

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Barna, Guzy, & Steffen, Ltd.	Supreme Court No. 20170340
Plaintiff/Appellee,	McHenry County No.: 2015-CV-
vs.	00093
Bradley C. Johnson and Karol M. Johnson	
Defendants/Appellants,	
And	
Dale Kuhn, Patricia Kuhn, Amber Buchman, Karin Kuhn, Samantha Kuhn, Western State Bank, and all persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Complaint,	
Defendants,	

BRIEF OF APPELLEE BARNA, GUZY, & STEFFEN, LTD.

Appeal from the District Court's Amended Judgment Dated July 14, 2017,
And
Order Denying Petition to Stay Proceedings Pending Appeal Dated August 11, 2017,
And
Order Denying Defendant Johnsons' Rule 60 Motion For Relief From Judgment and
Motion For Removal Pursuant to Rule 63 Dated December 8, 2017
In the District Court of McHenry County
Northeast Judicial District
The Honorable Anthony Benson, Presiding

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STATEMENT OF THE ISSUES

[1] The Johnsons are precluded from arguing their due process rights were violated because they failed to sufficiently raise this issue in the District Court.

[2] Even if the Johnsons sufficiently raised their due process argument, the Rules of Civil Procedure, including rules applicable to summary judgment and dismissal of claims, do not violate a litigant's due process rights.

[3] The District Court did not err in granting Summary Judgment in favor of BGS.

[4] The District Court did not err in granting the Motion to Dismiss the Johnsons' Counterclaim.

[5] The District Court did not abuse its discretion in denying the Johnson's Rule 60 Motion to Vacate the Judgment.

[6] The Johnsons' allegations of fraud upon the court and other misconduct are without merit.

STATEMENT OF THE CASE

[7] The dispute before this Court arises from a mortgage foreclosure on property located in McHenry County, North Dakota and Sheridan County, North Dakota. Defendants/Appellants Bradley and Karol Johnson (the "Johnsons") retained Plaintiff/Appellee Barna, Guzy, & Steffan, Ltd. ("BGS") to represent them in an action in Minnesota (the "Minnesota Lawsuit"). See Appellant's Appendix ("App.") 65–66. BGS extended credit by way of certain loan documents to the Johnsons for costs, fees and expenses that would be incurred by BGS in representing the Johnsons in the Minnesota Lawsuit. Id. at 66. To secure payment of the credit, the Johnsons executed and delivered

certain mortgage documents describing real property located in North Dakota. Id. at 66; 68. For purposes of this Appeal, the real property subject to the mortgage documents are hereinafter referred to as the “Section 3 Property,” the “Section 31 Property,” the “Section 32 Property,” and the “Section 8 Property” or collectively the “Property.” It is undisputed that despite due demands, the Johnsons failed to make payments to BGS as required under the loan documents, requiring BGS to commence the foreclosure action, as allowed under the mortgage documents.

[8] In August 2015, BGS commenced the mortgage foreclosure action by serving a Summons and Complaint on the Johnsons, Dale Kuhn, Patricia Kuhn, Amber Buchman, Karin Kuhn, Samantha Kuhn (the “Kuhns”), Western State Bank, and all persons unknown, claiming any estate or interest in, or lien or encumbrance upon the property. See Appellee App. 1-8; App. 57-58; see also (Doc. ID ##2-14). On September 17, 2015, the Johnsons, self-represented, answered the complaint and brought a counterclaim, alleging various claims including alleged legal malpractice regarding their representation in the Minnesota Lawsuit. App. 59-64.

[9] The Kuhns answered and counterclaimed alleging a right of first refusal interest in the Section 8 Property. See Appellee App. 40-44. Western State Bank did not serve an answer or other response to the Complaint and had previously recorded a satisfaction of a prior mortgage held by Western. Id. at 64-71.

[10] The foreclosure action has been plagued by numerous, meritless filings alleging fraud and misconduct by a number of unrelated parties from different states and in different proceedings. For example, the Johnsons claim the following individuals

engaged in fraud, corruption, conspiracy and other allegations that are equally defamatory, all of which somehow are relevant to the foreclosure action:

1. District Court Judge Anthony Benson. E.g. App. 207. (E.g. Doc. ID #276).
2. The Clerk of the McHenry County District Court. App. at 112.
3. Counsel representing BGS in this foreclosure matter. E.g., App. at 112; (Doc. ID #95); (Doc. ID #276).
4. Counsel representing the Kuhns. (Doc. ID #276)
5. Attorneys at BGS that represented the Johnsons in the Minnesota Lawsuit. App. 60-62; (Doc. ID #57); (Doc. ID #95).
6. The state District Court Judge in the Minnesota Lawsuit. App. 60; (Doc. ID #95 at pg. 2, 3).
7. The attorney who represented the adverse party in the Minnesota Lawsuit. (Doc. ID #57 at pg. 2); (Doc. ID #95 at pg. 2, 4).
8. Donna Mae Johnson, Bradley Johnson's mother, who was the plaintiff in the Minnesota Lawsuit. (Doc. ID #95 at pg. 2-3); (Doc. ID #102 at pg. 2-3); (Doc. ID #116).
9. Three District Court Judges in Minnesota the Johnsons claimed are corrupt and assisted dishonest people and their attorneys to steal from Mr. Johnson and his sons. (Doc. ID #213, at pg. 3).
10. The referee in the Minnesota Lawsuit. App. 134-42.
11. The Minnesota Office of Lawyer's Professional Responsibility. App. 122.
12. More broadly, the "Courts, Prosecutors, enforcers of legal conduct and of course the lawyers themselves" who "joined together in a conspiracy to

Obstruct Justice, Defraud, commit Fraud Upon The Court and many other violations to protect their isolated community from the consequences of corruption.” App. 123-24.

[11] On January 25, 2016, BGS moved to dismiss the Johnsons’ counterclaim pursuant to North Dakota Rules of Civil Procedure 12(b) and 12(h), arguing the Johnsons failed to state a claim upon which relief could be granted and that the District Court lacked subject matter jurisdiction over the Johnsons’ claims. (Doc. ID ##32; 33). On January 26, 2016, BGS moved for Partial Summary Judgment for foreclosure on the Property, except for the Section 8 Property. (Doc. ID #35) On February 24, 2016, the Johnsons filed a Motion for Continuance of the hearing on the BGS’ pending motions. Appellee App. 72-73.

[12] Following numerous filings, a hearing was held on the Motion to Dismiss and Motion for Partial Summary Judgment on June 20, 2016. See (Doc. ID #226) (“June 2016 Tr.”) On August 29, 2016, the District Court entered its Memorandum Opinion and Order for Dismissal and Partial Summary Judgment, dismissing the Johnsons counterclaim and granting Summary Judgment in favor of BGS as to the three parcels. Appellee App. at 74- 83. On September 27, 2016, the District Court entered its Findings of Fact, Conclusions of law and Order for Judgment and Judgment granting Summary Judgment in favor of BGS as to three parcels, *i.e.*, the Section 3, Section 31 and Section 32 Properties. Appellee App. 84- 96; (Doc. ID #228). The Notice of Entry of Judgment was filed on October 3, 2016. (Doc. ID #229).

[13] On October 17, 2016, the Johnsons filed a Notice of Appeal. (Doc. ID #231). This Court dismissed the appeal, determining it was not appealable because the judgment entered was for partial summary judgment, *i.e.* did not include the Section 8 Property. (Doc.

ID #237). On November 28, 2016, the Johnsons filed a Motion to Vacate Judgment alleging meritless allegations of fraud and other misconduct. (Doc. ID #238). Subsequently, on December 5, 2016, the Johnsons filed, among other things, a Motion to Vacate Judgment under Rule 60 and a Motion for Recusal under Rule 63. App. 147-161; see also (Doc. ID #240). On December 19, 2016, the District Court entered an Order regarding the Johnsons' recent Motions. (Doc. ID #248).

[14] On February 2, 2017, BGS moved for Summary Judgment for foreclosure on the remaining parcel, the Section 8 Property, subject to the Kuhns' right of first refusal. (Doc. ID ##265; 266). Following numerous filings, a Hearing on the Motions was held on March 17, 2017. See (Doc. ID #301) ("March 2017 Tr.)

[15] On June 27, 2017, the District Court entered its Memorandum Opinion and Order granting Summary Judgment in favor of BGS, subject to the Kuhns' right of first refusal on the Section 8 Property. App. 176 -183. On July 12, 2017, the Johnsons filed a Petition to Stay Proceedings Pending Appeal. (Doc. ID #286).

[16] On July 14, 2017, the District Court entered its Supplemental Findings of Fact, Conclusions of Law and Order for Judgment and Amended Judgment granting Summary Judgment in favor of BGS for foreclosure on the remaining Section 8 Property, subject to the Kuhns' right of first refusal. (App. 184-95; 197-201). Notice of Entry of Judgment was filed on July 18, 2017. (Doc. ID #293).

[17] On August 11, 2017, the District Court entered an Order denying the Johnsons' Petition to Stay Proceedings Pending Appeal as no appeal had been filed. App. 203-204. Following the execution of the Judgment, the Johnsons filed a Petition to Vacate Judgment and another Petition to Stay Execution Sale Pending Rule 60 Hearing and

Supreme Court Appeal, among other filings, on September 11, 2017. See (Doc. ID #305); App. 206-217. On September 15, 2017 and September 19, 2017, the Johnsons separately entered Notice of Appeals appealing the July 14, 2017 Amended Judgment and the “July 19, 2017” Notice of Entry of Judgment. App. 224; 226. On September 26, 2017, this Court entered an Amended Order of Remand, remanding the appeal to the District Court for the District Court’s consideration and disposition of the Johnsons’ Motion to Vacate and related documents. (Doc. ID #324).

[18] On September 29, 2017, the District Court entered an Order granting a stay of the proceedings and an Order for a Hearing on the Rule 60 Motion. (Doc. ID ##328; 329). Following more filings by the Johnsons, the Johnsons ultimately filed another Rule 63 Motion for Recusal on October 11, 2017. (Doc. ID #341). On November 7, 2017, a telephonic hearing was held on the Johnsons’ Rule 60 Motion and Rule 63 Motion.

[19] On December 8, 2017, the District Court entered its Order Denying Defendant Johnsons’ Rule 60 Motion for Relief from Judgment and Motion for Removal Pursuant to Rule 63. App. at 21-24. The Johnsons filed a Second Notice of Appeal on December 15, 2017. App. 236.

STATEMENT OF FACTS

A. Loan and Mortgage Documents.

[20] The Johnsons retained BGS to represent them in the Minnesota Lawsuit. See App. 65-66. BGS extended credit to the Johnsons for costs, fees and expenses that would be incurred by BGS in representing the Johnsons in the Minnesota Lawsuit. Id. at 66. The credit was extended pursuant to the following agreements: (1) Revolving Line of Credit Agreement in the amount of \$125,000.00, dated October 22, 2013; (2) Revolving

Promissory Note in the amount of \$125,000.00, plus interest, dated October 22, 2013. Id.; see also Appellee App. 9-21; 22-24.

[21] To secure payment of the Revolving Promissory Note and all other sums as may be advanced by BGS to the Johnsons, the Johnsons executed and delivered a Mortgage, dated October 22, 2013, and covering the Property. App. 66, ¶ 4; see also Appellee App. 45-59. The Mortgage was acknowledged by the Johnsons before a notary public and recorded in McHenry County, North Dakota, and Sheridan County, North Dakota. Id.

[22] The Mortgage included a covenant and agreement by the Johnsons to pay all the principal and interest of the indebtedness when due to BGS. App. 67 at ¶ 4. If the Johnsons failed, neglected or refused to pay the Mortgage indebtedness when due and payable BGS had the right to declare the entire amount of the indebtedness immediately due and payable; to foreclose the Mortgage and sell the Property 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 and interest, and the expenses of foreclosure as provided by law. Appellee App. 52-54.

B. Amended And Restated Loan And Mortgage Modification Documents.

[23] On or about January 16, 2014, the Johnsons, for value received, executed and delivered to BGS a written Amended and Restated Revolving Line of Credit Agreement acknowledging, among other things, that BGS had extended the Johnsons' credit in the amount of Two Hundred Thousand Dollars and no/100 (\$200,000.00). See Appellee App. 25-36.

[24] On or about January 16, 2014, as part of the same transaction, the Johnsons executed and delivered to BGS an Amended and Restated Revolving Promissory Note

promising and agreeing, among other things, to pay to the order of BGS the principal sum of Two Hundred Thousand Dollars and no/100 (\$200,000.00), plus interest at the rate of six percent (6.0%) per annum on the unpaid principal balance. See Appellee App. 37-39; see also App. 68, ¶ 6. The Amended and Restated Revolving Promissory Note further provided, among other things, that the Johnsons were to make interest only payments on the outstanding balance, commencing on February 1, 2014, until August 30, 2014 at which time the full remaining principal balance plus accrued interest was due and payable. Appellee App. 37 at ¶ 2.a.

[25] To secure payment of the Amended and Restated Revolving Promissory Note and to further secure payment of the Revolving Promissory Note, the Johnsons executed a Mortgage Modification Agreement, dated January 16, 2014, which also covers the Property. See Appellee App. 60-63. The Mortgage Modification Agreement was acknowledged by the Johnsons before a notary public and recorded in McHenry County, North Dakota, and Sheridan County, North Dakota. Id. The Mortgage Modification Agreement reflects the increase in the amount of credit extended under the Amended and Restated Revolving Line of Credit Agreement to the principal sum of Two Hundred Thousand Dollars and no/100 (\$200,000.00). Id. The remaining terms of the Mortgage, including payment and default terms, are left intact and in force by the Mortgage Modification Agreement. Id.

[26] It is undisputed that despite due demands being made the Johnsons failed to make the payments to BGS as required under the loan agreements. App. at 69, ¶ 9. The entire amount of the unpaid principal and interest under the loan and mortgage agreements remaining due and payable is as follows:

Principal \$ 224,230.64
Accrued interest to February 5, 2015 \$ 12,644.61

TOTAL: \$ 236,875.25

Id. at ¶8. Interest continues to accrue from and after February 5, 2015, at the rate of six percent (6.0%) per annum. Id. at ¶9.

C. The Foreclosure Action.

[27] BGS commenced a foreclosure action against the Johnsons, the Kuhns, and Western State Bank, and all other unknown parties. On September 17, 2015, the Johnsons, self-represented, answered the complaint and brought a counterclaim, alleging various claims including alleged legal malpractice and fraud regarding their representation in the Minnesota Lawsuit. App. 59-64.

[28] The Kuhns answered and counterclaimed alleging a right of first refusal interest in the Section 8 Property. See Appellee App. 40-44. Western State Bank did not serve an answer or other response to the Complaint. Western State Bank previously held a mortgage interest in all or part of the Property, which was satisfied of record in Sheridan County, North Dakota and McHenry County, North Dakota. See Appellee App. 64-71.

[29] On August 29, 2016, the District Court entered its Memorandum Opinion and Order for Dismissal and Partial Summary Judgment, dismissing the Johnsons counterclaim and granting Summary Judgment in favor of BGS as to the three parcels. Appellee App. 74-83. The District Court's order and the judgment (1) dismissed the Johnsons' counterclaim without prejudice because the court lacked subject matter jurisdiction and (2) entered summary judgment for foreclosure with regard to three parcels, i.e., the Section 3, Section 31 and Section 32 Properties. Id.; see also Id. at 84-96; (Doc. ID #228). So as to avoid issues with regard to the Kuhns' claimed right of first refusal and to

not seek to foreclose more land than may be necessary to pay the debt owed by the Johnsons, BGS did not seek foreclosure on the fourth parcel, the Section 8 Property.

[30] Subsequently and on February 2, 2017, BGS moved for Summary Judgment for foreclosure on the Section 8 Property, not objecting to the Kuhns' right of first refusal on the Subject 8 Property. On March 17, 2017, a Hearing was held on the Motion for Summary Judgment as to the Section 8 Property and the Johnsons' other motions. In regards to the Johnsons' allegations of misconduct, the District Court provided:

THE COURT: The only comment I will make here on the record is directed at the accusation of ex parte communications and Mr. Johnson indicating he saw the attorneys come out of my chambers. I am going to state on the record that did not occur. I did not have any meetings with the attorneys before the hearing.

March 2017 Tr., pg. 30: 20-25.

[31] On July 14, 2017, the District Court entered its Supplemental Findings of Fact, Conclusions of Law and Order for Judgment and Amended Judgment granting Summary Judgment in favor of BGS for foreclosure on the remaining Section 8 Property, subject to the Kuhns' right of first refusal. App. 184-95; 197-201. After a number of additional motions were brought by the Johnsons and addressed by this Court and decided by the District Court (E.g. Doc. ID ##294-351), the Johnsons filed their second notice of appeal. App. 236.

LAW AND ARGUMENT

I. THE JOHNSONS ARE PRECLUDED FROM ARGUING THEIR DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THEY FAILED TO SUFFICIENTLY RAISE THIS ISSUE IN THE DISTRICT COURT.

[32] The overarching argument the Johnsons present to this Court is that the District Court violated their due process rights through the proceedings of the foreclosure

action. The Johnsons, even though self-represented, are precluded from arguing their due process rights were violated because the Johnsons failed to sufficiently present this issue to the District Court. “The rules of procedure are not to be applied differently merely because the party is acting *pro se*.” Rosendahl v. Rosendahl, 470 N.W.2d 230, 231 (N.D. 1991). It is well settled that issues not sufficiently presented to the District Court will not be considered for the first time on appeal. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 178 (N.D. 1993). “This constraint applies with particular force to a constitutional issue.” Id. (quoting Hanson v. Williams County, 452 N.W.2d 313, 315 (N.D. 1985)). A question not sufficiently developed and presented to the District Court is not properly before this Court for review. North Dakota Guaranteed Student Loan Program v. Voigt, 513 N.W.2d 64, 66 (N.D. 1994). In order to sufficiently raise a constitutional challenge below, the party raising a constitutional issue “must do more than acknowledge, in passing, the constitutional difficulties of a [procedure]”. Id. at 178. It is long-standing law that “parties must bring up the ‘heavy artillery’ when asserting constitutional claims.” Id. Southern Valley Grain Dealers v. Bd. of Cty. Com’rs of Richland Cty., 257 N.W.2d 425, 434 (N.D. 1977).

[33] Further “[a]bsent authority and a reasoned analysis to support it, the mere assertion of unconstitutionality is insufficient to adequately raise a constitutional question.” Overboe v. Farm Credit Services of Fargo, 2001 ND 58, ¶ 13, 623 N.W.2d 372. Moreover, “[m]erely alleging unconstitutional action . . . is insufficient to raise a constitutional issue.” City of Minot v. Johnston, 379 N.W.2d 275, 278 (N.D. 1985); See also Voigt, 513 N.W.2d at 66 (concluding that merely citing to constitutional provisions but giving the district court no supporting authority or analysis was insufficient to adequately

raise a constitutional claim in the district court and thus precluded this Court's review); Schwarting v. Schwarting, 354 N.W.2d 706, 710 (N.D. 1984) (concluding the bare assertion that Appellant was "deprived of due process" was not sufficient to raise a constitutional issue). As evidenced by the record, the Johnsons have failed to properly present their constitutional arguments.

[34] In the Johnsons' numerous filings to the District Court, they merely assert their due process rights were violated but failed to offer any authority or reasoned analysis to support a constitutional issue. See App. 153 (accusing the District Court of "Denying defendants Due Process Rights"); (Doc ID #286 at pgs. 1; 2) (alleging the District Court "failed to provide impartial and complete Due Process to Defendants" and denying due process); App. 207 (alleging District Court denied "due process to unrepresented litigants"); (Doc. ID #325) ("demand that our Due Process Rights be respected"); (Doc. ID #326) (alleging District Court and BGS' Counsel colluded to deny the Johnsons of "full and fair Due Process").

[35] The Johnsons' the bare assertions of a violation of due process in filings to the District Court were wholly inadequate to properly present this issue for review to the District Court. Merely claiming a violation of due process is not enough. Schwarting, 354 N.W.2d at 710. Rather, the Johnsons had to provide supporting authority or analysis to support their constitutional claim. Overboe, 2001 ND at ¶ 13. The Johnsons' mere assertions that their due process rights were violated are hardly "heavy artillery" to assert a constitutional challenge as required under North Dakota law. As such, the Johnsons failed to sufficiently raise their due process claim in the District Court and are precluded from presenting it for review.

II. EVEN IF THE JOHNSONS SUFFICIENTLY RAISED THEIR DUE PROCESS ARGUMENT, THE RULES OF CIVIL PROCEDURE, INCLUDING RULES APPLICABLE TO DISMISSAL OF CLAIMS AND SUMMARY JUDGMENT, DO NOT VIOLATE A LITIGANT'S DUE PROCESS RIGHTS.

[36] Even if this Court concludes the Johnsons sufficiently raised their constitutional challenge, the Johnsons' argument shows a fundamental misunderstanding of the North Dakota Rules of Civil Procedure and is without merit. The Johnsons appear to contend that the summary judgment procedure is a violation of due process. The Johnsons do not appear to specifically raise due process issues with the law applicable to a motion to dismiss under Rules 12(b) and (h), the basis for the District Court's dismissal of the Johnsons' counterclaim. See Appellee App. 74-83. BGS assumes, however, that the Johnsons intended to include that dispositive order along with their claims that the Rules applicable to summary judgment applied in this matter violated their due process rights. This Court's review of a properly presented violation of a constitutional right is de novo. Schwab v. Zajac, 2012 ND 239, ¶ 22, 823 N.W.2d 737.

[37] There are two types of due process, substantive and procedural. St. Claire v. St. Claire, 2004 ND 39, ¶ 5, 675 N.W.2d 175. Substantive due process under the U.S. Constitution and Article 1, Section 12 of the North Dakota Constitution generally address claims with regard to a rule or statute that affect fundamental rights. See U.S. Const. amend. XIV, §1. For example, substantive due process involves a claim that the state entity that enacted a provision, such as the Legislature with regard to a statute, "had no power to act in the particular matter or, having power to act, that such power was exercised in an arbitrary, unreasonable, or discriminatory manner and that the method adopted has no reasonable relation to attaining the desired result." City of Fargo v.

Stensland, 492 N.W.2d 591, 594 (N.D. 1992) (quoting Menz v. Coyle, 117 N.W.2d 290, 299 (N.D. 1962)). The Johnsons do not cite any rule or statute that they claim deprived them of a fundamental right. Rather the Johnsons' claim the District Court failed to provide them an opportunity to present their arguments on summary judgment in a manner they desire. Such a claim falls within procedural due process. St. Claire, 2004 ND 39 at ¶ 6; Rudnick v. City of Jamestown, 463 N.W.2d 632, 639 (N.D. 1990) (claim that city employee was not provided sufficient opportunity to be heard, or a fair hearing, regarding a demotion determination is a procedural due process claim).

[38] Generally, “[p]rocedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case.” St. Claire, 2004 ND at ¶ 6; Rudnick 463 N.W.2d at 638. The requirements of due process are flexible and vary depending upon the circumstances of each case. Id. at ¶ 7. Those circumstances generally involve a determination of whether the party claiming deprivation of due process received a meaningful opportunity to be heard. See Id. (This Court concluded party was afforded an opportunity to be heard by being allowed to participate in the trial by telephone).

[39] Here, there is no claim or allegation by the Johnsons that they were not provided a “meaningful opportunity to be heard.” To the contrary, a review of the dockets and the number of motions that were brought and heard by this Court and the District Court shows that the Johnsons were provided more than a meaningful opportunity to have their arguments and claims heard and decided. Simply put, the Johnsons are not happy with the District Court’s rulings or the provisions of the Rules of Civil Procedure. Those complaints do not constitute a deprivation of due process.

[40] Further, summary judgment is explicitly permitted by the North Dakota Rules of Civil Procedure. See N.D.R.Civ.P. 56(a). It is well settled that summary judgment is a procedural device for the *prompt resolution of a controversy on the merits without a trial* if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Farmers Union Oil Co. v. Smetana, 2009 ND 74 ¶ 8, 764 N.W.2d 665; Wheeler v. Gardner, 2006 ND 24, ¶ 8, 708 N.W.2d 908; Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 11, 693 N.W.2d 604. The Johnsons had ample opportunity to present competent, admissible evidence raising a genuine issue of material fact but failed to do so.

[41] Similarly, a motion to dismiss a counterclaim under Rules 12(b) and (h) did not violate the Johnsons due process rights. To the contrary, the District Court dismissed the counterclaim because the Court found it did not have subject matter jurisdiction. Appellee App. 77-78. Subject-matter jurisdiction is the court's power to hear and determine the general subject matter in the action. Id. at 77, ¶ 7 (citing Albrecht v. Metro Area Ambulance, 1998 ND 132, 580 N.W.2d 583). The District Court explained that if subject-matter jurisdiction is lacking, North Dakota Rule of Civil Procedure 12(h)(3) compels dismissal of the action. Id. (citing Trottier v. Bird, 2001 ND 177, 635 N.W.2d 157). Equally important, the District Court's Order dismissed the counterclaim without prejudice, "so that the Johnsons may yet assert their claims against the Plaintiff and/or their attorneys, and in do so in the proper jurisdiction" in Minnesota. Id. at ¶ 9. Thus, the Johnsons have not been deprived due process to bring their counterclaim. They simply cannot bring those meritless claims in a Court that lacks subject matter jurisdiction.

[42] Arguments by the Johnsons that the District Court deprived them of the opportunity to conduct discovery is also without merit. (Appellant's Brief ¶ 88). "A district court has broad discretion regarding discovery, and its decision will not be reversed on appeal absent an abuse of discretion." Riemers v. Hill, 2016 ND 137, ¶ 14, 881 N.W.2d 624. A district court abuses its discretion "if it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law." Horob v. Farm Credit Services of North Dakota ACA, 2010 ND 6, ¶ 20, 777 N.W.2d 611 (internal citations omitted). The Johnsons were afforded the opportunity to be heard on whether they were entitled to conduct discovery. That the District Court exercised its broad discretion contrary to the desire of the Johnsons was not denial of due process. The same holds true with regard to the Johnson's motion for a continuance of the summary judgment proceedings.

[43] A "continuance" should be allowed only when the party requesting the continuance makes an adequate and proper showing to the court. Larson v. Baer, 418 N.W.2d 282, 288-89 (N.D. 1988). With regard to summary judgment, Rule 56(f) provides as follows:

(f) **When Affidavits are Unavailable.** If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may:

- (1) Deny the motion;
- (2) Order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) Issue any other just order.

N.D.R.Civ.P. 56(f). It is incumbent on the party seeking additional time for discovery to provide specific reasons supporting the request for additional time to conduct discovery. E.g., Continental Casualty Co. v. Kinsey, 513 N.W.2d 66, 69 (N.D. 1994) (affirming denial of request for time for additional discovery and granting summary judgment). An affidavit submitted under Rule 56(f) must ““identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.”” Choice Financial Group v. Schellpfeffer, 2006 ND 87, ¶ 12, 712 N.W.2d 855 (quoting Landerstadt v. Colafella, 885 F.2d 66, 71 (3rd Cir. 1989)). Rule 56(f) requires the party invoking the rule to provide an affidavit opposing the motion indicating why the facts necessary to oppose the motion cannot be obtained to be presented to the court. N.D.R.Civ.P. 56 (f). Neither of the two requirements necessary to invoke Rule 56(f) have been satisfied.

[44] Here, the Johnsons failed to submit an affidavit as required under Rule 56(f) setting forth "specific reasons" why they could not present facts essential to justify opposition to the summary judgment motions. The Rules of Civil Procedure provided the Johnsons the same full and fair opportunity to be heard as any other litigant. The District Court patiently and appropriately provided the Johnsons a full opportunity to present their arguments. The Rules of Civil Procedure, however, do allow for 12(b) motions to dismiss and for summary judgment. Application of those Rules did not deprive the Johnsons of any due process.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BGS.

[45] The Johnsons argue the District Court erred in granting Summary Judgment in favor of BGS. This Court's review of a District Court's decision to grant summary judgment is well established:

“In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.”

Martin v. Marquee Pacific, LLC, 2018 ND 28, ¶ 10, 906 N.W.2d 65 (quoting Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 17, 890 N.W.2d 222).

[46] “In considering a motion for summary judgment, a court may examine pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from that evidence to determine whether summary judgment is appropriate.” Good Bird v. Twin Buttes School District, 2007 ND 103, ¶ 5, 733 N.W.2d 601 (quoting Azure v. Belcourt Pub. School Dist., 2004 ND 128, ¶ 8, 681 N.W.2d 816). Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential element of a claim on which that party bears the burden of proof at trial. Evenson v. Quantum Indus., Inc., 2004 ND 178, ¶ 8, 687 N.W.2d 241. “[T]he party opposing the motion may not rest on mere allegations or denials in the pleadings but must present competent admissible evidence to show the existence of a genuine issue of material fact”. Beaudoin v. JB Mineral Servs., LLC, 2011 ND 229, ¶ 7, 808 N.W.2d 67. “When no pertinent evidence on an essential element is presented to the trial court in resistance to

the motion for summary judgment, it is presumed that no such evidence exists.” Riemers v. City of Grand Forks, 2006 ND 224, ¶ 8, 723 N.W.2d 518 (quoting Kummer v. City of Fargo, 516 N.W.2d 294, 297 (N.D. 1994)). Further, “conclusory statements in briefs do not effectively dispute material facts.” American State Bank and Trust Co. of Williston v. Sorenson, 539 N.W.2d 59, 61-61 (N.D. 1995).

A. Western State Bank does not claim an interest in the Property.

[47] Western State Bank did not serve an answer or other response to the Complaint. Rather, Western State Bank contacted counsel representing BGS in this foreclosure action advising that “Western State Bank has no interest in the referenced property” due to the satisfaction of Western State Bank’s Mortgage. Appellee App. at 69, 70. Thus, there is no dispute as to whether Western State Bank claims an interest in the Property. Summary Judgment was properly entered regarding Western State Bank’s prior interest.

B. The District Court properly concluded the Kuhns have a right of first refusal in the Section 8 Property.

[48] The Kuhns do not claim an interest in the Section 3 Property, Section 31 Property or the Section 32 Property. The Kuhns served and filed an answer and counterclaim alleging an interest in the Section 8 Property via a purported “right to match any bona fide offer to purchase the [Section 80 Property]” so long as certain conditions were met. See Appellee App. 40-44.

[49] BGS conceded to the material facts necessary for resolving the Kuhn Defendants’ right of first refusal in the Section 8 Property. See (Doc. ID #266). Specifically, BGS agreed the Kuhns’ right of first refusal interest is superior to BGS’ mortgage interests in the Section 8 Property and should remain a valid right of first refusal

on the Section 8 property through the foreclosure process. *Id.* at ¶ 25. BGS also had no objection to a judgment directing that the Section 8 property be sold last, separately, and only if necessary to satisfy remaining indebtedness owed by the Johnsons, resolving all material issues of fact regarding the Section 8 Property. Thus, the District Court properly concluded the Section 8 Property could be foreclosed upon, subject to the Kuhns' right of first refusal. *See* App. 181-83.

C. The District Court did not err by considering the Affidavit of Charles Seykora in granting Summary Judgment in favor of BGS.

[50] The Johnsons further argue the District Court erred by considering the affidavit of Charles Seykora, a partner of BGS, in granting summary judgment in favor of BGS. The Johnsons contend Mr. Seykora does not have personal knowledge of the facts relevant to the mortgage. “Under N.D.R.Civ.P. 56(e) an affidavit supporting and opposing summary judgment ‘must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein.’” *Perius v. Nodak Mut. Ins. Co.*, 2010 ND 80, ¶ 16, 782 N.W.2d 355 (quoting N.D.R.Civ.P 56(e)). In the District Court’s Memorandum Opinion and Order granting, in part, Summary Judgment in favor of BGS, the District Court found:

It has been established by the Affidavit of Charles Seykora that the repayment date for the notes came due, with demand for payment being made. No payments have been made, and as of February 5, 2015 the amount due the Plaintiff was . . . (\$236,875.25), with interest continuing to accrue at a rate of 6% per annum. Because no payment has ever been made by Defendant Johnsons, they are in default of their contractual obligations.

Appellee App. 81 at ¶ 16.

[51] Contrary to the Johnsons' belief, the use of affidavits in support of a motion for summary judgment is an expressly permitted practice under the North Dakota law. See N.D.R.Civ.P. 56(e). Mr. Seykora's affidavit sets forth the basis for his ability to attest to the information and documents identified therein. App. 65. As one of the owners of BGS, Mr. Seykora is certainly in a position to have firsthand knowledge of the business dealings of BGS, such as the mortgage transaction with the Johnsons. Moreover, the Johnsons have failed to present any competent, admissible evidence raising a genuine issue of material fact.

[52] The Johnsons relied upon unsupported, conclusory allegations and they have not presented competent, admissible, genuine issues of material fact as to the validity of the mortgage documents or their default thereof. The Johnsons contend the material facts at issue are the billings of BGS incurred in the Minnesota Lawsuit, yet presented no competent admissible evidence to the District Court, or to this Court, raising a genuine issue of material fact. The Johnsons failed to meet their burden. The District Court did not err in granting Summary Judgment in favor of BGS.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS THE JOHNSONS' COUNTERCLAIM.

[53] It is not clear in the Johnsons' appeal papers whether they are appealing the District Court's order dismissing the Johnsons' counterclaim without prejudice under Rule 12(h)(3). Appellee App. 91-92. BGS will address that issue out of an abundance of caution.

[54] This Court's review of a District Court's decisions on subject matter jurisdiction is de novo. Continental Resources, Inc. v. Counce Energy BC #1, LLC, 2018 ND 10, ¶ 6, 905 N.W.2d 768. As the District Court found and concluded, the Johnsons'

counterclaim alleged claims for damages based on theories that the individual attorneys representing the Johnsons, the presiding judge in the Minnesota Action, and others all engaged in various acts and conduct allegedly in violation of the law and Minnesota's rules, including the Minnesota Rules of Professional Conduct. Appellee App. 91. The District also found and concluded that the entirety of the conduct complained of in the Johnsons' counterclaim took place in Minnesota and that the court had no subject matter jurisdiction to make decisions by alleged Minnesota attorneys regarding the Minnesota Rules of Professional Conduct or other alleged tortious conduct by Minnesota attorneys committed in the state of Minnesota against Minnesota residents. *Id.* at 92. The District Court, therefore, properly dismissed the counterclaim.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE JOHNSONS' RULE 60 MOTION FOR RELIEF FROM JUDGMENT.

[55] To the extent the Johnsons contend the District Court abused its discretion in denying the Johnsons' Rule 60 Motion for Relief from Judgment, the District Court did not abuse its discretion in addressing these issues. (See Appellant Brief at ¶¶104-106.) "A district court's determination on a motion under N.D.R.Civ.P. 60(b) will not be overturned on appeal absent an abuse of discretion." *Jury v. Barnes Cnty. Mun. Airport Authority*, 2016 ND 106, ¶ 9, 881 N.W.2d 10. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reason decision, or it if misinterprets or misapplies the law.'" *Id.* (quoting *In re Estate of Cashmore*, 2013 ND 150, ¶ 9, 836 N.W.2d 427. Further, a party moving to vacate a judgment under Rule 60 has the burden to establish

sufficient grounds for disturbing a final judgment. American Bank Center v. Schuh, 2010 ND 124, ¶ 9, 784 N.W.2d 468.

A. The District Court did not abuse its discretion in denying the Johnsons’ argument that the Line of Credit limits the Judgment to \$200,000.

[56] The Johnsons appear to argue the District Court abused its discretion in denying the Johnsons’ Rule 60 Motion argument that the Line of Credit was limited to \$200,000. Appellant’s Brief ¶ 104. In denying the Johnsons’ Rule 60 Motion, the District Court addressed the Johnsons’ argument that the judgment could only be limited to \$200,000, stating:

“[T]he Court had reviewed the attached loan documents in this matter, as well as the affidavit of Charles Seykora, a partner in the Plaintiff law firm, regarding the amount owed by the Defendants under the loan documents. The Court determines that the evidence provided supported the summary judgment decision, and finds that the Defendant Johnsons have not produced evidence sufficient under Rule 60 to provide them relief from the judgment previously entered by the Court.”

App. 235 at ¶ 9.

[57] The Johnsons’ cite no authority or evidence supporting their contention that the Line of Credit is limited to \$200,000. Despite many opportunities to do so, the Johnsons failed to offer any actual evidence showing a material dispute as to the amounts owed. BGS presented the District Court with competent, admissible evidence as to the validity of amounts sought against the Johnsons. App. 65-69; see also Appellee App. 45-59; 60-63. The District Court did not abuse its discretion in denying the Johnsons’ Rule 60 Motion on the basis that the Revolving Line of Credit was limited to \$200,000.

[58] A court’s primary goal in interpreting a written contract is to give effect to the parties’ mutual intention when the contract was formed. Doeden v. Stubstad, 2008

ND 165, ¶ 14, 755 N.W.2d 859. Several contracts relating to the same matter between the same parties and made as part of substantially one transaction must be construed together. N.D.C.C. § 9–07–07; Grynberg v. Dome Petroleum Corp., 1999 ND 167, ¶ 10, 599 N.W.2d 261, 265.

[59] The loan agreements expressly state that BGS may recover the full amount of the Johnsons’ indebtedness. The Amended and Restated Revolving Line of Credit Agreement states, in relevant part, as follows:

To secure the payment of principal of and interest on the Amended Revolving Note, **and to further secure the payment and performance of each and every other debt, liability or obligation of every type or description which the [Johnsons] may now or hereafter owed to BGS, whether such debt, liability or obligation be now existing or hereafter arising** . . . the [Johnsons] shall grant to BGS a mortgage interest . . . in the real property described in the . . . Mortgage and Mortgage Modification Agreement

Appellee App. 28 (emphasis added). The express provisions of the parties’ Amended and Restated Revolving Line of Credit Agreement state, in relevant part, as follows:

In no event shall the [Johnsons] be entitled to any Advance or Advances in excess of Two Hundred Thousand and No/100 Dollars (\$200,000.00), and in the event the outstanding principal balance of the Amended Revolving Note exceeds that limit at any time, [the Johnsons] shall pay down the principal balance to a balance below that limit.

Appellee App. 26 (emphasis original). Further, the Amended and Restated Promissory Note provides, in relevant part, “This Amended Note . . . is funded pursuant to the terms of and entitled to the benefits and burdens of the original and Amended and Restated Revolving Line of Credit Agreement between [the Johnsons] and BGS” Appellee App. 37. Finally, the Mortgage explicitly secures the Note, “all amendments, renewals, extensions and modifications thereof . . . [and] the payment of all other sums with interest

thereon as may be advanced by [BGS] in accordance with this Mortgage” Appellee App. 45.

[60] Construing the foregoing language from the parties’ loan agreements together confirms that the parties contemplated the balance of the Johnsons’ indebtedness exceeding \$200,000. The language of the parties’ loan agreements further shows that all debts and obligations owed by the Johnsons to BGS are secured by the Mortgage and the Mortgage Modification Agreement. The parties expressly agreed, therefore, that BGS is secured up to and may recover the full amount owed by the Johnsons. The District Court did not abuse its discretion in denying the Johnsons’ Rule 60 Motion regarding the limit of the judgment.

B. The District Court did not abuse its discretion in determining that no newly discovered evidence supports vacating the Judgment.

[61] The Johnsons appear to argue that the District Court abused its discretion in determining there was no newly discovered evidence to allow vacating the judgment. Appellant’s Brief ¶¶ 105-06. In support of their Petition to Vacate Judgment, the Johnsons offered two affidavits recounting alleged hearsay communications between the Johnsons and Dale Kuhn. See (Doc. ID ##306; 307). In rejecting the Johnsons’ argument, the District Court held:

“The Defendant Johnsons also seek to introduce a certain explanation or statement made by Karol Johnson’s brother, Dale Kuhn, as well as a letter written to Dale Kuhn by Bradley Johnson. The Court has reviewed these new submissions, and does not find that the information is of a nature so as to affect the Court’s earlier decision in this matter. As previously indicated, the Court had fully considered the record leading to the summary judgment motion, and found summary judgment was appropriate and supported by the admissible evidence which had been presented.”

App. at 24, ¶ 8.

[62] To warrant vacating a judgment, newly discovered evidence must be significant enough to change the outcome of the case. Gustafson v. Poitra, 2008 ND 159, ¶ 24, 755 N.W.2d 479. Even if accepted at face value, the Johnsons' communications with Dale Kuhn appear to have no relevance to the material issues in this case, let alone the ability to change the outcome of the case. Simply put, there is no basis for vacating judgment in this matter based on newly discovered and admissible evidence. The Johnsons have not produced any actual evidence showing a material dispute as to any material fact regarding the mortgage documents. The District Court did not abuse its discretion in determining no newly supported evidence supports vacating the judgment.

VI. THE JOHNSONS' ALLEGATIONS OF FRAUD ON THE COURT AND OTHER MISCONDUCT ARE WITHOUT MERIT.

[63] As the Johnsons have repeatedly done in their numerous filings in the District Court, the Johnsons continue to allege meritless accusations of "fraud upon the court" and other misconduct including corruption, collusion and bias in the foreclosure action and the Minnesota Lawsuit. Appellant's Brief at ¶¶ 26; 77-84. In doing so, the allegations made in the Johnsons' briefing to the District Court and to this Court fail to state any valid legal or factual basis for vacating the Judgment or awarding the additional relief sought therein.

[64] There is absolutely no evidence to support the Johnsons' allegations of fraud or misconduct by the Court and/or the other parties to this action. The District Court in reaching this conclusion, stated: "The Court has considered the entire record in arriving at its decisions, and does not find that the Defendants are entitled to relief from Judgment on the basis of fraudulent activity." App. 179, ¶ 8.

[65] Moreover, a claim for “fraud on the court is limited to very unusual cases involving far more than an injury to a single litigant” Sargent County Bank v. Wentworth, 547 N.W.2d 753, 762 (N.D. 1996). “A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery or fabrication of evidence by counsel, and must be supported by ‘*clear, unequivocal and convincing evidence.*’” Id. at 761 (citing Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180 (8th Cir. 1976) (emphasis added)).

[66] The Johnsons have failed their high burden of demonstrating “fraud on the court” by clear and convincing evidence. The Johnsons’ sweeping defamatory allegations of conspiracy and fraud against the other parties, their counsel, and the courts are devoid of any factual specificity. E.g., N.D.R.Civ.P. Rule 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”) The Johnsons have fallen far short of meeting their high burden of proof on such serious allegations. The Johnsons’ allegations of fraud upon the court and other misconduct fail to state any valid legal or factual basis and are without merit.

CONCLUSION

[67] For the reasons set forth above, BGS respectfully requests this Court all orders and judgments of the District Court, including the District Court’s Amended Judgment dated July 14, 2017.

DATED this 18th day of April, 2018.

/s/ Mark R. Hanson

Mark R. Hanson, ND ID #04697

Peter A. Hvidston ND ID #08485

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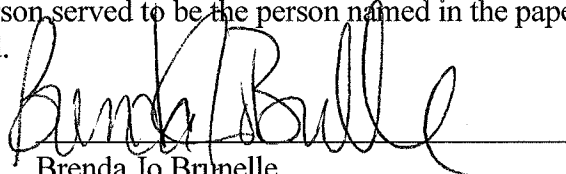
CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Barna, Guzy, & Steffen, Ltd., in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,847.

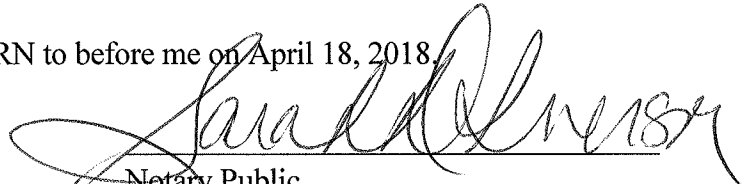
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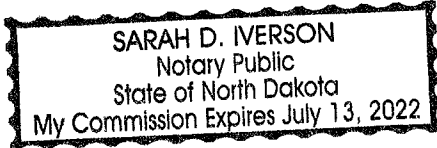
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That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

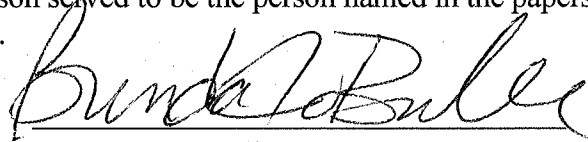

Brenda Jo Brunelle

SUBSCRIBED AND SWORN to before me on April 18, 2018.


Notary Public

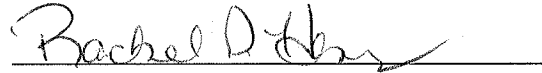
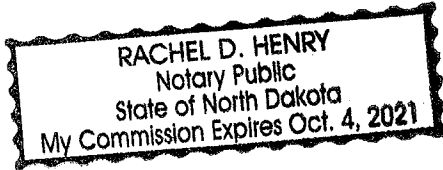


That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.



Brenda Jo Brunelle

SUBSCRIBED AND SWORN to before me on April 19, 2018.



Notary Public