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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **LOANCARE, A DIVISION OF**
3 **FNF SERVICING, INC.,**

4 Plaintiff-Appellee,

5 v.

NO. 33,648

6 **JOSEPH HARRIS and PATRICIA**
7 **HARRIS,**

8 Defendants-Appellants.

9 **APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY**

10 **Henry R. Quintero, District Judge**

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13 Albuquerque, NM

14 Office of the Arizona Attorney General

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19 for Appellee

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2 Anita M. Kelley
3 Albuquerque, NM

4 for Appellant

5 **MEMORANDUM OPINION**

6 **WECHSLER, Judge.**

7 {1} Defendants appeal from the denial of a Rule 1-060(B) NMRA motion to set
8 aside a judgment in a foreclosure action. We previously issued a notice of proposed
9 summary disposition, proposing to affirm. Defendants have filed a memorandum in
10 opposition. After due consideration, we remain unpersuaded. We therefore affirm.

11 {2} The pertinent background information having been set forth in the notice of
12 proposed summary disposition, we will avoid undue reiteration here, focusing instead
13 on the content of the memorandum in opposition.

14 {3} Defendants continue to assert that they should have been granted relief from the
15 judgment and permitted to engage in discovery in order to determine whether their
16 loan was procured by fraud. [DS 4; MIO 2-6] However, as we previously observed,
17 fraud was not asserted as an affirmative defense, and insofar as the materials relied
18 upon by Defendants to support their vague allegations were available far in advance
19 of the original award of summary judgment, [RP 95, 112-18] their failure to advance
20 the defense in a timely fashion is fatal. *See, e.g., Charter Bank v. Francoeur*, 2012-

1 NMCA-078, ¶¶ 3, 25, 287 P.3d 333 (concluding that a homeowner’s assertions of
2 fraud, misrepresentation, and/or “other misconduct” in conjunction with a motion to
3 set aside were insufficient to preserve these matters, where the homeowner filed no
4 answer to the complaint, “did not specifically raise a bad-faith defense and therefore
5 did not fairly invoke a ruling by the district court”).

6 {4} In their memorandum in opposition, Defendants contend that their allegations
7 of fraud and request for discovery should be regarded as timely, insofar as these
8 matters were mentioned at the hearing on Loancare’s motion for summary judgment.
9 [MIO 2-5] However, because Defendants neither propounded discovery, [MIO 5] nor
10 submitted an affidavit specifically demonstrating how postponement of a ruling and
11 granting additional time for discovery would enable Defendants to rebut Loancare’s
12 showing, *see* Rule 1-056(F) NMRA (requiring such an affidavit), the district court was
13 at liberty to proceed with the award of summary judgment. *See Butler v. Deutsche*
14 *Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶¶ 38-39, 140 N.M. 111, 140 P.3d 532
15 (arriving at a similar conclusion under similar circumstances). Although Defendant
16 suggests that his comments at the summary judgment hearing should supply an
17 adequate substitute for failure to comply with Rule 1-056(F), we disagree. *See*
18 *generally Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84

1 (observing that pro se litigants must comply with the rules of the court and will not
2 be treated differently from litigants with counsel).

3 {5} Finally, we understand Defendants to contend that the district court should have
4 granted their Rule 1-060(B) motion as a matter of equity, in order to afford them the
5 opportunity to inspect their original loan documents. [DS 5-6] However, Defendants
6 were not denied this opportunity; they simply failed to avail themselves of standard
7 discovery practice in a timely and appropriate fashion. Under such circumstances, we
8 remain unpersuaded that Defendants were entitled to relief. *See generally Benavidez*
9 *v. Benavidez*, 1983-NMSC-032, ¶ 14, 99 N.M. 535, 660 P.2d 1017 (observing that
10 Rule 1-060(B) “cannot be used to relieve a party from the duty to take legal steps to
11 protect his interests”).

12 {6} Accordingly, for the reasons stated above and in the notice of proposed
13 summary disposition, we affirm.

14 {7} **IT IS SO ORDERED.**

15
16

JAMES J. WECHSLER, Judge

17 **WE CONCUR:**

18

1 **MICHAEL D. BUSTAMANTE, Judge**

2

3 **RODERICK T. KENNEDY, Judge**