COLORADO COURT OF APPEALS

DATE FILED: October 2, 2014
CASE NUMBER: 2013CA1596

Court of Appeals No. 13CA1596
Adams County District Court No. 12CV749
Honorable C. Scott Crabtree, Judge

Nancy Ciancio and Marta Ciancio,

Plaintiffs-Appellees,

v.

2011-SIP-1 RADC Venture LLC, a Delaware limited liability company,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE ROMÁN
Casebolt and Gabriel, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced October 2, 2014

Kramer Law LLC, Harvey L. Kramer, Denver, Colorado; Telios Law PLLC, Theresa Lynn Sidebotham, Monument, Colorado, for Plaintiffs-Appellees

Kumpf Charsley & Hansen, LLC, Robert E. Wells, Englewood, Colorado, for Defendant-Appellant

This case considers competing deeds of trust on a property located at 128th and Washington Street in Thornton, Colorado (the property), in an action for foreclosure. Defendant, 2011-SIP-1 RADC Venture LLC, appeals the district court's judgment entered after the district court granted a motion for determination of a question of law in favor of plaintiffs, Nancy Ciancio and Marta Ciancio, concerning the competing deeds of trust. We conclude that there is a genuine issue of material fact as to whether the promissory notes on which the court entered judgment for plaintiffs were secured by the deed of trust on which foreclosure of the property proceeded. Accordingly, we reverse and remand for further proceedings.

I. Background

At issue in this case are initial promissory notes and deeds of trust and subsequent notes.

A. Initial Notes and Deeds of Trust

In 2006, Nancy Ciancio, Trustee, acquired a 60.6% interest (Ciancio interest) in the property. The remaining interest was held by Rolling Hills LLC (Rolling Hills) (24.86%) and Antonio Corona

(14.54%). Rolling Hills later agreed to buy the Ciancio interest for three million dollars.

On August 14, 2008, Frank Ciancio (Ciancio)[1] executed a warranty deed transferring the Ciancio interest in the property to Rolling Hills.

The same day, Joseph Talarico (Talarico), as manager of Rolling Hills, executed a promissory note for $875,000 in favor of Nancy Ciancio, Trustee, and Frank Ciancio, due and payable on February 2, 2009, with interest (2008 Ciancio note). The debt was secured by a deed of trust on the property, executed the same day by Talarico, as manager of Rolling Hills, in favor of Nancy Ciancio, Trustee, and Frank Ciancio (Ciancio deed of trust).

Also on August 14, 2008, Rolling Hills executed a note in favor of FirsTier Bank (FirsTier),[2] promising payment of $2,665,000, plus

---

[1] Frank Ciancio participated in these transactions and signed the documents on behalf of the Ciancio parties. Marta Ciancio and Nancy Ciancio were not present for or involved in the transactions pertinent to this case.

[2] Venture is the successor-in-interest to FirsTier's deed of trust. FirsTier was closed by its supervising institution in 2011, and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver. FDIC then assigned its interest in FirsTier's deed of trust to defendant.

interest, by February 14, 2009. As security for this note, Antonio Corona, individually, and Talarico, as manager of Jatco Properties, LLC, in turn as manager of Rolling Hills, executed a deed of trust on the property in favor of FirsTier (FirsTier deed of trust).

Both deeds of trust were then recorded on August 18, 2008, with the FirsTier deed of trust being recorded shortly before the Ciancio deed of trust.[3]

B. Subsequent Promissory Notes

The 2008 Ciancio note remained unpaid by the February 2, 2009, due date. A handwritten notation across the note declares it "Void" and "cancelled by replacement of new note dated May 12, 2009." A note dated May 8, 2009, (2009 Ciancio note) executed by Talarico, both individually and as manager of Rolling Hills, and by Dana Talarico, individually, promised payment of $900,000 to Nancy Ciancio, Trustee, and Frank Ciancio, on August 11, 2010, with interest accruing beginning on May 11, 2009. The 2009

[3] The Ciancio deed of trust as originally recorded reflected debt of three million dollars secured by the property. The deed was re-recorded a week later to reflect indebtedness of $875,000. No party contends that the Ciancio deed of trust secures debt greater than $875,000, plus interest, in favor of plaintiffs, nor does any party argue that the second recording has any effect on the priority of the deeds as they were originally recorded.

Ciancio note stated that it was secured by a deed of trust dated May 11, 2009. A handwritten notation on the 2009 Ciancio note states:

> Paid in full Jan 21, 2010
> By 100,000 (check)
> reduction in principal
> Balance 525 note to N. TR
> 325 note to FC/agent

On January 11, 2010, two more notes (collectively, the 2010 Ciancio notes) were executed by the same parties — Talarico, both individually and as manager of Rolling Hills, and Dana Talarico, individually — that executed the 2009 Ciancio note. One of the 2010 Ciancio notes promised payment of $325,000 plus interest to "Frank Ciancio, Agent," and the other promised payment of $525,000 plus interest to Nancy Ciancio, Trustee. Both 2010 Ciancio notes had a due date of August 16, 2010, and stated that they were secured by a deed of trust dated May 11, 2009. As part of this 2010 transaction, Talarico paid Nancy Ciancio $100,000.

C. This Action

The 2010 Ciancio notes and the FirsTier Note went unsatisfied.

On June 26, 2012, plaintiffs filed a complaint for judgment of $1,005,570 on the 2010 Ciancio notes. They further asserted that

the 2010 Ciancio notes were secured by the Ciancio deed of trust and requested judicial foreclosure of the property, with proceeds to be applied to the amounts owed pursuant to the 2010 Ciancio notes.

After plaintiffs filed this action for foreclosure, on July 5, 2012, Talarico, both individually and as manager and member of Rolling Hills, executed an "Amended and Restated Deed of Trust" (amended Ciancio deed of trust). In that instrument, Talarico acknowledged the 2008 Ciancio note had not been satisfied and had been modified and replaced by the 2010 Ciancio notes[4], and that the 2008 Ciancio note and the 2010 Ciancio notes are evidence of the debt secured by the Ciancio deed of trust.

In an amended complaint, plaintiffs named defendant a party as the holder of the FirsTier deed of trust and related note, and asserted that defendant's lien on the property was junior to the Ciancio deed of trust.

II. C.R.C.P. 56 Motion

[4] Talarico also acknowledged that the 2010 Ciancio note payable to Frank Ciancio, Agent, was for the benefit of Ciancio as agent for Marta Ciancio, and that Marta Ciancio is the holder of that 2010 Ciancio note "and the beneficiary" of the Ciancio deed of trust.

Plaintiffs moved under C.R.C.P. 56(h) for a determination as a matter of law that the Ciancio deed of trust was superior to the FirsTier deed of trust and that the 2010 Ciancio notes were secured by the Ciancio deed of trust. According to plaintiffs, the Ciancio deed of trust was superior because the transaction in which it was created constituted "vendor financing," of which FirsTier had notice, and there was no agreement to subordinate the Ciancio deed of trust. Further, plaintiffs argued, the modifications to the 2008 Ciancio note did not prejudice defendant as a junior lien holder, so the Ciancio deed of trust was senior to the FirsTier deed of trust for the amounts due and owing on the 2008 Ciancio note, as modified.[5] Plaintiffs attached several documents and affidavits in support of their motion.

Defendant opposed the motion, asserting that genuine issues of material fact precluded the requested determination and attached evidentiary support for their position. Defendant argued, as pertinent on appeal, that (1) the parties intended to subordinate the

[5] Plaintiffs sought a declaration of priority only for the amount that would have been accrued according to the interest rate provided in the original evidence of debt, rather than increased interest rates in subsequent promissory notes.

Ciancio deed of trust to the FirsTier deed of trust; (2) the Ciancio deed of trust was invalid because it was not executed by an authorized actor; and (3) the 2010 Ciancio notes were not secured by the Ciancio deed of trust.

The district court granted plaintiffs' motion for determination of a question of law in its entirety and ruled that: (1) defendant had not offered evidence which raised any genuine issue of material fact as to the existence of a subordination agreement; (2) the facts demonstrated that there was no issue about the validity of the contract and that Rolling Hills had ratified the Ciancio transaction; and (3) there was no genuine issue of material fact as to whether the 2010 Ciancio notes represented the original evidence of debt.

Later, the district court entered an order reiterating that the 2010 Ciancio notes constituted evidence of debt recoverable as a senior lien on the property up to the amount that would have been recoverable under the 2008 Ciancio note and ordered foreclosure of the property.

This appeal followed.

III. Standards

We review a decision on a motion for a determination of law pursuant to C.R.C.P. 56(h) de novo. *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011). An order deciding the question is proper only if "there is no genuine issue of any material fact necessary for the determination of the question of law." C.R.C.P. 56(h); *Henisse*, 247 P.3d at 579. A material fact is one that will affect the case's outcome, and whether a genuine issue of material fact exists is a question of law. *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007).

The moving party bears the initial burden of providing a basis for the motion and identifying those portions of the record and any affidavits that demonstrate there is not a genuine issue of material fact. *Id.* The nonmoving party is entitled to all favorable inferences. *Henisse*, 247 P.3d at 579.

If the moving party meets its initial burden, the burden shifts to the opposing party to establish there is a genuine issue of fact. *People in Interest of A.C.*, 170 P.3d 844, 846 (Colo. App. 2007). "A genuine issue of material fact cannot be established simply by allegations in pleadings or argument; rather, the opposing party

must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial." *Id.*

Affidavits submitted pursuant to C.R.C.P. 56 must be based on personal knowledge, set forth facts that would be admissible in evidence, and "show affirmatively that the affiant is competent to testify to the matters stated therein." C.R.C.P. 56(e); *USA Leasing, Inc., L.L.C. v. Montelongo*, 25 P.3d 1277, 1278 (Colo. App. 2001).

Because the moving party must establish the lack of a genuine issue of material fact, the nonmoving party is not necessarily required to submit opposing evidence to prevent the district court from granting the motion for determination of a question of law. *See Wolther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986) ("[W]hile a party against whom a summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate."); *see also Ginter v. Palmer & Co.*, 196 Colo. 203, 206, 585 P.2d 583, 585 (1978) ("Supporting affidavits submitted by the moving party, however, may be insufficient to satisfy his burden.").

Because an order deciding the question is proper only if there is no genuine issue of any material fact, "even where 'it is extremely doubtful that a genuine issue of fact exists,'" an order granting a C.R.C.P. 56 motion is not appropriate. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991) (quoting *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 428, 494 P.2d 1287, 1290 (1972); *see also Smith v. Mills*, 123 Colo. 11, 14-15, 225 P.2d 483, 485 (1950) ("Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial where there is *the slightest doubt* as to the facts.") (emphasis added).

IV. Analysis

Defendant contends the district court erred by summarily determining the priority of the Ciancio and FirsTier deeds of trust because (A) evidence supports a finding that a subordination agreement by implication exists; (B) a genuine issue of material fact exists as to whether the Ciancio deed of trust was ratified; (C) the Ciancio deed of trust is invalid because it conveyed an interest it did not own; and (D) a genuine issue of material fact exists as to

whether the 2010 Ciancio notes were secured by the Ciancio deed of trust.

A. Subordination Agreement by Implication

Often, the priority of rights in real property is controlled by the recording statutes. *See ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742, 744-45 (Colo. 2000) (explaining effect of recording statutes). However, where the recording statute "fails to provide a mechanism for determining the priority of the competing interests," the priority of rights in real property is determined by reference to the common law. *Id.* at 745-46. In Colorado, the common law gives a vendor's purchase money mortgage priority over a third-party's purchase money mortgage. *Id.* at 746. Parties can avoid the effect of this priority, however, by agreeing to subordinate the vendor's lien to that of the third-party lender. *Id.* at 747. However, a subordination agreement cannot be found by implication based merely on the earlier recording of the third-party's deed of trust. *Id.*

Here, the district court ruled that the Ciancio deed of trust, securing vendor financing of the property, was superior to the FirsTier deed of trust based on *ALH Holding*. Defendant does not challenge on appeal the conclusion that the Ciancio deed of trust

secured vendor financing for the property. Rather, defendant asserts the district court erroneously rejected its position that there was evidence that the parties intended to subordinate the Ciancio deed of trust to the FirsTier deed of trust.

At the outset, we disagree with defendant's position that summary disposition is never appropriate where a factual matter, such as a party's intent, is involved. Summary disposition "is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute." *Edwards v. Price*, 191 Colo. 46, 49, 550 P.2d 856, 858 (1976).

Defendant nonetheless contends that evidence exists to support a finding of a subordination agreement by implication in this case. Here, defendant points to evidence that:

- FirsTier intended its deed of trust to be in first position;
- it was the "understanding" of both Talarico and the closing agent that FirsTier's deed of trust would be in first position, and the closing agent recorded the FirsTier deed of trust first based on this understanding;
- there is no reference to a deed of trust in the purchase agreement between Ciancio and Rolling Hills, and there was

no agreement that the Ciancio deed of trust would be superior to the FirsTier deed of trust; and

- the title insurance policy provided that the Ciancio deed of trust was subordinate to FirsTier's deed of trust.

We agree with the district court that this evidence fails to raise a genuine dispute as to the existence of an implicit agreement to subordinate the Ciancio deed of trust.

A subordination agreement, even one found by implication, cannot be supported merely by evidence that the benefitting party intended that the other party subordinate his interest. A subordination agreement must be supported by some evidence that the other party intended to subordinate its interest. *See* Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 12.9, at 305-308 (5th ed. 2007) (while subordination can be unilateral, it must be authorized by the mortgagee taking a lower priority); *see also Am. Bank of Okla. v. Wagoner*, 259 P.3d 841, 849 (Okla. Civ. App. 2010) (Where the vendor's purchase money mortgage prevails over the mortgage the purchaser gives to a third-party lender, it "logically follows that the parties would have to jointly intend to overcome such circumstance."); *Republic Nat'l Life Ins. Co. v.*

Marquette Bank & Trust Co., 251 N.W.2d 120, 123 (Minn. 1977) (In reversing the lower court's finding that the lease contained an implied subordination agreement in favor of mortgage, the court found that although there "is ample evidence to support the conclusions that" the lender intended its mortgage to be prior to the lease and other parties involved in the transaction understood that intention "and purported to give it that effect[, t]he dispositive issue [in finding an implied subrogation agreement] is whether [lessee], in fact or in law, agreed to subordinate its lease.").

Even the authority relied upon by defendant demands evidence of the vendor's intent to subordinate his interest. *See* Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 9.2, at 790 (4th ed. 2001) (Some courts may find an implied agreement to subordinate "by finding that the *vendor* . . . *intended* to subordinate his mortgage to that of the third party, although the evidence of this type of implied agreement must be convincing." (emphasis added)).

Defendant maintains that an implied subordination agreement may also be found "if the vendor [the Ciancios] was in collusion with the mortgagor [Talarico] in representing to the lender [FirsTier]

that . . . any claims of the vendor on [the property would] be subordinate to the money lender's mortgage," George E. Osborne, *Handbook on Law of Mortgages* § 213, at 392 n.78 (1970). Of course, this would still require evidence relating to the intent of the vendor, which is what is lacking in this case.

Moreover, neither of the out-of-state cases relied on by defendant as recognizing subordination agreements by implication hold that such an agreement can be found without any evidence of the vendor's intent to subordinate his interest. *See Williams v. First Nat'l Bank & Trust Co.*, 482 P.2d 595, 596-97 (Okla. 1971) (giving effect to verbal agreement between vendor and bank that bank's mortgage was to be prior to vendor's); *Pulse v. N. Am. Land Title Co.*, 707 P.2d 1105, 1108 (Mont. 1985) (holding bank's deed of trust had priority over vendor's mortgage where there was evidence that vendor agreed to accept a second mortgage, vendor advised bank that vendor was to receive a second mortgage, and vendor's course of conduct after bank sought to foreclose supported bank's position as first mortgagee).

In short, while defendant's evidence indicates that FirsTier intended for its deed of trust to be superior to the Ciancio deed of

trust, it does not indicate that Ciancio intended or represented that his interest would be subordinate to FirsTier's.

Likewise, the fact that the purchase agreement does not refer to the Ciancio deed of trust does not give rise to the inference that Ciancio implicitly agreed to subordinate his interest. Defendant has identified no legal rule that a land purchase agreement should include a statement of security for a note that will finance the purchase, no evidence supporting the conclusion that the purchase agreement in this case would have included such a statement if the parties intended to finance the transaction with a secured note, and no evidence that Ciancio reasonably should have expected FirsTier to rely on the lack of a reference to a security interest in the purchase agreement to believe the FirsTier deed of trust would be in first position.

Similarly, the mere absence of an explicit agreement that the Ciancio deed of trust would be superior to the FirsTier deed of trust does not give rise to an inference that Ciancio implicitly agreed to subordinate his interest. *See ALH Holding*, 18 P.3d at 746-47 (between two purchase money mortgages, vendor's has priority over

third-party lender's as a matter of law, in the absence of an agreement regarding priority of mortgages).

Finally, Ciancio was not a party to the title insurance policy, and there is no suggestion that he had any part in creating, reviewing, or approving it, thus the title insurance policy is not evidence of Ciancio's intent. *See Allen v. Pacheco*, 71 P.3d 375, 379 (Colo. 2003) (in general, only the parties to a contract are bound by its terms).

To suggest Ciancio intended the Ciancio deed of trust to be subordinate to the FirsTier deed of trust, defendant pointed us to a letter in which Paul Holloway, a Vice President of Land Title Exchange Corporation, indicated to the closing agent that an unsecured note played a part in the 2008 transaction, and his deposition testimony agreeing that the unsecured note was "the seller carryback financing in the front-end transaction," and that Ciancio provided information that the note was to be unsecured. We have carefully considered this argument and are not persuaded that this evidence raises a genuine issue of material fact.[6]

[6] At oral argument, defendant also relied on an e-mail from Paul Holloway to the closing agent. However, defendant submitted this

Initially, we note that the letter is apparently identified as exhibit 5 in Mr. Holloway's deposition, and defendant submitted a copy of the letter as well as a portion of the deposition in response to the motion for determination of a question of law. The "unsecured promissory note" referred to in the exhibit, however, is never clearly identified in the deposition transcript in the record. Although Mr. Holloway testified that in commenting on an "unsecured promissory note," he relied on "the actual unsecured promissory note that [he] was holding," he was not asked to identify the unsecured note he was holding by the names of the parties to the note, the date of the note, or the amount of the note.

On the other hand, the 2008 Ciancio note irrefutably indicates that it is secured by an August 14, 2008, deed of trust on the property. Thus, the Holloway evidence does not support the inference suggested by defendant — that Ciancio provided

---

e-mail to the district court with its motion for reconsideration rather than with its summary judgment motion, and the district court summarily denied defendant's motion for reconsideration. The district court did not abuse its discretion under C.R.C.P. 59 by declining to alter its summary disposition order based on this newly-presented evidence. *See Blue Cross of W. N.Y. v. Bukulmez*, 736 P.2d 834, 840 (Colo. 1987) (trial court has discretion in determining whether to open judgment).

information that the 2008 Ciancio note was an unsecured note. *See Rocky Mountain Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1070 (Colo. 2010) (nonmoving party entitled to all favorable inferences *reasonably* drawn from the evidence).

Moreover, the August 13, 2008, letter states that it serves "as an unsecured promissory note Pay Down letter," and recites the principal balance as 3 million dollars, with a pay down balance of 2.5 million dollars as of August 14, 2008. The 2008 Ciancio note, however, was executed on August 14, 2008, with a principal balance of $875,000.

Thus, Mr. Holloway's reference to an unsecured promissory note demonstrates he was not referring to the 2008 Ciancio note.[7] Accordingly, Mr. Holloway's testimony does not raise a genuine issue of material fact as to whether Ciancio intended the deed of

[7] Notably, Mr. Holloway identified exhibit 6 in the deposition, which exhibit has not been made a part of the record, as "the promissory note that was signed at the front-end relinquished property transaction that started the 1031 Exchange." Mr. Holloway then testified that the promissory note was made in favor of Land Title Exchange Corporation, signed by Talarico as manager of Rolling Hills, and had been paid in full by two payments from two different sources totaling three million dollars.

trust corresponding to the 2008 Ciancio note to be subordinate to the FirsTier deed of trust.

Accordingly, we agree with the district court that the evidence offered by defendant is insufficient to create a genuine issue of material fact as to whether an implicit subordination agreement exists in this case.[8]

B. Validity of Ciancio Deed of Trust

We also reject defendant's contention that there is a genuine dispute as to whether Rolling Hills ratified the Ciancio deed of trust by accepting the Ciancio interest in the property.

The district court concluded that, even assuming Talarico lacked actual authority to bind Rolling Hills in the capacity in which he signed the Ciancio documents — omitting the intermediate designation of Talarico as manager of Jatco Properties, LLC — Rolling Hills ratified the transaction by accepting the benefit, the

---

[8] We decline to address arguments raised by defendant for the first time in the reply brief on appeal. *See BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 2012 COA 214, ¶ 22 n.1 (declining to address argument first raised in reply brief). Those arguments include:

- evidence that plaintiffs' counsel contacted defendant to try to buy defendant's interest supports a finding of a subordination agreement by implication; and
- plaintiffs should be estopped from asserting that their deed of trust was superior in position to the FirsTier deed of trust.

60.6% Ciancio interest in the property. *See Sec. Sav. & Loan Ass'n v. Colo. Real Estate & Dev., Inc.*, 163 Colo. 155, 158, 429 P.2d 288, 290 (1967) ("Even if the loans were not originally authorized they were ratified by acceptance of the benefits."). We agree with the district court's conclusion.

Talarico executed several documents on August 14, 2008, by signing his name on prepared signature lines. The signature lines on the purchase agreement, the 2008 Ciancio note, and the Ciancio deed of trust, describe Talarico's capacity as manager of Rolling Hills. The FirsTier note and FirsTier deed of trust are signed for "Jatco Properties, LLC, Manager of Rolling Hills, LLC," with Talarico designated as manager of Jatco Properties, LLC.

Initially, defendant offered no evidence that Rolling Hills challenged the validity of the Ciancio deed of trust on the ground that it was executed without corporate authorization. *See Mackay v. Lay*, 28 Colo. App. 70, 74, 470 P.2d 614, 615-16 (1970) ("If an agent exceeds his authority his principal may complain, but a third person may not. [The corporation on whose behalf the agent purportedly acted] had the right to affirm or repudiate the acts of its secretary. It did not disaffirm them, and plaintiff may not take unto

himself the right to do so." (quoting *Boteler v. Conway*, 56 P.2d 587, 589 (Cal. Ct. App. 1936))).

Nonetheless, defendant argues that by accepting the Ciancio interest in the property, Rolling Hills ratified only the purchase agreement — which contained no reference to a security interest or the Ciancio deed of trust. However, the purchase agreement, the Ciancio note, and the Ciancio deed of trust were all part of the same transaction completed on August 14, 2008. All three documents were executed by Talarico as manager of Rolling Hills as part of the transfer of the Ciancio interest in the property to Rolling Hills. The 2008 Ciancio note represented part of the obligation Rolling Hills undertook in exchange for the benefit received pursuant to the purchase agreement. Further, the 2008 Ciancio note, financing part of the three million dollar purchase price called for in the purchase agreement, refers to and describes the Ciancio deed of trust.

Thus, the fact that the purchase agreement does not explicitly refer to the Ciancio deed of trust does not create a genuine issue of material fact as to whether Rolling Hills ratified the Ciancio deed of trust by accepting the Ciancio interest in the property.

C. Conveyance of Greater Interest than Owned

Next, relying on *GMAC Mortgage Corp. v. PWI Group*, 155 P.3d 556 (Colo. App. 2006), defendant contends that the Ciancio deed of trust is invalid because Rolling Hills, which owned 85.46% of the property, purported to convey an interest in the entire property. However, because defendant did not make this argument to the district court and the district court did not consider or rule on it, we decline to address it on appeal. *See Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992).

Defendant further contends that the Ciancio deed of trust cannot be superior to the FirsTier deed of trust for more than 85.46% of the property. In this regard, we note that plaintiffs concede that the Ciancio deed of trust is senior to the FirsTier deed of trust as to only the 60.6% interest in the property sold and financed by the Ciancios. Nonetheless, because, as we will explain, further proceedings are necessary, this issue can be addressed by the district court on remand should it enter another order finding the Ciancio deed of trust superior to the FirsTier deed of trust.

D. Security for the 2010 Ciancio Promissory Notes

However, we agree with defendant's contention that the district court erred in granting plaintiffs' C.R.C.P. 56 motion because there were genuine issues of material fact as to whether the Rolling Hills obligations on which plaintiffs sought judgment, the 2010 Ciancio notes, were secured by the Ciancio deed of trust. Plaintiffs sought to foreclose on the property specifically pursuant to the Ciancio deed of trust, and sought to have the proceeds applied to the 2010 Ciancio notes as first priority, ahead of the FirsTier Note secured by the FirsTier deed of trust.

Defendant points to several discrepancies in the documents presented by plaintiffs. First, both the Ciancio and FirsTier deeds of trust are dated August 14, 2008; however, the 2010 Ciancio notes state that they are secured by a deed of trust dated May 11, 2009, yet the record is devoid of a deed of trust dated May 11, 2009.

Second, the notations on the 2008 Ciancio note show that it was cancelled and replaced by a note dated May 12, 2009, yet the

2009 Ciancio note is dated May 8, 2009, and the 2010 Ciancio notes are both dated January 11, 2010.[9]

Plaintiffs respond by citing to the amended Ciancio deed of trust, executed in July of 2012, and an affidavit by Talarico. The amended deed of trust, dated and recorded the month after the lawsuit was filed, states that the 2010 Ciancio notes modified and replaced the 2008 Ciancio note and are the evidence of debt secured by the Ciancio deed of trust encumbering the property. Likewise, the Talarico affidavit recites that the 2009 Ciancio note "was intended as an amendment and replacement of [the 2008 Ciancio note] with the Ciancio Deed of Trust to continue to serve as collateral for the unpaid purchase money loan," and that the 2010 Ciancio notes "constituted a replacement of [the 2009 Ciancio note] and a restructuring of the purchase money obligation secured by the Ciancio deed of trust."

---

[9] The 2009 and 2010 Ciancio notes also differ from the 2008 Ciancio note in ways other than simply extending the due date for payment. First, while the 2008 Ciancio note was executed only by Talarico as manager for Rolling Hills, the later notes also obligated Talarico and Dana Talarico individually. Second, while the 2008 Ciancio note describes the encumbered property by address, the later notes describe the encumbered property simply as "Vacant Land, Thornton, CO 80241." We recognize that the vacant land description is used in the FirsTier deed of trust, however.

But plaintiffs never explain the discrepancies in the notes and deed of trust which they produced and rely on to support their claim. For example, they never explain why three notes state that they are secured by a May 11, 2009, deed of trust, despite Talarico's averment that these notes were intended to be secured by the Ciancio deed of trust. *See Ginter*, 196 Colo. at 207, 585 P.2d at 585 (Statements in affidavit were insufficient for party moving for summary judgment to meet burden of proof, including example that affidavit "states only that a uniform accounting procedure has been followed, but does not indicate the method of asset valuation or whether normal accounting procedures concerning asset valuation have been observed."); *Lipp v. State*, 843 P.2d 41, 45 (Colo. App. 1992) (affidavit indicating that school employment search committee established its own criteria for positions and opining that plaintiff was not qualified, without giving specific information regarding the criteria, was insufficient to warrant summary judgment for school).

For its part, the district court found that the dates within the documents "appear[ed] to clarify" the alleged discrepancy as to the date of the note replacing the 2008 Ciancio note. The law requires

something more at this stage, however. "At the summary judgment stage, the trial judge's function is not to weigh the evidence and decide what occurred, but to determine whether or not a genuine issue exists for the jury." *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007); *see also Stapleton v. Pub. Emps. Ret. Ass'n*, 2013 COA 116, ¶ 22 (court should not resolve any disputed factual issue in ruling on C.R.C.P. 56(h) motion).

Likewise, the district court noted defendant did not produce additional documents or supporting correspondence indicating that there were multiple promissory notes or deeds. However, it is the *moving* party's burden to establish that there is no genuine issue of material fact. Moreover, summary disposition can be precluded where the moving party's documents themselves introduce the contradiction. *See Westerman v. Rogers*, 1 P.3d 228, 231 (Colo. App. 1999) (moving party's supporting documents and affidavits can themselves create a genuine issue of material fact).

At oral argument, plaintiffs, too, faulted defendant for not producing any *testimonial* evidence to oppose the evidence from Talarico, contending that argument is insufficient to defeat a motion for summary disposition supported by evidence. However,

defendant relies not merely on argument, but on evidence — the notes themselves — to demonstrate a genuine issue of material fact. *See* C.R.C.P. 56(e) (permitting reliance on "papers," as well as affidavits, depositions, and answers to interrogatories); *see also Lipp*, 843 P.2d at 45 (plaintiff's resume and the job qualifications in job announcement sufficient to preclude summary judgment motion based on affidavit).[10]

Although it may have been helpful in resolving this issue short of a trial, defendant was not required to explore this issue in Talarico's deposition in order to survive a motion for summary disposition as plaintiffs contended for the first time in oral argument. *See Smith v. Hoffman*, 656 P.2d 1327, 1329 (Colo. App. 1982) (summary judgment inappropriate despite plaintiff's failure to ask expert for opinion of defendant's conduct or the standard of care, even in face of ruling that expert testimony would be required at trial to establish the requisite standard of care, because plaintiff still might be able to elicit necessary testimony at trial).

---

[10] And the district court did not address defendant's argument that the evidence of debt plaintiffs sought judgment and foreclosure on stated that the debt was secured by a deed of trust which plaintiffs never presented to the court.

Alternatively, plaintiffs contend that the district court applied equitable subrogation, even if Talarico made a mistake in restating the Ciancio promissory notes or deed of trust. However, we do not read the district court's order as applying equitable subrogation to resolve the discrepancies in the dates of the documents.[11] Finally, plaintiffs submitted no evidence that the discrepancies in the documents *were* mistakes, nor do they elucidate precisely what those mistakes were or how they qualify plaintiffs for equitable subrogation. *See W. Fed. Sav. & Loan Ass'n of Denver v. Ben Gay, Inc.*, 164 Colo. 407, 411-12, 436 P.2d 121, 123 (1967) ("[W]here a first deed of trust has been released, through a mistake of fact, equity, under certain circumstances, will intervene to correct the mistake.").

We conclude that a genuine issue of material fact exists as to whether the 2010 Ciancio notes were secured by the Ciancio deed

[11] The court raised equitable subrogation in a later section of its order, addressing a different issue. The surrounding discussion addresses the facts that (1) the 2009 and 2010 Ciancio notes could be perceived as increasing the sum of the obligation beyond the amount of which FirsTier had notice and (2) Marta became a creditor when the 2010 Ciancio notes replaced the 2009 Ciancio note. Nor did the district court address that the 2009 and 2010 Ciancio notes stated that they were secured by a different deed of trust.

of trust, and remand for further proceedings on that limited issue. As explained, in all other respects, we agree with the district court's analysis and conclusions.

V. Conclusion

The judgment is reversed and the case is remanded for limited proceedings consistent with this opinion.

JUDGE CASEBOLT and JUDGE GABRIEL concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 10, 2013

Notice to self-represented parties*: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/index.cfm/ID/21607.*