STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1719

In re the Matter of Deutsche Bank Trust Company Americas,
as Trustee for Residential Accredit Loans, Inc.,
Mortgage Asset-Backed Pass-Through Certificates,
Series 2007-QSS for a Certificate of Title - Sopheap Pen.

Filed May 6, 2019
Affirmed
Worke, Judge

Scott County District Court
File No. 70-CV-16-4286

Sopheap Pen, Savage, Minnesota (pro se appellant)

Kristina Kaluza, Dykema Gossett PLLC, Minneapolis, Minnesota (for respondent Deutsche Bank Trust Company Americas)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Kalitowski, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the grant of summary judgment to respondent-bank, arguing that the district court erred in concluding that a loan-modification agreement never went into effect due to failure of a condition precedent. We affirm.

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

FACTS

In 2014, after appellant Sopheap Pen defaulted under the terms of a mortgage and the note secured thereby, respondent Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QSS (the bank) commenced a foreclosure by advertisement. The bank was the high bidder at a sheriff's sale, and the six-month redemption period expired without redemption. Pen challenged the validity of the sale in the United States District Court. The United States District Court determined that the foreclosure was valid, and the Eighth Circuit affirmed.

After filing a petition for a new certificate of title in March 2016, the bank decided to work with Pen in the interest of keeping her in the property. In December 2016, the bank offered Pen a loan-modification agreement (the agreement). Only after the Eighth Circuit affirmed the decision that the foreclosure was valid did Pen respond to the bank's loan-modification offer. On March 9, 2017, Pen's attorney contacted the bank to accept the offer. The bank directed Pen to deliver "certified funds in the amount of $2,237.43 with the initial down payment" the next day. On March 10, 2017, Pen submitted $2,237.43. Pen did not submit any other payment. In September 2017, the bank sent Pen a demand letter for payment due in the amount of $17,899.44. The sum encompassed eight missed payments from February - September 2017. Pen did not submit the demanded payment, and the bank returned Pen's March 10 payment due to her failure to make additional payments.

In April 2018, the bank moved for summary judgment on its petition for a new certificate of title. In response, Pen argued that the agreement was ambiguous regarding its effective date. She also claimed that she did not receive a copy of the executed agreement until October 2017, and, therefore, was not obligated to submit any payment until October 2017.

On August 22, 2018, the district court granted the bank's motion for summary judgment. The district court found that the bank agreed to accept "$2,237.43 with the initial down payment" to start the process of instituting the agreement, but that Pen failed to pay both the down payment and the first payment, which were required as a "prerequisite to the [a]greement becoming effective and binding." The district court determined that because the condition precedent failed, the agreement never became operative. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court reviews the evidence in the light most favorable to the party against whom summary judgment was granted, and reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *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 if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). A genuine issue of material fact does not exist "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, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Pen raises several claims in her pro se brief, but fails to support any with legal authority; thus, we could deem Pen's claims forfeited for inadequate briefing. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." (quotation omitted)). But even in considering Pen's claims, we conclude that the district court appropriately granted the bank's motion for summary judgment.

Pen argues that the agreement did not become effective until she received a copy of the executed agreement in October 2017. The agreement provides that the loan will not be modified "unless and until (i) [the bank] receives . . . the initial payment in the amount and by the date required under Sections 3.D., 3.E., 3.F., and 3.G. of this [a]greement, . . . and (iii) [Pen] receive[s] . . . a fully executed copy of this [a]greement." The unless-and-until language creates a condition precedent. *See Carl Bolander & Sons Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974) ("[T]here are no particular code words needed to form an express condition."). A condition precedent is "any fact except mere lapse of time which must exist or occur before a duty of immediate performance by the promisor can arise." *Id.* (quotation omitted); *see also Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989) (defining a condition precedent as "any fact or event, subsequent to the making of a contract, which must exist or occur before a duty of immediate performance arises under the contract").

"When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs." *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App. 1989).

Here, Pen acquired no rights under the agreement unless and until she paid the initial payment as required by the agreement. The terms of the agreement show that the "initial payment" included the "Down Payment" and the "first New Monthly Payment." Section 3.d required a down payment in the amount of $2,237.43 due on January 1, 2017. This section stated: "Down payment . . . must be received and applied prior to the modification effective date. If down payment is not received, the loan will not be modified." Section 3.e showed $2,237.43 as the new monthly payment amount. And section 3.f required the first new monthly payment due on February 1, 2017. Thus, Pen was required to make two payments, each in the amount of $2,237.43. There is no dispute that Pen made only one payment; therefore, she failed to satisfy a condition precedent, and the agreement did not become effective and binding.

Pen also argues that the agreement is ambiguous as to when the down payment was due. Pen's argument fails. First, there is no ambiguity. Second, even if there were an ambiguity, Pen failed to submit the down payment by any date.

Pen claims that section 3.d states that the down payment is due on January 1, 2017, but then states that the down payment "must be received and applied prior to the modification effective date," which is February 1, 2017. She claims that the agreement is ambiguous as to whether the down payment is due on January 1 or February 1.

Pen misreads the agreement. The agreement provides that the effective date is "the date of the first New Monthly Payment." The first new monthly payment is due on February 1, 2017; thus, the effective date is February 1, 2017. The down payment is due on January 1, 2017; it "must be received and applied prior to the modification effective date." Thus, the down payment is due on January 1, 2017, *prior* to February 1, 2017. Further, Pen made only one payment in March 2017. She did not make a down payment by January 1 or February 1, 2017; therefore, it would make no difference if there were an ambiguity.

Because Pen did not satisfy the condition of submitting two payments, the agreement did not become effective and the district court did not err in granting summary judgment in favor of the bank.

Affirmed.