

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20130370

JPMorgan Chase Bank, National
Association,

Cass County District Court
Case No. 09-2012-CV-02197

Plaintiff and Appellee,

v.

Frederick P. Skoda; Cynthia D. Skoda;
Alerus Financial, N.A.; State of North
Dakota; Workforce Safety and Insurance;
North Star Insurance Co.; Job Service,
North Dakota; First National Bank of
Omaha; Discover Bank; and any person in
possession,

Defendants,

Frederick P. Skoda,

Appellant.

APPEAL FROM THE CASS COUNTY DISTRICT COURT'S
GRANTING OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
THE HONORABLE STEVEN L. MARQUART PRESIDING
DATED AUGUST 14, 2013

**BRIEF OF PLAINTIFF AND APPELLEE JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION**

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STATEMENT OF THE ISSUE¹

- I. *Did the District Court Properly Grant Summary Judgment when Mr. Skoda Admitted to All Material Facts, Failed to Provide Evidence Sufficient to Withstand Summary Judgment, and the Mortgage and Note Expressly Authorize Chase's Acceleration of the Debt and Foreclosure on the Property?*

STATEMENT OF THE CASE

¶1 Appellee JPMorgan Chase Bank, National Association is the holder of a promissory note and mortgage from Appellant Frederick P. Skoda. Mr. Skoda defaulted on his promissory note, and Chase exercised its authority under the promissory note and mortgage to accelerate the debt owed and foreclose on the property when Mr. Skoda did not cure the default. In the foreclosure proceeding below, the district court properly concluded there were no genuine issues of material fact because Mr. Skoda admitted all material facts by failing to respond to Chase's Requests for Admission, and also because Mr. Skoda failed to provide sufficient evidence to rebut Chase's affidavits and evidence introduced in the record. Accordingly, the district court granted Chase's motion for summary judgment and entered judgment in favor of Chase. Mr. Skoda appealed.

STATEMENT OF THE FACTS

¶2 On July 26, 2001, Appellant Frederick P. Skoda ("Mr. Skoda"), executed and delivered to Alerus Financial, N.A., a written promissory note (the "Note") wherein Mr. Skoda promised and agreed to pay to the order of Alerus Financial, N.A., the sum of \$81,600.00, with interest at the rate of 7.00% per annum on the unpaid principal balance until fully paid. (Appendix ("A") 20–23.) The Note further provided that the principal

¹ Appellant did not request oral argument in his brief. Accordingly, pursuant to N.D. R. App. P. 34(a), Appellee recommends that this Court decide this appeal without oral argument because the factual record is clear and Appellant seeks review of a straightforward legal conclusion that is well-supported by the record.

and interest shall be paid in monthly installments, commencing on September 1, 2001, with a like amount on the first day of each month thereafter until the Note is fully paid.

(Id.).

¶3 Also on July 26, 2001, for the purpose of securing payment of the Note, Mr. Skoda and Cynthia D. Skoda (the “Skodas”) executed and delivered to Alerus Financial, N.A., a real estate mortgage (the “Mortgage”) wherein they granted to Alerus Financial, N.A. the following described real property situated in Cass County, North Dakota:

Lot Four (4), Block One (1), Vincent Marie Addition to the City of Fargo, situate [sic] in the County of Cass and the State of North Dakota.

(A24–40.) The land has a parcel identification number of 01-5420-00040-000, and is also known as 3266 35th Avenue SW, Fargo, North Dakota 58104. (A26). The Skodas executed the Mortgage before a notary public and it was duly filed for record in the Office of the Register of Deeds of Cass County, North Dakota, on July 31, 2001 as Document No. 988513. (A36–38.)

¶4 By the terms of the Mortgage, the Skodas covenanted and agreed as follows:

i. to pay the principal and interest of the indebtedness when due, to pay all ground rents, taxes, assessments, water rates and insurance premiums against loss by fire or such other hazard, in advance, in monthly installments, together with a late charge for late payment thereof;

ii. that if Mortgagors shall fail to make such payments, the Mortgagee may pay the same and add the cost thereof to the mortgage indebtedness, thereby becoming a part of the debt secured by the mortgage with the amount thereof immediately due and payable and bearing interest from the time of payment at the same rate as the principal sums;

iii. that if the Mortgagors failed, neglected, or refused to pay said amounts at the times they became due the Mortgagee had the right to declare the entire amount of the indebtedness immediately due and payable and to foreclose the mortgage and to sell the mortgaged premises at a foreclosure sale and out of the proceeds of the sale, to receive and retain the full amount of the mortgage indebtedness, including the principal, interest, taxes, insurance premiums, and expenses of the foreclosure provided by law.

(A26–36.) The Mortgage also contains a provision allowing for the acceleration of the loan and stating that the Short Term Mortgage Redemption Act applies. (A40.)

¶5 The Mortgage was later assigned to Homeside Lending, Inc., and the assignment was recorded on July 31, 2001 as Document No. 988514. (A60–61.) The Mortgage was then assigned to Appellee JPMorgan Chase Bank, National Association (“Chase”) on September 13, 2012, which was recorded as Document No. 1364169. (A58–59.)

¶6 The Skodas failed pay in full the monthly installments due pursuant to the Note and Mortgage and have been in default on the Note since April 1, 2011. (A98 at ¶ 10.)

¶7 Due to the Skodas’ default on the Note, Chase elected to accelerate and declare as due the whole amount of the unpaid principal sum of the Note, with interest, including advanced real estate taxes and insurance premiums and accrued late charges and costs. (A98 at ¶ 11.) On or around March 16, 2012, Chase served on the Skodas a written notice of its intention to foreclose pursuant to the Mortgage. (A1–4.) Such written notice described the real estate to be foreclosed, and provided the date and the amount of the sum due for principal, interest, fees, and costs. (*Id.*)

¶8 On July 17, 2012, Chase served the Summons and Complaint on Mr. Skoda, and filed the same with the district court on July 19, 2012. (A5–47.) The other above-captioned defendants were served with the Summons and Complaint as well. (A48–57.) Mr. Skoda was the only defendant to serve an answer to the Summons and Complaint. (A62–63.) On September 20, 2012, Chase, out of an abundance of caution, replied to an ambiguous statement that arguably amounted to a counterclaim raised by Mr. Skoda. (A64–68.)

¶9 On December 10, 2012, Chase served written discovery on Mr. Skoda, including Requests for Admission. (A83–87.) Mr. Skoda requested an extension of time to reply to the written discovery on January 10, 2013, which was granted by the Court on January 15, 2013. (A102.) Even so, Mr. Skoda failed to respond to Chase’s written discovery, including its Requests for Admission. (A76–77, 112 at ¶5.)

¶10 By failing to respond to Chase’s Requests for Admission, Mr. Skoda admitted, among other things, that the Skodas failed to comply with the terms of the Note and Mortgage by failing to make the installments on the principal sum of \$81,600.00, and failed to pay the accrued interest as duly authorized by the terms of the Note and Mortgage. (A83–87.)

¶11 On June 14, 2013, Chase noticed and made a motion for summary judgment with the district court. (A69–71.) Chase argued that all material facts had been admitted in favor of Chase through Mr. Skoda failing to respond to the Requests for Admission and through all other defendants’ failure to answer the Summons and Complaint. (A77–78.) Chase further argued that Mr. Skoda could not resist summary judgment because he offered nothing more than mere averments to respond to Chase’s evidence of record. (*Id.*) Chase also argued that Mr. Skoda’s allegations did not raise a genuine issue of material fact because he did not dispute that he was in default, and the terms of the Mortgage expressly authorized Chase to reject partial payment. (A78–79.) Mr. Skoda opposed Chase’s motion by largely reiterating his pleadings, and Chase again replied that Mr. Skoda had failed to refute any material fact, had failed to produce sufficient evidence to withstand summary judgment, and that the Mortgage and Note expressly authorized Chase to foreclose as it had done. (A103–109.)

¶12 On August 14, 2013, the district court granted Chase’s motion for summary judgment in its entirety. (A110–19.) The district court found that Mr. Skoda’s “Opposition to Motion for Summary Judgment does not deny allegations of the Complaint, and does not raise any issue preventing summary judgment from being entered in Plaintiff’s favor.” (A111–12.) The district court further stated that Mr. Skoda’s failure to respond to Chase’s Requests for Admission resulted in the admission of all material facts. (A112.) Accordingly, the district court found, among other things, that the Mortgage had been duly executed and filed, that Chase was authorized to foreclose on the property, and that Chase’s foreclosure process had been lawful. (A112–15.) Accordingly, the district court concluded that Chase’s claim was meritorious, the allegations in the Complaint were true, and that Chase was entitled to a judgment decreeing foreclosure on the Skodas’ property. (A115–19.) Judgment in accordance with the district court’s order was entered on August 15, 2013. (A120–26.)

¶13 Mr. Skoda subsequently filed the instant appeal.

LAW AND ARGUMENT

I. Did the District Court Properly Grant Summary Judgment when Mr. Skoda Admitted to all Material Facts, Failed to Provide Evidence Sufficient to Withstand Summary Judgment, and the Mortgage and Note Expressly Authorize Chase’s Acceleration of the Debt and Foreclosure on the Property?

¶14 This court should affirm the district court’s order granting Chase’s motion for summary judgment for three reasons. First, Mr. Skoda admitted all relevant facts by failing to respond to Chase’s Requests for Admission. Second, Mr. Skoda failed to present sufficient evidence of any material facts to withstand summary judgment. Third, Chase’s acceleration of the debt and foreclosure proceedings were expressly authorized

by the terms of the Note and Mortgage. Each of these reasons is independently sufficient to affirm the district court's summary judgment order.

¶15 This court reviews de novo a district court's decision for summary judgment. *Wagner v. Crossland Const. Co, Inc.*, 2013 ND 81, ¶ 5, 840 N.W.2d 81.

i. The District Court Correctly Granted Summary Judgment Because Mr. Skoda Admitted to All Material Facts

¶16 North Dakota Rule of Civil Procedure 36 provides that “[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.” This court has affirmed summary judgment against a party who admits all relevant facts by failing to respond to requests for admission. *See, e.g., Fargo Glass and Paint Co. v. Randall*, 2004 ND 4, ¶ 6, 673 N.W.2d 261; *Dakota Bank & Trust Co. of Fargo v. Bakke*, 377 N.W.2d 553, 557 (N.D. 1985).

¶17 In the present appeal, Mr. Skoda has not responded to Chase's Requests for Admission, even after receiving an extension by the district court. Accordingly, by operation of law, Mr. Skoda is deemed to have admitted all of Chase's Requests for Admission. *See* N.D. R. Civ. P. 36. As such, Mr. Skoda has admitted all material facts to this case, including that the Note and Mortgage are valid and binding contracts, that Chase is authorized to accelerate the debt of the Note and/or foreclose upon the property in the event of Mr. Skoda's default on the Note, that Mr. Skoda defaulted on the Note, that Chase's foreclosure is proper, and that the amounts owed are correct. (A83–87.)

¶18 Consequently, the district court correctly concluded no genuine issues of material fact existed and thus properly granted Chase's motion for summary judgment.

ii. *The District Court Correctly Granted Summary Judgment Because Mr. Skoda Failed to Provide Evidence Sufficient to Withstand Summary Judgment.*

¶19 “The party opposing summary judgment cannot simply rely upon the pleadings or upon unsupported, conclusory allegations.” *Hillerson v. Bismarck Pub. Schools*, 2013 ND 193, ¶ 8, 840 N.W.2d 65 (quoting *Spratt v. MDU Resources Group, Inc.*, 2011 ND 94, ¶ 7, 797 N.W.2d 328). The nonmoving party “must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact.” *Id.* “Additionally, this court has stated, the onus is on the party opposing summary judgment to draw the court’s attention to relevant evidence in the record; ‘the court has no duty to scour the record for evidence that would preclude summary judgment.’” *Hillerson*, at ¶ 8 (quoting *Tarnavsky v. Rankin*, 2009 ND 149, ¶ 8, 771 N.W.2d 578). These rules “should not be modified or applied differently merely because a party not learned in the law is proceeding pro se.” *Dakota Bank & Trust Co of Fargo v. Brakke*, 377 N.W.2d 553, 557 n.4 (citing *State v. Faul*, 300 N.W.2d 827 (N.D. 1980)).

¶20 In the present appeal, Mr. Skoda has failed to set forth specific facts with competent evidence to demonstrate a genuine issue of material fact. Mr. Skoda opposed summary judgment by producing copies of a personal check for the incorrect amount, a letter from Chase, and a tax receipt. Such evidence shows, at best, that Mr. Skoda made out a check for the “Principal + Interest ONLY,” that Chase exercised its right pursuant to the Mortgage to refuse partial payment, and that taxes were paid in 2011. (A26–27.) None of those facts are in dispute. Furthermore, those facts *corroborate* Chase’s allegations—Mr. Skoda was in default for failing to pay the funds in escrow as required by sections 1 and 3 of the Mortgage and Chase is expressly authorized to reject partial

payments. Because Mr. Skoda's exhibits actually support Chase's claims, they cannot be sufficient to raise a genuine issue of material fact. Furthermore, Mr. Skoda continues to support his claims—including his vague reference to the Fair Credit Reporting Act—by solely relying on self-serving averments, which are woefully insufficient to withstand summary judgment based on Chase's affidavits, the admitted Requests for Admission, and the plain terms of the Note and Mortgage.

¶21 Consequently, the district court correctly concluded that Mr. Skoda failed to produce evidence sufficient to withstand summary judgment and thus properly granted Chase's motion for summary judgment.

iii. The District Court Correctly Granted Chase's Motion for Summary Judgment Because the Mortgage and Note Expressly Authorize Chase's Actions

¶22 Interpretation of a contract is a question of law, which this court reviews de novo. *Wisness v. Kodak Mut. Ins. Co.*, 2011 ND 197, ¶ 5, 806 N.W.2d 146. "The language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-09; *see also Bernabucci v. Huber*, 2006 ND 71, ¶ 15, 712 N.W.2d 323.

¶23 The express terms of the Note and Mortgage establish that Mr. Skoda defaulted on the Note and that Chase was authorized to foreclose on the property. Paragraph 6(B) of the Note provides that, "[i]f [Mr. Skoda] do[es] not pay the full amount of each monthly payment on the date it is due, [Mr. Skoda] will be in default." (A21.) Furthermore, Section 1 of the Mortgage provides that "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3." (A26.). Section 3 of the Mortgage states, "Borrower shall pay

to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the “Funds”) to provide for payment of amounts due for: (a) taxes and assessments and other items,” as well as other enumerated expenses. (A27.) Chase has the authority under Section 3 of the Mortgage to “return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current.” (A27.) Finally, Section 22 authorizes Chase to accelerate the amount owed under the Note and foreclose the property if such default is not cured within the prescribed time. (A36.)

¶24 Under these provisions, Mr. Skoda defaulted on the Note when he failed to pay the full amount due, which included Escrow Items as enumerated in Section 3 of the Mortgage. Accordingly, Chase was authorized by the Mortgage to reject partial payments, accelerate the loan, and then foreclose on the property. (A26–28.) Accordingly, the undisputed facts of this claim are expressly authorized by the clear and plain terms of the Note and Mortgage.

¶25 Consequently, the district court correctly concluded that Mr. Skoda had defaulted on the Note and that Chase was authorized to foreclose on the property, and thus properly granted Chase’s motion for summary judgment.

CONCLUSION

¶26 The district court properly granted summary judgment in this matter. By failing to respond to Chase’s Requests for Admission, Mr. Skoda admitted all material facts in this proceeding and admitted that Chase’s claim was meritorious. Furthermore, Mr. Skoda failed to meet his burden of producing evidence of his vague claims sufficient to withstand summary judgment. Finally, the undisputed facts as applied to the plain language of the Note and Mortgage establish that Mr. Skoda was in default of the Note and Chase was thus authorized to foreclose on the property. As such, the district court

correctly concluded there were no genuine issues of material fact and properly entered judgment in favor of Chase.

¶27 For these reasons, Chase respectfully requests this court to affirm the district court's order granting summary judgment to Chase.

Respectfully submitted this 13th day of February, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

¶28 Appellee's Brief contains 2,881 words, excluding the parts of the brief exempted by N.D. R. App. P. 32(a)(7)(B)(iii). I certify that Appellee's Brief complies with the typeface requirements of N.D. R. App. P. 32(a)(5) and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010, Times New Roman, 12 point font.

Dated this 13th day of February, 2014.

s/ Donald T. Campbell

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Attorney for Plaintiff and Appellee

CERTIFICATE OF SERVICE

¶29 I hereby certify that a true and correct copy of the foregoing Appellee's Brief and Appellee's Appendix have been served by electronic e-mail and U.S. Postal Service to the following:

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Dated this 13th day of February, 2014.

s/ Donald T. Campbell

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CERTIFICATE OF SERVICE

¶29 I hereby certify that a true and correct copy of the foregoing Appellee's Brief and Appellee's Appendix have been served by electronic e-mail and U.S. Postal Service to the following:

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 10 2014

STATE OF NORTH DAKOTA

Dated this 10th day of February, 2014.

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