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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1094**

Margaret A. Papes,  
Appellant,

Connie L. Rongitsch, the Appointed Personal Representative  
of the Estate of Nickolas S. Papes, Jr.,  
Appellant,

vs.

CitiMortgage, Inc.,  
Respondent.

**Filed May 20, 2013  
Affirmed  
Halbrooks, Judge**

Dakota County District Court  
File No. 19HA-CV-11-3552

Margaret A. Papes, Hastings, Minnesota (pro se appellant)

Connie L. Rongitsch, St. Paul, Minnesota (pro se appellant)

Kendall L. Bader, Barnes & Thornburg LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and  
Rodenberg, Judge.

## UNPUBLISHED OPINION

**HALBROOKS**, Judge

Pro se appellants challenge the district court's grant of summary judgment in favor of respondent CitiMortgage, Inc. Appellants argue that there are genuine issues of material fact and that CitiMortgage did not own their mortgage. Appellants raise additional claims relating to notice of the foreclosure proceedings and violations of the Real Estate Settlement Procedures Act (RESPA) and Fair Debt Collections Act (FDCA). We affirm.

### FACTS

On June 23, 2003, Margaret and Nickolas Papes, Jr., executed both a promissory note in the amount of \$112,500 and a mortgage on their residential property in Hastings with ABN AMRO Mortgage Group, Inc. ABN AMRO recorded the mortgage in the Dakota County recorder's office on August 12, 2003.

Margaret and Nickolas divorced in 2007. The dissolution decree awarded Margaret all right, title, and interest in the property and made her solely liable for the payments of principal, interest, taxes, and insurance. Nickolas was awarded a lien on the property in the amount of \$33,293.16. On September 1, 2007, ABN AMRO merged with CitiMortgage, a New York corporation, which became the surviving entity. The certificate of merger was recorded in Dakota County on May 6, 2010. CitiMortgage notified the Papeses that it would begin accepting mortgage payments and servicing their mortgage beginning in September 2007.

Margaret Papes subsequently defaulted on the mortgage payments. In January 2009, CitiMortgage filed a “Notice of Pendency of Proceeding and Power of Attorney to Foreclose” on the mortgage. The notice, which was recorded in the Dakota County recorder’s office later that month, empowered the law firm of Usset, Weingarden, & Liebo, P.L.L.P. to foreclose by advertisement.

Margaret entered into an interim forbearance agreement with CitiMortgage in order for the Federal Home Loan Mortgage Corporation (Freddie Mac) to review her eligibility for the federal government’s Home Affordable Modification Program (HAMP). Margaret later applied for HAMP, but CitiMortgage denied her application because she failed to make all of her trial-period payments.

Nickolas died on May 17, 2010. Appellant Connie Rongitsch was appointed to be the personal representative of Nickolas’s estate in February 2011.

CitiMortgage executed a “Notice of Pendency to Foreclose” the Papeses’ mortgage on November 19, 2010, that was recorded in the Dakota County recorder’s office on November 29. CitiMortgage served Margaret with a notice of the mortgage-foreclosure sale of her property scheduled for January 27, 2011. Margaret filed an affidavit of postponement pursuant to Minn. Stat. § 580.07, subd. 2 (2012), delaying the sheriff’s sale until June 27, 2011.

Rongitsch received notice of the sheriff’s sale of the Papeses’ property on June 25, 2011. On the day of the sale, Margaret and Rongitsch sued CitiMortgage, challenging the foreclosure action on the following grounds: (1) there are no recorded documents that indicate a transfer of the mortgage from ABN AMRO to CitiMortgage; (2) CitiMortgage

did not have legal authority to foreclose the Papeses' mortgage because Freddie Mac owned the mortgage; (3) CitiMortgage failed to respond to Nickolas's RESPA-compliant requests for information and committed FDCA violations; and (4) a dispute as to where the mortgage payments were to be sent. Appellants also requested a restraining order against CitiMortgage to prohibit completion of the sheriff's sale of the property.

The sheriff's sale took place as scheduled on June 27. CitiMortgage purchased the Papeses' property for \$126,093.96 and recorded the purchase the next day. But in July, the district court granted appellants' motion for a temporary restraining order, limiting CitiMortgage's action on the property, and tolled the statutory redemption period. CitiMortgage later sold the property by quit-claim deed to Freddie Mac.

CitiMortgage moved for summary judgment. Appellants submitted a joint affidavit at the summary-judgment hearing that addressed only the mortgage-ownership issue. The district court granted CitiMortgage's motion, concluding that the foreclosure was valid, appellants' interests in the property had been extinguished, and CitiMortgage was the record owner of the property. This appeal follows.

## **D E C I S I O N**

We review a grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Summary judgment shall 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 of material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the record to determine whether there is any genuine issue of

material fact and whether the district court erred in its application of the law, *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011), and 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). There is no genuine issue of material fact when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and that is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Likewise, no genuine issue of material fact exists if "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69.

## I.

"[A]ny mortgage of real estate containing a power of sale, upon default . . . , may be foreclosed by advertisement." Minn. Stat. § 580.01 (2012). The foreclosing party must strictly comply with the foreclosure-by-advertisement statutes. *Ruiz v. 1st Fidelity Loan Servicing, LLC*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2013 WL 1629192, at \*4 (Minn. Apr. 17, 2013). The statute in effect at the time of the Papeses' foreclosure required CitiMortgage, as the party seeking to foreclose by advertisement, to comply with the following conditions:

- (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 . . . ;

(3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded . . . ;

(4) before the notice of pendency . . . is recorded, the party has complied with section 580.021 [providing notice to the mortgagor that foreclosure prevention counseling services are available].

Minn. Stat. § 580.02 (2012). The foreclosing party must have record and legal title in the security instrument at the time of foreclosure. *Jackson v. Mort. Elec. Registration Systems, Inc.*, 770 N.W.2d 487, 497 (Minn. 2009). Record title is title that “appears in the public records after the deed is properly recorded.” *Id.* (quotation omitted). Legal title “evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest.” *Id.*

Appellants do not dispute that a default of the mortgage occurred and that no other actions were instituted to recover their debt. Instead, appellants challenge the validity of the foreclosure sale based on the recording requirement. CitiMortgage responds that its merger with ABN AMRO was a transfer of assets by operation of law, not an assignment of appellants’ mortgage. CitiMortgage’s argument is persuasive.

The plain language of the statute requires that a mortgage assignment be recorded. Minn. Stat. § 580.02(3); *see also Jackson*, 770 N.W.2d at 501 (holding that “only assignments of legal title of the security instrument must be recorded in order to commence a foreclosure by advertisement”). An assignment is a “transfer of rights or property.” *Black’s Law Dictionary* 136 (9th ed. 2009). A merger, on the other hand, is “[t]he absorption of one organization (esp. a corporation) that ceases to exist into another

that retains its own name and identity and acquires the assets and liabilities of the former.” *Id.* at 1078.

Viewed under either New York<sup>1</sup> or Minnesota law, a merger operates as a transfer of assets by operation of law rather than assignment. N.Y. Bus. Corp. Law § 901(a) (2012) defines merger as a procedure by which two or more corporations merge or consolidate to form a single corporation. Upon a merger, all assets and liabilities “shall vest in such surviving or consolidated corporation without further act or deed.” N.Y. Bus. Corp. Law § 906(b)(2) (2012). One of the purposes of the Minnesota merger statutes is to “provide for the vesting of rights by operation of law without any need for further corporate action.” Minn. Stat. § 302A.641 gen. cmt. (2012). CitiMortgage asserts that its post-merger interest in the mortgage did not have to be recorded pursuant to the merger statutes. We agree and hold that the merger of ABN AMRO and CitiMortgage was not an assignment requiring recording pursuant to the foreclosure-by-sale statute.

The record indicates that appellants’ mortgage was recorded by ABN AMRO shortly after execution of both the note and the mortgage and that ABN AMRO and CitiMortgage subsequently lawfully merged. Appellants fail to produce any documentation showing that an assignment took place, and we see no indication of that in the record. *See Dunbar v. Wells Fargo Bank, N.A.*, 853 F. Supp. 2d 839, 848, 848 n.9 (D. Minn. 2012) (rejecting plaintiffs’ argument that an unrecorded assignment must exist because “defendants present[ed] a facially valid record of assignment” and plaintiffs did

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<sup>1</sup> We reference New York law because the merger of ABN AMRO and CitiMortgage occurred in New York. We also cite to Minnesota law to illustrate the similarities within both states’ merger statutes.

not introduce documents showing unrecorded assignments), *aff'd*, 709 F.3d 1254 (8th Cir. 2013). Appellants' speculation of an unrecorded assignment fails to overcome their burden on summary judgment. *See* Minn. R. Civ. P. 56.05 (stating that a party opposing summary judgment "must present specific facts showing that there is a genuine issue for trial"); *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (holding that speculation is insufficient to create a genuine issue of material fact).

Moreover, appellants fail to overcome prima facie evidence of a lawful foreclosure sale. In a mortgage-foreclosure case, a sheriff's certificate of sale has evidentiary value:

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 (2012). A valid sheriff's certificate of sale must include:

- (1) a description of the mortgage;
- (2) a description of the property sold;
- (3) the price paid . . . ;
- (4) the time and place of the sale, and the name of the purchaser;
- (5) the interest rate in effect on the date of the sheriff's sale; and
- (6) the time allowed by law for redemption[.]

Minn. Stat. § 580.12 (2012).

Appellants' mortgage contained a power-of-sale provision that granted "Lender and Lender's successors and assigns, with power of sale." The sheriff's certificate of sale provided information about appellants' mortgage and their property, as well as the price paid to CitiMortgage, time and location of sale, effective interest rate on the date of sale,

and the applicable redemption period. We conclude that CitiMortgage, as record and legal owner of the mortgage at the time of the foreclosure, properly complied with the foreclosure-by-advertisement statutes.

## II.

Appellants contend that there are genuine issues of material fact regarding whether Nickolas and his personal representative were entitled to notice of the foreclosure proceedings and whether CitiMortgage violated RESPA. Appellants also alleged a violation of the FDCA in their complaint. These issues are raised for the first time on appeal. Generally, this court does not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Pro se appellants are not relieved of the burden of adequately communicating to the district court what they want accomplished and by whom. *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987); *see also Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 317 (Minn. App. 2011) (determining an issue waived because appellants not only failed to include it in their complaint, but also failed to argue it in connection with the summary-judgment motion). Moreover, appellants have failed to brief the notice and RESPA issues with any legal analysis or citation to legal authority. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation). And the FDCA issue was not briefed on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not briefed on appeal are waived). We therefore decline to address appellants' remaining arguments.

**Affirmed.**