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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **MTGLQ INVESTORS, LP,**

3 Plaintiff-Appellee,

4 v.

5 **GABRIEL I. BACA a/k/a GABRIEL**
6 **BACA,**

7 Defendant-Appellant,

8 and

9 **CLAUDIA SCHULTZ a/k/a CLAUDIA N.**
10 **SCHULTZ; AMERICAN GENERAL**
11 **FINANCE SERVICES, INC.; and SANDIA**
12 **LABORATORY FEDERAL CREDIT UNION,**

13 Defendants.

14 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

15 **Joshua A. Allison, District Court Judge**

16 Tiffany & Bosco, P.A.

17 Melodie M. Lucero

18 Albuquerque, NM

19 for Appellee

20 Gabriel Baca

21 Albuquerque, NM

22 Pro Se Appellant

Court of Appeals of New Mexico

Filed 3/9/2026 9:42 AM



Mark Reynolds

No. A-1-CA-42827

1 **MEMORANDUM OPINION**

2 **WRAY, Judge.**

3 {1} Defendant appeals the district court’s entry of summary judgment against him
4 on Plaintiff’s claim for foreclosure. We issued a notice of proposed summary
5 affirmance, and Defendant has responded with a memorandum in opposition, which
6 we have duly considered. Remaining unpersuaded, we affirm.

7 {2} Defendant continues to contend that the district court failed to hold a hearing
8 on his motion to set aside default judgment, filed on February 18, 2020, which he
9 contends was entered because he was not served properly at the beginning of the
10 case. [MIO 5-9] Although the district court canceled the evidentiary hearing because
11 it vacated its entry of default judgment, Defendant alleges that his motion to set aside
12 default judgment challenged the district court’s personal jurisdiction over him due
13 to lack of proper service, making its entry of summary judgment void. [MIO 8-9]
14 Defendant reiterates his claim from the docketing statement that the service return
15 that indicates he was served was actually service on his son. [MIO 6] Defendant
16 contends that he was unable to adduce evidence of this mistake of service because
17 the district court canceled the evidentiary hearing. [MIO 7]

18 {3} From the record proper, Defendant’s motion to set aside default did not allege
19 that service was made on his son, claim a lack of personal jurisdiction, or contain
20 any evidence to support Defendant’s claim that his son was served. [1 RP 183-84]

1 Defendant's record citation that he preserved this argument references only his
2 motion to reconsider on the motion for summary judgment. [MIO 4-5; 3 RP 648-55]
3 If Defendant wanted the district court to dismiss the claim for lack of service or
4 personal jurisdiction, he was required to raise that defense or move to dismiss as his
5 initial pleading. *See* Rule 1-012(B) NMRA ("A motion making any of these defenses
6 shall be made before pleading if a further pleading is permitted."). As Defendant did
7 not raise those defenses in his initial motion to set aside default judgment and sought
8 permissive, affirmative relief from the district court thereafter in the form of a
9 counterclaim, he waived those defenses. *See Capco Aquisub, Inc. v. Greka Energy*
10 *Corp.*, 2008-NMCA-153, ¶ 32, 145 N.M. 328, 198 P.3d 354 ("We have previously
11 held that a defendant waives the defense of personal jurisdiction when the defendant
12 seeks permissive, affirmative relief from the district court."). [1 RP 216] Defendant's
13 allegation that this is a void judgment for lack of personal jurisdiction is therefore
14 unavailing. [MIO 7] Accordingly, we are not persuaded by Defendant's claim that
15 our notice of proposed disposition erred in concluding that Defendant did not
16 preserve this issue for appellate review. *See Farmers, Inc. v. Dal Mach. &*
17 *Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 (stating that the
18 burden is on the appellant to clearly demonstrate that the district court erred); *State*
19 *v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that
20 "[a] party responding to a summary calendar notice must come forward and

1 specifically point out errors of law and fact”), *superseded by statute on other*
2 *grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

3 {4} Defendant next argues that the district court erred in allowing Plaintiff to
4 initiate and litigate the foreclosure without physically producing the note for the
5 district court’s inspection on summary judgment. [MIO 9-13] Defendant contends
6 that the district court’s reliance on the attorney’s affidavit and copy of the note was
7 insufficient to grant summary judgment. [MIO 11-13] In our calendar notice, we
8 proposed to reject this claim because the original Plaintiff and current Plaintiff each
9 produced adequate evidence at the relevant times to indicate they possessed the note.

10 [CN 3-4]

11 {5} Defendant’s memorandum in opposition has not provided us with authority
12 that indicates that Plaintiff was required to produce the physical note for the district
13 court’s inspection. A plaintiff must possess the note to have a right to foreclose, *see*
14 *Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 30, 369 P.3d 1046, but
15 Defendant does not direct us to any authority that requires the plaintiff to produce
16 the physical note before judgment is entered. Instead, as we noted in our calendar
17 notice, Plaintiff was required to produce evidence of undisputed material facts
18 warranting a grant of summary judgment, and Defendant could rebut Plaintiff’s
19 prima facie showing by producing evidence that indicated a genuine issue of fact.

20 [CN 6-8] *See Bank of N.Y. Mellon v. Phuong Luu*, 2019-NMCA-053, ¶ 6, 448 P.3d

1 625. As we stated in our calendar notice, the original Plaintiff pleaded in its
2 complaint that it possessed the note [CN 3; 1 RP 3 ¶ 7], which is sufficient to
3 establish standing. *See Deutsche Bank Nat. Tr. Co.*, 2016-NMSC-013, ¶ 27. The
4 current Plaintiff met its initial burden on summary judgment by producing a copy of
5 the note with counsel’s attestation that they possessed the note. [2 RP 456-57; 303-
6 04] Defendant claimed that Plaintiff did not demonstrate an appropriate chain of title
7 [2 RP 465-67], but he did not produce any affidavit, deposition testimony, or
8 document that would cast doubt on Plaintiff’s claim that it possessed the note or
9 otherwise establish a disputed material fact. *See* Rule 1-056(E) NMRA (“When a
10 motion for summary judgment is made and supported as provided in this rule, an
11 adverse party may not rest upon the mere allegations or denials of his pleading, but
12 his response, by affidavits or as otherwise provided in this rule, must set forth
13 specific facts showing that there is a genuine issue for trial.”). Defendant claims that
14 summary judgment must be based on “competent evidence” [MIO 9], yet he does
15 not provide a citation for this proposition or explain why Plaintiff’s evidence does
16 not comply with Rule 1-056(E) NMRA. Defendant’s criticism of Plaintiff’s
17 evidence is insufficient to indicate a genuine issue of fact. *See HSBC Bank USA v.*
18 *Wiles*, 2020-NMCA-035, ¶¶ 14, 24 486 P.3d 922 (affirming summary judgment
19 where the foreclosure plaintiff established a prima facie case for standing and the
20 defendant did not “establish by admissible evidence a genuine issue of material fact

1 concerning the alleged conduct by [the plaintiff] or its counsel sufficient to defeat
2 [the plaintiff]’s motion for summary judgment as to [the plaintiff’s] right to
3 foreclose the [m]ortgage”). Defendant did not produce evidence indicating a genuine
4 issue of fact or otherwise rebut Plaintiff’s prima facie showing that it was entitled to
5 summary judgment.

6 {6} Defendant lastly reiterates his argument that misapplied mortgage payments
7 also should have precluded summary judgment. [MIO 13-17] Defendant continues
8 to allege that the district court erred in granting summary judgment while there were
9 still genuine issues of fact regarding the application of a \$700 mortgage payment
10 from 2010, as evidenced from correspondence between the loan servicer and the
11 New Mexico Attorney General’s office. [MIO 14] Defendant again contends that
12 Plaintiff did not demonstrate the amount owed was established with “competent
13 evidence.” [MIO 15] However, Plaintiff attached evidence indicating the defaulted
14 amount to its motion for summary judgment [2 RP 295; 412-15], and Defendant did
15 not dispute this amount or argue that Plaintiff misapplied payments in his response
16 [2 RP 460-77]. Though Defendant claims that this Court’s notice of proposed
17 disposition erred in suggesting that this issue was not “part of the case” before
18 summary judgment, his memorandum in opposition has not persuaded us that
19 Defendant properly raised this issue during the summary judgment proceedings

1 rather than in his motion to reconsider. [CN 9-11; MIO 13-16; 2 RP 460-477; 3 RP
2 648-55]

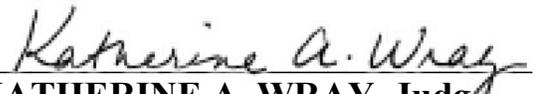
3 {7} Defendant’s argument does not support his position. Defendant’s allegation
4 of misapplied late fees rests solely on allegations in his answer and counterclaim,
5 not evidence presented in defense of summary judgment. [MIO 14; 1 RP 214-19]
6 *See* Rule 1-056(E) (“When a motion for summary judgment is made and supported
7 as provided in this rule, an adverse party may not rest upon the mere allegations or
8 denials of [their] pleading.”). Similarly, Defendant has demonstrated that the loan
9 servicer misapplied a payment in 2010, which appears to have been resolved
10 according to the letter he identified. [2 RP 416-17] Defendant does not explain why
11 the misapplication in 2010 makes the claimed amount by Plaintiff inaccurate, nor
12 does he explain why the evidence that Plaintiff produced did not accurately reflect
13 that Defendant defaulted on payments. *See Oswald v. Christie*, 1980-NMSC-136,
14 ¶ 6, 95 N.M. 251, 620 P.2d 1276 (“Summary judgment may be proper even though
15 some disputed issues remain, if there are sufficient undisputed facts to support a
16 judgment and the disputed facts relate to immaterial issues.”).

17 {8} Defendant’s memorandum in opposition has not otherwise asserted any fact,
18 law, or argument that persuades us that our notice of proposed disposition was
19 erroneous. *See Mondragon*, 1988-NMCA-027, ¶ 10; *see also Hennessy v. Duryea*,
20 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly

1 held that, in summary calendar cases, the burden is on the party opposing the
2 proposed disposition to clearly point out errors in fact or law.”).

3 {9} Accordingly, for the reasons stated in our notice of proposed disposition and
4 herein, we affirm.

5 {10} **IT IS SO ORDERED.**

6 
7 **KATHERINE A. WRAY, Judge**

8 **WE CONCUR:**

9 
10 **JENNIFER L. ATTREP, Judge**

11 
12 **ZACHARY A. IVES, Judge**