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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A26-0442**

R&P Industries, LLC, et al.,
Appellants,

vs.

First Western Bank & Trust,
Respondent.

**Filed September 21, 2026
Reversed and remanded
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-25-548

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Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and
Rasmusson, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellants challenge the district court's decision to grant respondent's summary-judgment motion and deny appellants' motion to modify a scheduling order. We reverse and remand.

FACTS

In this appeal from a district court's summary-judgment order dismissing appellants' complaint, we present the facts in the light most favorable to appellants as the nonmoving party. *See Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017).

In 2022, appellant-mortgagor R&P Industries, LLC (R&P) purchased nine parcels of real property (the property). R&P operates three parking lots on the property, and the remaining appellants lease commercial spaces on the property.

A mortgage held by respondent-mortgagee First Western Bank & Trust (the bank) encumbered the property. After a series of events, including "the aftershocks of the [COVID-19] pandemic on local businesses and the condemnation of [buildings on the property] by the City of Minneapolis," R&P fell behind on its mortgage payments. In April 2024, the bank commenced foreclosure proceedings. In May 2024, a process server went to the property to serve notices of a July 2024 foreclosure sale. The process server reported that the "premises were and have been vacant and unoccupied." As a result, the process server did not serve any appellant but instead posted the notice in multiple locations on the property and took pictures of the posted notices. The bank published notice of the foreclosure sale in a newspaper for six consecutive weeks. At the foreclosure sale, the bank purchased the nine parcels of the property "as a whole."

In January 2025, appellants filed a complaint against the bank. They challenged the validity of the foreclosure sale and sought injunctive relief preventing the bank from interfering with their possession of the property. As relevant here, appellants argued that

they “actually occupied” the property under Minnesota Statutes section 580.03 (2024). They asserted that the foreclosure sale was therefore void because the bank did not effect personal service of the foreclosure-sale notice on appellants. *See* Minn. Stat. § 580.03 (requiring personal service of foreclosure-sale notice on “person in possession of the mortgaged premises, if the same are actually occupied”); *Drews v. Fed. Nat’l Mortg. Ass’n*, 850 N.W.2d 738, 742 (Minn. App. 2014) (“Absent strict compliance with [section 580.03], the foreclosure proceeding is void.”).

Temporary Restraining Order (TRO) and Dismissal Motions

The same day that appellants filed their complaint, they filed a separate motion for a TRO to prevent the bank from interfering with their possession of the property. Within a month, the bank filed a motion to dismiss the complaint for failure to state a claim under Minnesota Rule of Civil Procedure 12.02(e). In opposing the motion, appellants analyzed occupancy of the buildings and occupancy of the parking lots separately. With respect to the buildings, their theory of actual occupancy relied on assertions that appellants kept inventory, furnishings, and records in the buildings, and that one appellant maintained a valid liquor license. With respect to the parking lots, which were not condemned, appellants relied on contentions that the lots were in active use, they had operational automated pay stations, and R&P had “an active license with the City of Minneapolis . . . to conduct business as a paid parking lot.” Appellants also noted that Surinder Singh, who “acts as a caretaker for the Property and operates” the businesses of several appellants, “visited the Property almost daily.”

In March 2025, the district court issued an order denying appellants' TRO motion. But the district court found, in relevant part, that appellants made an adequate showing of a likelihood of success on the merits of their foreclosure-sale-notice claim under section 580.03. The district court's finding relied on the presence of operational automated payment stations in the parking lots and Surinder's "regular visits to the Property." It rejected appellants' theory of actual occupancy that relied on "the presence of unseen items left inside the" condemned buildings, which appellants were forbidden from entering.

Three months later, the district court then issued an order denying the bank's motion to dismiss. It determined that, based on their allegations related to the parking lots, appellants sufficiently pleaded their personal-service claim. It again rejected appellants' reliance on allegations related to the buildings.

Amended Complaint and Summary-Judgment Motions

In August 2025, appellants filed an amended complaint, adding a new claim of "unlawful forcible self-help removal" under Minnesota Statutes sections 557.08 and 557.09 (2024) (providing for treble damages in some circumstances).

Both the bank and appellants filed motions for summary judgment.¹ Appellants offered additional evidence, including an affidavit from Surinder along with "parking lot revenue statements to show that the lots were actively being used." The revenue statements are addressed to "RJS investments," which owned the property before R&P purchased it in 2022.

¹ The bank moved for summary judgment on both claims, while appellants moved for summary judgment on the personal-service claim only.

In October 2025, appellants filed notice of another motion, requesting that the district court modify the scheduling order to allow additional time for discovery because they made a good-cause showing under Minn. R. Civ. P 16.02.

Summary-Judgment Order

On January 9, 2026, the district court issued an order granting the bank’s motion for summary judgment and denying appellants’ discovery-related motion as moot. It declined to consider Surinder’s affidavit, stating that his “self-serving statements cannot create a genuine issue of material fact.” It again rejected appellants’ theory of actual occupancy that relied on the condemned buildings. With respect to appellants’ reliance on the parking lots, the district court found that “the revenue statements are evidence of operation of a business” at the time that the bank’s “process server went to the addresses associated with the Property.” However, the district court stated that section 580.03 required open and visible occupancy. It explained:

The revenue statements do not prove that Plaintiffs’ claimed automated parking business was an open and visible operation of Plaintiffs. . . . Plaintiffs offered no pictures or other documentary evidence, no copies of any lease agreements, and no affidavits probative of what the purported parking business looked like in operation, such that [the bank] should have been aware that the parking areas at the Property were being operated by Plaintiffs, or that Plaintiffs otherwise met the “actual occupancy” standard

The district court also stated that the parking-lot revenue statements were “devoid of reference to any Plaintiff.” It therefore determined that there was no genuine issue of material fact on the issue of actual occupancy and dismissed the personal-service claim.

The district court relied on its dismissal of the personal-service claim to dismiss the self-help claim and deny appellants' discovery-related motion. It reasoned that, because appellants had no right to possess the property, they could not show damages necessary to proceed with the self-help claim. The district court then explained that, because its summary-judgment analysis did not rely on the evidence at issue in appellants' discovery-related motion, it did not need to "address the parties' discovery dispute."

This appeal follows.

DECISION

Appellants argue that the district court erred by granting the bank's summary-judgment motion on both the personal-service claim and the self-help claim and abused its discretion by denying appellants' discovery-related motion. We agree with appellant's argument regarding the personal-service claim and, for reasons explained below, reverse the summary-judgment dismissal of both claims as well as the denial of appellants' discovery-related motion.

Appellate courts "review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor*, 898 N.W.2d at 628 (quotation omitted). Appellate courts resolve doubts and factual inferences against the moving party, which bears the burden of showing an absence of factual issues. *Id.* We view the evidence in the light most favorable to the nonmoving party, but do not assess credibility or weigh evidence. *Id.*

“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). However, to establish a genuine issue of material fact, a nonmoving party must present more than “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). Additionally, affidavits from a person “that contradict [that person’s] earlier deposition testimony generally may not be used to create a genuine issue of fact.” *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001).

When a mortgage is foreclosed by advertisement, Minnesota Statutes section 580.03 requires that a copy of the notice of foreclosure sale “be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied.” If the premises are actually occupied, the process server must “ascertain who” the person “in possession” is “and serve the notice upon [them].” *St. Paul Swimming Pool v. First State Bank of N. St. Paul*, 182 N.W. 514, 515 (Minn. 1921). If service of the notice does not “strictly compl[y] with” section 580.03, “the foreclosure proceeding is void.” *Drews*, 850 N.W.2d at 742.

“Whether land is ‘actually occupied’ is primarily a question of fact.” *Compart v. Wolfstellar*, 906 N.W.2d 598, 608 (Minn. App. 2018) (quotation omitted), *rev. denied* (Minn. Apr. 17, 2018). “Actual occupancy,” for purposes of section 580.03,

is defined as an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. “Actual possession” has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy. The word “actual” is usually used in a statute in opposition to “virtual” or “constructive,” and calls for an open, visible occupancy.

Cutting v. Patterson, 85 N.W. 172, 173 (Minn. 1901) (discussing predecessor statute that similarly read, “if the same are actually occupied” (quotation omitted)); *see also Farm Credit Bank of St. Paul v. Kohnen*, 494 N.W.2d 44, 46 (Minn. App. 1992) (citing Minn. Stat. § 580.03 (1990)) (“The critical language of [section 580.03] has remained virtually unchanged since Minnesota became a state in 1858.”), *rev. denied* (Minn. Feb. 25, 1993).

The supreme court’s reasoning in *Cutting* and *St. Paul Swimming* is instructive here. In *Cutting*, two tracts of land were separated by an alley running east to west. *See* 85 N.W. at 172. The mortgagor’s residence and barn were on the northern tract of land. *Id.* The southern tract was “under cultivation as a garden” “in the proper season of each year.” *Id.* at 172-73. Each tract was enclosed by its own fence, and each fence had a gate that faced the other. *Id.* at 172 (stating that “[a]lmost exactly opposite” the northern tract’s gate “was another gate, through which one might pass through the fence surrounding the” southern tract). Foreclosure proceedings commenced in winter, when the ground was covered with snow. *Id.* at 173. No notice was served on the mortgagor, “the affidavit filed being to the effect that the premises were at the time of the foreclosure wholly vacant and unoccupied.”

Id. at 172. The supreme court concluded that the southern tract was “actually occupied.” *Id.* at 173. It relied on the proximity of the northern tract’s buildings to the southern tract’s garden, as well as the plainly visible fence and gates that “suggest[ed] that both [tracts] were used and occupied by the same person.” *Id.*

In *St. Paul Swimming*, the supreme court again considered “actual occupancy” of a seasonal-use property. 182 N.W. at 514-15. The mortgagor there owned and operated a clubhouse on real property encumbered by a mortgage. *Id.* at 514-15. The clubhouse was open each year from May to October. *Id.* at 515. The rest of the year, it was closed and locked, all equipment and supplies were stored within, and no one remained on the property. *Id.* The process server knew all of this when he attempted service in the off-season. *Id.* at 514-15. The process server also looked through windows and saw the items stored inside. *Id.* at 515. He nonetheless claimed that the property was vacant and unoccupied. *Id.* The supreme court concluded that the property was actually occupied, affirming the district court’s determination “that the failure to serve the notice of [foreclosure sale] was fatal to the validity of the [foreclosure] proceedings.” *Id.*

In this case, Surinder’s affidavit and the parking-lot revenue statements give rise to a genuine issue of material fact as to whether the property was actually occupied.² Our

² Appellants also argue that a genuine issue of material fact is established by a photograph of a parking-lot sign, found in the bank’s affidavit accompanying its motion to dismiss. Because appellants did not present this theory to the district court, we decline to consider it for the first time on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts do not consider issues not “presented [to] and considered by the [district] court in deciding the matter before it” and parties cannot “obtain review by raising the same general issue litigated below but under a different theory” (quotation omitted)).

analysis considers Surinder's affidavit because that affidavit does not contradict prior testimony or affidavit by him. *See Sampair v. Vill. of Birchwood*, 784 N.W.2d 65, 75 n.9 (Minn. 2010) ("[A] party cannot create an issue for trial by directly contradicting prior sworn testimony with a later-filed self-serving affidavit.").

Surinder's affidavit states in relevant part that (1) he "help[ed] manage and operate" the business of several appellants; (2) he communicated with the city and utilities on matters involving the property, including the condemnation of the buildings; (3) he "visited the Property almost every day to oversee the operation of the Parking Lots and to protect the Property from vandalism, break-ins, or criminal activity"; and (4) the parking lots remained operational and in use, continuing to accommodate "daily parking customers" and "lessees of . . . commercial parking spaces." The revenue statements corroborate Surinder's assertion regarding the active use of the parking lots because they show the existence of active, revenue-generating operations at the time of the attempted service of the foreclosure-sale notice. Similar to the process servers in *Cutting* and *St. Paul Swimming*, the process server here could observe visible signs of actual occupancy at the time of the attempted service, such that "it was incumbent on" them "to ascertain who" was in possession of the property to "serve the notice upon [them]." *St. Paul Swimming*, 182 N.W. at 515.

We conclude that the district court erred by granting the bank's summary-judgment motion because appellants, through their theory of actual occupancy of the parking lots, established a genuine issue of material fact as to whether the property was "actually occupied." Because we conclude that appellants' personal-service claim can survive

summary judgment based on the theory of actual occupancy of the parking lots, which are part of the whole of “the property” encumbered by the mortgage, we need not address the condemned buildings.

The district court relied on its summary-judgment dismissal of the personal-service claim as the sole ground for its summary-judgment dismissal of the self-help claim and its denial of the discovery-related motion. Because we reverse the former decision, we necessarily reverse the latter two as well and remand to the district court for further proceedings. *Cf. Logan v. Norwest Bank Minnesota, N.A.*, 603 N.W.2d 659, 665 (Minn. App. 1999) (reversing and remanding district court’s denial of class-certification motion after reversing and remanding grounds upon which district court relied for that denial). We express no opinion on the merits of the self-help claim. We also express no opinion on the discovery-related motion, as “district court[s have] broad discretion to amend scheduling-order deadlines.” *Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006).

Reversed and remanded.