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

**No. A-1-CA-41105**

**U.S. BANK NATIONAL ASSOCIATION,**

Plaintiff-Appellee,

v.

**JACK BURKETT a/k/a LONNIE JACK  
BURKETT a/k/a LONNIE BURKETT,**

Defendant/Cross-Plaintiff-Appellant,

and

**BILL L. BURKETT a/k/a BILL LLOYD  
BURKETT a/k/a BILL BURKETT,  
BONNIE S. TOMLINSON a/k/a BONNIE  
SUE TOMLINSON a/k/a BONNIE SUE  
BURKETT TOMLINSON,**

Defendants/Cross-Defendants-Appellees,

and

**R. MAX BEST, Personal Representative  
of the ESTATE OF JERRY DON BURKETT  
a/k/a JERRY BURKETT a/k/a JERRY D.  
BURKETT, Deceased,**

Defendant.

**APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY  
Donna J. Mowrer, District Court Judge**

McCarthy & Holthus, LLP  
Jason Bousliman  
Albuquerque, NM

for Appellee U.S. Bank National Association

Esquibel Law Firm  
Diego R. Esquibel  
Albuquerque, NM

for Appellees Bill L. Burkett and Bonnie S. Tomlinson

Jack Burkett  
Portales, NM

Pro Se Appellant

## DISPOSITIONAL ORDER

### **BACA, Judge.**

This matter is before the Court on Defendant Jack Burkett's<sup>1</sup> appeal from the district court's order granting Plaintiff U.S. Bank National Association's (U.S. Bank) motion for summary judgment. For the reasons that follow, we affirm.

1. U.S. Bank filed a complaint for foreclosure alleging that Defendants Bill Burkett and Bonnie Tomlinson signed a Home Equity Line of Credit Note (Note) and that the Note was secured by a Line of Credit Mortgage (Mortgage), executed by Defendants Bill Burkett, Bonnie Tomlinson, and Jack Burkett. The complaint further alleged that the three defaulted under the terms of the Note. Defendant Jack Burkett answered and filed a cross-complaint against Defendants Bill Burkett and Bonnie Tomlinson. The district court dismissed Defendant Jack Burkett's cross-claims after concluding that the cross-claims were barred by the doctrine of claim preclusion. U.S. Bank moved for summary judgment, which the district court granted. After the district court denied Defendant Jack Burkett's motion for reconsideration, he appealed the final summary judgment "and all directly or indirectly related orders entered by the [d]istrict [c]ourt."

2. Before turning to the merits of the case, we note that Defendant Jack Burkett did not in his brief in chief, directly challenge the district court's order denying his cross-claims. Defendant Bonnie Tomlinson's answer brief observes that Defendant Jack Burkett made no specific argument as to the district court's basis for dismissing his cross-claims, and Defendant Jack Burkett did not address this contention in his reply brief, apart from the lack of a predismittal hearing. The record shows that the district held a hearing on the motion to dismiss, and Defendant Jack Burkett does not explain why that hearing did not provide a sufficient opportunity to be heard before the cross-claims were dismissed. See *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50, 306 P.3d 457 ("Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property." (internal

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<sup>1</sup>Three of the named Defendants in this action have more than one alias. For ease of reference, we refer to the Defendants with only one of the aliases identified in the caption of the original complaint.

quotation marks and citation omitted)). Having effectively abandoned on appeal a challenge to the merits of the district court's decision to dismiss the cross-claims on the basis of preclusion, we confine our review to the district court's summary judgment order. See *Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (stating that failing to respond to an argument raised in an answer brief "constitutes a concession on the matter"). We further note that our inquiry in this case is limited to whether the district court erred by granting summary judgment in favor of U.S. Bank. Though Defendant Jack Burkett raises over a dozen claims of error, we address only the arguments that directly bear on this inquiry.<sup>2</sup>

3. As we understand Defendant Jack Burkett's arguments, he contends that summary judgment was improper because (1) U.S. Bank lacked standing to bring the foreclosure action; (2) there were several disputes about material facts that precluded the entry of summary judgment; and (3) summary judgment denied him due process.

4. In arriving at the conclusions we make herein, we have carefully reviewed the briefs, applicable law, and arguments made by the parties as well as the record.

5. "We review the district court's grant of summary judgment de novo." *Fed. Nat'l Mortg. Ass'n (Fannie Mae) v. Trissell*, 2022-NMCA-001, ¶ 5, 503 P.3d 381 (internal quotation marks and citation omitted). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. "We review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *Trissell*, 2022-NMCA-001, ¶ 5 (internal quotation marks and citation omitted). A summary judgment movant bears the "initial burden of establishing a prima facie case for summary judgment." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. A movant establishes a prima facie case when the motion is supported by "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id.* (internal quotation marks and citation omitted).

6. The party initiating a foreclosure action must show that it had standing to sue at the time it filed its complaint. *PNC Mortg. v. Romero*, 2016-NMCA-064, ¶ 19, 377 P.3d 461. To do so, "the foreclosing party must demonstrate that it had the right to enforce the note and the right to foreclose the mortgage at the time the foreclosure suit was filed." *Id.* (alteration, internal quotation marks, and citation omitted). A party who holds a promissory note possesses the right of enforcement and foreclosure. See NMSA 1978, § 55-3-301 (1992). The "holder" of a note is "the person in possession of [the] negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NMSA 1978, § 55-1-201(b)(21)(A) (2023). Third parties qualify as holders if they "prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation." *Bank of N. Y. v. Romero*, 2014-NMSC-007, ¶ 21, 320 P.3d 1.

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<sup>2</sup>Our review is also limited only to those arguments we identify in Defendant Jack Burkett's brief in chief. We do not review any of the arguments or issues that Defendant Jack Burkett raises for the first time in his reply brief. See *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 36, 145 N.M. 186, 195 P.3d 353 ("[W]e do not consider arguments raised in a reply brief for the first time.").

7. Here, U.S. Bank attached to its complaint a copy of the Note containing an allonge that indorsed the Note to U.S. Bank.<sup>3</sup> U.S. Bank also attached a “Certification of Possession of Original Note,” averring that counsel for U.S. Bank was holding the original Note in the attorney’s office files. Thus, U.S. Bank established that it had standing at the time it filed the foreclosure action.

8. Further, in its motion for summary judgment, U.S. Bank attached a “Debt Affidavit of Foreclosure” attesting that Defendants Bill Burkett, Bonnie Tomlinson, and Jack Burkett had defaulted on the Note. Because U.S. Bank submitted evidence that Defendants Bill Burkett, Bonnie Tomlinson, and Jack Burkett executed the Note, that U.S. Bank was entitled to enforce it, and that Defendants Bill Burkett, Bonnie Tomlinson, and Jack Burkett failed to make payments when due, U.S. Bank successfully established a prima facie case for foreclosure. *See Gen. Acceptance Corp. of Roswell v. Hollis*, 1965-NMSC-135, ¶ 9, 75 N.M. 553, 408 P.2d 53.

9. “Once the movant has made a prima facie showing that it is entitled to relief, the nonmoving party must respond by affidavit or other means demonstrating the existence of genuine material factual issues bearing on each of its claims.” *Los Ranchitos v. Tierra Grande, Inc.*, 1993-NMCA-107, ¶ 16, 116 N.M. 222, 861 P.2d 263. In his response to U.S. Bank’s motion for summary judgment, Defendant Jack Burkett alleged that several disputes of material fact existed that would make summary judgment improper, including that the Note was fraudulently obtained and the mortgage was subordinate to a prior lien. However, Defendant Jack Burkett did not offer proof supporting these allegations. He did not for example, attach a copy of any recorded lien, nor a copy of the judgment that Defendant Jack Burkett alleged created a lien on the property. He also did not attach any evidence that might create a question of whether the Note was fraudulently obtained.

10. “Mere argument or bare contention offered by the opposing party that a material issue of fact exists cannot override the moving party’s prima facie showing.” *Estate of Eric S. Haar v. Ulwelling*, 2007-NMCA-032, ¶ 10, 141 N.M. 252, 154 P.3d 67. Because Defendant Jack Burkett failed to rebut U.S. Bank’s prima facie showing, we hold that the district court did not err in concluding that there were no genuine issues of material fact in dispute.

11. Turning to Defendant Jack Burkett’s arguments regarding due process, he contends that summary judgment was unconstitutional because it deprived him of his right to a trial. Defendant Jack Burkett similarly contends that he was deprived of the opportunity “to prove fraud, enforce the judgment lien, and expose unethical conduct” because the district court granted summary judgment without a hearing.

12. Defendant Jack Burkett arguments boil down to a contention that a party can avoid summary judgment by telling the presiding authority that they intend to proffer evidence at an evidentiary hearing (or at trial). This is not how the summary judgment process works. Once a motion for summary judgment has been filed and a prima facie case in support of summary judgment has been established, the party opposing summary judgment cannot simply stand pat, it must come forward with evidence in the

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<sup>3</sup>To the extent Defendant Jack Burkett challenges the validity of the indorsement, as we explain, Defendant had the opportunity to present evidence to rebut U.S. Bank’s standing evidence and did not. *See Trissell*, 2022-NMCA-001, ¶ 9 (requiring the borrower to present evidence to rebut the validity of the lender’s prima facie evidence of standing).

form of affidavits, depositions, answers to interrogatories, or responses to requests for admission which establish that genuine issues of material fact exist that would preclude the grant of summary judgment. See Rule 1-056(C), (E). It is not sufficient to merely point to evidence or testimony that might be forthcoming at a trial or evidentiary hearing. See *Little v. Baigas*, 2017-NMCA-027, ¶ 6, 390 P.3d 201 (“During summary judgment proceedings, a party cannot rely on allegations of the complaint or argument that facts may exist, but instead must provide evidence to justify a trial on the issues and that gives rise to reasonable inferences.”).

13. As stated, U.S. Bank successfully established a prime facie case for foreclosure. Although Defendant Jack Burkett argued that he might be able to acquire evidence, ultimately, no evidence was presented in rebuttal to U.S. Bank’s motion for summary judgment. As a result, there was no dispute of material fact that needed to proceed to trial. Cf. *New Mexico L. Grp., P.C. v. Byers*, 2018-NMCA-023, ¶ 9, 413 P.3d 875 (“Because the district court was not called upon to decide any question of fact in granting summary judgment, no jury trial was necessary in this case and no right to such trial was violated by the granting of a summary judgment.”).

14. For these reasons, we affirm the district court’s order granting U.S. Bank’s motion for summary judgment.

**IT IS SO ORDERED.**

**GERALD E. BACA, Judge**

**WE CONCUR:**

**JACQUELINE R. MEDINA, Chief Judge**

**KATHERINE A. WRAY, Judge**