STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1556

Richard J. Behr,
Appellant,

vs.

EverBank,
Respondent,

Midwest Portfolio Servicing, LLC,
Respondent,

Minnesota Housing Finance Agency,
Defendant.

Filed March 31, 2014
Reversed and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-13-2508

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Kalli L. Ostlie, Shapiro & Zielke, LLP, Burnsville, Minnesota (for respondent)

Thomas B. Olson, Shaun D. Redford, Olson & Lucas, P.A., Edina, Minnesota (for respondent Midwest Portfolio Servicing, LLC)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant mortgagor challenges the district court's summary-judgment dismissal of his quiet-title action following a foreclosure by advertisement. Because there are genuine issues of material fact regarding whether respondent mortgagee strictly complied with statutory notice requirements and whether respondent sheriff's-certificate holder is a bona-fide purchaser, summary judgment is inappropriate. We therefore reverse and remand.

FACTS

Appellant Richard J. Behr owned and occupied a single family home in Minneapolis. In April 2003, Behr executed a mortgage on the property. The mortgage was assigned to respondent EverBank in 2008.

In 2011, Behr defaulted on the mortgage by failing to make monthly payments, and EverBank commenced a foreclosure-by-advertisement proceeding. On November 1, 2011, William Drury, a private process server, served Behr with a notice of mortgage foreclosure. The sheriff held a foreclosure sale, and respondent Midwest Portfolio Servicing LLC (MPS) purchased the property.

MPS brought an eviction action against Behr after the redemption period expired. Behr filed a quiet-title action in district court, seeking a judgment declaring the sheriff's sale void due to defective notice. Behr contends that the foreclosure and resulting sheriff's sale are void because EverBank failed to serve him with a notice of redemption rights under Minn. Stat. § 580.041 (2012). MPS and EverBank moved for summary

judgment. The district court awarded summary judgment to respondents, finding that "Behr was . . . personally served with the Notice of Redemptive Rights as required by Minn. Stat. § 580.041" and that "MPS is a bona fide purchaser." This appeal follows.

D E C I S I O N

"A motion for 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." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). Accordingly, a court deciding a summary-judgment motion must not make credibility determinations or otherwise weigh evidence relevant to disputed facts. *Id*.; *see also Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007) ("Weighing the evidence and assessing credibility on summary judgment is error.").

"[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which 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*, 566 N.W.2d at 71. "Although summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed to afford a substitute for a trial where there are issues to be determined." *Ahlm v. Rooney*, 274 Minn. 259, 262, 143 N.W.2d 65, 68

(1966). Even if the record "leads one to suspect that it is unlikely [that the nonmoving party] will prevail upon trial, that fact is not a sufficient basis for refusing [him] his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." *Dempsey v. Jaroscak*, 290 Minn. 405, 410, 188 N.W.2d 779, 783 (1971) (quotation omitted).

"[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

"[F]oreclosure by advertisement was devised to avoid the delay and expense of judicial proceedings." *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013) (quotation omitted). "Foreclosure by advertisement provides a foreclosing party with a faster and more efficient means to foreclose and allows a party to foreclose in the absence of judicial supervision." *Id.* "Because foreclosure by advertisement is a purely statutory creation, the statutes are *strictly construed*. [Appellate courts] require a foreclosing party to show exact compliance with the terms of the statutes. If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void." *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487,

494 (Minn. 2009) (emphasis added) (quotations and citations omitted);[1] *see Ruiz*, 829 N.W.2d at 54 ("Under Minn. Stat. § 580.02 (2012), all assignments of a mortgage must be recorded before the mortgagee begins the process of foreclosure by advertisement. Absent strict compliance with this requirement, a foreclosure by advertisement is void.").

To initiate a foreclosure by advertisement, "[s]ix weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises . . . , and at least four weeks before the appointed time of sale a copy of such notice shall be served . . . upon the person in possession of the mortgaged premises." Minn. Stat. § 580.03 (2012). The notice of foreclosure must include, among other things, the name of the mortgagor, the date of the mortgage, the amount claimed to be due on the mortgage, the time and place of sale, and the time allowed by law for redemption by the mortgagor. Minn. Stat. § 580.04 (2012).

In addition, and as is at issue in this case, for owner-occupied residences, the mortgagee must serve the mortgagor with a foreclosure advice notice and a notice of redemption rights under Minn. Stat. § 580.041.

> Any person may establish compliance with or inapplicability of [Minn. Stat. § 580.041] by recording, with the county recorder or registrar of titles, an affidavit by a person having knowledge of the facts, stating that the notice required by this section has been delivered in compliance with this section or that this section is not applicable because the property described in the notice of foreclosure did not consist of one to four family dwelling units, one of which was

[1] The supreme court's statements regarding the strict-compliance standard, although dicta, are entitled to "great weight." *In re Wylde*, 454 N.W.2d 423, 425 (Minn. 1990); *see Simons v. Shiltz*, 741 N.W.2d 907, 910 (Minn. App. 2007) (relying on dicta in a supreme court opinion), *review denied* (Minn. Feb. 19, 2008).

> occupied by the owner as the owner's principal place of residency. The affidavit and a certified copy of a recorded affidavit shall be prima facie evidence of the facts stated in the affidavit.

Id., subd. 3. EverBank's attorney executed and recorded an "Affidavit of Compliance," stating that "the Notice of Redemption Rights [has] been delivered in compliance with Minnesota Statute 580.041."

Behr contends that EverBank did not serve him with a notice of redemption rights and that the failure of service renders the foreclosure sale void for lack of strict compliance. Respondents counter that EverBank's affidavit of compliance is prima facie evidence that EverBank served Behr with a notice of redemption rights and that Behr must overcome EverBank's prima facie showing with clear-and-convincing evidence. Respondents further argue that a determination regarding whether there is a genuine issue of material fact precluding summary judgment must be evaluated under the clear-and-convincing standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986) ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

Respondents cite *Kueffner v. Gottfried* as support for their contention that Behr must present clear-and-convincing evidence to prevail in his quiet-title action. 154 Minn. 70, 191 N.W. 271 (1922). The supreme court in *Kueffner* held that "[u]pon an application to set aside the service of a summons, the sheriff's return of service is strong evidence in plaintiff's favor and its effect can only be overcome by unequivocal, clear and convincing evidence." *Id.* But *Kueffner* did not involve a challenge to the validity of

a foreclosure by advertisement. *Id.* And respondents do not cite, and we are not aware of, precedential authority holding that a mortgagor challenging the validity of a foreclosure by advertisement must overcome a prima facie showing of compliance by clear-and-convincing evidence.[2] But even if we assume, without deciding, that the standard of proof is clear and convincing and that the clear-and-convincing standard applies to our de novo review of the district court's summary-judgment determination, for the reasons that follow, we nonetheless conclude that there is a genuine issue of material fact precluding summary judgment.

Behr relies on three affidavits to establish a genuine issue of material fact. The first is his affidavit stating that he "never received any notice that [he] had the right to redeem [his] house after the sale," and that he "did not try to redeem because [he] did not know that [he] had the legal right to do so." The second is process-server Drury's "Affidavit of Service on Occupant(s)," which he executed on November 2, the day after service. In that affidavit, Drury states that he served Behr with the "notice of foreclosure sale, foreclosure advice notice pursuant to Minnesota statute [580.04], and the following designation notices, as required by law:" homestead designation notice and designation

[2] We question whether the imposition of a clear-and-convincing burden of proof on a party challenging the validity of a foreclosure by advertisement is consistent with the foreclosing party's obligation to strictly comply with statutory foreclosure requirements. *See Ruiz*, 829 N.W.2d at 54 ("Under Minn. Stat. § 580.02 (2012), all assignments of a mortgage must be recorded before the mortgagee begins the process of foreclosure by advertisement. Absent strict compliance with this requirement, a foreclosure by advertisement is void.").

notice. Drury's affidavit of service does not mention service of a notice of redemption rights.

The third affidavit that Behr relies on is the affidavit of his attorney stating that Behr told her "that he did not receive a notice about his redemption rights along with the notice telling him about the [sheriff's] sale." The attorney's affidavit also states that she "looked at the foreclosure record filed along with the sheriff's certificate of sale at the Office of the Hennepin County Recorder," "[t]he foreclosure record did not include a copy of the Notice of Mortgage Foreclosure Sale or a copy of the Notice of Redemption Rights that purportedly had been served upon Mr. Behr," and that in her experience, "it is quite unusual for a foreclosure record filed along with the sheriff's certificate not to include the notices that were served upon the occupant in compliance with the foreclosure by advertisement statutes."

Behr acknowledges that Drury executed a second affidavit regarding service, which is dated February 22, 2013, and that the affidavit states that Drury "personally served" a notice of redemption rights on Behr on November 1, 2011. Behr contends that Drury's second affidavit is suspect because it was executed approximately 16 months after the purported date of service and after Behr initiated this lawsuit. Behr also contends that EverBank's affidavit of compliance is not prima facie evidence of compliance with section 580.041 because the affiant, an attorney at the law firm that hired Drury to serve Behr, "has no personal knowledge of the documents Mr. Drury actually served on November 1, 2011." *See* Minn. Stat. § 580.041, subd. 3 (referring to "an affidavit by a person having knowledge of the facts"). Behr argues, "[f]oreclosing

counsel can attest that he requested Mr. Drury to deliver certain documents, which he then provided to Mr. Drury, but that is where foreclosing counsel's knowledge of the facts end." That argument has merit. *See State ex rel. Sime v. Pennebaker*, 215 Minn. 75, 77-78, 9 N.W.2d 257, 259 (1943) (holding that counsel's affidavit attesting to facts known by party was without evidentiary worth because it was obviously founded on mere hearsay).

Respondents note that the summary-judgment record includes evidence that there have been two prior foreclosure proceedings against Behr's property, Behr brought the underlying loan into compliance in both of those proceedings, Behr requested a redemption quote after the sheriff's sale in this case, Behr remained in the property rent-free throughout the redemption period, and Behr requested the excess proceeds from the sheriff's sale. Respondents argue that "[t]he record taken as a whole could not lead a rational trier of fact to find for Appellant; therefore there was no genuine issue for trial." *See DLH*, 566 N.W.2d at 70. Respondents also argue that the omission of the notice of redemption rights from the list of documents that were served in Drury's November 2, 2011 affidavit of service is immaterial because no specific form is required and Drury simply used an old form.

The parties' arguments highlight the crux of the issue in this case: Behr's lawsuit challenging EverBank's strict compliance with statutory foreclosure requirements cannot be resolved without a finding regarding whether EverBank served a notice of redemption rights on Behr and that finding cannot be made without credibility determinations regarding the sworn assertions of Behr and Drury. Reasonable persons could draw

different conclusions regarding whether Behr or Drury is more credible. On one hand, the record contains evidence that suggests that Behr was aware of his redemption rights and that his affidavit is therefore not credible. On the other hand, respondents' argument that Drury essentially made a mistake by using an old affidavit-of-service form could lead a reasonable person to conclude that he also may have made a mistake regarding which documents he actually served. And although respondents may be correct that the foreclosure-by-advertisement statute does not require an affidavit of service to individually list every document served, the absence of a notice of redemption rights from the list of specific documents served in Drury's November 2, 2011 affidavit of service could lead a reasonable person to conclude that it was not served.

In sum, viewing the facts in the light most favorable to Behr and refraining from making credibility determinations, we conclude that there is a genuine issue of material fact regarding whether EverBank served Behr with a notice of redemption rights. *See Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 753-54 (Minn. 2005) (stating that, on appeal from an award of summary judgment, appellate courts view the evidence "in the light most favorable to the nonmoving party" and "do not weigh facts or determine the credibility of affidavits and other evidence"). As to respondents' claim that the factual dispute is inadequate to defeat summary judgment under a clear-and-convincing standard of proof, we reject EverBank's argument that Behr's affidavit is "bare" and "unsupported." Behr's affidavit is supported by the omission of a notice of redemption rights from Drury's November 2, 2011 affidavit of service and the affidavit

of Behr's attorney stating that the foreclosure record filed with the county recorder in this case does not include a notice of redemption rights.

We also reject respondents' argument that our decision should be based on *Arzt v. Bank of America*, 883 F. Supp. 2d 792 (D. Minn. 2012). In *Arzt*, a bank foreclosed on a mortgagor's property by advertisement. 883 F. Supp. 2d at 794. A deputy sheriff served the mortgagor with notice of the foreclosure sale. *Id*. Among other arguments, the mortgagor argued that "the foreclosure by sale was invalid because she was not served with the requisite notices prior to the sheriff's sale." *Id*. at 796. As evidence of service, the bank submitted a sheriff's affidavit attesting to service of the required documents. *Id*. The federal district court awarded summary judgment to the bank because the mortgagor presented "no evidence calling into question the credibility of the sheriff in the performance of his official duties" and because her "self-serving affidavit and bare assertion that she did not receive service . . . does not create a genuine dispute sufficient to overcome her burden to repudiate the sheriff's certificate." *Id*. at 796-97. The federal court reasoned that "[i]n Minnesota, a sheriff's return of service is 'strong evidence' of service" and that "[t]o overcome the presumption of delivery, the opposing party must present 'unequivocal, clear, and convincing' proof that is 'practically conclusive.'" *Id*. at 796 (quoting *Kueffner*, 154 Minn. at 73, 191 N.W. at 272).

Arzt is not binding on this court. *See State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002) ("[F]ederal court interpretations of state law are not binding on state courts."); *State ex rel. Ulland v. Int'l Ass'n of Entrepreneurs of Am.*, 527 N.W.2d 133, 136 (Minn. App. 1995) ("[T]his court is not

bound by precedent from other states or the federal courts."), *review denied* (Minn. Apr. 18, 1995). Moreover, it is distinguishable. Unlike the circumstances in *Arzt*, this case involves service by a private process server, and not service by the sheriff. *See Arzt*, 883 F. Supp. 2d at 796 ("Arzt presents no evidence calling into question the credibility of the sheriff in the performance of his official duties."). And in *Arzt*, the only evidence contradicting the sheriff's affidavit of service was the mortgagor's affidavit that she did not receive service. *Id*. at 796-97. In this case, Behr's affidavit denying service is buttressed by Drury's failure to list the notice of redemption rights in his affidavit of service.

Lastly, we address MPS's argument that it is a bona-fide purchaser. A bona-fide purchaser "is one who gives valuable consideration without actual, implied or constructive notice of inconsistent outstanding rights of others." *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). "Whether one is a good-faith purchaser is a factual determination." *Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 488 (Minn. App. 2007). Thus, the propriety of deciding the question at summary judgment is suspect. We therefore conclude that summary judgment is not appropriate on that ground. *See Fabio*, 504 N.W.2d at 761.

Reversed and remanded.