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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0803**

In the Matter of the Petition of CitiMortgage, Inc.,
a New York corporation,
relating to Certificate of Title No. 1004362
for a new Certificate of Title
after Mortgage Foreclosure Sale

**Filed April 24, 2017
Affirmed
Worke, Judge**

Hennepin County District Court
File Nos. 27-ET-CV-11-1440; 27-CV-HC-12-1597

Renee Kinzer, Minneapolis, Minnesota (pro se appellant)

Katherine M. Melander, Brian W. Varland, Jeffrey A. Scott, Heley, Duncan & Melander,
PLLP, Minneapolis, Minnesota (for respondent CitiMortgage, Inc.)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Smith, John,
Judge.*

UNPUBLISHED OPINION

WORKE, Judge

In this post-foreclosure proceeding, appellant challenges the district court's adoption of the report of the examiner of titles and grant of summary judgment to respondent. We affirm.

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

FACTS

Appellant Renee Kinzer and her husband David Kinzer owned real property in Minneapolis. The Kinzers divorced in 2004, but continued to own the property as joint tenants. Shortly after the divorce, on March 26, 2004, David Kinzer mortgaged the property. In doing so, he represented that the Kinzers were still married, and according to Renee Kinzer (Kinzer), David Kinzer used a forged power-of-attorney form to execute the mortgage on her behalf. The Kinzers defaulted on the mortgage, and a sheriff's sale was held in June 2011. Respondent CitiMortgage was the purchaser at the sheriff's sale, and there was no redemption of the property.

In September 2011, CitiMortgage commenced an action requesting a new certificate of title. Kinzer filed an answer, alleging "an improper and illegal mortgage and invalid mortgage foreclosure sale" and requesting that she be deemed the property's sole owner. CitiMortgage conveyed the property to Federal Home Loan Mortgage Corporation (FHLMC), and FHLMC commenced an eviction action against the Kinzers. In response, Kinzer sought a temporary restraining order (TRO) to halt the eviction. In March 2012, the district court granted the TRO and directed Kinzer to initiate a civil action. Kinzer commenced a civil action in May 2012, attacking the validity of the mortgage and foreclosure.

On September 16, 2013, the parties reached a mediated settlement agreement in Kinzer's civil action. The agreement was signed by Kinzer, CitiMortgage, and FHLMC. The terms of the agreement were, in relevant part, as follows: (1) CitiMortgage and FHLMC were to pay \$18,000 in full settlement of Kinzer's claims, with \$15,000 paid upon

“settlement papers” being signed, and \$3,000 paid if Kinzer vacated the property by April 30, 2014; (2) Kinzer was to dismiss the lis pendens, consent to proceedings subsequent, acknowledge that the foreclosure in 2011 was valid, and acknowledge the validity of the mortgage of March 26, 2004; (3) Kinzer was to release all claims, including claims relating to title of the subject property; and (4) the parties were to execute releases.

Following the settlement, in October 2013, Kinzer moved to refer the matter back to mediation, arguing that a final settlement agreement was never reached, she was coerced into signing the agreement, unauthorized terms were added, and her attorney had engaged in willful and negligent misrepresentation and breached his fiduciary duty.

In January 2014, the district court concluded that the settlement agreement was valid and enforceable and dismissed Kinzer’s complaint with prejudice. Kinzer appealed that determination. On January 20, 2015, this court affirmed the dismissal, concluding that Kinzer had failed to put forth valid bases to invalidate the settlement agreement. *Kinzer v. CitiMortgage, Inc.*, No. A14-0830, 2015 WL 234262, at *1 (Minn. App. Jan. 20, 2015).

In January 2014, CitiMortgage and FHLMC moved the district court, under Minn. R. Civ. P. 60.02, to order Kinzer to sign a W-9 form (a request for taxpayer identification number and certification). Kinzer refused to sign the W-9, which CitiMortgage and FHLMC argued was necessary to process Kinzer’s settlement payment. The district court determined that a rule 60.02 motion was inappropriate and encouraged FHLMC and CitiMortgage “to consider other possible ways to carry out the settlement agreement without the need for . . . Kinzer to sign a W-9 form.”

In May 2014, FHLMC filed a second eviction action alleging its right to possess the property. The district court granted summary judgment for FHLMC and issued a writ of recovery. The matter was appealed to this court and affirmed. *Fed. Home Loan Mortg. Corp. v. Kinzer*, No. A14-1013, 2015 WL 134201, at *5 (Minn. App. Jan. 12, 2015), *review denied* (Minn. Apr. 14, 2015). In affirming, we noted that Kinzer did not dispute that the mortgage was foreclosed and that there was no redemption, and she did not dispute that “CitiMortgage purchased the property at the sheriff’s sale and registered a copy of the sheriff’s certificate, and later conveyed its interest in the property to [FHLMC], which was also registered.” *Id.* at *3.

In April 2015, the district court, pursuant to Minn. Stat. § 508.20 (2016), referred CitiMortgage’s title action to the examiner of titles to hear and determine issues of law and fact and make a report for the district court. CitiMortgage moved for summary judgment, claiming that a valid foreclosure had occurred, CitiMortgage had obtained the rights to the property, the property was then conveyed to FHLMC, and CitiMortgage was therefore entitled to a new certificate of title in favor of FHLMC. CitiMortgage further alleged that the defenses raised in Kinzer’s answer were barred by res judicata. Kinzer moved for partial summary judgment. On August 17, 2015, the examiner issued a report recommending summary judgment for CitiMortgage and determining that Kinzer’s challenges were barred by the mediated settlement agreement and res judicata.

CitiMortgage moved to adopt and Kinzer moved to reject the examiner’s report. Kinzer argued that res judicata was inapplicable because CitiMortgage failed to perform the terms of the settlement agreement by not paying her \$15,000 upon her signing of the

settlement agreement. In November 2015, the district court ordered that CitiMortgage either tender \$15,000 to Kinzer or submit a brief explaining why Kinzer's claims were barred despite nonpayment. In December 2015, CitiMortgage tendered payment of \$15,000 to Kinzer's attorney, and the attorney attempted to give the payment, minus his fees, to Kinzer, but she refused to accept. In March 2016, the district court adopted the examiner's report, granted summary judgment in favor of CitiMortgage, and directed the registrar of titles to enter a new certificate of title in favor of FHLMC. This appeal followed.

D E C I S I O N

The district court adopted the report and recommendations of a title examiner and granted summary judgment in favor of CitiMortgage. "Our review of a district court's decision to adopt the report and recommendations of a title examiner presents a mixed question of law and fact." *In re Petition of Beachside I Homeowners Ass'n*, 802 N.W.2d 771, 773 (Minn. App. 2011). The district court's factual findings will not be disturbed unless clearly erroneous. *Id.* But we review the district court's legal conclusions and judgment de novo. *Id.*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the

district court erred in its application of the law to the facts.” *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

Kinzer argues that (1) genuine issues of material fact preclude summary judgment; (2) the district court improperly applied claim preclusion; (3) res judicata bars CitiMortgage’s title action; (4) the parties agreed that Kinzer’s previous civil action is not relevant to this matter, and the district court lacked jurisdiction over the settlement agreement; (5) the settlement agreement was abandoned and the judgment was dormant, and the district court improperly rewrote the terms of the settlement agreement; (6) the district court improperly made factual findings and clearly erred in its findings; and (7) David Kinzer was not properly served, and the district court improperly awarded costs and disbursements. We address each issue in turn.

Summary judgment

We first address whether genuine issues of material fact remain in CitiMortgage’s title action following a mortgage foreclosure. “Any person who has, by an action or other proceeding to enforce or foreclose a mortgage . . . become the owner in fee of the land . . . may have the title registered.” Minn. Stat. § 508.58, subd. 1 (2016). Here, there was a mortgage and subsequent foreclosure, a sheriff’s sale, CitiMortgage purchased the property, and there was no redemption. A sheriff’s certificate of sale was entered into the record, which provides prima facie evidence of title in fee for CitiMortgage and its heirs and assigns. See Minn. Stat. § 580.19 (2016).

Kinzer argues that genuine issues of material fact remain because CitiMortgage repeatedly stated during a motion hearing that the validity of the mortgage and foreclosure

was in dispute. Kinzer's argument is meritless. CitiMortgage was simply clarifying Kinzer's challenges to the title action and arguing that those challenges were barred by res judicata.

Kinzer argues that a genuine issue of material fact exists because, in CitiMortgage's answer in Kinzer's civil action, CitiMortgage admitted that "the mortgage is void." Again, Kinzer's argument is meritless. CitiMortgage was simply presenting alternative pleadings and arguing that, if the mortgage was void, David Kinzer was liable to CitiMortgage. See Minn. R. Civ. P. 8.05(b) (permitting two or more alternative or hypothetical statements of a defense).

Kinzer argues that genuine issues of material fact remain over the validity of the mortgage and foreclosure. She seeks title to the property and argues that the mortgage was fraudulently obtained. No genuine issues of material fact exist because those matters were already decided, and Kinzer's attacks on the mortgage and foreclosure are barred by res judicata, which precludes a party from raising claims that were, or could have been, raised in an earlier action. See *Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 239 (Minn. 2007).

This court reviews de novo whether res judicata is applicable. *Id.* Res judicata bars a subsequent claim when "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007) (quotation omitted).

First, there was an earlier claim involving the same set of factual circumstances. Kinzer commenced an action in 2012 seeking title to the property and attacking the validity of the mortgage and foreclosure. She alleged that her former husband used a forged power-of-attorney form to obtain a mortgage without her knowledge. Here, Kinzer again seeks title and claims that the mortgage and foreclosure are invalid because her former husband used a forged power-of-attorney form to obtain a mortgage without her knowledge.

Second, the same parties are involved. Kinzer was the plaintiff in her previous civil action, and CitiMortgage and FHLMC were both named defendants. Third, Kinzer's previous civil action reached a final disposition pursuant to a mediated settlement agreement and subsequent dismissal with prejudice. "A judgment based on a settlement agreement is a final judgment on the merits, but only with respect to those issues and claims actually settled." *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 736 n.1 (Minn. App. 1995) (citation omitted), *review denied* (Minn. Sept. 28, 1995). In her complaint in her civil action, Kinzer asked the district court to declare the power-of-attorney, the mortgage, and the sheriff's sale to be void and to declare her the sole owner of the property. Pursuant to the settlement agreement, Kinzer would consent to proceedings subsequent and acknowledge the validity of the mortgage and foreclosure. Therefore, Kinzer's claims challenging the validity of the mortgage and foreclosure reached a final judgment on the merits.

Fourth, Kinzer had a full and fair opportunity to litigate the matter. She was represented by counsel and participated in a mediation session, she signed the settlement

agreement and then challenged its validity. The settlement agreement was deemed binding and enforceable, she appealed, and we affirmed.

In sum, Kinzer's claim of title based upon a challenge to the validity of the mortgage and foreclosure is barred by res judicata, and there are no genuine issues of material fact regarding the validity of the mortgage and foreclosure. *See Application of Schaefer to Register Title*, 287 Minn. 490, 490, 178 N.W.2d 907, 908 (1970) (holding that res judicata barred a claim of title asserted in a registration proceeding when the same claim had been asserted and dismissed with prejudice in a prior action between the same parties); *Barth v. Stenwick*, 761 N.W.2d 502, 508 (Minn. App. 2009) (setting forth requirements for collateral estoppel, which are similar to requirements for res judicata but concern previously litigated issues rather than claims); *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. App. 1996) (stating that Minnesota does not permit collateral attacks on facially valid judgments), *review denied* (Minn. Feb. 26, 1997).

Preclusion

Kinzer next argues that preclusion is inapplicable because CitiMortgage failed to perform the terms of the settlement agreement by failing to pay her. Kinzer's challenge is unavailing. A binding and enforceable settlement agreement was reached, the matter was disposed of pursuant to that agreement, and this court affirmed that disposition. Therefore, res judicata is applicable. Generally, in the absence of fraud, a valid judgment entered by agreement operates as res judicata "to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties." *Pangalos v. Halpern*, 247 Minn. 80, 85-86, 76 N.W.2d 702, 706 (1956).

Res judicata

Kinzer argues that res judicata bars CitiMortgage's present title action. She argues that the resolution of the previous rule 60.02 motion (asking the district court to make Kinzer sign the W-9 form) "denied CitiMortgage a transfer of title for not paying on the mediation contract." Kinzer mischaracterizes that order. The district court simply concluded that a rule 60.02 motion was the improper vehicle for the requested relief; the order was not a denial of a request to transfer title. Further, the rule 60.02 order was not a final judgment on the merits. *See Brown-Wilbert*, 732 N.W.2d at 220 (requiring a final judgment on the merits for application of res judicata); *see also* Minn. R. Civ. P. 60.02 (providing relief from final judgments, orders, or proceedings, and noting that a motion under rule 60.02 "does not affect the finality of a judgment or suspend its operation").

Civil action

Kinzer argues that the parties agreed that her civil action challenging the mortgage and foreclosure is not relevant to this matter. Kinzer's argument is meritless. CitiMortgage is clearly arguing that res judicata is applicable. Kinzer asserts that the district court lacked jurisdiction to rule on the settlement agreement because the case was not before the court. However, res judicata intrinsically requires the existence and examination of a previous claim. *See Drewitz*, 728 N.W.2d at 239.

Settlement agreement

Kinzer argues that the settlement agreement was abandoned and dormant, and CitiMortgage somehow waived any right to seek title following its motion under rule 60.02. Kinzer also argues that the district court improperly rewrote the terms of the settlement

agreement. We shall not address these arguments as they were not raised before the district court. Generally, we will not consider issues not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Factual findings

Kinzer argues that the district court improperly made findings in its summary judgment order and clearly erred in its findings. While a district court must not make factual findings on summary judgment, it may apply the law to undisputed facts, as occurred here. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

Kinzer asserts that the district court clearly erred by finding that her marriage was dissolved in March 2014, and the mortgage “was executed after July 1, 1987.” The district court’s observation that the marriage was dissolved in 2014 was erroneous, as the decree was entered in 2004. However, the district court “accepted, adopted, and approved” the examiner’s report, which noted the correct date of the dissolution. Further, the date was not germane. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (stating that de minimis error not grounds for reversal). Kinzer also argues that it was erroneous to find that the mortgage “was executed after July 1, 1987.” This was not an error because the mortgage was executed in 2004.

Service/Costs and disbursements

Kinzer asserts that David Kinzer was not properly served with an order to show cause. This issue was not raised before the district court. *See Thiele*, 425 N.W.2d at 582. Regardless, service was proper. The examiner of titles recommended that notice be provided by order to show cause. *See* Minn. Stat. § 508.13 (2016) (concerning powers and

reports of examiners). An order to show cause was then issued by the district court. Affidavits were filed stating that David Kinzer could not be located in Minnesota and that he was therefore served by both mail and publication. The district court found that David Kinzer was served and received notice, and the record supports this finding. *See* Minn. Stat. § 508.58, subd. 1 (requiring due notice); Minn. R. Gen. Pract. 215 (requiring, in proceedings under Minn. Stat. § 508.58, when the manner of service is not prescribed by statute, service by order to show cause in the manner designated by that order); *see also* Minn. Stat. § 508.39 (2016) (allowing service of nonresidents by mail, publication, or other means if ordered by the court).

Lastly, Kinzer argues, in her reply brief, that the district court, sua sponte, improperly awarded costs and disbursements to CitiMortgage. We shall not address this issue because it was not raised in Kinzer's principal brief. Issues that are raised for the first time in a reply brief are not properly before this court. *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 748 (Minn. App. 2001).

Affirmed.