STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0387

In re the Matter of the Petition of
Mortgage Electronic Registration Systems, Inc.,

Mortgage Electronic Registration Systems, Inc., petitioner,
Respondent,

vs.

John Souza,
Appellant.

Filed October 29, 2012
Affirmed
Cleary, Judge

Hennepin County District Court
File No. 27-ET-CV-09-482

Curtis D. Ripley, Peter J. Schwingler, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondent)

John Souza, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Chutich, Presiding Judge; Schellhas, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellant challenges the district court's judgment denying his motion for summary judgment, granting respondent's motion for summary judgment, and ordering

the Registrar of Titles to cancel the certificate of title issued in appellant's name and to enter a new certificate of title. We affirm.

FACTS

In August 2005, appellant John Souza executed a note for a loan of $183,200 in favor of Irwin Mortgage Corporation (Irwin). The loan was secured by a mortgage on real property located in Minneapolis. Souza mortgaged the property to respondent Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Irwin and Irwin's successors and assigns. In December 2005, the mortgage was filed with the Office of the Registrar of Titles in Hennepin County.

MERS claims that Souza stopped making payments on the loan in November 2007, and MERS commenced a foreclosure-by-advertisement proceeding in the spring of 2008. MERS executed a power of attorney designating the law firm of Shapiro, Nordmeyer & Zielke, LLP, to execute the foreclosure. The power of attorney was executed by MERS representative Liquenda Allotey. A sheriff's sale of the property was held in April 2008. MERS purchased the property, and a sheriff's certificate of foreclosure sale was completed. Souza did not redeem the property during the six-month redemption period.

Shari Middlebrooks was a senior research specialist with JP Morgan Chase Bank, N.A. (Chase Bank). In her capacity at Chase Bank, Middlebrooks had access to the historical records of EMC Mortgage, LLC, formerly known as EMC Mortgage Corporation (EMC), the servicer of Souza's loan. In an affidavit, Middlebrooks swore that the customer account activity statement (loan statement) for Souza's loan indicates

that Souza last made a payment on the loan in November 2007, that the check for that payment was returned, and that no further payments were submitted. A copy of the loan statement was attached to Middlebrooks's affidavit and includes information about when loan payments were made.

Souza responded to MERS's contention alleging that he was in default by stating that "no such contention has been made." Souza later stated that he was "not aware of a default," and that "no party thus far identified appears to have had a rightful claim to declare a default even if such a party existed." Souza argued that: MERS did not show that he defaulted on the loan because it did not present a competent fact witness to prove the default; there was no basis to know whether Middlebrooks's affidavit was based on personal knowledge; and the loan statement accompanying Middlebrooks's affidavit was inadmissible hearsay.

In February 2009, MERS conveyed the property by quit-claim deed to JP Morgan Chase Bank, National Association, as Trustee for Certificateholders of Bear Stearns ALT-A Trust, Mortgage Pass-Through Certificate, Series 2006-2 (Chase).[1] Chase conveyed the property by limited warranty deed to Rodney Crooks the same day. In May 2009, Crooks conveyed the property by warranty deed to Joel and Kristy Gatheridge. On the same day, the Gatheridges mortgaged the property to MERS as nominee for their lender.

[1] It appears from the record, the district court's memorandum, and Souza's brief that MERS informed Souza that Chase was the owner of the note at the time of foreclosure.

MERS filed a petition in district court to cancel the certificate of title entered in Souza's name and enter a new certificate of title in MERS's name. The court ordered Souza and Irwin to show cause why it should not grant MERS's petition. Souza answered, arguing that MERS did not have standing to foreclose; that he had not received notice of the foreclosure sale; and that MERS had not presented any competent fact witnesses.

Souza and MERS both moved for summary judgment. The district court granted MERS's motion for summary judgment, denied Souza's motion for summary judgment, and ordered the Registrar of Titles to cancel the certificate of title issued in Souza's name and to enter a new certificate of title. This appeal followed.

D E C I S I O N

On appeal from summary judgment, an appellate court reviews de novo whether any genuine issue of material fact exists and whether the district court erred in its application of the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). A motion for summary judgment will be granted 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. "Evidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial." *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991).

In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the party against whom judgment was granted. *Lyman Lumber Co. v. Cornerstone Constr., Inc.*, 487 N.W.2d 251, 254 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992).

A party cannot defeat a motion for summary judgment with "unverified and conclusory allegations or by postulating evidence that might be developed at trial." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). A party opposing summary judgment must do more than show that there is some "metaphysical doubt" as to the material facts and must not rest on mere averments. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70–71 (Minn. 1997). "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

I.

Souza argues that MERS did not have the authority to foreclose by advertisement on his property under Minn. Stat. § 580.02 (2006). The statutory requirements for foreclosure in effect at the time of this foreclosure were:

> (1) that some default in a condition of such mortgage has occurred, by which the power to sell has become operative;
>
> (2) that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof, or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part;
>
> (3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been

> recorded; provided, that, if the mortgage is upon registered land, it shall be sufficient if the mortgage and all assignments thereof have been duly registered.

Id.[2]

A.

Souza first contends that the requirements under Minn. Stat. § 580.02 were not met because there was not sufficient evidence to demonstrate that he defaulted on the loan. He does not explicitly deny the default, but he claims that Middlebrooks's affidavit could only address the period during which EMC was associated with his loan, not the entire life of the loan. He also claims that the loan statement was incomplete because it did not include loss-mitigation offsets or balances calculated during the account's duration.

> Every sheriff's certificate of sale made under a power to sell contained in a mortgage shall be prima facie evidence that all the requirements of law in that behalf have been complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale, the purchaser's heirs or assigns, after the time for redemption therefrom has expired.

Minn. Stat. § 580.19 (2010).

Souza must do more than show there is some "metaphysical doubt" as to the default and cannot rest on mere averments. *DLH*, 566 N.W.2d at 70–71.

[2] Minn. Stat. § 580.02 (2010), includes a fourth provision requiring that, "before the notice of pendency as required under section 580.032 is recorded, the party has complied with section 580.021." This subsection went into effect on August 1, 2008, and does not apply to the foreclosure here, which commenced in spring 2008 and concluded with the sheriff's sale in April 2008. *See* 2008 Minn. Laws ch. 341, art. 5, § 6.

The loan statement presented by MERS demonstrates a default, and Souza does not indicate how the inclusion of other loan information may disprove that default. At most he only suggests that this other information may show a more comprehensive view of the loan, but does not claim that the information would disprove the default. Souza even admits that the "exact significance" of the loss-mitigation offsets in this case "cannot be ascertained." Souza cannot avoid summary judgment by relying on mere speculation without presenting concrete evidence. *Hangsleben*, 505 N.W.2d at 328. Souza's questions and speculation about the loan information do not refute the evidence showing a default and do not raise a genuine issue of material fact.

Souza also claims that the loan statement is inadmissible hearsay, claiming that it does not fall under the business-records exception to the hearsay rule because it was prepared for litigation. *See* Minn. R. Evid. 803(6). Souza specifically highlights that a date found on the loan statement, October 19, 2010, occurred during the course of litigation and 18 months after the sheriff's sale occurred. MERS argues that the loan statement is a business record and that the October 2010 date indicates when the document was printed, rather than when it was prepared. Even if we accept Souza's argument, he still did not present any facts to rebut MERS's prima facie evidence, provided by the sheriff's certificate of sale, that a default occurred. Souza has not raised any genuine issue of material fact regarding whether he defaulted on the loan.

B.

Souza next argues that the requirements of Minn. Stat. § 580.02 were not met because there were defects in the transfer of the note and the mortgage. Many of Souza's

arguments rely on New York trust laws and regulations for the securitization of assets. His arguments appear to fall into three categories: he first contends that there were defects in the transfer of the note and that Chase's ownership of the note prior to foreclosure is questionable; he next contends that there were unrecorded assignments of the mortgage; finally he contends that there were defects in the conveyance of the property after the foreclosure was complete.

Souza first appears to argue that the transfer of the note to Chase prior to the foreclosure violated various Financial Accounting Standards Board regulations, Securities and Exchange Commission rules, and New York statutes regulating trusts. Specifically, Souza argues that Chase's interest in the property could not have been perfected without a "chain of transfers," which required the transfer of both the note and the mortgage. Because the certificate of title does not indicate that the mortgage was transferred to Chase when the note was transferred, Souza contends the note could not have been properly transferred to Chase. Souza also argues that a trust, like Chase, must hold legal title to its assets and that a transfer which violated trust laws invalidates the transfer and prevents Chase from having the requisite legal ownership. Souza does not indicate whether this type of invalidating transfer refers to a transfer of the note, the mortgage, or both.

The Minnesota Supreme Court addressed the transfer of legal and equitable interests in mortgages in *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009). In *Jackson*, multiple plaintiffs whose properties were in various stages of foreclosure claimed that MERS had not recorded assignments of their mortgages as

required. *Id.* at 490. The court noted the distinction between the promissory note and the security instrument—in *Jackson*, the security instruments were mortgages—and held that, although assignments of the mortgage must be recorded before a mortgage is foreclosed by advertisement, MERS members were not required to record assignments of the note associated with a mortgage before commencing a foreclosure of that mortgage by advertisement. *Id.* at 493–96. The court also noted that a party can hold the note without holding legal title to the mortgage, but that the holder of a note holds an equitable interest in the associated mortgage, and that "any disputes that arise between the mortgagee holding legal title to the mortgage and the assignee of the promissory note holding equitable title to the mortgage do not affect the status of the mortgagor for purposes of foreclosure by advertisement." *Id.* at 500–01.

Souza does not indicate what effect the transfer of the note here had on his interest in the property in relation to the foreclosure. As the supreme court noted in *Jackson*, however, any disputes arising from the transfer of the note do not affect Souza's status regarding the foreclosure. Therefore, this aspect of Souza's argument does not raise a genuine issue of material fact regarding MERS's authority to foreclose.

Souza next argues that, in order to perfect Chase's interest in the property, the mortgage must have been assigned at the same time the note was transferred. He argues that this assignment should have been recorded on the certificate of title, but was not. Souza also appears to argue that there were multiple other assignments, presumably the "chain of transfers" discussed above, that were not recorded.

Souza cannot defeat summary judgment with unverified conclusory allegations. *Gradjelick*, 646 N.W.2d at 230. Nor can he rest on mere averments. *DLH*, 566 N.W.2d at 70–71. Because Souza did not provide any evidence, other than his allegations, that assignments or transfers of the mortgage occurred and were not recorded, he does not raise any genuine issue of material fact.

Souza finally argues that certain post-foreclosure documents, including an affidavit of trustee executed on behalf of Chase, were insufficient to legally transfer the property.

To have standing to raise a claim, a party must have suffered an injury as a result of the alleged illegal conduct of another, and that injury must be capable of being redressed in court. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 176 (Minn. App. 2012). Once a sheriff's certificate of sale is recorded and the redemption period has expired, the certificate "shall operate as a conveyance to the purchaser . . . of all the right, title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage, without any other conveyance." Minn. Stat. § 580.12 (2006). "When real property is sold pursuant to a foreclosure, the mortgagor may redeem the property within a certain time period after the sale . . . ." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 756 N.W.2d 172, 177 (Minn. App. 2009). "The right of redemption lasts six months from the date of the foreclosure sale." *Bradley v. Bradley*, 554 N.W.2d 761, 764 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996).

It is undisputed that Souza did not attempt to redeem the property after the foreclosure sale. Once the redemption period was over and the certificate of sale was

recorded, MERS had all right, title, and interest in the property. Because Souza no longer had an interest in the property, he suffered no injury based on the post-foreclosure transfers, and he does not have standing to challenge those transfers.

The sheriff's certificate of sale is prima facie evidence that the requirements for foreclosure by advertisement were met and that MERS gained title to the property. Souza did not produce anything to rebut this evidence and did not raise any genuine issue of material fact regarding whether there was a default on the loan or whether there were any assignments of the mortgage.

II.

Souza also argues that, even if the requirements of Minn. Stat. § 580.02 were met, MERS failed to meet other statutory requirements necessary to commence the foreclosure by advertisement. Souza argues that it is unclear whether MERS had the authority to foreclose on the property; whether MERS could assign the power to foreclose to another party; whether the individual who signed foreclosure documents on behalf of MERS had the authority to do so; and whether MERS's power of attorney was valid.

Souza first appears to argue that it is not clear that MERS had the authority to foreclose on the property because there is no documentation connecting Irwin with any of the other parties involved, including EMC as servicer of the note.

"[I]n order to foreclose by advertisement, both record and *legal* title must concur and co-exist at the same time in the same person or persons who alone have the authority to foreclose the mortgage regardless of other equitable interests vested in third parties." *Jackson*, 770 N.W.2d at 497 (quotation omitted).

Souza has not presented any evidence that MERS did not have legal and record title at all relevant times. Because MERS had legal and record title, MERS was the party authorized to foreclose, regardless of assignments of the note between MERS members. Souza does not raise a genuine issue of material fact regarding MERS's authority to foreclose.

Souza next appears to argue that it is unclear whether MERS could grant another party the authority to execute the foreclosure and whether the MERS representative who signed the power of attorney was authorized do so.

In *Jackson*, the court discussed the relationship between MERS and its members in relation to transfers and assignments of a mortgage and a promissory note. The court stated:

> MERS instructs its members to have someone on their own staff become a certified MERS officer with authority to sign on behalf of MERS. This procedure allows the member that owns the indebtedness to assign or foreclose the mortgage loan in the name of MERS, eliminating the need to either work through a third party or to execute an assignment of the security instrument from MERS back to the member.

Id. at 491.

The court went on to explain that "the Minnesota Legislature passed an amendment to the Recording Act that expressly permits nominees to record an assignment, satisfaction, release, or power of attorney to foreclose." *Id.* (quotation omitted).

MERS submitted evidence, in the form of an agreement for signing authority, that demonstrated that Liquenda Allotey, the MERS representative who signed the power of

attorney, was authorized to sign documents on behalf of MERS. Souza did not present any evidence, beyond mere speculation, that Allotey was not authorized to execute a power of attorney on behalf of MERS. Souza cannot avoid summary judgment by relying on mere speculation without presenting concrete evidence. *Hangsleben*, 505 N.W.2d at 328. Because Souza did not present any evidence to refute MERS's claims, he does not raise a genuine issue of material fact regarding whether MERS could assign the authority to execute the foreclosure or whether Allotey was authorized to execute the power of attorney.

Souza finally claims that the power of attorney is not valid because the notary seal cannot be reproduced in a legible manner, as required by Minn. Stat. § 359.03, subd. 3 (2010). Such a defect does not invalidate the power of attorney.

> In any case where an instrument affecting the title to real estate, or authorizing an act affecting the title to real estate, was heretofore or is hereafter filed for record and recorded in the office of the county recorder or filed in the office of the registrar of titles of the county in this state wherein the real estate, or any part thereof, is situated, and there is apparent on the face of the instrument or the record thereof a defect in the attestation of the instrument, or the absence of any attestation, or a defect in the acknowledgment of the instrument or in the certification of the acknowledgment, or the absence of any certificate of acknowledgment, or a combination of two or more of such defects, the instrument and the filing and record thereof and certified copies of the instrument and of the record thereof shall have the same force and effect as constructive notice and the same force and effect as evidence and the same force and effect for all purposes that they would have had if no such defect or omission in attestation, acknowledgment or certification of acknowledgment had been apparent on the face of the instrument or the record thereof.

Minn. Stat. § 507.251, subd. 1 (2010).

Even if the notarial seal here cannot be reproduced in a legible manner, and MERS concedes that the stamp is not as clear as it could be, the effect of the document is unchanged. As the district court noted, "The record includes sworn and notarized affidavits confirming that Liquenda Allotey was authorized to sign the foreclosure documents on behalf of [MERS] and that she signed the Power of Attorney on behalf of [MERS]. [Souza] has not offered any *evidence* to rebut this testimony." Souza has not raised a genuine issue of material fact.

III.

Finally, Souza argues for the first time on appeal that the district court judge exhibited bias against him. Generally, this court will not address matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we were to address Souza's arguments, he does not present sufficient evidence to warrant reversal based on judicial bias.

"[I]t is presumed that judges will set aside collateral knowledge and approach cases with a neutral and objective disposition." *State v. Dorsey*, 701 N.W.2d 238, 248–49 (Minn. 2005) (quotation omitted). "To defeat this presumption, [a party] would have to adduce evidence of favoritism or antagonism." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008).

Souza argues that the judge was concerned about irregularities in his documents, but relatively unconcerned about irregularities in MERS's documents. Upon examination of the record, it is clear that the district court judge was merely questioning what

documents Souza was relying on when he was making his arguments. Furthermore, the judge even allowed Souza to have the final argument, stating, "I normally don't do this, but Mr. Souza if you would like to have the last word I would be happy to hear from you." Souza does not present evidence of favoritism or antagonism sufficient to rebut the presumption that the judge was able to approach the case with a neutral and objective disposition.

Affirmed.