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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-92**

Minnwest Bank South,
Appellant,

vs.

Les Overman a/k/a Leslie J. Overman,
Respondent.

**Filed December 15, 2009
Reversed and remanded
Toussaint, Chief Judge**

Murray County District Court
File No. 51-CV-08-211

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Considered and decided by Toussaint, Chief Judge; Wright, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Minnwest Bank South challenges the district court's grant of respondent Les Overman a/k/a Leslie J. Overman's motion to dismiss appellant's claim to recover on a promissory note associated with a mortgage. Appellant argues that the district court erred in concluding that its claim was a compulsory counterclaim in a prior action on the mortgage and therefore precluded under Minn. R. Civ. P. 13.01. Because appellant's claim on the note was the subject of a pending action at the time of the action on the mortgage, that claim was not a compulsory counterclaim in the mortgage action, and we therefore reverse and remand.

DECISION

When a district court considers matters outside the pleadings on a Minn. R. Civ. P. 12.02(e) motion for judgment on the pleadings for failure to state a claim on which relief can be granted, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Minn. R. Civ. P. 12.02. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review 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 issue on appeal is whether the district court erred in concluding that appellant's claim on the note was a compulsory counterclaim that should have been brought in the action on the mortgage. The mortgage and note were a result of several short-term loans respondent took from appellant in order to cover his family-farm operating expenses. In 2001 respondent executed a promissory note consolidating his outstanding debt with appellant. The note was secured by a personal-property security agreement and a mortgage. Respondent defaulted on the note, and in 2003 appellant commenced a replevin action, claiming that respondent was in default on the promissory note and requesting the district court to allow liquidation of the personal property held by appellant as security for the note. Appellant also requested a judgment for the amount outstanding on the note following liquidation. The district court issued an order for seizure and delivery of the personal property on May 8, 2006 and ordered that a deficiency judgment be entered after the liquidation of the personal property.

Respondent then commenced a declaratory-judgment action seeking to have the mortgage declared invalid while the replevin action was still pending. The district court in the declaratory-judgment action concluded that appellant's mortgage was valid. Following the conclusion of that action, the replevin action was dismissed by stipulation.¹ Respondent then appealed the district court's declaratory-judgment decision, and this

¹ We note that at oral argument there was dispute as to whether the replevin action was dismissed with or without prejudice. Because this issue was not raised below or briefed on appeal, we do not address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating this court will generally not consider matters not argued to and considered by district court); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating issues not briefed on appeal are waived).

court reversed, concluding that the mortgage was invalid. *Overman v. Minnwest Bank S.*, No. A07-1147, 2008 WL 2574461, at *2 (Minn. App. July 1, 2008).

On July 31, 2008, appellant commenced this action, requesting a judgment against respondent for the full amount of the note plus interest. Respondent answered and filed a motion for judgment on the pleadings. The district court granted respondent's motion for judgment on the pleadings on the ground that appellant's claim was a compulsory counterclaim despite the pending replevin action because the parties eventually dismissed that action pursuant to a stipulated agreement, and appellant did not seek to consolidate the replevin action with the declaratory-judgment action.

On appeal, appellant argues that the district court erred in concluding that the claim on the note was a compulsory counterclaim because, at the time of the declaratory-judgment action, appellant had a claim on the note in the pending replevin action. We agree. "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party . . . except that *such a claim need not be so stated if, at the time the action was commenced, the claim was the subject of another pending action.* Minn. R. Civ. P. 13.01 (emphasis added).

Here, the claim for the deficiency judgment on the note was pending throughout the entire declaratory-judgment proceeding in the district court and was voluntarily dismissed only after the district court entered judgment in the declaratory-judgment proceeding. Under the plain language of the rule, appellant was not required to bring a claim that was already pending in another action. Nothing in the rule required appellant to consolidate its claim for a deficiency judgment on the note with respondent's

declaratory-judgment action.

Because appellant's claim on the note was pending throughout the entire declaratory-judgment proceeding in the district court and because the plain language of rule 13.01 states that otherwise compulsory counterclaims are not required to be pleaded if they are the subject of a pending action, the district court erred in concluding that appellant's claim was barred as an unpleaded compulsory counterclaim.

Reversed and remanded.