiple assignments of the mortgages occurred at the time the trusts were created.

Regarding the Wollmering mortgage, appellants argue:

> The PSA . . . shows that the following assignments of the mortgage occurred: Green Point Mortgage Funding (lender) → EMC Mortgage Corporation (Seller) → Structured Asset Mortgage Investments II Inc. (Depositor) → JPMorgan Chase (Trustee). This series of assignments occurred prior to the closing of the trust in late 2004. But the only of record assignment is the assignment from MERS to JPMorgan Chase in 2009. MERS had no interest in the property to convey in 2009. In order to be effective, the mortgage should have been assigned to JPMorgan Chase as trustee by Structured Asset Mortgage Investments II Inc. in 2004. There is a break in the chain of title from GreenPoint Mortgage to JPMorgan Chase as trustee and the late assignment does not cure this defect when the other assignments, tracing the chain of title to JPMorgan Chase are not of record.

Regarding the Bakke/Fink mortgage, appellants argue that the following assignments of the mortgage occurred prior to the closing of the trust in 2006: Mortgage Investment Consultants (lender) → EMC Mortgage corporation (Sponsor) → Structured Asset Mortgage Investments II Inc. (Depositor) → JPMorgan Chase (Trustee).

Although the PSAs governing the Wollmering and Bakke/Fink trusts indicate that there were multiple transfers of the promissory notes underlying the mortgages, there is no evidence that multiple mortgage assignments were required. *See Jackson*, 770 N.W.2d at 491 (noting that PSAs "suggest that when loans are transferred between MERS members, an assignment of the promissory note is executed but an assignment of the security interest is not – although the original security instrument is delivered along with the promissory note").

Appellants' argument that multiple mortgage assignments must have occurred together with the multiple transfers of the underlying promissory notes is contrary to the *Jackson* decision, in which the supreme court answered the following certified question in the negative:

> Where an entity, such as defendant Mortgage Electronic Registration Systems, Inc., serves as mortgagee of record as nominee for a lender and that lender's successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn. Stat. ch. 580?

770 N.W.2d at 489. The court explained:

> First, we conclude that the plain language of sections 580.02 and 580.04 of the foreclosure by advertisement statutes use the term mortgage to refer to security instrument assignments and not to promissory note assignments. Second, this interpretation is consistent with our longstanding principles of real property law which establish that while a promissory note assignment does constitute an equitable assignment of the security instrument, a promissory note assignment is not an assignment affecting legal title, and only assignments of legal title of the security instrument must be recorded in order to commence a foreclosure by advertisement. Thus, on the facts before us, the term mortgage as used in the foreclosure by advertisement statutes does not appear to require MERS members to record promissory note assignments before foreclosure by advertisement.

Id. at 501. Under the reasoning in *Jackson*, if MERS could foreclose on the mortgage interests it held despite multiple transfers of the underlying promissory notes, it could assign the mortgage interests it held despite multiple transfers of the underlying notes. *See also Welk v. GMAC Mortg., LLC*, 850 F. Supp. 2d 976, 989-90 (D. Minn. 2012)

(noting that MERS changed its internal rules, deciding that rather than pursuing foreclosure itself, it would transfer legal title to the mortgage to the note holder, record the assignment, and allow the note holder to pursue foreclosure).

Appellants argue that the Wollmering and Bakke/Fink mortgages were parts of trusts that required mortgage assignments according to the trust terms and that "[t]he trust documents are therefore evidence of the unrecorded assignments." Section 2.01 of the PSAs does require that Structured Asset deposit with JPMorgan Chase the original mortgage. But under the express language of the PSAs, the requirement that Structured Asset deposit a certified copy of the assignment of the mortgage to JPMorgan Chase applies "*unless the Mortgage Loan is a MOM loan*," and a Mom Loan is defined as "[w]ith respect to any Mortgage Loan, MERS acting as the mortgagee of such Mortgage Loan, solely as nominee for the originator of such Mortgage Loan and its successors and assigns, at the origination thereof." (Emphasis added.) Thus, Structured Asset was not required to deposit certified copies of assignments of the Wollmering and Bakke/Fink mortgages, which named MERS as mortgagee as nominee for the originator and its successors, and the trust documents are not evidence of unrecorded assignments.

Citing to page 27 of the appendix to their brief, appellants assert that Fannie Mae may have unrecorded interests in the Rashid and Jasorka properties. The document at pages 27 to 28 is part of appellants' memorandum to the district court opposing summary judgment, and it cites to "Butler Second Affidavit Ex. 3" to support appellants' assertion as to the Jasorka property and "Butler Second Affidavit Exs. 6 & 7" to support appellants' assertion as to the Rashid property. The document that immediately follows

the memorandum opposing summary judgment in appellants' appendix is labeled "Affidavit of William Butler" and contains attached exhibits A, B, and C, none of which indicates that Fannie Mae had a mortgage interest in either the Rashid or Jasorka properties. We have found two documents in the record labeled "Second Affidavit of William Butler," one filed March 13, 2012, and one filed March 26, 2012, neither of which contains the numbered exhibits cited in the memorandum opposing summary judgment.

The affidavit filed March 13, 2012, contains attached exhibit C, which shows the results of a search of Fannie Mae's website for the Jasorka property; exhibit F, which shows the results of a search of MERS's website for the Rashid property; and exhibit G, which shows the results of a search of Fannie Mae's website for the Jasorka property. But none of those exhibits supports appellants' claim of an unrecorded mortgage interest held by Fannie Mae. As the district court explained,

> the results of the Fannie Mae lookup do not state that Fannie Mae owns the Jasorka mortgage; they state that Fannie Mae "owns a loan" at Mr. Jasorka's address. The term "loan" suggests that Fannie Mae owned Mr. Jasorka's indebtedness. . . . To conclude based on this language that the mortgage was assigned to Fannie Mae would be "mere speculation."
>
> . . . .
>
> [Appellants] argue that there is a genuine issue as to whether unrecorded assignments of the Rashid mortgage to JPMorgan Chase and Fannie Mae exist that predate the assignment from MERS to Chase Home Finance in June 2012. Search results from a MERS loan lookup tool state that JPMorgan is the "servicer" of the Rashid loan and Fannie Mae is an "investor" as of March 13, 2012. Fannie Mae's loan lookup tool states that the company does not own a loan

> at Mr. Rashid's address as of March 13, 2012. For the same reasons discussed with respect to the Jasorka Mortgage, these documents do not suggest that there was an assignment of the actual mortgage to any of these parties.

(Citations to the record omitted.)

Again citing to page 27 of the appendix to appellants' brief, appellants argue that JPMorgan Chase may have an unrecorded mortgage interest. None of the exhibits attached to the Butler affidavits that we have identified supports this contention.

Appellants argue that Structured Asset, which was involved in the Wollmering and Bakke/Fink trusts and the sale of the promissory notes underlying the Rashid mortgage, is not a MERS member and, therefore, MERS could not have been acting as Structured Asset's nominee. *See Jackson*, 770 N.W.2d at 491 (stating that when a MERS member transfers an interest in a mortgage loan to a non-MERS member, MERS no longer acts as the mortgagee of record and an assignment of the security interest is executed and typically recorded in the local land recording office). But even if Structured Asset was not a MERS member, JPMorgan Chase was the trustee of the Wollmering and Bakke/Fink trusts, appellants concede that JPMorgan Chase is a MERS member, and there is no evidence of a mortgage assignment to Structured Asset. The PSAs provided that Structured Asset sold, transferred, and assigned all of its right, title, and interest in the mortgage loans to the trust. Consequently, any dispute between Structured Asset and an assignee of the mortgage interests or promissory notes would not affect appellants' status in foreclosure-by-advertisement proceedings. *See Jackson*, 770 N.W.2d at 501 ("In essence, any disputes that arise between the mortgagee holding legal title and the

assignee of the promissory note holding equitable title do not affect the status of the mortgagor for purposes of foreclosure by advertisement.").

Appellants argue that the district court "mistakenly relied on contract law" to support its conclusion that appellants lack standing to challenge respondents' alleged lack of compliance with the PSAs. But the Minnesota federal district court has held that mortgagors have no standing to assert claims based on violations of a PSA because mortgagors are not parties to or third-party beneficiaries of such agreements. *Karnatcheva v. JPMorgan Chase Bank, N.A.*, 871 F. Supp. 2d 834, 842 (D. Minn. 2012), *aff'd* 704 F.3d 545 (8th Cir. 2013). Also, a Michigan federal district court has held that an alleged breach of a PSA "would not render the [mortgage] assignments themselves (which are separate contracts) void." *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 717 F. Supp. 2d 724, 747-48 (E.D. Mich. 2010).

Appellants argue in their reply brief that the district court improperly applied the burden of proof by not requiring respondents to show that there were not unrecorded mortgage assignments. Appellants' argument suggests that to prove that their mortgage assignments are valid, respondents must prove that no other assignments occurred. Respondents have presented evidence that shows facially valid mortgage assignments, appellants were afforded the opportunity to conduct discovery "to flesh out whether [respondents] are valid assignees to a properly perfected mortgage," and, in the case of the Wollmering and Bakke/Fink properties, appellants' argument that the mortgage interests were required to be transferred to the trust for the trust to be effective is contrary to the express language of the PSAs as well as to the *Jackson* court's construction of

statutes governing foreclosure by advertisement and its explanation of the operation of PSAs.

A party referring to any part of the record must provide this court with a citation to the record, or to an addendum or appendix if reproduced therein. Minn. R. Civ. App. P. 128.03. Appellants have cited this court to no evidence supporting their claims of unrecorded mortgage interests, and we have found no such evidence in our independent review of the record. Accordingly, there is no basis for this court to reverse the district court's grant of summary judgment for respondents.

Affirmed.