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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-47**

In re the Matter of the Petition of:
Federal National Mortgage Association.

**Filed December 5, 2011
Affirmed
Crippen, Judge***

Hennepin County District Court
File No. 27-ET-CV-09-1092

Rachel Ann Wexler, St. Louis Park, Minnesota (pro se appellant)

Robert Quinlin Williams, Wilford & Geske, Woodbury, Minnesota (for respondent
Federal National Mortgage Association)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and
Crippen, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant mortgagor, Rachel Wexler, challenges the district court's adoption and confirmation of the examiner of titles' conclusion that appellant was not entitled to personal service of a foreclosure notice because she did not "actually occupy" the foreclosed property. Appellant also argues that the examiner of titles abused her discretion by admitting an incomplete document and hearsay in evidence. Because the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

district court's occupancy finding is not clearly erroneous and appellant was not prejudiced by the examiner of titles' evidentiary rulings, we affirm.

FACTS

In July 2007 appellant purchased a condominium unit in Minneapolis secured by a mortgage. Appellant defaulted on the mortgage, and the law firm representing the lender notified appellant that foreclosure proceedings would be commenced.

On April 3, 2008, a process server for the lender visited the condominium building to personally serve appellant with a notice of the mortgage foreclosure sale. An employee of the condominium building's management company advised the process server that company records showed that appellant's condominium unit "was vacant and nobody was living there." The employee did not permit the process server to see the condominium unit. As a result, appellant was not personally served with a foreclosure notice.

The lender purchased the condominium unit at the subsequent foreclosure sale and assigned the sheriff's certificate to respondent Federal National Mortgage Association. Appellant did not redeem the property during the six-month redemption period.

Respondent petitioned the district court for a new certificate of title free and clear of appellant's interests in the condominium unit, and appellant filed an answer claiming ineffective service of the foreclosure notice. The district court referred the matter to the examiner of titles. After hearing evidence on appellant's occupancy, the deputy examiner of titles found that neither appellant nor anyone else actually occupied the condominium

unit on the date that the lender attempted to serve the foreclosure notice on appellant. Therefore, the examiner concluded that personal service on appellant was not required by the foreclosure-by-advertisement statute, Minn. Stat. § 580.03 (2010). The district court adopted the examiner's findings and conclusions and ordered a new certificate of title free and clear of appellant's interests.

D E C I S I O N

We will sustain a district court's findings of fact unless they are clearly erroneous; the findings of a referee, to the extent that they are adopted by the district court, are considered findings of the district court. Minn. R. Civ. P. 52.01; *see also Wirtz v. Bardon Land Co.*, 257 N.W.2d 315, 317 (Minn. 1977) (instance of examiner of titles sitting as referee). Credibility determinations are the exclusive province of the factfinder. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We review questions of statutory interpretation de novo. *Beecroft v. Deutsche Bank Nat'l. Trust Co.*, 798 N.W.2d 78, 82 (Minn. App. 2011), *review denied* (Minn. July 19, 2011).

To commence foreclosure by advertisement, the mortgagee must serve a notice of foreclosure upon the "person in possession of the mortgaged premises if the same are actually occupied." Minn. Stat. § 580.03. Appellant argues that the district court erred by finding that she did not "actually occupy" her unit when the lender attempted to serve notice.

Actual occupancy, not merely constructive, requires “an open, visible occupancy.” *Cutting v. Patterson*, 82 Minn. 375, 380, 85 N.W. 172, 173 (1901) (interpreting earlier version of foreclosure-by-advertisement statute’s notice requirement that is substantially similar to current section 580.03). Actual occupancy is not “trivial” but “substantial” and “suited to an appropriate use of the property possessed.” *Fitger v. Alger, Smith & Co.*, 130 Minn. 520, 525, 153 N.W. 997, 999 (1915); *see also Varco-Pruden Bldgs. v. Becker & Sons Constr., Inc.*, 361 N.W.2d 457, 458-59 (Minn. App. 1985) (affirming district court’s finding that mortgagor’s occupancy of small office in larger building—which was not evinced by signs, business cards, telephone listings, or published materials—was “sporadic and incidental” and, therefore, mortgagor was not entitled to personal service of foreclosure notice).

Appellant asserts as a matter of fact that she occupied the foreclosed condominium unit and was entitled to personal service of the foreclosure notice. But the district court found, and the record reflects, that appellant was not using the condominium unit and her physical presence in the condominium unit was limited to showing it to prospective buyers and renters.

Appellant testified that she attended association meetings and used her assigned parking space and the condominium building’s pool and loading dock. The district court found that this use was “sporadic and not of a material nature,” and that appellant’s actions were consistent with ownership but did not necessarily indicate that she or anyone else actually occupied the condominium unit. And the district court found that a marketing photograph of the interior of the condominium unit, depicting a countertop

with a vase of flowers and place settings, appeared to be “staged” and did not depict furniture or items of a personal nature suggesting occupancy. The record amply supports the district court’s finding that appellant’s use of the condominium unit was “not a substantial use of a residential property and did not rise to the level of actually occupying the mortgaged premises.” This supports the district court’s conclusion that appellant was not entitled to personal service of the foreclosure notice under the foreclosure-by-advertisement statute.

Appellant also challenges the examiner’s evidentiary rulings, arguing that the examiner erroneously admitted into evidence an incomplete sheriff’s certificate of sale and an affidavit containing hearsay. We will reverse evidentiary rulings only on a showing of an abuse of discretion. *Johnson v. Washington Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994). And an error in the exclusion of evidence is grounds for a new trial only if it would “affect the substantial rights of the parties.” Minn. R. Civ. P. 61.

Appellant argues that the process server’s vacancy report should have been admitted into evidence under Minn. R. Evid. 106, which provides that, when a recorded statement is introduced, the adverse party may require introduction of any other part of the statement that ought to be considered contemporaneously. But this “rule of completeness” does not apply unless it is necessary to provide the factfinder a full understanding of the facts, and it may not be used to introduce otherwise irrelevant statements. *State v. Mills*, 562 N.W.2d 276, 286-87 (Minn. 1997). The examiner admitted the sheriff’s certificate of sale into evidence and overruled appellant’s objection as to incompleteness.

Under Minn. Stat. § 580.12 (2010), a sheriff's certificate of sale must contain a description of the mortgage and the property sold, the price paid for each parcel sold, the time and place of the sale, the name of the purchaser, the interest rate in effect on the date of the sale, and the time permitted by law for redemption. Appellant has not challenged any of this included information, and the statute does not require that a valid sheriff's certificate of sale include a vacancy report.

Appellant's plea for attention to the vacancy report rests on language in the report stating that the process server viewed the inside of the condominium unit and found it empty. But the examiner based her occupancy finding on other evidence, notwithstanding the process server's lack of personal observations. Moreover, appellant does not demonstrate that the excluded vacancy report contains any new evidence or evidence inconsistent with evidence in the record. The examiner did not abuse her discretion by declining to demand admission of the vacancy report into evidence.

Appellant also argues that the affidavit of vacancy executed by the process server, which was admitted into evidence, contained hearsay. The record shows no hearsay objection to this evidence at trial, and we are not to address matters not argued and considered below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, because the examiner's findings are substantially supported by other evidence in the record, any purported error in admitting this evidence had no effect on the outcome of the case. *See* Minn. R. Civ. P. 61 (requiring that harmless error be ignored).

Affirmed.