

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1097**

Deutsche Bank National Trust Company,
Respondent,

vs.

Stephen C. Roberts,
Appellant,

Genevieve B. Roberts,
Appellant,

Capital Alliance Financial, LLC, et al.,
Respondents,

Burns & Hansen, PA,
Respondents,

vs.

Ocwen Loan Servicing,
third party defendant,
Respondent

**Filed January 29, 2018
Affirmed
Worke, Judge
Concurring in part, dissenting in part, Rodenberg, Judge**

Hennepin County District Court
File Nos. 27-CV-16-9185, 27-CV-10-5505

Daniel J. Sathre, Houser & Allison, APC, Excelsior, Minnesota (for respondents Deutsche Bank National Trust Company and Ocwen Loan Servicing)

Stephen C. Roberts, Genevieve B. Roberts, Minnetonka, Minnesota (pro se appellants)

Erik Frederick Hansen, Burns & Hansen, P.A., Minneapolis, Minnesota (for respondent Burns & Hansen, P.A.)

Joseph Mohammed Jammal, Stenger & Stenger, PC, Grand Rapids, Michigan (for respondents Capital Alliance Financial, LLC and Capital One Bank USA NA)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this judicial-foreclosure action, appellants argue that the district court erred in interpreting the parties' settlement agreement, determining that the asserted interest rate on the loan was correct, and denying appellants' motion to remove the judge. We affirm.

FACTS

In June 1996, appellants Stephen C. Roberts and Genevieve B. Roberts (the Robertses) executed a note in the amount of \$140,000 and secured repayment with a mortgage encumbering their property. The interest rate was 14.8%. The Robertses were eligible for an Interest Rate Reduction Program (IRRP) that would reduce the interest rate by 1% per annum if they made timely payments for six consecutive months. Under the IRRP, the interest rate would not reduce below 9.9%.

The Robertses fell behind on mortgage payments. In May 2011, Litton Loan Servicing LP (Litton), then-servicer¹ of the Robertses' loan, agreed to a temporary repayment plan. At the time, the loan was due for the September 1, 2010 installment and

¹ Avelo Mortgage LLC (Avelo) serviced the loan before Litton.

the Robertses also owed nearly \$24,000 in additional fees. The Robertses began making monthly payments under the repayment plan in June 2011.

In September 2011, Litton was acquired by respondent Ocwen Loan Servicing (Ocwen). Ocwen is the servicer for respondent Deutsche Bank National Trust Company (Deutsche Bank). In November 2011, Ocwen returned funds to the Robertses, stating that they were insufficient to satisfy the defaulted amount on the loan and that there was no alternative-repayment agreement.

In August 2012, the Robertses initiated a lawsuit against Ocwen, alleging a breach-of-contract claim for Ocwen's refusal to abide by the terms of the repayment plan with Litton. Ocwen removed the action to federal court (federal matter). By February 26, 2014, the parties had reached an agreement and put it on the record before a United States District Court Magistrate Judge. The agreement terms included:

[F]irst . . . is that the [Robertses] shall pay \$155,000 on or before July 17, 2014, which would be in full satisfaction of the mortgage loan.

. . . .

If payment is not made by July 17, 2014, [Ocwen] will be entitled to proceed with the foreclosure on the mortgage loan; . . . [the Robertses] consent to the foreclosure and agree not to contest the issues.

The next term would be at the end of the redemption period, [the Robertses] would agree to vacate the property. And as part of this agreement, they would consent to an Order of Eviction in the event they do not voluntarily vacate by the expiration of the redemption period.

[T]he parties have also agreed that Ocwen will take steps to correct or amend the credit line reporting for the account specifically for the period of time involving the . . . work-out plan and after or to the present date.

In March, the United States District Court filed an order noting that an agreement had been reached and dismissing the federal matter without prejudice.

Ocwen drafted an agreement and presented it to the Robertses to sign. Instead of signing the agreement, the Robertses sought to add a term regarding the amount due. The parties did not sign an agreement and the Robertses did not pay Ocwen \$155,000 by July 17, 2014.

In October 2014, Ocwen moved to enforce the agreement. By this time, the Robertses' deadline to perform under the terms of the agreement had passed. At a hearing before the magistrate judge, the Robertses argued that Ocwen's agreement to take steps to correct the credit-line reporting was "a condition precedent" to the Robertses' performance. The magistrate judge asked the Robertses why the credit reporting was not presented as a condition precedent at the prior hearing. The Robertses' attorney conceded that there was no mention of it being a condition precedent, stating that it was only recently learned that the credit-line reporting was affecting the Robertses' ability to refinance. The magistrate judge issued a report and recommendation recommending a determination that the parties' agreement was "valid and enforceable" and that, because the Robertses failed to submit payment by the deadline, Ocwen was entitled to proceed with foreclosure, which the Robertses "may not contest." In December 2014, an order was filed granting Ocwen's motion to enforce the agreement and dismissing the Robertses' claim with prejudice.

The Robertses appealed the federal matter. The Eighth Circuit Court of Appeals vacated the December 2014 order and judgment and remanded with instructions to dismiss Ocwen's motion to enforce the agreement and enter a separate judgment based on the

March 2014 order. In July 2015, the federal district court entered judgment, stating: “This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.” It further stated: “Pursuant to the [o]rder . . . issued on March 28, 2014, judgment is hereby entered, and this action is dismissed without prejudice.”

On June 16, 2016, Deutsche Bank filed a complaint, alleging that the Robertses defaulted under the terms of the mortgage and additionally owed over \$125,000 in interest, costs, and disbursements. On August 3, 2016, the Robertses filed their answer, counterclaim, and third-party complaint. The Robertses alleged several affirmative defenses, including failure to satisfy a condition precedent. The Robertses’ counterclaim alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance. The same day, the Robertses filed a first amended answer, counterclaim, and third-party complaint, alleging additional defenses and counterclaims. Deutsche Bank moved to dismiss for failure to state a claim upon which relief can be granted.

In December 2016, the district court filed an order granting Deutsche Bank’s motion to dismiss. The district court concluded that the Robertses’ claims arising out of the same operative facts as those in the federal matter were barred. The district court, however, concluded that it could not issue an order for monetary judgment “at this time” because the amount of the judgment could not be determined from Deutsche Bank’s complaint.

In February 2017, Deutsche Bank moved for summary judgment regarding the amount of the judgment. The Robertses also moved for summary judgment, alleging that

the interest rate could not be determined. The Robertses also moved to remove the district court judge, alleging that the judge was biased and prejudged the case.

In June 2017, the district court filed an order granting Deutsche Bank's motion for summary judgment and denying the Robertses' motion for summary judgment. The district court found that the initial interest rate was 14.8% and that in 2008, when the note was transferred to Litton, the interest rate had been reduced to 13.8% due to the IRRP. The district court found that Deutsche Bank's records showed that the total amount due was \$277,190.41 as of March 6, 2017. The district court also denied the Robertses' removal motion. The Robertses sought review of the motion to remove by the chief judge of the district court. The chief judge also denied the motion. This appeal followed.

DECISION

Waiver

The Robertses argue that the district court erred in determining that they waived their right to challenge the foreclosure action. “[W]aiver is the intentional relinquishment of a known right.” *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) (quotations omitted). This court reviews a district court’s determination that a party has waived a right for clear error. *In re Civil Commitment of Giem*, 742 N.W.2d 422, 432 (Minn. 2007).

The district court concluded that, as part of the agreement reached in the federal matter, the Robertses waived their right to defend against the foreclosure. “Settlement of claims is encouraged as a matter of public policy.” *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008). “A settlement agreement is a contract.”

Dykes v. Sukup Mfg. Co., 781 N.W.2d 578, 581-82 (Minn. 2010). When the language of a contract is clear and unambiguous, this court enforces the agreement of the parties as expressed in the contract. *Id.* at 582. A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Id.* This court reviews de novo whether a contract is ambiguous. *Id.*

The Robertses do not challenge the validity of the agreement. The Robertses agreed that if they did not pay Ocwen \$155,000 by July 17, 2014, Ocwen would “be entitled to proceed with the foreclosure” and they would “consent to the foreclosure and agree not to contest the issues.” The Robertses argue that their agreement not to “contest the issues” was not a waiver of their right to challenge the foreclosure because the term “the issues” is ambiguous. However, when read in context, this term is not susceptible to more than one reasonable interpretation. *See Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 892 (Minn. 1994) (“The sense of a word depends on how it is being used; only if more than one meaning applies within that context does ambiguity arise.”).

The agreement addressed the mortgage and foreclosure. More importantly, the agreement related to what the Robertses agreed to do if they failed to make their payment to Ocwen. They agreed that Ocwen was entitled to proceed with foreclosure and that they would not contest it. Further, they agreed that if Ocwen proceeded with foreclosure, they “would consent to an Order of Eviction in the event they do not voluntarily vacate by the expiration of the redemption period.” Everything that the Robertses agreed to do under the terms of the agreement if they failed to make a timely payment to Ocwen related to the foreclosure; thus, the only reasonable interpretation of “the issues” is the issues related to

the foreclosure. The district court did not clearly err in concluding that the Robertses waived their right to contest foreclosure issues.²

Time for performance

The Robertses also argue that the district court erred in concluding that Ocwen's delay in taking steps to address the Robertses' credit reporting was reasonable.

Contract formation requires a "meeting of the minds on the essential terms of the agreement." *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 100-01 (Minn. App. 2004). But "[a] binding contract can exist despite the parties' failure to agree on a term if the term is not essential or can be supplied." *Id.* at 101. As stated in *Liljengren Furniture & Lumber Co. v. Mead*, when "a contract is silent as to the time of performance," the law implies that performance shall be "within a reasonable time." 42 Minn. 420, 424, 44 N.W. 306, 308 (1890).

The parties did not include a date in the agreement regarding when Ocwen was to take steps to attempt to amend the credit-line reporting. The parties did agree that the Robertses would pay Ocwen by July 17, 2014. The record shows that Ocwen began contacting the Robertses in March 2014 in order to get the Robertses to sign an agreement. If the timing of Ocwen's performance was essential, the Robertses could have raised it when Ocwen attempted contact, but the Robertses sought instead to add a statement to the

² The district court also ruled that the doctrine of res judicata precluded the Robertses' claims. Because we have determined that waiver applies, we do not need to analyze the application of res judicata.

agreement regarding the amount due on July 1, 2014, shortly before the Robertses were required to pay Ocwen \$155,000.

Ocwen moved quickly after the agreement was reached by drafting a written agreement and attempting to communicate with the Robertses. In contrast, the Robertses failed to respond to Ocwen's initial communication attempts, failed to pay Ocwen based on the terms of the agreement, and failed to address Ocwen's time for performance, if Ocwen's time for performance was an essential issue. Thus, Ocwen's delay in taking steps to attempt to amend the credit-line reporting was reasonable under the circumstances.

Summary judgment

The Robertses also argue that the district court erred in granting Deutsche Bank's motion for summary judgment because the interest rate cannot be determined. 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 applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). We must view the evidence in "the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The original interest rate charged was 14.8%. The Robertses were eligible for the IRRP that would reduce the interest rate on the unpaid principal by 1% per annum if they made timely payments for six consecutive months.

Deutsche Bank's evidence shows that Avelo serviced the loan before transferring it to Litton in July 2008. Before Litton boarded the Robertses' loan information in its computerized servicing database, known as RADAR, it conducted a comprehensive review to ensure the validity and accuracy of the records and loan-accounting information. This included a review of, among other things, the note, mortgage, and prior servicer payment and transaction history. Litton would not board a loan on RADAR until a complete accounting confirmed that the loan information was complete, accurate, and in full compliance with the terms of the note and mortgage. Before boarding the Robertses' loan in RADAR on July 4, 2008, Litton confirmed that the principal balance was \$130,223.99 and the interest rate was 13.8%. The interest rate indicated that the Robertses qualified for one rate reduction under the IRRP. Deutsche Bank submitted an affidavit of a senior loan analyst from Ocwen, who previously worked for Litton, stating that if the Robertses had been "entitled to an additional interest rate reduction, that issue is one which would have been discovered during Litton's independent review of the loan accounting."

The Robertses' objection is based on their assertion that they "have personal knowledge" that they "made at least the first 36 monthly payments in a timely manner." The Robertses made this assertion in affidavits opposing Deutsche Bank's motion for summary judgment. But the Robertses provided no evidence. See *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 388 (Minn. App. 2010) (stating that a self-serving affidavit created by a party in an attempt to create a fact issue for trial is generally insufficient). Further, Litton's records show that the interest rate was 13.8% when transferred from Avelo in 2008. The Robertses submitted payments for at least two years

after that transfer. If the Robertses, as they suggest, had qualified for more than one interest-rate reduction under the IRRP, it belies logic that they would continue to make payments on a loan with a 13.8% interest rate and not challenge that interest rate. Based on this record, the district court did not err by granting Deutsche Bank's motion for summary judgment.

Removal

Finally, the Robertses argue that the district court should have been removed for cause. "A motion to remove for cause is committed to the discretion of the [district] court and this court will reverse only for an abuse of that discretion." *Hooper v. State*, 838 N.W.2d 775, 790 (Minn. 2013) (quotation omitted). Any motion for removal on the basis of actual prejudice or bias shall first be heard by the judge sought to be removed. Minn. R. Gen. Pract. 106. If the judge denies the motion, it may then be reconsidered by the chief judge of the district court or another judge designated by the chief judge. *Id.* Here, the district court denied the motion and the chief judge of the district court also denied the motion.

The Robertses first contend that the district court was biased because the district court ruled on the condition-precedent issue, which they claim was raised only in the federal matter and never argued in district court. The Robertses claim that the district court "must have based its analysis, its decision, and its Order on the federal action." However, the Robertses' answer, counterclaim, and third-party complaint alleged an affirmative defense of failure to satisfy a condition precedent. The Robertses alleged that "[t]here were no conditions precedent to the requirement that Ocwen correct Roberts' [sic] credit

reports.” They alleged that Ocwen breached the agreement “because they had not corrected and had not even attempted to correct” the credit reports. Finally, they alleged that their “obligation to pay Ocwen \$155,000 by July 17, 2014 was relieved and is excused by Ocwen’s . . . breach.” These assertions together allege that because Ocwen did not attempt to correct the credit-line reporting, the Robertses were relieved of their obligation to submit payment. This implies that the Robertses were not required to act until Ocwen first attempted to correct the credit-line reporting, i.e., a condition precedent to their submitting payment. The district court appropriately relied on the Robertses’ pleadings.

The Robertses also assert that the district court was biased because it stated that it could not “at this time” grant Deutsche Bank’s motion for monetary judgment. The Robertses claim that “at this time” implies that the district court would “certainly do so as soon as it was able.” Deutsche Bank sought a judgment on the pleadings. The district court ruled that it could not issue an order for a monetary judgment because Deutsche Bank’s complaint did not include documentation supporting a specific judgment. The “at-this-time” language meant that the district court required Deutsche Bank to support its request for a monetary judgment.

As the district court ruled, the Robertses were dissatisfied with the district court’s decision, but that does not make the district court biased against the Robertses. *See State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008) (“The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge’s impartiality.”).

Affirmed.

RODENBERG, Judge (Concurring in part and dissenting in part)

I concur in those portions of the court's opinion affirming the district court concerning appellants' waiver of the right to challenge the foreclosure action, affirming its finding that Ocwen did not unreasonably delay in addressing the credit-report issue, and concluding that appellants' arguments concerning disqualifying bias on the part of the district court are meritless. I respectfully dissent from that portion of the court's opinion affirming the district court's summary judgment in favor of Ocwen for money damages under the note totaling \$277,190.41.

The court's opinion accurately identifies the summary-judgment standard and our standard of review. Properly applying those standards to the facts here, there remain unresolved issues of material fact precluding summary adjudication of the case.

The original June 1996 note, between appellants as borrowers and Equity Lending Inc. as lender, entitled appellants to interest-rate reductions if they made timely payments on the note; the original 14.8% interest rate was subject to being reduced by 1% for each six-month period within which appellants timely made all payments, with 9.9% interest being the lowest rate they could achieve. Equity Lending assigned the note and mortgage to Transamerica Mortgage Company. Transamerica, in turn, assigned to Chase Manhattan Bank.³ Chase eventually assigned the note and mortgage to Deutsche Bank "as trustee for GSAMP Trust 2006-SEA1 Mortgage Pass-Through Certificates, Series 2006-SEA1" in 2012. During the early years of the note and mortgage, Avelo serviced the loan, but

³ For some reason not disclosed by the record, this assignment to Chase in 2001 was not recorded with the Hennepin County Recorder until May 11, 2011.

eventually that responsibility passed to Litton Loan Servicing LP. By 2011, appellants had fallen behind on their payments with Litton, which was then servicing the loan. Litton agreed not to commence foreclosure proceedings if appellants complied with a repayment plan agreed to in May 2011. Appellants paid \$6,000 to Litton on May 17, 2011, and then submitted nine consecutive and timely payments of \$3,394.11 as they had agreed with Litton that they would.⁴ Unknown to appellants, Litton was acquired by Ocwen in September of 2011. Ocwen, after acquiring Litton, accepted appellants' September and October payments under the agreement with Litton. But in November 2011, Ocwen began rejecting the payments and told appellants that, short of payment in full, it would refuse to accept any further payments made pursuant to the agreement between appellants and Litton (which, of course, Ocwen had acquired). The last payment submitted by appellants was in February 2012.

Then the suing started.

Appellants sued Ocwen in federal court, and the parties settled that litigation by way of a second stipulated settlement agreement described in the court's opinion.⁵ The agreement called for appellants to pay the compromise amount of \$155,000 by July 17, 2014, which the parties agreed would be payment in full. Appellants did not pay it, leading to the foreclosure and the lawsuit by Deutsche Bank for the amounts due on the note. It is

⁴ Appellants submitted payments for the months of June 2011 through February 2012.

⁵ There was an appeal to the Eighth Circuit Court of Appeals, as noted by the majority opinion. In context, the issues in that appeal are not relevant to the question of how much money appellants still owe on the note.

with respect to the district court's summary adjudication of the amount due on the note that I take issue with the majority's analysis.

In support of respondents' motion for summary judgment, Ocwen Senior Loan Analysts Kevin Flannigan and Howard R. Handville provided supporting affidavits claiming that appellants owe the amount for which they were sued. Appellants each responded to the motion by way of an affidavit alleging that appellants had made "at least the first 36 monthly payments in a timely manner," and that the interest rate used by Ocwen and Deutsche Bank to compute the current interest due under the note and mortgage was therefore incorrect. The "first 36 monthly payments" would have been paid during the time Avelo was servicing the loan. Appellants did not provide a specific alternative interest computation, but challenged the accuracy of the 13.8% interest rate advanced by respondents and ultimately adopted by the district court.

Respondents' claim of the amount owed relies entirely on the Litton and Ocwen payment history. One of Flannigan's affidavits purports to demonstrate the absence of any genuine and material factual dispute about the amount of appellants' indebtedness by claiming that Flannigan knows of "Litton's routine practice" of regularly updating and applying payments correctly. He attached as an exhibit to his affidavit a Litton-generated payment history about which Flannigan claims he "acquired personal knowledge of the matters stated [therein] by personally examining these business records." Flannigan had apparently worked for Litton before Ocwen acquired it, but there is nothing in his affidavit nor anywhere else in the record demonstrating that Flannigan worked for Avelo, which serviced the loan before Litton. *The Avelo payment records are nowhere to be found in*

the record. The payment records supplied as an appendix to a Flannigan affidavit only go back to 2006. Those records are only those of Litton and Ocwen.

Handville's affidavit swore that the business records of the previous servicers of this oft-transferred loan were "integrated" into Ocwen's business records and that he knows that the Ocwen records are regularly kept and accurate. Neither Flannigan nor Handville claims personal knowledge of the accuracy of Avelo's records, other than to express their complete confidence that the records (wherever they are and if they even exist) must be correct because of how careful, diligent, and honest the banks and loan servicers have always been.

Flannigan's supplemental affidavit, apparently intended to eliminate the factual issue identified by appellants concerning the interest-rate issue, alleges this much: "I am not aware of any evidence that would entitle Borrowers to an additional interest rate reduction" below the 13.8%. What Flannigan's supplemental affidavit does *not* allege is that there *actually exists any evidence* establishing that appellants are *not entitled* to a further interest-rate reduction.

Plainly, there remains an unresolved fact issue on this record. The Avelo records—which would pertain to the period of time during which appellants swear they made "at least the first 36 monthly payments in a timely manner"—have not been produced. Respondents say that, because Senior Loan Analysts Flannigan and Handville know all about Ocwen's records, into which Litton's records and Avelo's records have been "integrated," and they know the regularly kept Ocwen records to be accurate, we can be sure that the 13.8% interest rate is correct and that there is no genuine dispute of material

fact about whether appellants owe \$277,190.41 under the original note. This claim is made despite the absence of any pre-2006 records.

The majority properly characterizes appellants' affidavits as self-serving. The affidavits of respondents are no less self-serving. I don't know why we would disregard the self-serving affidavits of debtors, but credit the self-serving affidavits of bankers. Moreover, respondents' affidavits provide no foundation concerning much of what they purport to prove about the records of prior servicers of this loan. This loan was transferred around between banks and loan-servicing companies many times, and all we have is a truncated record of the payments on this loan since 2006. Respondents have produced no records at all for the relevant period of time. The supplemental Flannigan affidavit actually purports to assert that Flannigan's *lack of awareness of evidence* of the disputed fact should be considered *proof of what the nonexistent evidence is*.⁶

Based on the record here, it might well be that appellants actually owe \$277,190.41 under the note. If I had to guess, I would suppose that respondents are probably right. But in the summary-judgment context, guessing, supposing, and probabilities are not in order. Respondents are not entitled to summary adjudication that this is the correct amount unless there is no genuine issue of material fact. Based on the state of this record, the district court could not have decided this case in respondents' favor without making findings concerning disputed facts. Appellants say they made the 36 consecutive timely monthly

⁶ If I say I know of no evidence that a person has any money in her pocket, my statement is not evidence of the absence of money in her pocket. All I have done with such a statement is disqualify myself from opining about whether there is money in her pocket.

payments. Respondents, by contending that the proper interest rate to compute the amount due is 13.8%, dispute that factual claim. And respondents have not—and apparently cannot—produce the payment records from the period of time in question. Awarding summary judgment in favor of respondents on this record was error, and I would reverse the grant of a money judgment in favor of Deutsche Bank and remand for trial.