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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0455**

Michael O'Byrne, et al.,
Appellants,

vs.

Bremer Bank, National Association,
Respondent.

**Filed October 30, 2017
Affirmed
Connolly, Judge**

Olmsted County District Court
File No. 55-CV-16-1391

David W. VanDerHeyden, VanDerHeyden Law Office, P.A., Rochester, Minnesota (for appellants)

Ken D. Schueler, Dustin C. Jones, Dunlap & Seeger, P.A., Rochester, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellants who are borrowers challenge the summary judgment granted to respondent lender, arguing that a 2009 loan did not extinguish a 2007 mortgage and that

respondent's predecessor breached a settlement agreement. Because the district court did not err in concluding that the 2009 loan did extinguish the 2007 mortgage and that respondent's predecessor did not breach the settlement agreement, we affirm.

FACTS

In 2007, appellants Michael O'Byrne (M.), and his daughter Allison O'Byrne Stoehr (A.), obtained financing from Eastwood Bank (Eastwood), the predecessor of respondent Bremer Bank (Bremer), to build a spec home on A.'s property (the 2007 loan). M. signed a promissory note for \$125,000 due on July 15, 2008; A. signed a mortgage (the 2007 mortgage) for the loan, with the property as collateral. A. was required to maintain insurance and to name Eastwood as the loss payee; in the event of total loss, insurance proceeds were to be applied to appellants' debt, with any excess going to A. The insurer was Spring Valley Mutual Insurance (Spring Valley). The spec home was constructed, insured, and placed on the market.

In 2009, the spec home remained unsold and the 2007 loan unpaid. M. and his wife, appellant Beverly O'Byrne (B.), refinanced the spec home loan and another loan with Eastwood by taking out a new loan of \$156,000, which had a maturity date of July 10, 2010 (the 2009 loan). Collateral for the 2009 loan was M. and B.'s homestead.

In 2010, M. and B. defaulted on the 2009 loan. In 2011, the spec home, still unsold, was destroyed by a fire of unknown origin, and M. and A. brought a claim against Spring

Valley.¹ While Spring Valley was evaluating the claim, M. personally demolished the remains of the spec home without Spring Valley's permission.

M. and A. submitted a claim for \$270,000, of which \$30,000 was for loss of personal property. This loss was inconsistent with Spring Valley's findings before the demolition, and Spring Valley denied the claim on the ground that M. and A. submitted a false proof-of-loss form for nonexistent personal property. M. and A. then brought an action against Spring Valley (the Spring Valley action).

In 2012, the default of M. and B. on the 2009 loan was resolved with a settlement agreement (the agreement). Eastwood said it would not foreclose if M. and B. paid off the loan by June 30, 2013; M. and A. assigned Eastwood the right to any settlement proceeds of the Spring Valley action until the agreement was fully satisfied; and Eastwood agreed to testify in the Spring Valley action.

The trial in that action took place in 2013. Testimony from Eastwood representatives indicated that, while the 2007 loan was satisfied by the 2009 mortgage, the satisfaction document had not been sent out. Eastwood issued a satisfaction of the 2007 mortgage the same day this testimony was given.

The jury returned a special verdict for Spring Valley, finding that M. and A. had breached their insurance contract and were not entitled to damages. A. moved for judgment as a matter of law (JMOL). The district court found that A. did not breach the agreement but, following a hearing to determine the amount to which A. was entitled, concluded that

¹ This was the second claim for loss of a home by a fire of unknown origin filed with Spring Valley; B. filed a claim in April 2009 on a home she shared with M.

she was not entitled to recover because her mortgage was extinguished when fire destroyed the spec home and anything she received would go to M. M. and A. appealed; this court reversed the grant of JMOL, concluded that A. could not recover for the loss, and reinstated the jury verdict. *O'Byrne v. Spring Valley Mutual Ins. Co.*, No. A14-0886, 2015 WL 4527650, at *9 (Minn. App. July 6, 2015), *review denied* (Minn. Sept. 29, 2015).

When M. and B. failed to make timely payments on the 2009 loan, Eastwood issued a notice of default and right to cure. M. and B. then refinanced with another lender and paid off the 2009 loan, thus complying with the agreement.

In February 2016, appellants brought this action against respondent Bremer Bank, successor to Eastwood. They sought damages of over \$270,000 on seven claims: (1) failure to enforce the mortgage clause in the Spring Valley policy; (2) abuse of process; (3) breach of the agreement; (4) breach of fiduciary duty; (5) negligence; (6) breach of implied covenant of good faith and fair dealing; and (7) invasion of privacy.²

Respondent moved for summary judgment; appellants moved to amend their complaint and for partial summary judgment. Following a hearing, the district court denied appellants' motions and granted respondent's motion. Appellants challenge the grant of summary judgment, arguing that the district court erred in concluding that the 2007 mortgage was satisfied by the 2009 loan and that Eastwood did not breach the agreement.

² Appellants also brought, but later dismissed, a claim of tortious interference with contractual relations.

DECISION

“We 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).

1. Effect of the 2009 Loan

As the district court noted, “[appellants’] claims are premised on their allegation that the 2007 mortgage remained in effect following the 2009 loan refinance.” Appellants argue that, because the 2009 loan was not a refinance but a renewal and Eastwood did not issue a satisfaction for the 2007 mortgage until 2013, the 2007 mortgage was in effect at the time of the 2011 fire and, under its terms, Eastwood was required to exercise its right to the insurance proceeds as the loss payee. But the supreme court rejected this argument long ago.

[Payment of a mortgage debt] completely extinguishe[s] the mortgage, for it [is] a mere incident of the debt. The fact that, though paid, the mortgage was not satisfied of record, does not change the situation; for it is well settled that an assignee of a mortgage takes it subject to the defense that it has been paid, even though not discharged of record.

Hendricks v. Hess, 112 Minn. 256, 127 N.W. 995, 997 (Minn. 1910) (citation omitted).

The district court correctly concluded that, as a matter of law, the 2007 mortgage was extinguished with the 2009 refinancing and that Eastwood’s failure to provide a statement of satisfaction of the 2007 mortgage until 2013 was irrelevant to the satisfaction.

Appellants also argue that whether the 2007 mortgage was extinguished when the loan it secured was paid off is not a question of law but a question of fact, the relevant fact being the intent of the parties. Assuming this is true, M., the only party to both the 2007 and the 2009 loans, testified that the 2009 loan was intended to pay off the 2007 loan. He answered affirmatively when asked if the 2009 loan document said it was paying off two separate Eastwood loans, one of which was the 2007 loan. M.'s testimony is corroborated by the Real Estate Worksheet for the 2009 transaction, which has the blank after "loan purpose" filled in with the words "refinance spec house." Thus, M.'s own testimony defeats appellants' argument that "the parties intended that the [2009] note was a renewal note that continued an obligation under the prior note(s) and that as a result this renewal did not discharge, extinguish, or satisfy the \$125,000 note . . . or . . . the 2007 mortgage."

The district court was also correct in concluding that, "even if the [2007] mortgage was in effect at the time of the 2011 fire, enforcement of the clause at issue [in Minn. Stat. § 65A.01, subd. 3 (2016)] would not have benefitted [appellants]." That clause provides the text of the Minnesota Standard Fire Insurance Policy, including:

[W]hensoever this [insurance] company shall be liable as to a mortgagee or vendor for any sum for loss under this policy . . . this company shall elect by itself, or with others to pay the mortgagee or vendor the full amount secured by such mortgage or contract for deed, then the mortgagee or vendor shall assign and transfer to the company the mortgagee's or vendor's interest, upon such payment, in the said mortgage or contract for deed together with the note and debts thereby secured.

Minn. Stat. § 65A.01, subd. 3. "This policy language creates a contractual right to assume any and all benefits flowing from the assigned note and mortgage." *TIG Ins. Co. v.*

Anderson, 663 N.W.2d 1, 4 (Minn. 2003). Thus, if the mortgage had not been extinguished in 2011 and Eastwood had recovered under the policy, appellants would have been liable to Spring Valley instead of to Eastwood.

The district court did not err in concluding as a matter of law that the 2009 loan satisfied the 2007 loan in full and extinguished the 2007 mortgage.

2. Breach of the Mediation Agreement

Appellants argue that Eastwood breached its 2012 settlement agreement with M. and B. by failing to cooperate in the Spring Valley action by providing a satisfaction for the 2007 mortgage. This argument is based on the clause in the agreement requiring Eastwood “to cooperate and appear in such action [i.e., the Spring Valley action] to testify, if subpoenaed, however, [Eastwood] does not warrant or represent that such testimony will be helpful to [M. and B.]’s prosecution of [the Spring Valley] action.” A representative of Eastwood was subpoenaed, appeared, and testified at the trial that the 2007 loan had been paid off in 2009. Although this testimony was not helpful to M. and B., it does not support appellant’s argument that Eastwood breached the agreement by failing to cooperate and appear in the action.

Appellants also argue that Eastwood breached the agreement by foreclosing on appellants’ home, thus helping to defeat their claims in the Spring Valley action. But the agreement provided that M. and B. would pay off the 2009 loan in full by June 30, 2013; they breached it by not paying off the loan by that date. The loan was secured by their home, and they provide no reason why Eastwood should not have foreclosed when they breached. M. and B. do not dispute the debt or that they were in default; nor do they argue

that the foreclosure of their home was procedurally defective. Thus, neither of appellants' assertions of breach of the settlement agreement has merit.³

The district court did not err in determining that the 2007 mortgage was satisfied by the 2009 loan and that Eastwood did not breach the parties' 2012 agreement.

Affirmed.

³ Appellants also argue that Eastwood breached the settlement agreement by failing to recover insurance proceeds under the 2007 mortgage after the fire in 2011 and by not timely assessing its legal capability to enforce its right to the insurance proceeds. These arguments fail because they are based on the premise that the 2007 mortgage was still in effect at the time of the fire, which we have already rejected.